

# Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem<sup>\*</sup>

By  
L. Song Richardson<sup>†</sup>

## ABSTRACT

The adjudication of transnational criminal cases is burdened by a very narrow compulsory process mechanism known as Mutual Legal Assistance Treaties. These treaties regularize foreign evidence gathering for prosecutors and explicitly prevent their use by criminal defendants. The danger of inaccurate verdicts and wrongful convictions that may result from unequal access to evidence highlights the need to resolve this flawed transnational adjudication process, and specifically, its evidentiary method. Building on the works of Neil Komesar, Ronald Coase, and Mancur Nelson, the author utilizes a comparative institutional analysis approach to consider the question of how to obtain parity between the prosecution and the defense in the ability to compel foreign evidence in transnational criminal cases. The issue is of great importance in a post-9/11 world, where the fairness and accuracy norms that underpin criminal prosecutions are increasingly ephemeral and illusory. The comparative framework illumines the important considerations for identifying the institution best suited to achieve the norm of parity. No criminal process scholar explicitly utilizes the comparative institutional analysis framework. This oversight is a mistake. The comparative framework provides an ideal theory to dissect criminal process questions. Explicit institutional comparison, rather than simplistic single institutional considerations, should underlie all criminal process

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<sup>†</sup> Assistant Professor, DePaul University College of Law. J.D., The Yale Law School, 1993; B.A., Harvard College, 1988. The author is grateful to Michele Goodwin, Stephen Siegel, Andrew Gold, Maggie Livingston, Michael Jacobs, M. Cherif Bassiouni, and Dorothy Brown, for reviewing this Article and for helpful comments. The author thanks Brendan Hammer and Natalie Wilson for providing valuable research assistance, Dean Glen Weissenberger for valuable support, and the editors of the Berkeley Journal of International Law for their assistance. Any errors are my own.

scholarship addressing fairness and equity norms.

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My question is: Why should American citizens accused of a crime. . .be stuck with a process that the Justice Department itself has called "cumbersome and ineffective?"<sup>1</sup>

At the core of the legal objections is the belief that it is improper in our adversarial system of justice to deny defendants compulsory process and other effective procedures from[sic] compelling evidence abroad if those procedures are available to the prosecution. . .

Senator Jesse Helms<sup>2</sup>

## PROLOGUE

This Article begins with two scenarios drawn from actual cases. They help describe and contextualize the disparity in the ability to compel foreign evidence that exists in the adjudication of transnational criminal cases as a result of the powerful Mutual Legal Assistance Treaties (hereinafter MLATs). MLATs regularize foreign evidence gathering for prosecutors and explicitly prevent their use by criminal defendants. The facts highlight how the treaties create a compulsion disparity between the government and defendants in their ability to gather foreign evidence. Underlying these facts is the dark premise that the transnational criminal adjudication process in the United States, particularly its evidentiary method, is deeply flawed.

### A. *Scenario One: The Unlucky Driver*<sup>3</sup>

Mr. Atkins is long haul truck driver who lives in Canada. He makes his living delivering items to or picking up items from the United States. He is barely able to make ends meet. He uses all the money he makes to care for his wife and two children. Because of his limited resources, he does not possess his own truck. Instead, he works for a number of trucking companies that allow him to use their trucks when they hire him.

One evening, Mr. Atkins received a telephone call from Gary, the dispatcher for one of the trucking companies. Gary and Mr. Atkins were well acquainted since Mr. Atkins had worked for that trucking company many times in the past. Gary asked if he was available to pick up a load of steel pipes from the United States early the next morning. Mr. Atkins was happy to agree. There

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1. *Mutual Legal Assistance Treaty Concerning the Cayman Islands, Report of the Committee on Foreign Relations, U.S.-Cayman Is.*, at 175, Mar. 19, 1990, S. EXEC. DOC. NO. 101-8, (1989) [hereinafter *Cayman Islands*] (quoting Senator Jesse Helms).

2. *Quoted in Marian Nash (Leich), Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 93, 101 (1997).

3. This scenario is loosely based on the facts of a criminal case in which the author was involved. The names and facts have been slightly altered to protect the privacy of the parties involved and to better illustrate the dangers of the lack of compulsion parity in transnational criminal cases.

was nothing unusual about the conversation. He would be paid his normal fee and, as usual, the truck would be waiting for him in the company's locked and secure yard. The keys would be in the ignition and everything he needed to pick up the load would be on the truck, including tarps.

At 4 a.m. the next morning, Mr. Atkins arrived at the trucking company. He met John, an employee who guarded the yard, at the locked gate. He knew John from his prior work for the company. The two chatted for a few minutes and then John unlocked the gate and led Mr. Atkins to the flatbed truck he would be driving. Mr. Atkins inspected the truck to make sure that everything he needed was there. He noticed that there were tarps rolled up and secured to the back of the trailer. Everything appeared to be in order so Mr. Atkins drove to the border.

When Mr. Atkins arrived at the border, he was sent by a border patrol agent to secondary inspection. He was told that it was just a routine inspection. Mr. Atkins was not surprised. Since September 11<sup>th</sup>, he had been sent to secondary inspection before. He went to the waiting room, drank some coffee and read the paper while waiting for agents to complete the inspection. Meanwhile, border patrol agents conducted a thorough search of the truck. They unrolled the tarps that were secured on the back of the trailer. They found 100 kilograms of marijuana carefully hidden inside.

Mr. Atkins was arrested on the spot and taken into federal custody. He was subsequently charged with possession with intent to deliver a controlled substance in federal district court. His defense was that he did not know the marijuana was in the tarps. Pretrial, Mr. Atkins asked the Court to subpoena Gary, the dispatcher, and John, the guard of the trucking yard. If called as a witness, John would testify that Mr. Atkins had not been in the truck yard until he arrived early one morning to drive the truck to the United States and that Mr. Atkins did not touch or unroll the tarps before he left the truck yard that morning. John did not want to voluntarily travel to the United States to testify because he feared that his company would fire him if he testified on Mr. Atkins' behalf. John believed that someone from the company may have known about the drugs that were in the tarps. He did not want to lose his job. He would only appear if he received a subpoena.

The judge denied Mr. Atkins' request. Although he determined that the testimony of Gary and John would be material and relevant, the judge stated that his subpoena power did not extend beyond the border. If Mr. Atkins wanted to present the testimony of his witnesses, the judge stated that he would be willing to send a diplomatic request to a Canadian court asking it to take the testimony of the two witnesses in Canada. However, this diplomatic process, known as letters rogatory, could take years to complete and there was no guarantee the Canadians would agree.

Mr. Atkins then asked the government for help. The government had the power to compel the appearance of Mr. Atkins' witnesses in the United States under the provisions of the Mutual Legal Assistance Treaty between the United States and Canada. The treaty requires the signatories to provide evidence,

including witness testimony, for use in a foreign jurisdiction upon a proper government request. In other words, the treaty creates transnational compulsory process. The government refused to make the request on Mr. Atkins' behalf. However, the government did invoke the treaty to obtain its own evidence from Canada.

Because Mr. Atkins was in custody and had no funds to post bail, he had an untenable choice to make: remain in custody for what could be years while the diplomatic process proceeded, or go to trial without his witnesses. He proceeded to trial, and testified on his own behalf. However, in the face of his uncorroborated testimony, he was convicted.

### *B. Scenario Two: The Man with a New Suitcase<sup>4</sup>*

John Smith was exhausted but happy to arrive back home in Seattle after a two-week vacation in Mexico. The past 24 hours had been rough. His suitcase had been stolen the night before his departure, leaving him desperately searching for new luggage in the few hours remaining before his flight home. Luckily, he found the time to purchase new luggage at a large open air market and to file a police report for his lost luggage in Mexico. He had noticed a chemical smell emanating from his new suitcase, but he did not have time to be picky. He dismissed the smell, chalking it up to the suitcase being new. A Mexican citizen named Michael Ortiz had first-hand knowledge of these events. Ortiz had helped Smith place an advertisement in a Mexican newspaper requesting return of his stolen luggage and had helped Smith pack the new suitcase.

While drinking a coffee during a layover in Texas, Smith did not know that airport officials were checking all in-transit luggage for contraband. As he dreamt about sleeping in his own bed for the first time in two weeks, his suitcase aroused suspicion because of a strong chemical odor emanating from it. The police opened his suitcase but found nothing unusual inside. The police then tested a fragment of the suitcase itself. That fragment tested positive for cocaine. The police checked the identification tag and found Smith's name and address. Upon exiting his plane at the Seattle-Tacoma airport, John Smith was arrested. He was subsequently charged with knowingly importing cocaine into the United States.

Pretrial, Smith requested the aid of the prosecutor and the Court in compelling the testimony of Ortiz and the police report from Mexico. The prosecutor refused. He said that he was under no obligation to utilize the existing treaty between the United States and Mexico to request evidence on Smith's behalf. The Court stated that although the requested evidence was relevant and material, his subpoena power did not extend to Mexico and thus, he could not compel Ortiz to appear or the Mexican government to release the

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4. The inspiration for this scenario originated from the facts of *United States v. Filippi*, 918 F.2d 244 (1st Cir. 1990).

police report. The Court suggested that Smith request the evidence through diplomatic channels, although the Court acknowledged it might be years before the Mexican government responded, if it responded at all.

Smith proceeded to trial without the witness or the document. He testified to these facts, but his testimony was uncorroborated. The jury convicted him.

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The danger of inaccurate verdicts and wrongful convictions that result from unequal access to evidence highlights the need to resolve this flawed transnational adjudication process, and specifically, its evidentiary method. Failure to do so results in cognizable deprivations to our system of criminal justice in general and to defendants in particular, whether the high-profile alleged “terrorist” or the less provocative, but far more common, truck driver or traveler. As recognized by the Supreme Court over 30 years ago:

To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.<sup>5</sup>

MLATs create inequities in evidence-gathering capabilities that affect the accuracy of criminal trials by distorting the evidence available to fact-finders. When the ability to compel evidence is unequal, accuracy and fairness norms, such as punishing the guilty and freeing the innocent, can be illusory.

## I.

### INTRODUCTION

How to attain equity and fairness in an adversarial system is a perennial question of criminal procedure in the United States. Scholars seeking an answer often turn to social norm theory,<sup>6</sup> legal liberalism,<sup>7</sup> or formalism. No criminal process scholar explicitly utilizes the comparative institutional analysis framework to examine criminal process questions. While these other theories can identify aspirational social justice and equality norms, only comparative

5. *United States v. Nixon*, 418 U.S. 683, 709 (1974).

6. For example, a social norm theorist would argue that the courts should not restrict the ability of a frictionless political process to define the appropriate limits of law enforcement behavior. See, e.g., Tracey L. Meares and Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1988 U. CHI. LEGAL F. 197 (1998), Dan M. Kahan and Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998). When the political process has struck the balance between individual rights and effective law enforcement, courts should not substitute their decision-making for that of the political process.

7. A legal liberalist would argue that the courts must define the appropriate limits of political action. See generally William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) (critiquing legal liberalists’ reliance upon the courts). For both social norm and legal liberalism theorists, it is the goal that animates institutional choice.

institutional analysis determines whether the courts, the political process, or the market is the best institution to achieve them. The examination of criminal process questions in the United States should be enlightened by understanding each institution's competence and ability compared to that of the others and understanding the interactions amongst them.

Resolving the disparity in the ability to compel foreign evidence is difficult in light of relative congressional indifference and the lasting reverberations of the terrorist attacks of September 11, 2001. Scholars argue that inequities in the power to produce evidence created by MLATs violate the Constitution.<sup>8</sup> Scholarly approaches, however, either fail to explore the question of institutional choice or consider it as an afterthought.<sup>9</sup> This Article considers how comparative institutional analysis can inform the question of how to obtain compulsion equity in transnational criminal cases adjudicated in the United States. The relevant decision-makers for purposes of comparison are the Senate, which ratifies the treaties, the executive<sup>10</sup> that negotiates them, the courts, and the evidence gathering market.<sup>11</sup> This Article concludes that the best solution for remedying the compulsion disparity in transnational evidence gathering is for courts to establish a moderate right to compulsion parity.

Compulsion disparities undermine the very legitimacy of the criminal justice system. In the absence of parity, there can be no confidence that criminal adjudications result in reliable outcomes. By analyzing the question of unequal access to evidence in transnational cases, this Article demonstrates the utility of comparative institutional analysis for analyzing criminal process issues generally, by illuminating institutional considerations that transcend this particular setting.

The Article proceeds in six parts. Part II describes the comparative

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8. See, e.g., Ian Conner, *Peoples Divided: The Application of United States Constitutional Provisions in International Criminal Law Enforcement*, 11 WM. & MARY BILL RTS. J. 495 (2002).

9. See, e.g., Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?* 39 HOUS. L. REV. 307 (2002); 3 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CRIMINAL, OBTAINING EVIDENCE: CRIMINAL, §12-3-3, at 87 (1990).

10. The executive is shorthand for federal prosecutors, State Department officials, representatives from the Attorney Generals office, and various administrative agencies, all of whom were involved in negotiating these treaties. See ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 324 (1997).

11. The term market is employed to describe the actions parties in a criminal case take to meet their demand for foreign evidence and to affect the supply of evidence available to the other party. The manner in which these parties interact with each other and with domestic or foreign entities to negotiate the provision of evidence can be termed "transactions" since they involve the transfer of goods, for example, evidence. In the evidence-gathering market, each party is acting selfishly, but from these actions there "emerges a structure that affects and constrains them all. Once formed, a market becomes a force in itself, and a force that the constitutive units acting singly or in small numbers cannot control." Kenneth N. Waltz, THEORY OF INTERNATIONAL POLITICS 24-26 (1979) cited in Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 13 (1999).

institutional analysis framework and its application to criminal process questions. Part III contextualizes application of the framework by exploring the norm of compulsion parity. Part IV discusses Mutual Legal Assistance Treaties (MLATs), a mechanism for regularizing foreign evidence-gathering, and explains how the treaties create a compulsion disparity in the United States between the government and criminal defendants in their ability to gather foreign evidence. Part V examines the relative merits and disadvantages of the market, the political process, the executive, and the courts for resolving the compulsion disparity created by MLATs. Finally, Part VI concludes with a recommendation for the institutional approach best suited to rectify the current disparity in the transnational criminal process.

## II.

### THE VALUE OF CHOICE: COMPARATIVE INSTITUTIONAL ANALYSIS AND ITS RELATIONSHIP TO CRIMINAL PROCESS QUESTIONS

#### A. *The Framework in General*

As developed by Neil Komesar, the comparative institutional analysis framework addresses the question of how to decide which institution<sup>12</sup> is best equipped to achieve a desired policy or goal.<sup>13</sup> Rather than focusing on what the best policy is or what the law should be,<sup>14</sup> the framework spotlights the

12. The term “institution” is used in this Article in its narrow sense to describe “large-scale social decision-making processes—markets, communities, political processes, and courts.” NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 31 (2001) [hereinafter *LAW’S LIMITS*]. An alternative view held by institutional economists and social scientists, understands institutions as the rules that govern or constrain decisions. Under this view, institutions have three primary characteristics: formal rules (for example, judicial or political rules), informal rules (for example, custom) and enforcement mechanisms for enforcing those rules. See, e.g., DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990). These characteristics of institutions are the determinants of market activity.

13. Komesar draws from the works of Ronald Coase and Mancur Olsen. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* 8, 29-30 (1994) [hereinafter *IMPERFECT ALTERNATIVES*]. Coase’s work demonstrates that public policy analysis which assumes a frictionless market or government response is not useful since perfect (frictionless) institutional choices do not exist. Ronald H. Coase, *The Problem of Social Cost*, 3 *J. L. & ECON* 1 (1960). According to Coase,

[T]here is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market or the firm. Satisfactory views on policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects.

*Id.* at 18. According to Komesar, the “call for comparative institutional analysis inherent in Coase’s work seems not to have been heeded.” *IMPERFECT ALTERNATIVES*, *supra* note 13 at 29. Komesar’s emphasis on the distribution of stakes can be traced to Olsen’s work on collective action. See *LAW’S LIMITS*, *supra* note 12, at 30-31 n.23, (citing MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION* (1965)); *IMPERFECT ALTERNATIVES*, *supra* note 13 at 8 n.3 (same).

14. Comparative institutional analysis does not inform goal choice. *IMPERFECT*



institutions that make the decisions. Institutional choice should play a central role in determining how to attain a desired goal because it will determine the efficacy of the approach to that goal.

The framework takes for granted that all institutions are imperfect—that there is no universal first and best institutional choice for every desired goal or legal problem.<sup>15</sup> Rather, all institutions are affected by similar dynamics because “institutions tend to move together.”<sup>16</sup> The same systemic factors that cause malfunctions or failures in one institution may similarly cause malfunctions in others.<sup>17</sup> Accepting that all institutions can fail under similar circumstances, the choice amongst them requires a comparison to determine which is least likely to fail in a given context.

Under comparative institutional analysis, the appropriate question is not whether a particular institution works better in one setting than in another.<sup>18</sup> Rather, the correct question is whether, in any given setting, one institution is better or worse than its available alternatives.<sup>19</sup> Once a goal is identified, “the task is to choose among imperfect alternatives” on the basis of comparison.<sup>20</sup> Sometimes application of the framework will reveal an obvious institutional choice. At other times, when the issues are complex and involve large numbers of relevant participants,<sup>21</sup> the answer may entail difficult institutional compromises. Thus, comparative analysis does not always provide easy answers.<sup>22</sup> However, defining a role for an institution in the absence of a comparative approach may exacerbate existing institutional malfunctions or may lead to counter-intuitive results.

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ALTERNATIVES, *supra* note 13, at 4-5, 48, 49-50. Rather, application of the framework usually occurs after an analyst has already identified a desired policy or value. Some scholars have critiqued the framework on this basis. *See, e.g.*, William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 514 n.22 (2000) (“Komesar gives only limited attention to how goal choices are made and how they fit into the process of policy analysis.”); Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 L. & SOC. INQUIRY 959, 988 (1997) (critiquing Komesar’s failure to emphasize goal choice as a critical component to comparative institutional analysis). Others have applied the framework to the question of goal choice. *See, e.g.*, Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 HAWAII L. REV. 23 (2005) (arguing that the choice of social goals is contested and can be analyzed utilizing a comparative institutional analysis framework). This Article does not join this discussion.

15. LAW’S LIMITS, *supra* note 12, at 174-75.

16. *Id.* at 23-29, 176; IMPERFECT ALTERNATIVES, *supra* note 13, at 23.

17. LAW’S LIMITS, *supra* note 12, at 3, 4, 176.

18. IMPERFECT ALTERNATIVES, *supra* note 13, at 6.

19. *Id.*

20. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1407 (1996).

21. Institutional performance is linked to variation in the numbers of relevant participants and the complexity of the issues involved. Increases in numbers and complexity adversely affect the performance of most institutions. LAW’S LIMITS, *supra* note 12, at 23, 25.

22. *Id.* at 177-180.

### B. The Role of Courts

Courts play a critical role in institutional choice because they determine which institution will decide a particular issue through the doctrinal rules or standards they create. Sometimes a court's institutional choices are explicit. More often, however, they are implicit in the court's decision.<sup>23</sup>

Courts make institutional decisions by defining the character of rights.<sup>24</sup> They can create strong rights, moderate rights or no rights at all. The character of the right represents a different institutional choice.

#### 1. Strong Rights

A court creates "strong rights and certain remedies"<sup>25</sup> when it chooses to undo a decision made by another institution in favor of its own judgment.<sup>26</sup> When courts define strong rights, they create easily applied doctrinal rules<sup>27</sup> and then leave implementation to other institutions. In the criminal process context, the rule that indigent defendants have a right to appointed counsel in all criminal prosecutions is an example of a strong right with a certain remedy.<sup>28</sup> If counsel is not provided, the conviction will be reversed. The decision of how to implement the right is left to the political process.<sup>29</sup> Strong rights entail "significant judicial activism"<sup>30</sup> because the court substitutes its decision for those made by other institutions without creating a concomitant increase in its workload, thus leaving the task of how to effectuate the right to other institutions.<sup>31</sup>

#### 2. Moderate Rights

A court defines moderate rights when it decides that it is better suited to

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23. *Id.* at 4-5, 19-20.

24. *Id.* at 5.

25. *Id.*

26. *Id.*

27. *Id.* at 19. Komesar likens the distinction between judicial activism and judicial activity to the traditional dichotomy between rules and standards. *Id.* at 5. Both the strongest and weakest judicial activism are found in rules that involve limited judicial activity. These rules allocate significant responsibility away from the courts to other institutions such as the market or the political process. *Id.* Moderate rights involve standards and judicial balancing and therefore require the most judicial activity. *Id.*

28. *See, e.g.,* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

29. In this case, state legislatures had to determine how to fund indigent defense counsel in order to effectuate this newly created right.

30. LAW'S LIMITS, *supra* note 12, at 5. For example, in *Gideon*, 372 U.S. 335, the Court held that an indigent defendant had a right to counsel in all criminal prosecutions despite a Florida law that only allowed for the appointment of counsel to indigents in capital cases.

31. LAW'S LIMITS, *supra* note 12, at 5.

determine how to implement the right than other institutions.<sup>32</sup> Instead of employing a doctrinal rule, it creates a more flexible standard that it will apply on a case by case basis.<sup>33</sup> The Supreme Court's jurisprudence regarding the reach of the Fourth Amendment's exclusionary rule is an example of a moderate right.<sup>34</sup> Rather than creating a rule that all violations of the Fourth Amendment require suppression of evidence in all instances, the Court created a standard which balances the "costs" of exclusion against the "benefits" derived from that exclusion.<sup>35</sup> The court's workload increases because it conducts the balancing case by case. As such, the right is weaker and there is more uncertainty about the law.<sup>36</sup>

### 3. No Rights

Finally, a court can take a hands-off approach and decide not to create any rights or remedies at all, leaving decision-making entirely to other institutions.<sup>37</sup> The rule that criminal defendants have no constitutional right to discovery is an example of a doctrinal rule with no concomitant right.<sup>38</sup> Courts frequently create a rule without a right<sup>39</sup> because their limited resources and personnel prevent them from reviewing all governmental action.<sup>40</sup> In the "no rights" situation, both judicial activism and judicial activity are at their lowest.<sup>41</sup>

### C. Application to Criminal Process Questions

Outside the criminal procedure context, scholars recognize comparative institutional analysis as a useful theory for analyzing law, rights, and the role of courts in supplying the demand for law and rights.<sup>42</sup> However, no criminal

32. *Id.* at 5, 19.

33. *Id.*

34. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984).

35. *Id.*

36. LAW'S LIMITS, *supra* note 12, at 19.

37. *Id.* at 19-20.

38. *See, e.g.*, *Weatherford v. Bursey*, 429 U.S. 545 (1977).

39. LAW'S LIMITS, *supra* note 12, at 11. ("Judges are asked to decide who will decide basic substantive decisions. Rather than directly addressing these substantive decisions, courts funnel most of them elsewhere.")

40. *Id.* at 3, 4, 176; *See also* Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 663 (1988) [hereinafter *A Job for Judges*] ("The physical capacity of the courts to review governmental action is simply dwarfed by the capacity of governments to produce such action."); IMPERFECT ALTERNATIVES, *supra* note 13, at 128-38; LAW'S LIMITS, *supra* note 12, at 26.

41. LAW'S LIMITS, *supra* note 12, at 19-20.

42. *See, e.g.*, Dunoff & Trachtman, *supra* note 11 (international law); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (corporate law); Daniel H. Cole, *The Importance of Being Comparative*, 33 IND. L. REV. 921 (2000) (environmental law); Larry I. Palmer, *Patient Safety, Risk Reduction, and the Law*,

process scholar explicitly utilizes comparative institutional analysis to examine criminal process questions. Instead, some scholars are quick to propose a doctrinal rule to serve a procedural goal without considering whether the adjudicative process is best equipped to achieve that goal.<sup>43</sup> Others suggest ways in which different institutions could achieve a desired policy without comparing the relative merits of those institutions.<sup>44</sup> Simply cataloging the available institutions without engaging in any comparison amongst them leaves unanswered the question of which institution will best serve the desired policy. Other scholars simply ignore questions of institutional choice. This oversight is a mistake. The comparative framework is an ideal methodology for analyzing criminal process issues.

The lack of attention to the comparative framework by criminal process scholars could be “animated by a deep aversion to a particular institution and a deep conviction that the goal they have espoused will insulate them from this institution.”<sup>45</sup> For example, some criminal process scholars believe the political process rarely protects the rights of criminal defendants.<sup>46</sup> They are more confident that the courts are the best champions of justice for unpopular groups.<sup>47</sup> While evidence exists to support this view, overburdened courts may perform no better than the malfunctioning political process to meet the demand for rights.

The question of institutional choice often seems obvious in the criminal

36 HOUS. L. REV. 1609 (1999) (patient’s rights); David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657 (2000) (affirmative action); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) (separation of powers); Kenneth G. Dau-Schmidt, *Employment Security: A Comparative Institutional Debate*, 74 TEX. L. REV. 1645 (1996) (labor law); Arti K. Rai, *Intellectual Property Rights in Biotechnology: Addressing New Technology*, 34 WAKE FOREST L. REV. 827 (1999) (intellectual property); Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337 (1998) (family law); Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545 (1995) (sports law); Buzbee, *supra* note 14 (urban sprawl); Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996) (legal ethics); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398 (2007) (business judgment rule).

43. See, e.g., Lenese C. Herbert, *Bete Noir: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149 (2003).

44. See, e.g., Tuerkheimer, *supra* note 9.

45. LAW’S LIMITS, *supra* note 12, at 174. For the legal liberalist, mistrust of the political process makes it unnecessary to analyze whether that institution would be better suited to achieve the desired goal in certain situations. For the social norm theorist, the belief that the courts hinder communities of color from political self-determination in attempting to control the violence in their communities obviates the need to determine whether the adjudicative process could better serve the desires of these communities.

46. See, e.g., David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999).

47. *Id.*

process context because defendants in a criminal case are already before the courts and will remain there until the case is resolved. Thus, the courts appear to be the clear institutional choice to attain a desired criminal process goal. In seeking ways to protect individual rights against government overreaching, criminal process scholars often examine ways in which the courts can provide the necessary protection without explicitly considering whether the courts are the institution best equipped to do so. This decision makes sense because courts have traditionally been the bulwark against excesses of government power.

However, courts make institutional choices when they define the character of rights.<sup>48</sup> Courts may not create the strong right that is sought because of their institutional limitations. Instead of turning blindly to the courts to address criminal process questions, scholars must compare several alternative decision-makers. Depending upon the goal sought, the institutions of criminal process include the political process, the courts, the executive (including prosecutors), defendants, juries, and administrative agencies. It is critical to examine and compare the competence of these institutions to resolve a process issue because this analysis may reveal that an institution other than the court is best suited to achieve the desired policy or goal.

Achieving compulsion parity between prosecutors and defendants in their ability to gather evidence located outside the United States is an important criminal process goal in the era of global crime. Currently, MLATs only allow prosecutors to obtain foreign evidence. This Article considers how the comparative framework would approach and resolve the question of attaining compulsion equity in transnational criminal cases. Since the framework does not address the question of goal choice,<sup>49</sup> Part III discusses the importance of the norm of compulsion parity by examining its historical and current formulations.

### III.

#### THE NORM OF COMPULSION PARITY

It is an "ancient proposition" that in a trial, "the public . . . has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege."<sup>50</sup> The "very integrity" of the judicial process as well as public confidence in the system depends upon full disclosure of evidence.<sup>51</sup> For these reasons, both prosecutors and defendants have the right to compulsory process. Eliminating this right has the "effect of suppressing the truth."<sup>52</sup> To ensure that the criminal process can reliably free the innocent and punish the guilty, both parties should have compulsion parity, for example, the

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48. See *supra* notes 23-41 and accompanying text.

49. See *supra* note 14.

50. *United States v. Nixon*, 418 U.S. at 709 (citations omitted).

51. *Id.* at 708-9.

52. *Washington v. Texas*, 388 U.S. 14, 20 (1967).

equal ability to compel the production of evidence that is relevant and material so that it can be presented to the trier of fact.<sup>53</sup> Subpart A addresses the historical evolution of the norm of compulsion parity and Subpart B addresses its current formulation.

### A. Historical Evolution

Compulsion parity is a value deeply rooted in our constitutional history.<sup>54</sup> In England, before the establishment of coercive means for securing the presence of favorable witnesses, innocent defendants went to their deaths.<sup>55</sup> The English parliament remedied this injustice in 1695 when it passed a statute granting defendants charged with treason the same subpoena power available to the prosecution.<sup>56</sup> The principle of parity was well-established by the time Blackstone wrote his Commentaries on the Laws of England shortly before the American Revolution. He wrote, “[the defendant] shall have the same compulsive process to bring in his witnesses for him, as was usual to compel their appearance against him.”<sup>57</sup>

The American colonists brought with them memories of the dangers of a justice system without compulsion parity.<sup>58</sup> William Penn’s experience in England provides a compelling example. Penn was arrested in 1670 for delivering a sermon to an unlawful assembly of Quakers.<sup>59</sup> His trial proceeded in his absence after he was removed from the courtroom. He had attempted to defend himself without the assistance of an attorney and without the ability to compel the testimony of witnesses on his behalf. Penn was eventually acquitted by a jury that ignored the judge’s instructions to convict. Later, when he became

53. The international community likewise recognizes the importance of compulsion parity. Article 14(3)(e) of the International Covenant on Civil and Political Rights provides: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” International Covenant on Civil and Political Rights art. 14(3)(e), *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171. The United States became a party to the Covenant in 1992.

54. See Akhil Amar, *Twenty-Fifth Annual Review of Criminal Procedure: Foreward: Sixth Amendment First Principles*, 84 GEO. L. J. 641, 699 (1996) (“Though the words of the Compulsory Process Clause do not, on their face, demand a parity reading, the established Anglo-American right that the clause meant to declare was clearly defined in terms of subpoena parity”); Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1072 (1999) (“The Compulsory Process Clause, at the very least, requires the government to permit criminal defendants to avail themselves of the same rules of process—in the literal sense of service of process to compel the attendance of witnesses in court—as are available to the prosecution”).

55. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 85 (1974).

56. *Id.* at 89. This “landmark English Treason Act of 1696 gave defendants ‘the like Processe. . . to compel their Witnesses. . . as is usually granted to compell Witnesses to appear against them. . . .’” See Amar, *supra* note 56, at 699-700 (citation omitted).

57. Westen, *supra* note 57, at 90 (citation omitted).

58. *Id.* at 97-98 & n.114.

59. *Id.* at 91.

founder of the Pennsylvania colony, Penn included both compulsory process and compulsion parity in that state's Charter of Liberties.<sup>60</sup> The provision provided that "all criminals shall have the same Privileges of Witnesses and Counsel as their prosecutors."<sup>61</sup>

Most state constitutions protected the right to compulsory process, including parity.<sup>62</sup> New Jersey's State Constitution of 1776, for example, gave the accused "the same privileges of witnesses . . . as their prosecutors are or shall be entitled to."<sup>63</sup> The common principle in early American formulations of the right to compulsory process was that defendants should have at least the same rights as the prosecution to compel witnesses to testify on their behalf.<sup>64</sup>

Compulsory process, including parity, was so important to the states that it was protected in the Constitution under the Sixth Amendment.<sup>65</sup> The Compulsory Process Clause provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."<sup>66</sup> Though the Clause's language does not explicitly require parity, its history demonstrates that parity is implied. When James Madison drafted the clause, most state provisions emphasized the defendant's right to present evidence on a par with the prosecution. Only two states, Massachusetts and New Hampshire, emphasized the subpoena power.<sup>67</sup> Madison, a consensus builder, likely drafted the Clause to specifically emphasize the minority view so as to ensure it would not be overlooked. He believed his language would implicitly protect the "more conspicuous and common aspects of the defendant's right to present witnesses in his favor[.]" including parity.<sup>68</sup>

60. He also included a provision in the governing laws protecting the right of defendants to present a defense. *Id.* at 91-92.

61. *Id.* at 92-93 (citing Act of May 31, 1718, 1 Laws of Pennsylvania, ch. 236 sec. 4 (Bioren ed. 1810)).

62. Westen, *supra* note 57, at 90-91, 94-95; Amar, *supra* note 56, at 699-700.

63. Westen, *supra* note 57, at 95; Amar, *supra* note 56, at 699-700.

64. Westen, *supra* note 57, at 95.

65. *Id.* at 94-95 (footnotes omitted) ("[State provisions] all reflected the principle that the defendant must have a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case. The states pressed the principle so vigorously that the framers of the federal Bill of Rights included it in the sixth amendment in a distinctive formulation of their own.")

66. For a brief discussion of the history of the Compulsory Process Clause, see Lisa Graver, *The Current Value of Compulsory Process: Can a Defendant Compel the Admission of Favorable Scientific Testimony?* 48 CASE W. RES. L. REV. 865, 868-870 (1998).

67. Westen, *supra* note 57, at 94-95 nn.96 & 99.

68. *Id.* at 99-100. The language of the compulsory process clause was widely publicized. If state representatives from the majority states had thought the language was narrowly limited to the subpoena power, they likely would have raised the issue. *Id.* at 100. None did because of their belief that Madison's language was implicitly as broad as their comparable state provisions. *Id.*

When the first congress statutorily implemented the compulsory process clause in 1790, it gave the clause a broader meaning than the subpoena power. *Id.* The statute provided that a person accused of treason:

### B. Current Formulation

There are very few cases construing the Sixth Amendment's compulsory process clause. *Washington v. Texas* is the first.<sup>69</sup> In *Washington*, two Texas statutes barred persons charged or convicted as co-participants in the same crime from testifying for each other. However, the statute did not bar their testimony on behalf of the prosecution because of the belief that co-accuseds would lie only when called by the defense. Finding this reasoning arbitrary, the Court held that Washington was denied his compulsory process right to put a witness on the stand whose testimony would be relevant and material to the defense.<sup>70</sup> In so holding, Chief Justice Warren wrote,

[T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.<sup>71</sup>

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shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.

Act of April 30, 1790, ch 9, 29, 1 Stat. 112, 119, *cited in* Richard A. Nagareda, *supra* note 56, at 1117.

Westen concludes, "compulsory process by 1791 represented the culmination of a long-evolving principle that the defendant should have a meaningful opportunity, at least on a par with that of the prosecution, to present a case in his favor through witnesses." Westen, *supra* note 57, at 77-78. According to Wigmore, in his Treatise on Evidence at Common Law, the reference to "compulsory process" in the Sixth Amendment "provided nothing new or exceptional"; it merely "gave solid sanction, in the special case of accused persons, to the procedure ordinarily practised and recognized for witnesses in general." 3 John Henry Wigmore, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 2190, 2965 (1st ed. 1904).

69. 388 U.S. 14 (1967).

70. *Id.* at 23.

71. *Id.* at 20. In his concurrence in *Washington*, Justice Harlan viewed the case, not as one implicating compulsory process rights, but rather, one implicating due process guarantees. He concluded that the Texas statute violated due process because the State recognized the relevance and competence of a co-accused's testimony, but arbitrarily barred the defendant from being able to use this testimony. *Id.* at 23. As with the compulsory process clause, non-arbitrary exclusion of defense evidence does not violate due process. *See also* *Montana v. Egelhoff*, 518 U.S. 37, 53 (1976) ("The introduction of relevant evidence can be limited by the State for a 'valid' reason...").

When defendants are deprived of their ability to present a defense, absent a persuasive reason, the courts have found a violation of due process, *see, e.g.*, *Webb v. Texas*, 409 U.S. 95 (1972); compulsory process, *see, e.g.*, *Washington*, 388 U.S. 14; or both, *see, e.g.*, *Crane v. Kentucky*, 476 U.S. 683 (1986). In *Crane*, the state was able to present the defendant's confession but the defense was excluded from presenting evidence that would have tested the confession. Because neither the judge nor the prosecution could provide a rational justification for the exclusion, due process and compulsory process were violated. *Id.* at 690, 691. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), *Ritchie* claimed he was prevented from learning the names of witnesses in his favor as well as other evidence because of the trial court's failure to disclose the contents of an agency's child abuse file. He claimed entitlement to the State's assistance in uncovering arguably useful information. The Court stated that the applicability of the Sixth Amendment's Compulsory Process Clause to this type



The Supreme Court has not explicitly held that compulsion parity is required by the Compulsory Process Clause. However, the Court acknowledges that the Clause's history reflects the Framers' intent to provide an accused with rights equal to that of the prosecution to compel witnesses and evidence.<sup>72</sup>

The Compulsory Process Clause is an essential safeguard for protecting the innocent and pursuing the truth in our adversarial system of criminal justice.<sup>73</sup> It not only grants defendants the right to compel witnesses to appear, but also the right to present their testimony<sup>74</sup> and to compel documentary and physical evidence.<sup>75</sup> The Clause implicitly requires parity between defendants and

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of claim was unsettled. Instead, the Court adopted a due process analysis since its precedents addressing fundamental fairness of trials established a clear framework for the analysis. The Court stated, "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Id.* at 56. It does not matter whether it is the prosecution (*see, e.g., Crane*, 476 U.S. 673), the judge (*see, e.g., Webb*, 409 U.S. 95), or a statute (*see, e.g., Washington*, 388 U.S. 14, *Chambers v. Mississippi*, 410 U.S. 284 (1973)) that denies defendants their ability to present a defense. The denial still violates due process.

72. *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 408 n. 13 (1988) (citing Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 94-95 (1974) (footnotes omitted) ("[State provisions] all reflected the principle that the defendant must have a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case. The states pressed the principle so vigorously that the framers of the federal Bill of Rights included it in the sixth amendment in a distinctive formulation of their own.")). In *Taylor*, the Court upheld a trial court's order precluding a defense witness because of the lawyer's failure to give the government sufficient notice of his witness as required by statute. The Court found that witness preclusion under the circumstances of this case did not violate the Compulsory Process Clause. However, the Court did acknowledge:

[T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . . [W]e believe that [this] reasoning [is] required by the Sixth Amendment.

*Id.* at 408 (citation omitted)(edits in original).

73. *See Amar, supra* note 56, at 642 (1996) ("The deep principles underlying the Sixth Amendment's three clusters and many clauses [and, I submit, underlying constitutional criminal procedure generally] are the protection of innocence and the pursuit of truth.").

74. *Washington*, 388 U.S. at 23 (The framers of the Sixth Amendment "did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.").

75. The use of the word "witnesses" in the Clause includes both witnesses who furnish evidence through testimony as well as those who furnish evidence by producing documents and other items. *See, e.g., United States v. Hubbell*, 530 U.S. 27, 49-55 (2000) (Thomas, J. concurring). According to Justice Thomas, this "broad view of the term 'witness' in the compulsory process context dates back at least to the beginning of the 18th century. *Id.* at 54 n.4 (citation omitted). *See also United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (CCD Va. 1807), *cited with approval* in *Hubbell*, 530 U.S. at 54-55. During his treason trial, Aaron Burr sought the issuance of a subpoena *duces tecum* to compel President Jefferson to provide the letter that purported to contain incriminating evidence against Burr. Chief Justice Marshall, presiding as a circuit judge, rejected the government's argument that the Sixth Amendment's Compulsory Process Clause only permitted the defendant to compel witness testimony, but not documents. The court held that the right to compulsory process included the right to secure papers material to the defense. *Id.* at 55.

prosecutors. However, as discussed in Part IV, the norm of compulsion parity has not kept pace with the rise of global crime<sup>76</sup> as a result of the powerful MLAT.

#### IV.

#### MUTUAL LEGAL ASSISTANCE TREATIES AND THE RETRENCHMENT OF COMPULSION PARITY

Mutual Legal Assistance Treaties are bi-lateral treaties that facilitate the gathering of evidence from foreign locales. However, MLATs fail to achieve accuracy and reliability in criminal adjudications because they create transnational compulsory process solely for prosecutors. Subpart A discusses the necessity of MLATs in an era of global crime and Subpart B describes their function.

##### A. Necessity of MLATs

Long before the global war on terror began in earnest after the events of September 11, the exponential growth of transnational crime was a government concern.<sup>77</sup> That concern has not abated. In a June 2006 speech in Israel, former

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76. Advances in technology and modes of travel facilitate the commission of crimes across international borders. See Nancy Guffey-Landers, *Establishing an International Criminal Court: Will it do Justice?*, 20 MD. J. INT'L L. & TRADE 199 (1996) (arguing that technology and advanced modes of travel have increased the possibility of crimes being committed across borders such as drug trafficking, money laundering, terrorism and human rights violations). Drug trafficking, money laundering, and international organized crime are just a few of the crimes that are increasingly perpetrated on global scale. See, e.g., Abraham Abramovsky and Jonathan I. Edelstein, *Time for Final Action on 18 U.S.C. sec 3292*, 21 MICH. J. INT'L L. 941, 946 (2000) (establishing that the three factors most cited for explaining the growing globalization of crime are narcotics, banking secrecy and technology); Ellen Podger, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997) (discussing the expansion of federal white collar prosecutions involving international activities); Thomas G. Snow, *Prosecuting White-Collar Crime: The Investigation and Prosecution of White Collar Crime, International Challenges and the Legal Tools Available to Address Them*, 11 WM. & MARY BILL RTS. J. 209, 209-210 (2002) (noting that contemporary white collar crime is now a transnational crime because of increased use of international financial systems to commit the crime); *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) (Brennan, J., dissenting) ("Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country."). See also Christopher M. Pilkerton, *The Bite of the Apple: The Use of Narcotics-Related Foreign Wiretap Evidence in New York City Courts*, 11 INT'L LEGAL PERSP. 103 (2001) ("The global trade of drug trafficking currently poses the most serious threat U.S. law enforcement has ever had to combat.").

77. See, e.g., The White House, INTERNATIONAL CRIME CONTROL STRATEGY 15-25 (1998) (describing international crime threat resulting from transnational drug trafficking, smuggling of illegal goods and undocumented immigrants, money laundering, and piracy of intellectual property) cited in Diane Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 820 n.75 (2000). Former Attorney General Dick Thornburgh stated, "Often, more than 50 percent of my day is devoted to some matter relating to our

Attorney General Alberto R. Gonzales articulated a vision that remains committed to stomping out transnational crime:

[D]espite the tremendous demands on the Department in the post-9/11 world, our commitment to fighting crime has never been stronger. We are cooperating with our international partners to fight everything from organized crime and drug trafficking to cybercrime, human trafficking, corruption and intellectual property crimes. We are working as a team, and we are making good progress.<sup>78</sup>

Domestic prosecution of transnational crime presents challenges. The parties commonly require evidence located in a foreign jurisdiction in a form admissible in American courts. Prosecutors and law enforcement officials on the one hand and accused individuals on the other must both contend with issues of national sovereignty and alien legal systems that impede their ability to acquire that evidence. When evidence necessary to effectively prosecute or defend is located in a foreign jurisdiction, there exist two significant hurdles to obtaining it. The first obstacle is the need to respect sovereignty. Absent a treaty or other agreement between nations, the jurisdiction of law enforcement agents does not extend beyond a nation's borders.<sup>79</sup> Laws often forbid unilateral law enforcement activities by foreign agents.<sup>80</sup> Beyond U.S. borders, American subpoenas for evidence have no effect. Hence, sovereignty hinders law enforcement's ability to gather and seize foreign evidence.

The second obstacle is the difficulty of harmonizing<sup>81</sup> different legal systems, cultures, and customs. For example, nations differ in the acts they decide to criminalize,<sup>82</sup> the techniques law enforcement can utilize,<sup>83</sup> the laws

international involvement in fighting drug trafficking, money laundering, international organized crime and business fraud, environmental depredations, terrorism or espionage." Address by Attorney General Dick Thornburgh, American Bar Association annual meeting (Aug. 8, 1989), *quoted in* Michael Burke, *United States v. Salim: A Harbinger for Federal Prosecutions Using Depositions Taken Abroad*, 39 CATH. U. L. REV. 895, n.4 (1990).

78. Excerpted from Prepared Remarks of Attorney General Alberto R. Gonzales at Malka Brender Hall "Kes Hamishpat" Trubowitz Law Building, Tel Aviv University (June 27, 2006), [http://www.usdoj.gov/ag/speeches/2006/ag\\_speech\\_060627.html](http://www.usdoj.gov/ag/speeches/2006/ag_speech_060627.html).

79. NADELMANN, *supra* note 10, at 5.

80. *Id.* at 5, 331. *See, e.g.*, Art. 271 of the Swiss Penal Code (*cited in* NADELMANN, *supra* note 10, at 331 n.47):

Whoever, on Swiss territory, without being authorized so to do, takes on behalf of a foreign government any action which is solely within the province of a [Swiss] government authority or a [Swiss] government official, whoever does anything to encourage such action, . . . shall be punished by imprisonment, in serious cases in the penitentiary. . . .

For a discussion of similar restrictions in other nations, see Sharon DeVine and Christine M. Olsen, *Taking Evidence Outside of the United States*, 55 B.U. L. REV. 368, 386 (1975).

81. Nadelmann describes harmonization as a concept that incorporates three processes: the "regularization of relations among law enforcement officials of different states, [the] accommodation among systems that retain their essential differences, and [the] homogenization of systems toward a common norm." NADELMANN, *supra* note 10, at 10 (emphasis in original).

82. Many American tax and securities law violations are not criminal in other nations.

83. Typical techniques used in the United States such as wire-tapping and undercover

and legal procedures available for obtaining evidence, and the infrastructures governing whether evidence will be provided. MLATs were negotiated with foreign nations to overcome these obstacles.

### B. Function of MLATs

MLATs create transnational compulsory process between nations.<sup>84</sup> They are bi-lateral in order to specifically tailor each treaty to account for differing legal systems and law enforcement priorities.<sup>85</sup> MLATs mandate mutual cooperation between nations in the investigation and prosecution of transnational crime. The parties can deny assistance only on the bases explicitly set forth in the treaty.<sup>86</sup> The primary motivation of the United States to negotiate

operations are either forbidden or strictly constrained elsewhere. *Id.* at 7, 209, 225-235, 239-246. Many civil law countries operate under the "legality principle," requiring the prosecution of anyone known to have committed a crime, and preventing law enforcement from turning individuals into informants. *See id.* at 216, 218-19.

84. MLATs are not the sole means of obtaining evidence abroad. Executive agreements can provide limited assistance to investigate specified types of crimes. Executive agreements with foreign governments are signed by the President without Senate ratification and bind the country. *See* U.S. CONST. art. II, § 2; Guffey-Landers, *supra* note 78, at 209.

In addition to MLATs and executive agreements, various multilateral arrangements exist. For example, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides for mutual legal assistance in Article 7. This treaty entered into force in 1988. Under the Convention, a nation may request mutual legal assistance for the following reasons:

Taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing information and evidentiary items; providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records; identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7(2), *opened for signature* Dec. 20, 1988, 28 I.L.M. 493, 508. The UN Convention is silent as to the ability of criminal defendants to use the treaty to obtain evidence on their behalf. *See* Michael Abbell, *DOJ Renews Assault on Defendant's Right to Use Treaties to Obtain Evidence from Abroad*, THE CHAMPION, AUG. 21, 1997, at 21, available at <http://www.nacdl.org/champion/articles /97aug02.htm>. These other methods are of limited utility because they only cover certain specified crimes.

85. Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1265 (1998) ("[MLATs] help us bridge the gulfs of language, culture and disparate legal systems that in the past hampered cooperation in criminal law enforcement" and thus "have vastly improved international collaboration in combating crime"); Abraham Abramovsky, *Prosecuting the "Russian Mafia": Recent Russian Legislation and Increased Bilateral Cooperation May Provide the Means*, 37 VA. J. INT'L L. 191, 207 (1996). MLATs were structured to streamline and make more effective the process of obtaining foreign evidence. *See* Treaty with Austria on Mutual Legal Assistance in Criminal Matters, U.S.-Austria, at 2, S. Exec. Rep. No. 104-24 (1996) [hereinafter *Austria*] citing *Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearings Before the House Committee on Foreign Affairs*, 100th Cong. 36-37 (1987) (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division).

86. Each MLAT explicitly sets forth the situations in which the requested country can deny assistance under the treaty, usually in Article 3. Typically, they allow for the denial of requests that appear to involve military or political offenses not recognized under the criminal laws of the

these treaties is to facilitate obtaining foreign evidence in a form admissible in United States courts.<sup>87</sup>

While each MLAT is the product of individual negotiations,<sup>88</sup> they do contain some similarities. MLATs typically provide for the taking of testimony, the production of records, evidence, and information, the service of judicial orders, and the transfer of persons in custody for testimonial purposes.<sup>89</sup> MLATs also permit any other assistance not prohibited by the laws of the requested nation, allowing the treaties to evolve over time.<sup>90</sup>

MLATs call for the creation of a “Central Authority” in each nation to facilitate treaty requests.<sup>91</sup> By making requests directly to the Central Authority, the courts and diplomatic channels are avoided, and the time required to secure evidence is significantly reduced.<sup>92</sup> The Office of International Affairs (OIA) in the Criminal Division of the United States Department of Justice serves as the Central Authority for the United States.<sup>93</sup> The OIA was created in 1979, after

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requested state or that would violate the constitution of the requested state. They also permit denials when the request would violate the national security or basic public policy of the requested state.

87. A significant motivation for foreign nations’ willingness to negotiate MLATs was a desire to reduce unilateral actions taken by the United States to obtain evidence. *See, e.g.*, NADELMANN, *supra* note 10, at 367 (description of Canadian MLAT).

88. For an in-depth discussion of the negotiation history, *see id.* at 345-384; Tuerkheimer, *supra* note 9, at 358.

89. Some types of assistance, such as the transfer of persons in custody for testimonial purposes, were not always available through other processes like the diplomatic letters rogatory. The types of assistance required by an MLAT are usually documented in the first Article. *See, e.g.*, Austria, *supra* note 87, at 6, providing for the following types of assistance: (1) the taking of testimony or statements of persons; (2) service of documents; (3) execution of requests for searches and seizures; (4) the provision of documents and other articles of evidence; (5) locating and identifying persons; and (6) the transfer of individuals in order to obtain testimony or for other purposes. The earliest treaties, like the one with Switzerland, allowed the denial of assistance if the crime was not specifically enumerated in the treaty. Harris, Asia Crime Prevention Foundation (ACPF) Lecture: Mutual Legal Assistance Treaties: Necessity, Merits, and Problems Arising in the Negotiation Process (2000) [hereinafter Harris Lecture]. Experience proved this limitation to be too restrictive, so later treaties included the requirement of dual criminality (the act committed would be an offense in both jurisdictions). This too proved to be too restrictive. Most current treaties do not provide dual criminality as a basis for denial of assistance. *Id.*

90. *Id.*

91. *See, e.g.*, Treaty for Mutual Assistance in Criminal Matters, U.S.-Switz., art. 28, May 25, 1973, 27 U.S.T. 2019 [hereinafter Swiss MLAT].

92. NADELMANN, *supra* note 10, at 319. *See* Austria, *supra* note 87, at 1. The process for MLAT requests is incorporated in 28 U.S.C. § 1782.

93. The Central Authority for the United States is the Attorney General or his designee. *See, e.g.*, Austria, *supra* note 87, at 14. The OIA was designated as the Central Authority for purposes of making and receiving MLAT requests pursuant to 28 C.F.R. § 0.64-1. This section states:

The Assistant Attorney General, Criminal Division . . . shall have the authority and perform the functions of the “Central Authority” or “Competent Authority” (or like designation) under treaties and executive agreements between the United States of America and other countries on mutual assistance in criminal matters that designate the Attorney General or the Department of Justice as such authority. The Assistant Attorney General, Criminal Division, is authorized to re-delegate this authority to the

the first MLAT was signed.<sup>94</sup> Every U.S. Attorney's Office in the country has an "international security coordinator" who is responsible for handling requests to or from foreign nations.<sup>95</sup>

MLATs have many advantages. First, evidence can be obtained quickly because requests bypass the courts and diplomatic channels.<sup>96</sup> Second, MLATs establish a procedural framework for ensuring that the evidence will be admissible in domestic courts.<sup>97</sup> Third, they can provide a mechanism for circumventing the financial secrecy laws that so often frustrate American investigations.<sup>98</sup> Without MLATs, frustration with these laws frequently leads the United States to resort to unilateral actions to obtain foreign evidence.<sup>99</sup> Fourth, MLATs can require that the request and the evidence provided be kept

Deputy Assistant Attorneys General, Criminal Division, and to the Director and Deputy Directors of the Office of International Affairs, Criminal Division.

The OIA negotiates MLATs with the State Department. [www.usdoj.gov/criminals/oia.html](http://www.usdoj.gov/criminals/oia.html). The staff of OIA consists of nearly eighty men and women in Washington, D.C. as well as attorneys and associated staff in six foreign countries. Harris Lecture, *supra* note 91. On any given day, they handle about 6,000 requests to and from the U.S., about two thirds of which are requests for mutual assistance. *Id.* The number of requests grows every year. *Id.*

The OIA helps local, state and federal prosecutors make MLAT requests. They will provide model requests and help with drafting. UNITED STATES ATTORNEYS' MANUAL, Title 9, Criminal Resource Manual 276 (1997). Once a draft is complete, the OIA sends the final request to the requested country's Central Authority. *Id.* Usually, the OIA will only send the request after it has been translated. *Id.*

94. NADELMANN, *supra* note 10, at 342. The first MLAT was negotiated with the Swiss. *See infra* notes 182-212 and accompanying text.

95. UNITED STATES ATTORNEY'S MANUAL, § 9-90.050 (2004). Any local, state or federal prosecutor who needs overseas evidence can make an MLAT request. To make the request, the prosecutor contacts an OIA attorney who will work with the prosecutor to draft the request. Snow, *supra* note 78 at 227-28.

Requests must generally be in writing, though more recent treaties allow requests in another form in urgent circumstances. Requests must contain: the name of the authority conducting the investigation; a description of the evidence sought and the purpose for which it is sought; applicable legal provisions (with their texts), the name and location of the persons sought, and any procedures for obtaining or authenticating the foreign evidence that will assist in its admissibility in the U.S. *Id.* at n.70. After the request is translated, the OIA forwards the MLAT request directly to the other country's Central Authority. Many countries have statutes which provide procedures for responding to foreign MLAT requests. Similar to the process followed in the United States, foreign prosecutors will obtain subpoenas or other compulsory orders from their courts. Once the requested evidence is obtained, it is returned by the Central Authority of the requested country to the OIA. The OIA then forwards the evidence directly to the prosecutor. *Id.* The evidence gathered generally cannot be used for purposes other than those stated in the request without the prior consent of the requested State. Some treaties permit the use of information for any purpose once it becomes public. *Id.*

96. *See Cayman Islands, supra* note 1, at 166 (testimony of Pisani) ("[R]equests made via MLATs can often be turned around and received in a matter of weeks, and, in some cases, even shorter.").

97. NADELMANN, *supra* note 10, at 319.

98. *Id.*

99. *See infra* notes 117-124 and accompanying text.

confidential,<sup>100</sup> preventing suspects from learning of the request and attempting to hide, obscure, or destroy evidence. Fifth, they can permit requests to be made prior to the institution of criminal proceedings. This allows administrative agencies and grand juries to request evidence under the treaty.<sup>101</sup> Sixth, MLATs can require the provision of evidence in cases where no “dual criminality”<sup>102</sup> exists.

Despite their many advantages, MLATs contain one serious flaw. The vast majority explicitly exclude criminal defendants from the benefits of the compulsory process provisions. Prosecutors are guaranteed access to foreign evidence while defendants are not.

As of October 1, 2005, the United States has signed 61 MLATs and the number continues to grow.<sup>103</sup> All but the three earliest contain language restricting defense access.<sup>104</sup> This is significant because MLATs are negotiated with those nations that pose a significant transnational crime problem. As a result, in the majority of cases where defendants require foreign evidence to

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100. NADELMANN, *supra* note 10, at 319. The United States wanted to limit the amount of information necessary to support an MLAT request to prevent targets from learning of the investigation and trying to undermine United States' evidence gathering efforts by either legal recourse or illicit intimidation and bribery. *Id.* at 361. These efforts were not always successful. The Swiss treaty, for example, requires that “[u]pon receipt of a request for assistance, the requested State shall notify . . . any person from whom a statement or testimony or documents, records, or articles of evidence are sought.” See Swiss MLAT, *supra* note 93, at art. 36(a). This provision warns suspects that they are under investigation at an earlier stage of the investigation than is required under the Federal Rules of Criminal Procedure, giving them greater opportunities to shift their funds and otherwise hide evidence. Another problematic provision from the point of view of the United States requires that requests for assistance include not only “the subject matter and nature of the investigation or proceeding” but also “a description of the essential acts alleged or sought to be ascertained”; see *id.* Art. 29(1)(a). As a consequence of this provision, suspects learn the prosecution's theory at an early stage in the investigation. In the United States, the defendant often does not discover that theory until the indictment. The United States was successful in maintaining secrecy in the Italian MLAT. That treaty contains a provision allowing the United States to request that the application for assistance and the contents of the request remain confidential. See Treaty Between the United States and Italy on Mutual Legal Assistance in Criminal Matters, Together with a Related Memorandum of Understanding, U.S.-Italy, art. 8(2), Nov. 9, 1982, 98th Cong., 2nd Sess. Treaty Doc. 98-25, [hereinafter Italian MLAT].

101. NADELMANN, *supra* note 10, at 332.

102. *Id.* at 333. Dual criminality refers to behavior that is criminal in both jurisdictions. *Id.* at 6-7.

103. As of September 28, 2009, these countries include: Anguilla, Antigua/Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belize, Belgium, Brazil, British Virgin Islands, Canada, Cayman Islands, Columbia, Cyprus, Czech Republic, Dominica, Egypt, Estonia, European Union, Finland, France, Germany, Greece, Grenada, Hong Kong, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, South Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Montserrat, Morocco, Netherlands, Panama, Philippines, Poland, Romania, Russian Federation, St. Kitts-Nevis, St. Lucia, St. Vincent/Grenadines, South Africa, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Turks and Caicos Islands, United Kingdom, Uruguay, and Venezuela. U.S. DEP'T OF STATE, TRAVEL.STATE.GOV, BUREAU OF CONSULAR AFFAIRS, MUTUAL LEGAL ASSISTANCE (MLAT) AND OTHER AGREEMENTS, [http://travel.state.gov/law/info/judicial/judicial\\_690.html](http://travel.state.gov/law/info/judicial/judicial_690.html).

104. The three earliest MLATs are the Swiss, Turkish and Netherlands treaties.

defend themselves, they are forced to rely upon inefficient market processes<sup>105</sup> while the government obtains evidence pursuant to the treaty. This creates a significant compulsion disparity in transnational criminal cases.

## V.

### COMPARING THE INSTITUTIONS

The four institutions that can play a role in protecting the norm of compulsion parity are the evidence-gathering market, the political process, the executive, and the courts. Each has its own merits and shortcomings. Only by comparing institutional capabilities is it possible to make an informed choice amongst them. Since the relevant decision-makers are the same, many of the factors considered are transferable to other criminal process questions. The Subparts below examine each institution's competence to safeguard parity either singly or in conjunction with another institution.

#### A. *The Market for Foreign Evidence*

Without MLATs, parties struggle to obtain foreign evidence because it is beyond the reach of domestic subpoenas. Law enforcement and defendants utilize either informal methods, such as cooperation and unilateral actions, or a formal diplomatic process called letters rogatory to obtain foreign evidence. Though far from perfect, these processes make up an informal community or market that represents a viable institutional choice for attaining the goal of equal access to evidence between prosecutors and defendants. What follows is an examination of this market. Comparative institutional analysis necessitates this exploration because one option for eliminating the compulsion disparity that currently exists between the prosecution and the defense is a return to the pre-MLAT world.

##### 1. *Informal Evidence Gathering*

American law enforcement agents abroad often develop informal, cooperative relationships with their foreign counterparts. By working closely with their foreign equivalents, they can conduct investigations and obtain evidence while avoiding accusations that they are performing investigative operations normally reserved for employees of a sovereign. Cooperation often takes place below the radar of high level government officials so as not to be hindered by government policies.<sup>106</sup> High level officials pay attention only

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105. See *infra* notes 108-142 and accompanying text.

106. This is a notion advanced by Robert Keohane and Joseph Nye Jr. called "transgovernmental relations." See Robert Keohane and Joseph Nye Jr., *Transgovernmental Relations and International Organizations*, *WORLD POLITICS* 27, 43 (1974) (referring to "sets of direct interactions among sub-units of different governments that are not controlled or closely guided



when the activities of agents or prosecutors "assume political significance, attract media attention or threaten to disrupt other dimensions of a state's foreign relations."<sup>107</sup>

Despite significant obstacles, cooperation and internationalization of policing has made great strides. American law enforcement agencies have increased their presence in foreign nations. For example, legal attachés operate as overseas agents of the FBI.<sup>108</sup> They handle all international matters that fall within the FBI's jurisdiction<sup>109</sup> and their presence facilitates informal cooperation. Legal attachés do not typically investigate criminal matters. Rather, they work as liaisons between American and foreign law enforcement agencies and prosecutors,<sup>110</sup> playing a crucial role in cutting through red tape and expediting requests to and from the United States for information and evidence.<sup>111</sup> Other law enforcement agencies such as the DEA<sup>112</sup> and the Secret Service also have an international presence that facilitates cooperation.<sup>113</sup> Additionally, the United States' office of Interpol assists with communications between the United States and foreign police agencies.<sup>114</sup>

Cooperative arrangements are not always possible, however, because they depend upon dual criminality<sup>115</sup> and similar law enforcement priorities. Absent informal cooperation, American law enforcement officials sometimes resort to three forms of unilateral action. First, law enforcement officials attempt to operate as private investigators rather than as representatives of a foreign sovereign.<sup>116</sup> This option is often problematic. Regardless of whether agents exercise their sovereign powers to arrest and the like, they are still employees of a foreign nation. Most nations do not take kindly to unilateral operations by foreign law enforcement and many have laws prohibiting such activity.<sup>117</sup> Also, local law enforcement agents may resent foreign agents operating on their turf.<sup>118</sup> They may report the activity to high level government officials, creating

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by the policies of the cabinets or chief executives of those governments") cited in NADELMANN, *supra* note 10, at 107-9.

107. NADELMANN, *supra* note 10, at 108.

108. *Id.* at 150.

109. *Id.* at 152.

110. *Id.* at 152-3.

111. *Id.* at 153.

112. *Id.* at 147-150.

113. *Id.* at 164-167.

114. *Id.* at 181.

115. For example, joint investigations of securities law violations are hampered by the fact that many of these violations simply are not criminal acts in other countries. *Id.* at 6-7.

116. *Id.* at 8.

117. For example, in many nations, laws forbid foreign agents from carrying firearms and even preclude them from conducting interviews and carrying out other investigative inquiries on their own. *Id.* at 190.

118. *See id.* at 108-9.

friction between the nations.<sup>119</sup> Second, unilateral action also takes the form of pressuring foreign nations to accommodate U.S. law enforcement needs.<sup>120</sup> Finally, in rare cases, unilateral actions involve bribery of foreign officials<sup>121</sup> and abductions.<sup>122</sup> As can be imagined, these unilateral measures lead to international friction.<sup>123</sup>

The same obstacles that hinder transnational criminal investigations can sometimes provide benefits to criminals. Successfully investigating and obtaining transnational evidence for prosecution is difficult. Transnational lawbreakers often take advantage of the lack of cooperation between nations and investigatory hindrances.<sup>124</sup> For example, offenders can hide the proceeds of their criminal activity in foreign bank accounts, safe in the knowledge that blocking statutes, designed specifically to limit the availability of financial documents and records, will hamper prosecutors' efforts to obtain important evidence.<sup>125</sup> The hurdles prosecutors face in obtaining foreign evidence often lead them to forgo prosecution.<sup>126</sup> For the transnational offender, "foreign territories and alien systems offer safe havens, lucrative smuggling opportunities, and legal shields and thickets to disguise their criminal

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119. This occurred in a case in which the author was involved. Police officers from Washington State located and interviewed witnesses living in Canada without the prior permission or cooperation of local Canadian police. The local police learned of the unilateral police activity and reported it to high level government officials, resulting in friction between Canada and the United States.

120. NADELMANN, *supra* note 10, at 7. One form of pressure the United States was able to exert resulted from the growth of multinational corporations doing business in the United States. Foreign corporations operating in the United States were susceptible to court orders and subpoenas served upon their branches and personnel. *Id.* at 316. One well-known case, *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), arose from such a situation. *See infra* note 140. When fines are levied against domestic branches for failing to comply with subpoenas for records existing in the foreign branches of these corporations, foreign nations often respond to this unilateral financial pressure by agreeing to cooperate and providing the requested records. NADELMANN, *supra* note 10, at 358-9. Another form of unilateral action taken by the United States was the use of Ghidoni waivers. *See generally* Harvey M. Silets and Susan W. Brenner, *Compelled Consent: An Oxymoron with Sinister Consequences for Citizens Who Patronize Foreign Banking Institutions*, 20 CASE W. RES. J. INT'L L. 435 (1988). These waivers allow a court to order a grand jury target to sign a consent form waiving any bank secrecy privilege. *Id.* at 435-436.

121. NADELMANN, *supra* note 10, at 323.

122. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

123. For example, international tensions arose between the United States and the United Kingdom when prosecutors began serving subpoenas upon local branches of multinational corporations, commonly referred to as "Bank of Nova Scotia subpoenas" (referencing well-known cases involving such subpoenas). Civil fines are imposed for failures to comply. *See infra* note 140. To resolve the tension, the Justice Department ordered that all subpoenas to institutions in the United States for records located abroad be cleared through the Department. NADELMANN, *supra* note 10, at 359-360. This became known as "the Jensen memorandum" after Associate Attorney General D. Lowell Jensen. *Id.* at 360.

124. NADELMANN, *supra* note 10, at 324.

125. *Id.* at 314, 324.

126. *Id.* at 322-23.

enterprises.”<sup>127</sup>

However, when criminal defendants require foreign evidence to defend themselves, they often face challenges more acute than those of law enforcement and prosecutors. Defendants cannot informally ally with law enforcement communities in other nations to aid in investigations. They cannot take advantage of the diplomatic pressures that governments exert to facilitate cooperation.<sup>128</sup> And, while they can obtain personal records and evidence such as their own financial documents or telephone records by requesting them directly from foreign institutions,<sup>129</sup> they cannot obtain other types of evidence through informal mechanisms except perhaps through bribery or other corrupt means.

Both the government and defendants can hire private investigators.<sup>130</sup> These investigators can operate abroad without raising sovereignty concerns. Law enforcement reliance on private investigators has decreased, though, as cooperation and harmonization among governments has increased.<sup>131</sup> However, defendants still rely upon them, as long as they have sufficient funds to hire them.

## 2. *Formal Evidence Gathering: Letters Rogatory*

The primary formal method available to prosecutors and defendants for obtaining foreign evidence in the absence of an MLAT is a process called letters rogatory.<sup>132</sup> The letters rogatory procedure requires the party seeking foreign evidence or other assistance to submit a formal request through diplomatic

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127. *Id.* at 6. The United State was concerned with the protection organized crime received from financial secrecy jurisdictions like Switzerland. *Id.* at 324. Despite serious efforts, law enforcement and prosecutors were unable to obtain financial evidence from these jurisdictions. *Id.*

128. *Id.* at 109.

129. For example, under the laws of the Cayman Islands, disclosure of bank records is generally prohibited unless the customer consents or the Cayman Grand Court orders disclosure. See Confidential Relationships (Preservation) Law (1995 Revision), available at <<http://broadhurstbarristers.com/html/laws.html>>.

130. NADELMANN, *supra* note 10, at 17, 99-100. One of the largest private detective agencies was the Pinkerton Detective Agency, whose principal client between 1890 and 1892 was the federal government. *Id.* at 49, 55-58. When the agency was investigated in 1892 for its role in suppressing the Homestead strike, Congress passed a law forbidding the use of private detectives to enforce federal law. *Id.* at 49, (citing HOMER CUMMINGS and CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 373 (Macmillan 1937)). This did not stop the federal government from hiring private detectives. Pinkerton agents were hired by the State Department to hunt down Robert LeRoy Parker and Henry Longbaugh, aka Butch Cassidy and the Sundance Kid, in the jungles of Bolivia. NADELMANN, *supra* note 10, at 60. Most historians agree that the agency was responsible for their deaths. *Id.* at 60 and note 141.

131. *Id.* at 22, 101-02.

132. 28 U.S.C. § 1781 (1970) (giving courts the discretionary authority to grant and receive judicial assistance to and from a foreign court through letters rogatory).

channels from a domestic court to a foreign court.<sup>133</sup> Letters rogatory are problematic for a number of reasons. First, formal judicial proceedings are a prerequisite to the use of letters rogatory.<sup>134</sup> Hence, the procedure provides little assistance to prosecutors seeking evidence prior to instituting proceedings. Second, the procedure creates no obligation among nations to provide the requested evidence.<sup>135</sup> If a country responds to a request, it is simply as a matter of comity.<sup>136</sup> Even if a response is forthcoming, it frequently takes years.<sup>137</sup> Third, the procedure can be used to request a foreign court to compel the

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133. NADELMANN, *supra* note 10, at 318; Inter-American Convention on Letters Rogatory, 14 I.L.M. 339 (1975) (entered into force Aug. 27, 1988), at art. 5, *cited in* Abraham Abramovsky & Jonathan I. Edelman, *Time for Final Action on 18 U.S.C. sec. 3292*, 21 MICH. J. INT'L L. 941, 947 (2000) (providing that letters rogatory must be certified by a diplomatic or consular agency); David Whedbee, *The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad Under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters*, 12 PAC. RIM L. & POL'Y J. 561, 570 (2003).

134. At least one court has allowed the issuance of a letter rogatory in support of grand jury proceedings. *United States v. Reagan*, 453 F.2d 165 (6th Cir. 1971). However, many common law countries will refuse to respond to a request made before formal charges have been filed. *See* ABBELL & RISTAU, *supra* note 9, §12-4-3, at 132 note 1. *See also* NADELMANN, *supra* note 10, at 322 (many countries reject letters rogatory requests coming from grand juries.)

135. *See* ABBELL & RISTAU, *supra* note 9, §12-3-3, at 87-88. Upon reviewing a request, the foreign court, at its discretion, may choose then to issue orders to the appropriate authority in its country asking it to produce the requested evidence. *Id.* at 88. *See also* Whedbee, *supra* note 135, at 570. Foreign courts are often reluctant to obtain evidence for criminal proceedings in another country and many lack officials specifically charged with responding to requests. NADELMANN, *supra* note 10, at 322.

136. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 cmt. e (1978). The meaning of the comity doctrine remains unclear. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 1, 3 (1991) (noting comity has been variously defined as "a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or 'considerations of high international politics concerned with maintaining amicable and workable relationship between nations.'"). In *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), the Supreme Court noted comity "in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other;" Instead, it is "the recognition which one nation allows within its territory to legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience."

137. *See* Cayman Islands, *supra* note 1, at 166 (testimony of Pisani) ("[E]ven with countries where we have the best of relations, it takes an average of 6 months now to have a return on a letters rogatory. That is far too long in the Twentieth Century to wait."). In a lecture given in 2000 in Japan, the Director of the OIA stated, "Too often, however, the letter process is not very successful, and the prosecutor or police officer who generates a letter rogatory may wait many frustrating months, or years, only to find that the requested evidence is not produced. We have many cases in which evidence sought by letters rogatory is supplied long after the trial for which it was requested has been completed." Harris Lecture, *supra* note 91. *See also* Abramovsky & Edelman, *Time for Final Action on 18 U.S.C. § 3292*, 21 MICH. J. INT'L L. 941, 949 (citing H.R. Rep. No. 98-907, 2d Sess. (1984)), reprinted in 1984 U.S.C.C.A.N. 3182, 3578; *Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearings Before the House Comm. On Foreign Affairs*, 100th Cong. 36-37 (1987) (discussing the use of letters rogatory and their limitations as compared to MLATs). If a defendant is in custody, the long wait for evidence that may never arrive pursuant to a letter rogatory may raise Sixth Amendment speedy trial concerns, especially in cases where the prosecution has an existing MLAT with the country from which the evidence is sought.

testimony of foreign witnesses, to obtain permission to interview witnesses, and to obtain documents.<sup>138</sup> However, evidence gathered may not be in a form admissible in American courts. Due to the inadequacies of the process, letters rogatory are often replaced by informal evidence gathering.<sup>139</sup> When countries fail to provide evidence under letters rogatory, the United States frequently resorts to unilateral actions both to obtain the evidence and to pressure the other nation into negotiating MLATs.<sup>140</sup>

Although informal law enforcement cooperation and the letters rogatory process are not ideal methods for obtaining evidence,<sup>141</sup> neither party is guaranteed access to foreign evidence. In other words, evidence gathering parity exists in the market. While this solution is by no means ideal, comparative institutional analysis teaches that no institutional choice is perfect. If the goal of achieving compulsion parity is important to the fair functioning of our criminal justice system, as this Article argues, difficult institutional choices and compromises must be made. A return to the pre-MLAT market represents a viable means of achieving compulsion parity, and must be considered alongside the political process, the executive, and the courts.

### B. *The Political Process*

Another institution that can play a role in protecting the norm of compulsion parity is the political process, namely, the Senate. The Senate Foreign Relations Committee takes testimony from interested parties regarding treaties and issues reports to the full Senate with recommendations regarding ratification. The Senate can remedy compulsion disparity by declining to ratify

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138. NADELMANN, *supra* note 10, at 319.

139. *Id.* at 318. Some nations will respond to informal requests such as those made through Interpol to obtain evidence. Others require the more formal letters rogatory. *Id.* at 318-9. For example, in an effort to obtain financial records from banks in the Cayman Islands, a country with strong bank secrecy laws, prosecutors convinced the federal courts to issue letters rogatory to Cayman courts. However, the Cayman courts refused to respond with the requested evidence. Prosecutors then resorted to unilateral measures, serving subpoenas duces tecum to the Miami branch of the Canadian Bank of Nova Scotia seeking records maintained in the banks' Bahamian, Cayman Islands, and Antigua branches. See *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982) and *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984). When the bank refused to comply on the basis that compliance would violate its country's bank secrecy laws, the federal court agreed to levy daily fines of \$25,000 on the bank. This was the first time the courts became involved in the process of helping the government obtain foreign evidence by ordering sanctions. NADELMANN, *supra* note 10, at 358. Even with the existence of letters rogatory, the United States still resorted to unilateral actions such as bribing local officials. *Id.* at 357.

140. *Id.* "[T]he principle incentive for many foreign governments to negotiate MLATs with the United States was, and remains, the desire to curtail the resort by U.S. prosecutors, police agents, and courts to unilateral, extraterritorial means of collecting evidence from abroad." *Id.* at 315.

141. The informal and formal processes that exist suffer from uncertainty as a result of systemic obstacles such as foreign legal institutions, political tensions and the lack of compulsory mechanisms for ensuring the provision of foreign evidence. MLATs are negotiated to overcome these problems.

MLATs that create it.

The major advantage of the political process is its responsiveness to public will and its ability to gather facts through hearings.<sup>142</sup> The competence of the Senate to protect parity depends upon the opportunity and ability of various interests to effectively have their voices and views considered by Senators. Two forms of political malfunction, minoritarian bias and majoritarian bias, can distort the political process. Determining what form of bias is likely to exist is crucial because that bias will affect the competence of the Senate to protect the norm of compulsion parity. Below, the Senate's MLAT ratification history is examined, and the majoritarian bias which prevented parity interests from being seriously considered by Senators is exposed.

### 1. Ratification History

Prior to 1988, Senate ratification of MLATs occurred perfunctorily, with little fanfare or opposition.<sup>143</sup> However, that changed in 1988 when the executive presented the Senate Foreign Relations Committee with additional MLATs to consider and ratify.<sup>144</sup> For the first time, these MLATs contained provisions preventing defendants from utilizing the compulsory process provisions.<sup>145</sup> As a result, executive officials faced serious opposition to ratification. The opposition groups included the National Association of Criminal Defense Lawyers, the Criminal Justice Section of the American Bar Association,<sup>146</sup> the American Civil Liberties Union and private criminal defense

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142. IMPERFECT ALTERNATIVES, *supra* note 13, at 68.

143. NADELMANN, *supra* note 10, at 379.

144. *Id.*; Bruce Zagaris and Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT'L & COMP. L. 1, 20 (1997). The Senate was considering the treaties with the Cayman Islands, Mexico, Canada, Belgium, Thailand and the Bahamas. Cayman Islands, *supra* note 1, at 5.

145. The MLATs with the Cayman Islands, Mexico, Canada, and Belgium provide they do "not give rise to a right on the part of a private party to obtain . . . any evidence." The Bahamian and Thailand treaties provide that the treaties are intended "solely" for mutual assistance between the government and law enforcement authorities of the contracting parties and are "not intended or designed to provide such assistance to private parties." See Treaty on Mutual Assistance in Criminal Matters, U.S.-Bahamas, art. 1(3), S. TREATY DOC. 100-17 (1987).

A few years later, in 1996, the executive faced similar opposition to the Austrian MLAT. In my discussions of the legislative history concerning the opposition to this language, no distinction is made between testimony offered during the hearings in 1988-89 and that in 1996. Although there also was opposition to several other provisions of the treaties, the focus is on the opposition to the treaties' language barring defense access to the compulsory process provisions. For an extended discussion of the complicated legislative history surrounding these treaties and the objections to other provisions of the treaty, see generally Zagaris and Resnick, *supra* note 146.

146. The American Bar Association testified in support of defense access and the Criminal Justice Section of the ABA issued a resolution, approved unanimously by the ABA's House of Delegates, that "every future MLAT should expressly permit criminal defendants to use the treaty to obtain evidence from the Requested country to use in their defense if they can make a showing of

lawyers (collectively, the "defense lobby").<sup>147</sup> The defense lobby argued the treaties should not be ratified because they created an unconstitutional compulsion disparity.<sup>148</sup> Executive officials dismissed this criticism<sup>149</sup> and their arguments were persuasive. The Committee vote was nearly unanimous in favor of recommending ratification of these MLATs.<sup>150</sup> Only one Senator, the late Jesse Helms, criticized MLATs, in part because of the inequity in evidence gathering capabilities they created.<sup>151</sup> He questioned why criminal defendants' only option for obtaining foreign evidence would be the inefficient and discretionary letters rogatory<sup>152</sup> process when "MLATs [were] the result of the United States deciding that the letters rogatory were not satisfactory for U.S. prosecutorial needs because they were too slow in obtaining information."<sup>153</sup>

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necessity to the trial court." ABA Criminal Justice Section Report No. 109 (1989) cited in Michael Abbell, *DOJ Renews Assault on Defendant's Right to Use Treaties to Obtain Evidence from Abroad*, THE CHAMPION, AUG. 21, 1997, at 20, 21.

147. Abbell, *supra* note 148, at 21. NADELMANN, *supra* note 10, at 380.

148. The primary opposition came from testimony by Michael Abbell, the first director of OIA who is now a defense lawyer. NADELMANN, *supra* note 10, at 380. He argued the exclusionary language violated fairness norms and the compulsory process clause of the Sixth Amendment. He pointed out that defendants would be forced to rely upon the inadequate letters rogatory process while the prosecution could take advantage of MLATs.

149. Justice Department officials were not happy with their former colleague's criticisms. *Id.* at 380-81.

150. The vote in the Senate Foreign Relations Committee was 17-2 in favor of the MLATs. NADELMANN, *supra* note 10, at 383. Senator Helms represented one of the nay votes. The treaties were not ratified by the full Senate until late 1989. *Id.* at 383. By that time, Senator Helms had successfully appended two reservations to the treaty, one of which stated that nothing in the MLAT would require or authorize "legislation or other action by the United States prohibited by the U.S. Constitution as interpreted by the United States." *Id.* at 381-83. Neither reservation directly addressed the compulsion disparity concern.

151. See Cayman Islands, *supra* note 1, at 6, 52-55. Helms raised concerns about the disparity. *Id.* at 175; Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 91 AM.J. INT'L. L. 93, 100 (January, 1997) (setting forth the written questions submitted by Senator Helms to the Department of State in connection with hearings over the advice and consent of a number of MLATs in 1996). His written questions included the following:

Defendants do not have access to information through MLAT procedures. This disparity between prosecution and defendant in access to MLAT procedures has led some to question the fairness and even the constitutionality of MLATs denying individual rights. At the core of the legal objections is the belief that it is improper in our adversarial system of justice to deny defendants compulsory process and other effective procedures from compelling evidence abroad if those procedures are available to the prosecution . . . . Are there any efforts to provide access to information under consideration in current negotiations?

152. Letters rogatory are a completely discretionary and diplomatic process for obtaining foreign evidence. See *supra* notes 134-143 and accompanying text for a description of the failings of the letters rogatory procedure.

153. See Cayman Islands, *supra* note 1, at 175. In relevant part, Senator Helms' question was as follows:

I believe that the Justice Department says that individuals can use letters rogatory, . . . but the MLATs are the result of the United States deciding that the letters rogatory were not satisfactory for U.S. prosecutorial needs because they were too slow in

The Committee's report to the Senate recommending ratification did acknowledge that the "disparity between prosecution and defendant . . . has led some to question the fairness and event [*sic*] the constitutionality of MLATs denying individual rights."<sup>154</sup> However, the report concluded, "it is clear that MLATs are intended to aid law enforcement authorities only."<sup>155</sup> The Committee's decision to ratify the MLATs, despite its awareness of the compulsion disparity they created, is evidence of political malfunction in the form of majoritarian bias. A discussion of political malfunction and how it affected the Senate ratification process follows.

## 2. Evidence of Majoritarian Bias

Political malfunction can take the form of minoritarian or majoritarian bias, depending upon how the impacts of a policy are distributed amongst those affected.<sup>156</sup> Minoritarian bias occurs when a special interest minority group prevails on an issue that disproportionately harms the majority. The majority could change the policy by virtue of its numbers, but each individual member of the majority is only minimally affected, for example, the per capita impact of the policy is small. There is little incentive for individuals to expend time and energy to understand the issues or even to recognize the harm to their interests.<sup>157</sup> On the other hand, the per capita impact on individual members of the special interest minority group is large. Each member thus has the incentive to understand its interests, organize political activity and determine the most effective way to influence the political process in order to prevail.<sup>158</sup> Hence, minoritarian bias is most likely to occur when an interest group with small numbers and high per capita stakes is pitted against a majority with low per capita stakes.<sup>159</sup>

Majoritarian bias also results from a skewed distribution of impacts.<sup>160</sup> But this time, the majority understands its interests and votes to implement a policy that harms the minority group far more than any corresponding benefit to the majority. Although the minority group may understand the disproportionate harm to its interests, it simply cannot overcome the power of the majority to

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obtaining information . . . . My question is, Why should American citizens accused of a crime by foreign governments be stuck with a process that the Justice Department itself has called "cumbersome and ineffective?"

154. Austria, *supra* note 87, at 10. In an earlier MLAT, the committee additionally stated that, "[N]othing in the treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under the treaty." Cayman Islands, *supra* note 1, at 5.

155. Austria, *supra* note 87, at 9, 10 ("MLATs were intended to be law enforcement tools, and were never intended to provide benefits to the defense bar.").

156. IMPERFECT ALTERNATIVES, *supra* note 13, at 68.

157. *Id.* at 68-69.

158. *Id.* at 68-72.

159. *Id.* at 71-72.

160. *A Job for Judges*, *supra* note 40, at 672.



outvote them.<sup>161</sup>

The Committee's overwhelming vote in support of ratification, despite awareness of the compulsion disparity, evidences the majoritarian bias that existed during the ratification process. Both the executive and defense lobbies were well-informed as to the issues surrounding MLATs<sup>162</sup> and the channels of political influence, and both had high per capita stakes. However, the executive lobby successfully influenced the Senate hearings because they could credibly threaten to harness the power of the voting majority. In such a situation, when a smaller group within the majority has high stakes in an issue and can impel other majority members to act, they are known as a catalytic subgroup.<sup>163</sup>

A catalytic subgroup operates much like a special interest minority but is distinguished by its ability to spur the majority into action.<sup>164</sup> In order to do this, the subgroup must accomplish three things. First, it must educate the majority to care enough about a policy to take steps to implement it. Second, since the policy will disproportionately impact a minority group, the subgroup must convince majority members that they will not be mistaken for or become a part of that minority. Third, the subgroup must attain these goals in a manner that is easy for the majority to understand and digest with minimal effort. Otherwise, because of the low per capita stakes of each majority group member, they will simply not expend energy to learn enough about a particular policy to care enough to vote.<sup>165</sup>

The subgroup can attain these goals through the use of simple symbols and safe targets. Stereotypes are examples of simple symbols. These symbols convey considerable information with minimal effort. They are familiar and traditional sources of differentiation which people are usually "exposed to at an early age."<sup>166</sup> As such, they are endowed with meaning that is immediately recognized, often creating a visceral, emotional response.<sup>167</sup> A swastika is a particularly cogent example of a simple symbol that can be used with ease to communicate a powerful message to a targeted constituency.

A safe target is a discrete and easily identifiable group, such as one defined by its race or ethnicity,<sup>168</sup> that will be disproportionately harmed by a policy.

161. *Id.*

162. A technical analysis of the treaties is provided to the Senate by the treaty negotiators to address anticipated problems and questions. NADELMANN, *supra* note 10, at 354. The executive was criticized for failing to make the treaties and their accompanying technical analyses available to the public until the eve of the Senate hearings. Cayman Islands, *supra* note 1, at 205, 206 (1988) (statement of Bruce Zagaris).

163. IMPERFECT ALTERNATIVES, *supra* note 13, at 72.

164. *Id.* Unlike a special interest group, however, the subgroup has the incentive to inform and organize the lower per capita stake members of the majority. *Id.*

165. *See supra* notes 158-161 discussing minoritarian bias.

166. *A Job for Judges*, *supra* note 40, at 676.

167. *Id.* at 676-77.

168. *Id.* at 677.

The target is “safe” only if the majority feels secure that it will not become part of or be mistaken for that minority. The more familiar the classification or source of difference between the safe target and the members of the majority, the easier it is to activate the majority to vote.<sup>169</sup>

By coupling a simple symbol with a safe target, the catalytic subgroup can efficiently and effectively educate the majority about an issue. Use of these symbols and targets lowers the information costs of educating the low stakes majority and spurring them to action.<sup>170</sup> When a catalytic subgroup can utilize simple symbols in conjunction with a safe target, instances of severe majoritarian bias are most likely to exist.

Any advantage the political process has by virtue of its ability to respond to the public will and gather facts, becomes a liability in the face of majoritarian political malfunction. Catalytic subgroups can influence the political process merely by threatening to activate the majority and turn out the vote. By using simple symbols against a safe target, the subgroup can issue a subtle threat to legislators: side with us or we will activate the majority and vote you out of office. If credible, such threats are a powerful bargaining chip when negotiating with political actors,<sup>171</sup> and can influence policy-making. Thus, legislators’ responsiveness to the public will may exacerbate majoritarian bias.

The executive lobby’s use of simple symbols against a safe target can explain its success before the Senate. Criminal defendants are a safe target because they are a discrete, easily identifiable and marginalized group. During the Senate hearings, the executive lobby emphasized the message that support for MLATs meant politicians were being “tough on crime.”<sup>172</sup> This theme was echoed numerous times in the testimony of executive branch officials.<sup>173</sup>

169. *Id.* at 676.

170. *Id.*; IMPERFECT ALTERNATIVES, *supra* note 13, at 73.

171. *Id.* at 74, 83.

172. The testimony of Mary Mochary, Principle Deputy Legal Adviser with the Department of State provides a good example of the executive’s use of simple symbols against safe targets:

We have stressed that mutual legal assistance treaties can help countries fight back against the enemies within: Narcotraffickers who threaten the stability of well-meaning governments; terrorists who hold the rule of law in contempt; and white-collar criminals who enrich themselves by stealing from honest citizens. We have also emphasized that the treaties are important because many criminals operate on an international scale, orchestrating illegal activities in the United States from foreign countries . . . . Today’s major criminal . . . whether he embezzles money or launders it, is far more likely than not to cross an international border or to leave traces of his criminal conduct in several countries. This kind of conduct is not limited to the drug trafficker or terrorist, even though they may be most proficient in these practices. This is the methodology of the major criminal who seeks to exploit to his advantage the barriers to cooperation that can be erected by international borders.

*See* Cayman Islands, *supra* note 1, at 58-59, 225-26.

173. Cayman Islands, *supra* note 1, at 87, 90, 92 (testimony of Mary Mochary) (“There is little doubt that The Bahamas will remain a significant transshipment point for narcotics for the foreseeable future. This fact only underscores the need for more efficient and effective cooperation

Politicians understand that being “tough on crime” decreases the potential for ouster.<sup>174</sup>

The defense lobby, on the other hand, was at a disadvantage. They could not credibly threaten activation of the majority. While they could bring politicians’ attention to the risk of convicting the innocent in the absence of compulsion parity, legislators are aware that most citizens believe that those accused of crime have too many rights. In this context, constitutional protections for criminal defendants are viewed as “technicalities” that allow the factually guilty to go free.<sup>175</sup>

Majoritarian bias infected the political process. While it is impossible to assert that this bias was the singular causal factor resulting in the ratification of MLATs that disproportionately harm those accused of crime, it certainly was a significant contributing factor. Unearthing the majoritarian bias that permeated the Senate has implications for institutional choice. Majoritarian bias thrives in a majoritarian system, making it difficult for the political process to correct the policy results it produces as a consequence of the malfunction.<sup>176</sup> Whether the Senate is competent to protect compulsion parity depends upon the defense lobby’s ability to counteract the powerful influence of the executive lobby’s credible threat to activate the majority against Senators who do not vote to give

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in joint law enforcement endeavors;” “[T]he treaty with the Cayman Islands will facilitate U.S. efforts to obtain bank records and other evidence of money laundering and trafficking in illicit narcotics;” “[T]he treaty should help shore up U.S. efforts to stem the flow of illegal narcotics from Southeast Asia to the rest of the world.”); *Id.* at 94 (statement of Mark M. Richard presenting the views of the Department of Justice) (“The negotiation and implementation of effective mutual legal assistance treaties and executive agreements is a very important aspect of our effort to investigate and prosecute serious crime. As this Committee knows all too well, we have in recent years seen the internationalization of serious crimes such as narcotics trafficking, money laundering, terrorism, and large scale fraud. As a result, it has become increasingly common that significant evidence in major criminal cases will be found abroad. Obtaining such evidence, particularly in a form that will be admissible in our courts, has not been an easy matter. The purpose of our MLATs is to provide a reliable and efficient means of obtaining this evidence.”); *Id.* at 217 (letter to committee from J. Edward Fox, Assistant Secretary, Legislative Affairs) (“Secretary of State Shultz asked me to convey to you the importance which he attaches to Senate approval of all six treaties during the current session. The treaties are very important to U.S. law enforcement interests, especially in obtaining convictions against international narcotics traffickers, terrorists, and other international criminals”).

174. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (“Voters demand harsh treatment of criminals; politicians respond with tougher sentences...and more criminal prohibitions. This dynamic has been particularly powerful the past two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label ‘tough on crime.’”).

175. See, e.g., Charles J. Ogletree, Jr., *Comment: Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 170-171 (1991) (referencing the public’s view that too many guilty defendants go free based upon “technicalities.”); Guido Calabresi, *Law and Truth: Debate: Exclusionary Rules: The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 111 (2003) (conservatives view the fourth amendment’s exclusionary rule as a “technicality” that frees guilty criminal defendants).

176. *A Job for Judges*, *supra* note 40, at 705.

advice and consent to MLATs. This may prove difficult when politicians believe that being “soft on crime” will hurt their chances of re-election.<sup>177</sup>

### C. *The Executive*

The executive branch also plays a role in protecting compulsion parity because it is responsible for negotiating MLATs. This institution occupies a unique position in our adversarial criminal justice system. On the one hand, it must be concerned with effectively prosecuting the guilty. On the other, its agents, the prosecutors, must act as “ministers of justice”<sup>178</sup> to ensure that defendants receive a fair trial.<sup>179</sup> Bias can exist in this institution when the

177. Politicians are loath to be characterized as “soft on crime.” See, e.g., Jill Young Miller, *Hanging Tough; She’s Survived Polio, Poverty and Two Bouts of Bone Cancer. Georgia Supreme Court Justice Carol Hunstein Is Used to Fighting. She Says She’ll Never Be the Same after a Bruising Battle for Re-election*, *The Atlanta Journal-Constitution*, Dec. 17, 2006, at 1D; Jennifer Steinhauer, *Bulging, Troubled Prisons Push California Officials to Seek a New Approach*, *N.Y. TIMES*, Dec. 11, 2006, at A18. A change in attitude may occur if the defense lobby can demonstrate that a factually innocent person was wrongfully convicted as a result of the absence of compulsion parity. See generally JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION & OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (1st ed. 2000) for a discussion of how wrongful convictions can affect legislative reform and public opinion.

178. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (1995) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); See also ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION, Standard 3-1.3, cmt. (3d ed. 1993) (the prosecutor must “strive not for ‘courtroom victories’...but for results that best serve the overall interests of justice.”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1981) (The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”); Lisa Kurcias, *Prosecutor’s Duty to Disclose Exculpatory Evidence*, 69 *FORDHAM L. REV.* 1205, 1209 (2000) (“The prosecutor has this duty to seek justice because she is a representative, not of a single individual, but of the government and society as a whole.”); Richard Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 *N.C. L. REV.* 693, 695 (1987) (“The prosecutor’s role as an advocate is tempered by an obligation of fairness, a duty to ensure that each trial results in an accurate determination of guilt and punishment.”); Jennifer Blair, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. 530B and the Reality of Inaction*, 49 *U.C.L.A. L. REV.* 625, 629 (2001) (“federal prosecutors have shouldered the heightened obligation to always ‘seek justice,’ and not to merely be an advocate for a client.”).

179. See, e.g., *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (The prosecutor, as the agent of the people and the State, has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice.). See also *Moore v. Illinois*, 408 U.S. 786, 809-810 (1972) (Marshall, J., concurring in part and dissenting in part) (“It is the State that tries a man, and it is the State that must insure that the trial is fair.”). As stated by the Supreme Court over 70 years ago:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a

appropriate balance between these conflicting roles is upset. The existence of bias affects the executive's competence to protect the norm of equal access to foreign evidence. Scrutinizing the role this institution played in negotiating MLATs uncovers the extent of any bias that existed. The two subparts below analyze the negotiation history of the first MLAT, and the executive's role in creating the current compulsion disparity.

### 1. *Negotiating the Swiss MLAT*

The evolution of MLATs is primarily a chronicle of the executive branch's efforts to facilitate foreign evidence-gathering and ensure its provision in a form admissible in American courts.<sup>180</sup> The United States negotiated its first MLAT with Switzerland.<sup>181</sup> Examination of the negotiation process reveals its delicate nature and the seemingly insurmountable hurdles executive officials overcame. While each MLAT negotiation involves different considerations dependent upon existing political relations with the country and the differing law enforcement priorities of each,<sup>182</sup> valuable lessons were learned during the Swiss negotiations that facilitated the negotiation of subsequent treaties.<sup>183</sup>

The Swiss MLAT was the first negotiated between a civil law and a common law country.<sup>184</sup> Officials from the State, Justice and Treasury Departments as well as the Securities and Exchange Commission were given negotiating responsibility.<sup>185</sup> The United States sought an MLAT with Switzerland primarily because it had the toughest bank secrecy laws.<sup>186</sup> These laws had stymied the efforts of prosecutors and law enforcement agencies to obtain information from Swiss financial institutions.<sup>187</sup> As a result, organized crime, including the Mafia, successfully hid assets in Switzerland.<sup>188</sup>

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wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). See generally Bruce Green, *Why Should Prosecutors Seek Justice?* 26 FORDHAM URB. L.J. 607, 634 (1999).

180. NADELMANN, *supra* note 10, at 327.

181. *Id.* at 323.

182. *Id.* at 345-375 (discussing the different incentives for negotiating treaties with other countries).

183. *Id.* at 345.

184. *Id.* at 326. Switzerland was already a signatory to a multilateral MLAT, the European Convention on Mutual Assistance in Criminal Matters, European Treaty Series No. 30, and several bi-lateral criminal assistance treaties with European countries. See Lionel Frei, *Overcoming Bank Secrecy: Assistance in Tax Matters in Switzerland on Behalf of Foreign Criminal Authorities*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 107 (1988).

185. *Id.* at 324.

186. *Id.* at 324-25 (explaining other reasons for negotiating the treaty with Switzerland first.) See also, Lionel Frei, *Overcoming Bank Secrecy: Assistance in Tax Matters in Switzerland on Behalf of Foreign Criminal Authorities*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 107, 112-22 (1988) (discussing how foreign nations can obtain information despite Swiss bank secrecy laws).

187. *Id.* at 324-25.

188. *Id.* at 324-26.

Negotiations were politically sensitive and took over nine years to complete.<sup>189</sup> The Swiss press periodically criticized the negotiations, fanning fears that treaty requests would be relatively one-sided, with most coming from the United States.<sup>190</sup> Additionally, Swiss business leaders feared potential investors would invest elsewhere if MLATs allowed the United States to pierce bank secrecy laws.<sup>191</sup> Eventually, the negotiators held meetings with Swiss business and banking leaders and obtained their support for the treaty.<sup>192</sup> The treaty was signed in 1973<sup>193</sup> and ratified by the U.S. Senate and the Swiss in 1976.<sup>194</sup>

The negotiation of the Swiss treaty illuminates the challenges and compromises involved in creating a mechanism for regularizing foreign evidence gathering. Even after the treaty was signed, the transition was rocky. For example, the United States angered the Swiss by continuing to utilize unilateral measures, such as court orders,<sup>195</sup> to compel Swiss banks located in the United States to provide evidence in violation of Swiss bank secrecy laws.<sup>196</sup> The countries negotiated and signed two Memorandums of Understanding to resolve the tensions,<sup>197</sup> and agreed every effort would be made to utilize the MLAT before resorting to unilateral measures. By the end of the 1980s, most of the kinks were resolved.<sup>198</sup>

The executive learned valuable lessons from the Swiss negotiations and from using the treaty which helped it to anticipate problems and avoid pitfalls in future negotiations.<sup>199</sup> First, the executive learned to negotiate treaties more

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189. Treaty negotiations began in 1967 and ended when the treaty was ratified in 1976. NADELMANN, *supra* note 10, at 326, 334. For further discussion of the negotiating history of the U.S. and Swiss MLAT, see Lionel Frei and Stefan Treschel, *Origins and Applications of the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters*, 31 HARV. INT'L L.J. 77 (1990).

190. NADELMANN, *supra* note 10, at 327

191. *Id.*

192. *Id.*

193. *Id.* at 333.

194. See Swiss MLAT, *supra* note 93.

195. For example, the United States resorted to unilateral measures during discovery in the largest tax evasion case in U.S. history. NADELMANN, *supra* note 10, at 338. Prosecutors obtained a subpoena duces tecum from a federal court which they served on the U.S. based subsidiary of a Swiss company. When the Swiss company failed to comply, the court issued a fine of \$50,000 per day. See *In re Grand Jury Subpoena Directed to Mark Rich & Co., A.G.*, 707 F.2d 663 (2d Cir. 1983); *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032 (2d Cir. 1984); *In re Marc Rich & Co., A.G.*, 736 F.2d 864 (2d Cir. 1984); 739 F.2d 834 (2d Cir. 1984). The case eventually settled.

196. NADELMANN, *supra* note 10, at 335.

197. See *id.* at 336-39.

198. *Id.* at 339. A similar agreement was included in the MLAT with the Cayman Islands. *Id.* at 361. The U.S. agreed not to serve subpoenas duces tecum on U.S. branches of foreign banks as a way of circumventing bank secrecy laws. See Art. 17 of Cayman MLAT, NADELMANN, *supra* note 10, at 361, 363-65.

199. NADELMANN, *supra* note 10, at 341, 343. In 1979, the State Department created the Office of Law Enforcement and Intelligence (LEI). *Id.* at 342. The LEI and OIA began negotiating MLATs

quickly, avoiding the laborious nine year process experienced with the Swiss.<sup>200</sup> Second, it learned that having at least one foreign representative with experience in criminal prosecutions could help streamline negotiations.<sup>201</sup> That person could explain the country's criminal processes and also build relationships with executive officials in order to facilitate requests later made under the treaty.<sup>202</sup> Third, the language of the treaties was simplified in order to broaden the types of evidence available, reduce the likelihood that courts from either country would impede legal assistance, and avoid future disagreements.<sup>203</sup>

## 2. *Creation of the Compulsion Disparity*

The Swiss treaty is silent regarding defense access to its compulsory process provisions.<sup>204</sup> There is no evidence defense access was discussed or even considered. This changed in future MLATs, the reason for which is unclear. Perhaps the experience of prosecutors litigating a major fraud case utilizing the Swiss MLAT accounts for the change. In January of 1980, Italian financier Michele Sindona was charged with 69 counts, including fraud and perjury, in connection with the collapse of the Franklin National Bank.<sup>205</sup> Prior to trial, Sindona requested evidence pursuant to the MLAT with the Swiss. This was the first time a defendant sought foreign evidence under the MLAT. The prosecution refused to utilize the treaty on Sindona's behalf. However, because the treaty was silent regarding a defendant's ability to use it to obtain evidence, the federal district court ordered the Department of Justice to request the evidence or the case would be dismissed with prejudice.<sup>206</sup>

Prior to the Sindona prosecution, the possibility that defendants could take advantage of MLATs may not have occurred to executive officials. Whether or not the Sindona prosecution had any bearing on the change, it is certainly interesting that after Sindona's trial in early 1980, every subsequent MLAT, save one, included language restricting its use to the government.<sup>207</sup> There is no

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together. *Id.* at 342. This partnership worked well, with the LEI bringing expertise in the politics of judicial assistance and treaty negotiations and the OIA bringing expertise in prosecuting crime and in making and responding to MLAT requests. *Id.*

200. *See id.* at 334, 343.

201. *Id.* at 343.

202. *Id.*

203. *Id.* at 346.

204. *See, e.g.*, 27 U.S.T. 2019, Articles 9, 10, 25.

205. *United States v. Sindona*, 636 F.2d 792 (2d Cir. 1980). For background on the prosecution of Michele "The Shark" Sindona, see James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L., 405, 415 (1988).

206. *See* ABBELL AND RISTAU, *supra* note 9, §12-4-8, at 174 n.7; Alan Ellis and Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 2d edition 403, 440 (M. Cherif Bassiouni ed., 1999).

207. The treaty with the Netherlands is the exception. *See* Treaty on Mutual Assistance in

need to speculate about the purpose for adding the restrictive language. A State Department official stated, “MLATs were intended to be law enforcement tools, and were never intended to provide benefits to the defense bar.”<sup>208</sup> The executive gives numerous explanations for creating the disparity: it has the job of proving guilt beyond a reasonable doubt;<sup>209</sup> granting access to defendants would deter other nations from negotiating MLATs;<sup>210</sup> and defendants do not need compulsory process because they have greater access to foreign evidence.<sup>211</sup> The executive has even denied that MLATs create compulsory process.<sup>212</sup>

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Criminal Matters, U.S.-Neth., June 12, 1981, T.I.A.S. No. 10,734. It does not contain the restrictive language although it was signed after the Sindona trial. The Italian MLAT provides that the treaty is intended “solely” for mutual assistance between the government or law enforcement authorities of the contracting parties. Treaty on Mutual Legal Assistance in Criminal Matters, Together with a Related Memorandum of Understanding, U.S.-Italy, art. 1, Nov. 9, 1982, S. Treaty Doc. 98-25. The Thailand and Bahamian treaties provide that they are not intended or designed to provide assistance to private parties. Treaty with Thailand on Mutual Assistance in Criminal Matters, U.S.-Thail., art. 1 Mar. 19, 1986, S. Treaty Doc. No. 101-18; Treaty with The Bahamas on Mutual Assistance in Criminal Matters, U.S.-Bah., art. 1, Aug. 19, 1987, S. Treaty Doc. No. 100-17. The Canadian, Caymanian, and Mexican MLATs provide that they do “not give rise to a right on the part of a private party to obtain . . . any evidence.” See Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Can., art. 2, Mar. 18, 1985, S. Treaty Doc. No. 100-14 [hereinafter Canadian MLAT]; Cayman Islands, *supra* note 1; Mutual Legal Assistance Cooperation Treaty, U.S.-Mex., Dec. 9, 1987, S. Treaty Doc. No. 100-13.

208. Austria, *supra* note 88 at 10 (testimony before the Senate Foreign Relations Committee during the ratification process). The State Department’s website discussing MLATs provides that defendants must generally utilize the letters rogatory process. See [www.travel.state.gov/law/info/judicial/judicial\\_690.html](http://www.travel.state.gov/law/info/judicial/judicial_690.html). See also Cayman Islands, *supra* note 1, at 176 (Testimony of White, former director of the Office of International Affairs, Criminal Division, Department of Justice.) (“It was the conception in the very beginning that these kinds of law enforcement tools would be limited to the parties, the governments, the law enforcement authorities of each.”).

209. See Austria, *supra* note 87, at 10 (The government “has the job of assembling evidence to prove guilt beyond a reasonable doubt, so it must have the tools to do so. The defense does not have the same job, and therefore does not need the same tools.”) This statement reflects a deep misunderstanding of the role of prosecutors in our adversarial system of criminal justice. This misunderstanding is not surprising. As advocates, prosecutors are not immune from the pressure and desire to win. In fact, the many prosecution offices foster a “win-loss scorekeeping mentality.” For a comprehensive discussion of this mentality and culture, see Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Score-Keeping Mentality Doing Justice for Prosecutors*, 38 CAL. W. L. REV. 283 (2001) and Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (discussing institutional pressures on prosecutors to win at all costs).

210. The government has never asserted that any treaty partner required the exclusion as a condition to signing the treaty. In fact, an executive official admits that “there was no discussion of how our treaty partners would react to receiving MLAT requests by or on behalf of criminal defendants” among the negotiators. Cayman Islands, *supra* note 1, at 274.

211. See Austria, *supra* note 87, at 10-11. (“[T]he defendant frequently has far greater access to evidence abroad than does the Government, since it is the defendant who chose to utilize foreign institutions in the first place.”).

212. “[T]here is nothing that the defense is being denied” because none of the MLATs provide the government with transnational compulsory process. See Austria, *supra* note 87, at 10-11. This



The creation of a compulsion disparity demonstrates the existence of executive bias in favor of the executive's role as law enforcer rather than minister of justice. The reason the executive does not protect a defendant's right to compulsory process appears obvious. After all, allowing defendants access to the treaty to obtain evidence would make successful prosecution of transnational offenders more difficult. It is easy, then, to dismiss consideration of the executive as an institution that could protect parity.

Further analysis, however, renders this ready dismissal inappropriate. Executive officials did take pains to ensure that MLATs protected some defense interests. The treaties provide protections for the privilege against self-incrimination.<sup>213</sup> They also protect defendants' sixth amendment right to confrontation by providing that the defendant (or his counsel) be present in foreign judicial proceedings to take evidence.<sup>214</sup> Executive officials safeguarded these defense interests even in the face of questions from foreign governments about why these rights needed accommodation and amid complaints about the inconveniences these rights would cause in foreign judicial proceedings.<sup>215</sup> Certainly, protecting these interests does not make prosecution easier. Additionally, in at least one instance, the executive has requested defense

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statement contradicts testimony of other executive branch officials before the Senate. For example, a Deputy Assistant Attorney General stated that:

[MLATs] provide, from our perspective, a much more effective means of obtaining evidence. . . . [An] MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases . . . . [I]n an MLAT, we have the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts....[O]ur MLATs are structured to streamline and make more effective the process of obtaining evidence'

*Id.* at 2-3 (citing *Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearings Before the Senate Committee on Foreign Affairs Committee on Foreign Affairs*, 100th Cong., 1st Sess., at 36-37 (1987) (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division)): This same official testified in hearings that "[i]t has been increasingly common that significant evidence in major criminal cases will be found abroad. Obtaining such evidence, particularly in a form that will be admissible in our courts, has not been an easy matter. The purpose of our MLAT's is to provide a reliable and efficient means of obtaining this evidence." Cayman Islands, *supra* note 1, at 61 (statement of Mark M. Richard). The express provisions of MLATs create compulsory process for the government. For example, the U.S.-Mexico MLAT not only compels a witness to appear for a deposition, but also compels that the witness bring any requested documents:

A person in the requested State whose testimony is requested shall be compelled by subpoena, if necessary, by the competent authority of the requested Party to appear and testify or produce documents, records, and objects in the requested State to the same extent as in criminal investigations or proceedings in that State.

Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, U.S.-Mex., Art. 7, 27 I.L.M. 443, 449 (emphasis added). Similar language exists in other MLATs.

213. See 27 U.S.T. 2019, Article 13; NADELMANN, *supra* note 10, at 332.

214. See 27 U.S.T. 2019, Article 12; NADELMANN, *supra* note 10, at 332-33.

215. NADELMANN, *supra* note 10, at 355.

evidence under an MLAT despite the existence of the exclusionary language.<sup>216</sup>

The executive's protection of these interests is significant for two reasons. First, it demonstrates the executive's willingness and ability to protect defendants' constitutional rights in certain circumstances. Second, it shows that foreign nations are amenable to persuasion from the executive to include provisions in MLATs that are alien to their legal systems and procedures. Thus, the executive institution cannot easily be dismissed as an option for achieving the goal of parity, for it is best situated to convince foreign nations of the importance of parity and, at times, it protects defense interests.

The executive's competence to protect parity norms depends upon whether, in most instances, the bias tips in favor of their role as ministers of justice or as advocates seeking to effectively prosecute transnational offenders. The question is whether the executive can be relied upon to strike the appropriate balance in every case. Experience in analogous contexts demonstrates the answer is likely no.<sup>217</sup> While the executive may decide to protect parity by utilizing an MLAT

216. In *United States v. Des Marteau*, 162 F.R.D. 364 (M.D. Fla. 1995), once the court granted the defendant's motion to depose a foreign national located in Canada, the prosecution agreed to utilize the Canadian MLAT to facilitate it. *Id.* at 372 n.5 ("The United States, after communicating with its office of International Affairs, informed the Court it is appropriate to utilize the treaty (with Canada) in this manner.") The prosecutor utilized the Canadian MLAT despite language which provides that it "shall not give rise to a right on the part of a private party to obtain . . . any evidence . . ." See Canadian MLAT, *supra* note 209, at art. 2.

217. For example, prosecutors could not be relied upon to disclose material exculpatory evidence to defendants of their own volition, *see, e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963), or to disclose witness perjury, *see, e.g.*, *Mooney v. Holohan*, 294 U.S. 103 (1972).

In the past, the executive has expressed the view that it might seek evidence on behalf of defendants if there was a court order. According to an executive official: "Nothing in the proposed treaties would preclude the Department of Justice from making MLAT requests on behalf of prosecutors who wish to pursue claims raised by the defense . . . [I]t would not be accurate to describe this process as 'making a request on behalf of a criminal defendant.'" Cayman Islands, *supra* note 1, at 273 (emphasis in original). However, their position seems to be hardening. In its most recent statements on the issue, the Department of Justice has taken the position that it need not comply with a court order to request information on behalf of the defense using an existing MLAT. See 3 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CRIMINAL, OBTAINING EVIDENCE, at 27 & n.12 (Supp. 1997) ("The Department of Justice, however, has continued to maintain that the restrictive language in the more recent mutual assistance treaties in criminal matters gives it veto power over whether the United States will make a court-ordered treaty request on behalf of a defendant."). In testimony before the Senate Foreign Relations Committee in 1992, the Deputy Legal Adviser for the Department of State, Mr. Alan Kreczko, testified that "the court . . . lack[s] the power or authority to compel the Government to make a request for the benefit of the defense over the objection of the prosecution." STAFF OF S. COMM. ON FOREIGN RELATIONS, 102ND CONG., CONSULAR CONVENTIONS, EXTRADITION TREATIES, AND TREATIES RELATING TO MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS 6, 40-41 (Comm. Print 1992). If the prosecutor did not believe that the request was appropriate, and opposed the use of the MLAT for the request, Mr. Kreczko testified that it was unlikely that the Department of Justice would make the request. *Id.* In such cases, he stated, the Court would have to pursue the letters rogatory approach. *Id.* He also testified that if the prosecutor felt the request was inappropriate, it could be ignored. *See id.* Empirical analysis is necessary to determine whether or not the prosecution is actually requesting evidence on behalf of defendants under the treaties. Arguably, the prosecution's role as a Minister of Justice would require them to seek material and relevant evidence on a defendant's behalf.

for the benefit of defendants, it is risky to rely upon the executive's good graces to do so.<sup>218</sup> Officials from the Department of Justice already express the view that even if a court orders them to request defense evidence under the treaty, they will refuse the order if they deem it to be inappropriate.<sup>219</sup> Before completely dismissing the executive, however, its competence to resolve the disparity in access to process must be compared to that of the political process and the courts. An examination of the competence of the courts to protect parity follows.

#### D. The Courts

Criminal process questions are likely to be resolved by the courts because in most instances, the questions arise in the context of a pending criminal adjudication. Whether the court should provide a right and what the strength of that right should be are questions of institutional choice. While this Article seeks to answer these questions in the context of the compulsion disparity created by MLATs, similar questions arise when seeking to resolve most criminal process questions.

The character of the right to compulsion parity defined by courts will reflect a choice amongst the relevant institutions.<sup>220</sup> The three Subparts below

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218. Relying upon the good graces of the executive to protect compulsion parity is risky because they are advocates, after all. In hotly contested cases, for example, it is more likely that the prosecution will determine that the defense request is without merit. Prosecutors, just like defense lawyers, are not immune from the pressures of trial and the desire to win that comes long with it. Prosecutors have been known to hide physical evidence and bury statements inconsistent with their theory of guilt. See Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Score-Keeping Mentality Doing Justice for Prosecutors*, 38 CAL. W. L. REV. 283, 297-99 (2001). She describes a situation where the prosecution failed to disclose a statement from an eyewitness (the victim's brother) saying that the killers were white while the prosecution was prosecuting a black man for the crime. If some prosecutors will go this far in their zeal to win, there can be no question that some prosecutors will decide not to use the MLAT on behalf of a defendant in order to place themselves at an advantage during the trial. It is in hotly contested cases, when the defense's ability to rebut the prosecution's case with its own evidence could make the difference between conviction and acquittal, that the prosecution will most likely refuse to utilize the MLAT voluntarily on behalf of the defense.

219. While the government may decide to use the MLAT for the benefit of defendants, nothing currently compels them to do so. An official from the Department of Justice expressed a similar view:

There may be cases in which a court determines that because of the exceptional circumstances of the case, the interests of justice require that it order the prosecutor to make an MLAT request. In such a circumstance, the government would evaluate such a prospective order, reserving its rights to oppose issuance or appeal issuance, and if it lost such an appeal, to weigh the consequences of non-compliance. These consequences could include dismissal of the case against the defendant, or suffering such sanctions as the court might see fit to impose, including a prohibition on the government's use of certain evidence in the case in question.

Cayman Islands, *supra* note 1, at 273.

220. See *supra* notes 23-41 and accompanying text.

respectively examine the considerations for deciding whether courts should define no rights, moderate rights or strong rights to compulsion parity in transnational criminal cases. The strength of the right reflects an institutional choice, and thus, a conception of the relative competence of the available decision-makers.<sup>221</sup>

### 1. *No Rights to Compulsion Parity*

The courts can determine that no Sixth Amendment right to compulsion parity exists in the transnational context. This judicial inaction would leave MLATs in place and represent a decision that the political process and the executive are the appropriate forums for change. Before the decision to provide no remedy or judicial review is made, the form and degree of bias in the political and executive institutions must be examined and compared.<sup>222</sup> Otherwise this judicial response can exacerbate existing biases or produce counter-intuitive results.

When considering the relative merits of the political process and the executive, there are two factors to weigh. The first is the majoritarian bias that permeates the political process.<sup>223</sup> The second is the executive bias in favor of its law enforcer role.<sup>224</sup> The court should produce no rights or remedies only if the executive or political institutions, even in the face of their existing biases, are comparably better suited than the courts to achieve the goal of equitable process.

A determination of no rights would seem to exacerbate, rather than alleviate existing biases in the executive and political institutions. It is easy, then, to assume that these institutions should not be relied upon to protect parity. But comparative institutional analysis rejects such a simplistic approach. The existence of a malfunction in other institutions does not, in and of itself, create a sufficient basis for the allocation of institutional responsibility to the courts. As explored in Subpart two, the courts may perform no better because of limited physical resources and personnel and lack of competence to decide the issue at hand.<sup>225</sup>

### 2. *Moderate Rights to Compulsion Parity*

Rather than declaring no rights to compulsion parity, courts could define moderate compulsory process rights for transnational defendants by creating a flexible doctrinal standard. This approach indicates a determination by the

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221. LAW'S LIMITS, *supra* note 12, at 71.

222. *Id.*

223. *See supra* notes 158-178 and accompanying text.

224. *See supra* notes 216-223 and accompanying text.

225. IMPERFECT ALTERNATIVES, *supra* note 13, at 138-149.

courts that they are the institution best suited to protect the norm of parity in evidence-gathering. A moderate right requires courts to substitute their decision-making for that of other institutions.<sup>226</sup> Rather than leaving it to the executive to decide if it will respond to a defense request for evidence, or letting the Senate decide whether or not to ratify an MLAT, the court decides when and under what circumstances compulsion parity is warranted.

A standard requires courts to determine, on a case by case basis, whether a defendant's rights to compulsion parity are violated. This increases the strain on courts' limited physical and personnel resources. Therefore, before deciding to substitute their decisions for those of other institutions by defining a moderate right, courts must decide whether the balance of competence and scale favors that substitution.<sup>227</sup> Competence refers to the judges' ability to investigate, understand, and make substantive decisions.<sup>228</sup> It is determined, for the most part, by training and experience.<sup>229</sup> The strain on the court's limited resources is reduced when its competence in an issue is high.<sup>230</sup>

Federal judges have special competence in criminal procedure issues as a result of experience. The federal criminal docket constitutes a significant portion of the cases federal courts adjudicate each year. Judges frequently interpret the constitutional provisions governing a defendant's rights and a prosecutor's obligations in such cases. Despite the strain on the court's limited resources, balancing the issues in order to determine how to protect compulsion parity in transnational criminal cases is well within the competence of the courts.

However, transnational cases in general and MLATs in particular raise potential foreign policy issues, a traditional area of doubt about the courts' competence.<sup>231</sup> Conducting foreign affairs usually requires secrecy, flexibility and the ability to respond quickly to changed circumstances.<sup>232</sup> Courts do not have independent access to foreign intelligence and thus may not understand the far-reaching implications of their decisions. Judges must consider the possibility that their rulings on issues involving foreign affairs unwittingly expose sensitive information and reduce the executive's flexibility to respond.<sup>233</sup>

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226. *See id.* at 150.

227. *Id.* Scale refers to "the resources and budget available to the judiciary and the constraints on the expansion and size of the adjudicative process." *Id.* at 138.

228. *Id.* at 138-39.

229. *Id.*

230. *Id.* at 138-150.

231. Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 380-394 (1984) [hereinafter *Taking Institutions Seriously*]. The executive has speculated that including a provision that allowed defense access to the treaty might prevent some nations from entering into MLATs. Austria, *supra* note 87, at 10.

232. *Taking Institutions Seriously*, *supra* note 233, at 381.

233. *Id.* at 382. The Supreme Court is reluctant to adjudicate issues that it views as implicating foreign policy or foreign relations. *See, e.g.*, *United States v. Balsys*, 524 U.S. 666, 697 (1998) ("Because foreign relations are specifically committed by the Constitution to the political branches, U.S. Const., art. II, § 2, cl. 2, we would not make a discretionary judgment premised on inducing

A flexible balancing approach may best serve the goal of achieving compulsion parity while reducing foreign policy concerns. How would such a standard work? In cases where defendants require foreign evidence, the court would first determine whether the requested evidence is relevant and material. This requirement of materiality is consistent with current doctrinal approaches in domestic criminal cases. If the requested evidence is material, the court could then order the prosecution to request the evidence under the existing MLAT or risk dismissal.<sup>234</sup>

This is a viable option. The treaties require that requests for evidence come from the government and not a private party. However, they are silent regarding the ability of the government to request evidence *on behalf of* a defendant. One executive official expressed the view that if a request was made by the government on behalf of a defendant, “the United States would expect the foreign government to treat the request like any other MLAT request made by the United States.”<sup>235</sup> This flexible case by case approach requires courts to do more, but avoids invalidating MLATs, thereby avoiding serious foreign policy concerns.

### 3. *Strong Rights to Compulsion Parity*

An alternative approach for the courts is to find a strong Sixth Amendment right to compulsion parity in transnational criminal cases. The strongest Sixth Amendment right would require courts to substitute their decisions for political process and executive determinations. By creating a clear doctrinal rule that compulsion parity is a constitutional requirement in transnational cases and MLATs are unconstitutional because of the disparity they create, the courts reject Senate and executive determinations that the disparity is appropriate.

The advantage of a clear rule is that it requires minimal judicial activity. If MLATs are unconstitutional because of the disparity they create, the decision of how to remedy the disparity falls to other institutions. In the meantime, in the absence of MLATs, defendants and prosecutors would be forced to rely upon the evidence-gathering market to obtain foreign evidence. By finding a strong right to compulsory process, the courts choose the market as the institution to protect parity, at least until new MLATs are negotiated. Though the pre-MLAT

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them to adopt policies in relation to other nations without squarely confronting the propriety of grounding judicial action on such a premise”).

234. There is precedent for this. In *United States v. Des Marteau*, 162 F.R.D. 364 (M.D. Fla. 1995), once the court granted the defendants motion to depose a foreign national located in Canada, the prosecution agreed to utilize the MLAT with Canada to facilitate it. *Id.* at 372 n.5 (“The United States, after communicating with its office of International Affairs, informed the Court it is appropriate to utilize the treaty [with Canada] in this manner.”) Similarly, in *United States v. Sindona*, 636 F.2d 792 (2d Cir. 1980), the court required prosecutors to obtain defense evidence utilizing the existing MLAT. See 3 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE - CRIMINAL 27 & n.12. (Supp. 1997).

235. Cayman Islands, *supra* note 1, at 274.

market was far from perfect, it represents a viable institutional choice for attaining equal access to foreign evidence between prosecutors and defendants.

Creation of a strong right might motivate the executive to protect parity explicitly in the treaties. Rather than relying upon the inefficient evidence-gathering market, the executive can decide to negotiate parity-protecting language into future treaties, as well as save existing treaties by negotiating memorandums of understanding that explicitly require prosecutors to request foreign evidence on behalf of defendants. The new treaties and the memorandums of understanding for existing MLATs could contain a materiality requirement in order to allay a foreign nation's concern that it will be inundated with frivolous or baseless requests for defense evidence.

Negotiation of memorandums of understanding can likely be done with minimal delay as a result of the special relationships developed between the nations during the process of negotiating MLATs.<sup>236</sup> Attorneys for the OIA already schedule annual or biannual meetings with foreign Central Authorities to discuss issues and problems.<sup>237</sup> If the executive decides to negotiate memorandums of understanding, the issue could simply be added to the agenda. If the nation is a signatory to the International Covenant on Civil and Political Rights<sup>238</sup> (often described as the International Bill of Rights), it will likely sign such a memorandum since the Covenant contains explicit protection of the right to compulsion parity.<sup>239</sup>

Similarly, a court-declared right provides the defense lobby with a

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236. "[T]he ratification of an MLAT reflects the fact that the two countries consider each other important and that their mutual legal assistance relationship is something that they are proud of" as a national asset. Harris Lecture, *supra* note 90. Harris also acknowledges that during the negotiation process, personal relationships and contacts were developed that facilitate cooperation. The Director of the OIA stated, "A related advantage [of MLATS] is that it is far easier to amend or revise a bilateral treaty than a comprehensive multilateral treaty. For instance, the U.S. is in the process now of negotiating revisions and amendments to some of our older MLATs, on such topics as video link or asset forfeiture and asset sharing. This enables states to add new ideas to the text of the bilateral MLAT with a minimum of delay, or respond quickly to changes in legislation. Obviously, it is not possible to revise multilateral crime conventions without a great deal of difficulty." *Id.*

237. Thomas Snow, *Symposium: Prosecuting White-Collar Crime: The Investigation and Prosecution of White Collar Crime: International Challenges and Legal Tools Available to Address Them*, 11 WM. & MARY BILL OF RTS. J. 209, n.68 (2002).

238. Art. 14(3)(e), *entered into force* March 23, 1976, 999 U.N.T.S. 171.

239. At least one treaty, the U.S.-Austria MLAT, specifically provides that the Austrian Central Authority will make requests from the U.S. on behalf of their defendants under the treaty. *See* Austria, *supra* note 87, at 14 (1996). In the technical analysis of this treaty, this provision was explained as follows: "The Austrian delegation indicated that under its legal system, courts are required to seek evidence to assist defense counsel as well as prosecutors. The Austrian Central Authority therefore will make such requests to the United States under the Treaty. The United States delegation stated that the United States Central Authority ordinarily does not make treaty requests on behalf of defense counsel. The negotiators agreed that the Treaty is not available for use by private counsel representing civil litigants as a means of evidence-gathering in criminal or civil matters. Private litigants in the United States may continue to obtain evidence from Austria by letters rogatory, an avenue of international assistance left undisturbed by the Treaty." *Id.*

powerful tool to counteract the majoritarian bias that previously existed in the political process. Senators need no longer fear being voted out of office when they refuse to ratify an MLAT which creates a compulsion disparity. The cover of a court ruling insulates them from threats of ouster.

Defining a strong right to compulsory process has many disadvantages, however. MLATs are important law enforcement tools in a world of transnational crime. Their creation entailed monumental efforts and hard-fought compromises to harmonize differing legal systems in order to combat the exponential rise in global crime.<sup>240</sup> Effective transnational prosecutions require mandatory mechanisms for obtaining evidence from foreign nations. The willingness of nations to work with the United States to create these mechanisms depends upon our willingness to enter into MLATs.<sup>241</sup> Declaring MLATs unconstitutional would return nations to square one, creating international friction and irritation.<sup>242</sup>

Even if nations feel inclined to renegotiate, their own domestic politics may make renegotiation difficult. The court's decision invalidating MLATs compromises the executive's authority and legitimacy to negotiate new treaties. How would the executive officials convince foreign nations that these renegotiated treaties would not be declared unconstitutional? Moreover, if new treaties cannot be negotiated, the United States may once again resort to the unilateral actions that so angered foreign nations in the past.<sup>243</sup> A strong right thus raises serious foreign policy concerns.

## VI. CONCLUSION

Comparative institutional analysis must inform any decision of how to obtain a desired goal or policy, because there is rarely one easily identified first and best institution. The framework teaches that the choice is amongst imperfect and flawed alternatives, each burdened with its own benefits and drawbacks. Explicit institutional comparison teases out existing institutional biases and helps to avoid unanticipated results or unintended consequences. Without comparative analysis, a role may be defined for the court that exacerbates an

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240. See *supra* notes 182-208 and accompanying text.

241. "[W]e need to receive confirmation from the Senate that the Senate believes that the conclusion of MLAT's is in the best interest of the United States. We cannot sensibly continue in this direction if the Senate believes otherwise. We cannot reasonably expect foreign governments to adopt meaningful cooperative agreements with us if we are unable to ratify the MLAT's that we have urged them to conclude. Senate advice and consent to ratification of the six pending MLAT's also would show foreign governments that their efforts to cooperate with the United States in law enforcement matters have not been in vain." Cayman Islands, *supra* note 1, at 221 (testimony of Mary Mochary).

242. Of course, the executive could mitigate the foreign policy damage caused by this approach by allowing foreign nations to continue to request evidence from the United States.

243. See *supra* notes 118, 121-124 and accompanying text.



existing malfunction in another institution or produces a counter-intuitive result. No matter what the criminal process question is, explicit institutional consideration and comparison forces contemplation of nuanced questions and avoids simplistic answers and knee-jerk institutional choices.

Applying the comparative framework to the question of how to achieve compulsion equity in transnational criminal cases demonstrates its usefulness. At first blush, it may appear that a strong right to compulsion parity in transnational criminal cases would best protect the twin goals of accuracy and fairness in criminal adjudications. However, comparative institutional analysis reveals a potentially counter-intuitive negative result from this seemingly attractive option.

Strong compulsory process rights could undermine accuracy norms. Under a strong rights approach, if the executive is unable to renegotiate the existing MLATs to explicitly protect parity, the parties are left to rely upon the evidence-gathering market that existed prior to MLATs.<sup>244</sup> This market does not provide the parties with reliable access to material and relevant evidence from foreign nations. Surprisingly, a strong right makes prosecution of the guilty more difficult and increases the risk that a factually innocent person will be wrongfully convicted. Accordingly, a strong right is not the best option.

A moderate right to compulsion parity provides the best solution to remedying the compulsion disparity in transnational evidence-gathering. The potential problem with a moderate rights approach is uncertainty about whether a foreign nation will comply with a government request on behalf of defendants. However, nothing in the treaties' language prevents this type of request, and the U.S. government has expressed the view that foreign nations will honor it.<sup>245</sup> A moderate right would leave MLATs intact, thereby avoiding serious foreign policy concerns. Under this approach, the courts would determine, on a case by case basis, whether to order the prosecution to request defense evidence. Although a moderate right requires courts to use more resources in making case by case materiality determinations, these decisions are already made by courts in most criminal cases. The increased burden upon the courts will thus be negligible. With MLATs in place, both parties will be able to present foreign evidence to the trier of fact. Comparative institutional analysis demonstrates that a moderate right provides the best safeguard for protecting the innocent and convicting the guilty in transnational criminal cases.

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244. *See supra* notes 243-250 and accompanying text.

245. *See supra* note 241.