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'TIL DEATH DO US PART: EXTRICATING THE USE OF CONFIDENTIAL MARITAL COMMUNICATIONS IN EXTRADITION HEARINGS

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TABLE OF CONTENTS

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I. INTRODUCTION

Javier Montejo Alfaro ("Montejo") is a Peruvian national who lived and worked in the United States.[1] He worked as a security guard at a night club in New Jersey and sent remittances back to Peru to support his wife, Sarita Luisa Mendoza Alvan ("Mendoza"), his daughter, and other relatives.[2] A review of the court record does not indicate that Montejo had a criminal record either in the United States or Peru.[3] Nonetheless, that changed when his wife, Mendoza, accused him of directing her to act as an intermediary in an illegal drug trafficking scheme.[4]

The tale of why Peruvian law enforcement charged Montejo with aggravated illegal drug trafficking and demanded his extradition from New Jersey to Peru is complex.[5] Nevertheless, it begins with the arrest of Jose Ormeño Villanueva ("Ormeño") at an international airport in Lima, Peru in June 2013 where Peruvian law enforcement detained Ormeño before he boarded a flight headed to New York.[6] A search of Ormeño's luggage uncovered packages of Peruvian jam, hot sauce, and pisco sour mix[7] that hid almost 2 kilograms of cocaine hydrochloride and 3.4 kilograms of cocaine hydrochloride solution.[8]

During his interrogation, Ormeño denied knowing that the Peruvian products contained illegal drugs and told law enforcement that he received the packages from a woman that he met, for the first time, a few hours before arriving at the airport[9] at the request of his co-worker and friend, Fernando Franco Rotthier, whom he described as an American with Peruvian parents.[10] According to Ormeño, he picked up the Peruvian products at Mr. Franco Rotthier's request because they were

1. Memorandum of Law in Support of Extradition, Ex. 1 at 137, ECF No. 9-1, *In re* Extradition of Montejo Alfaro, No. 18-4127 (D.N.J. Aug. 6, 2019) [hereinafter "Peru's Extradition Request"]. Montejo was a legal resident of the United States. *Id.* at 210.
2. *Id.* at 142–44.
3. *See generally id.*
4. *Id.* at 162.
5. *Id.* at 208–11.
6. *Id.* at 7–10.
7. The packages of Peruvian jam, hot sauce, and pisco sour mix are hereinafter referred to as the "Peruvian products."
8. Peru's Extradition Request, *supra* note 1, at 17, 26.
9. *Id.* at 51–56, 59, 61.
10. *Id.* at 200.

unavailable in the United States.[11] Although Ormeño identified Mendoza,[12] he did not recognize the picture of Montejo.[13]

One month later, in July 2013, Peruvian law enforcement arrested Mendoza and charged her in the illegal drug trafficking scheme.[14] Much like Ormeño, she denied knowing that the packages contained illegal drugs.[15] Instead, Mendoza, in three separate statements[16] to Peruvian law enforcement, accused her husband, Montejo, of directing her to accept a package containing the Peruvian products from a stranger[17] and then give that same package to another stranger.[18] Although she maintained her innocence,[19] the court record reveals how each of her statements to Peruvian law enforcement continuously evolved, revealing that she knew more about the actual contents of the Peruvian products.[20]

Though Mendoza denied knowing Mr. Franco Rotthier,[21] a search of Mendoza's home by Peruvian law enforcement uncovered a suitcase with a "luggage tag" or "boarding pass" with the name of "Fernando Franco Rotthier."[22] When confronted with this evidence, Mendoza claimed that the suitcase was left by her husband after a 2011 trip to Peru, but that she did not know why the luggage tag (or boarding pass) contained Mr. Franco Rotthier's name.[23]

The extraditing magistrate[24] found Mendoza's statement that she was unaware that the illegal drugs were hidden in the Peruvian products incredulous[25] but found that if any marital privilege applied, it was

11. *Id.* at 61.
12. *Id.* at 55, 78.
13. *Id.* at 200.
14. *Id.* at 82, 156.
15. *Id.* at 164–65.
16. *Id.* at 131–45, 146–51, 186–96.
17. *Id.*
18. *Id.*
19. *See generally id.*
20. *Id.*
21. *Id.* at 139, 192–93.
22. Memorandum of Law in Support of Extradition at 3, ECF No. 9, *In re* Extradition of Montejo Alfaro, No. 18-4127 (D.N.J. Aug. 6, 2019). The U.S. Government's brief describes the find by Peruvian law enforcement as a "suitcase with a luggage tag and/or boarding pass issued by American Airlines in the name of Fernando Franco." *Id.* However, the extradition request from Peru uses both terms interchangeably, so it is unclear from the record whether it was a "luggage tag" or "boarding pass" in Mendoza's home. *See generally* Peru's Extradition Request.
23. *Id.* at 123, 164.
24. See *infra* Section II.B for the meaning of "extraditing magistrate."
25. *In re* Extradition of Montejo Alfaro, No. 18-4127, slip. op. at 13–14 (D.N.J. Aug. 6, 2019) ("It strains credulity that [Mendoza] would go to such extraordinary lengths to help her husband send hot sauce to a stranger in the United States.").

nullified by the criminal conspiracy between the two spouses.[26] Moreover, the extraditing magistrate found Mendoza's statement regarding Montejo's involvement in the drug trafficking conspiracy credible[27] despite the fact that in the six years after the arrest of both Ormeño and Mendoza, the extraditing country (Peru) had not included any other corroborating information regarding the probability of Montejo's guilt[28] or the results of the multiple official letters requesting additional information from various entities that were issued during the investigation.[29] In the end, the extraditing magistrate granted Peru's request to certify the extraditability[30] of Mr. Montejo Alfaro based on Mendoza's statement, peppered with what seemed like self-serving falsehoods, and the "luggage tag" or "boarding pass" found in her residence.[31]

This Note will address whether in his finding of probable cause the extraditing magistrate may properly rely on evidence that contains confidential marital communications where there is no waiver. Specifically, this Note will address the "tension" between the privilege exception found in Rules 1101(c) and 1101(d)(3) of the Federal Rules of Evidence and section 3190 under title 18 of the U.S. Code.[32] Part I will explain the extradition process, including the meaning of probable cause, as well as what evidence is admissible during a probable cause hearing and the rule of non-contradiction, which denies an extraditee the opportunity to bring forth evidence that contradicts the charges leveled against him. Part II will examine the origins of the privileges in general, with a focus on spousal privilege and its application in federal law. Part III will discuss the "tension" between Rules 501, 1101(c), and 1101(d)(3) of the Federal Rules of Evidence and section 3190 through the lens of *In re Montejo Alfaro*.[33] This part will also discuss the potential impact on Montejo's extradition had the extraditing magistrate disregarded Mendoza's statements based on the marital communications privilege either under Rule 1101(c) or Rule 1101(d)(3) during the hearing. Ultimately, this Note hopes to demonstrate that a court should not base

26. *Id*. at 14.
27. *Id*. at 13–14.
28. *See generally* Peru's Extradition Request, *supra* note 1.
29. *See id*. at 113–16.
30. *See* Section II.B *infra* explaining the United States' role in submitting Peru's extradition request.
31. In re *Montejo Alfaro*, slip. op. at 14; *see* also Memorandum of Law in Support of Extradition, *supra* note 22, at 3.
32. *Compare* 18 U.S.C. § 3190, *with* FED. R. EVID. 1101(c) *and* FED. R. EVID. 1101(d)(3)*; see also* In re *Montejo Alfaro*, slip. op. at 10–11 (describing briefly the "tension" between Rule 1101(d)(3) and section 3190).
33. In re *Montejo Alfaro*, slip. op. at 10–11.

its finding of probable cause on privileged, confidential communications because an extradition system that subjects an extraditee to harsh consequences—such as being subject to criminal prosecution, standing trial, and, if convicted, incarceration in a different country—and does not allow an extraditee the ability to either explain or refute the evidence, should at minimum keep the privilege intact as contemplated in Rules 1101(c) and 1101(d)(3). This Note is *not* intended to prove Mr. Montejo Alfaro's guilt or innocence. Instead, the argument presented here is that when faced with unusual circumstances that involve privilege, caution should instruct the extradition magistrate's decision and strict adherence to Rules 1101(c) and 1101(d)(3) during a probable cause hearing should be required.

II. EXTRADITION TO FOREIGN COUNTRIES

A. Extradition of "Fugitives"

Under the Extradition Act,[34] together with the treaties formed with foreign nations, a federal court may grant an application allowing the extradition of a "fugitive" from the United States to a foreign country to stand trial if the court finds probable cause.[35] The United States government is obligated to surrender any "persons" within its jurisdiction who are accused of committing a crime at the request of a foreign country with whom it has an extradition treaty.[36] The power to extradite rests with the Executive Branch, but only when the United States and the requesting foreign country are parties to a bilateral extradition treaty that specifically calls for the surrender of fugitives to the requesting state.[37] However, even where the applicable treaty does not obligate the United States to extradite a fugitive (including any U.S. citizen), to a foreign requesting country, the United States Secretary of State may nonetheless order the surrender of a fugitive, as long as the treaty meets other requirements and conditions.[38]

In *Valentine v. United States*,[39] the Supreme Court found that either a treaty or federal statute can confer the power to extradite to the

34. 18 U.S.C. §§ 3181–3196.

35. *See* 18 U.S.C. § 3190; Grin v. Shine, 187 U.S. 181, 184 (1902) (stating that "treaties should be faithfully observed, and interpreted with a view to fulfill [an extradition magistrate's] just obligations to other powers, without sacrificing the legal or constitutional rights of the accused").

36. 18 U.S.C. § 3181.

37. *Id.*

38. 18 U.S.C. § 3196.

39. 299 U.S. 5 (1936).

Executive Branch.[40] In addition, the *Valentine* Court found that although the Executive Branch's power to extradite was limited because the "Constitution creates no executive prerogative to dispose of the liberty of the individual," the existence of a treaty (or statute) granting executive power to extradite is sufficient.[41] Simply put, provided there is an extradition treaty or a federal statute, the United States, through the Executive Branch, has the power to extradite a fugitive to a foreign country.[42]

The intent of the extradition statute, originally promulgated in 1848,[43] was to remove the necessity of having foreign governments send its witnesses and citizens to the United States to confront the accused,[44] as well as to provide a process for extraditing "fugitive[s]."[45] Since before the inception of the extradition statute, legislators believed that instituting full-fledged legal proceedings of fugitives within the United States by foreign government would defeat the purpose of extradition treaties, notwithstanding the public demand for judicial oversight over the international extradition process.[46] The lack of full legal proceedings

40. *Id.* at 9.

41. *Id.* at 8.

42. *Id.*

43. Act of Aug. 12, 1848, 30TH CONG. § 5 (1st Sess. 1896), https://www.loc.gov/law/help/statutes-at-large/30th-congress/session-1/c30s1ch167.pdf.

44. Bingham v. Bradley, 241 U.S. 511, 517 (1916); *see also* Collins v. Loisel, 259 U.S. 309, 316 (1992) (quoting Charlton v. Kelly, 229 U.S. 447, 461 (1913)) ("'If [the right to introduce evidence] were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties.'").

45. Artemio Rivera, *Probable Cause and Due Process in International Extradition*, 54 AM. CRIM. L. REV. 131, 132 (2017) ("The main purpose of extradition treaties is to formalize and standardize an ancient practice, control the spread of safe havens for criminals, protect human rights, and support collaborative efforts between states in the fight against crime.").

46. Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1208 (1991) (explaining that the first extradition statutes were enacted in 1848 because of Congress's concern over the impact of treaty obligations stemming from the lack of federal judges and the public's demand for "judicial involvement in the extradition process."); *In re* Thomas Kaine, 55 U.S. (14 How.) 103, 112 (1852) ("[A] great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison, and surrender, a fugitive, and thereby execute the treaty himself; and there were still more opposed to an assumption that he could order the courts of justice to execute his mandate.").

stemmed not only from the political expediency and the notion that agreements with foreign nations should be honored,[47] but also from the fact that "treaties" are mentioned explicitly in the U.S. Constitution's Supremacy Clause.[48] Thus a treaty, especially those ratified by Congress, is recognized along with the Constitution and federal laws as part of the "supreme" laws of the United States.[49] As such, treaties that affect individuals necessarily collide with constitutional protections afforded to individuals—specifically, the Fourth Amendment.[50] Hence, the creation of the statute with a semblance of due process and the involvement of the judicial branch under the direction of the Executive Branch was necessary.[51] In this regard, an extraditing magistrate's task is to examine "whether there is probable cause to believe that the defendant is guilty of the crimes charged" by the requesting foreign country.[52] During the court's inquiry of probable cause, the Federal Rules of Evidence do not apply.[53] Consequently, the court may rely on evidence that would ordinarily be deemed inadmissible.[54]

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47. U.S. CONST. art. VI, cl. 2. ("[The] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ***and all Treaties made, or which shall be made,*** under the Authority of the United States, ***shall be the supreme Law of the Land***.") (emphasis added).

48. *See id*. It is axiomatic that the United States adheres to the international customary *pacta sunt servanda* doctrine and the notion that every treaty in force is binding upon the agreeing parties and must be performed in good faith. Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 433 (2d Cir. 2001); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 321 and cmt. a, at 190 (1987) (stating that *pacta sunt servanda* "is perhaps the most important principle of international law"); Air France v. Saks, 470 U.S. 392, 399 (1985) ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.").

49. U.S. CONST. art. VI, cl. 2.

50. Rivera, *supra* note 45, at 132. ("Despite their merits, extradition treaties create conflicts between the law enforcement interests of governments and the constitutional rights of those subject to the treaty . . . ."); *see also* Lobue v. Christopher, 893 F. Supp. 65, 67 (D.D.C. 1995) (holding that the extradition statute is unconstitutional because it authorizes executive branch officials to review decisions of the judiciary branch), *vacated on other grounds*, 82 F.3d 1081, 1082 (D.C. Cir. 1996) (vacating lower court's judgment for lack of subject matter jurisdiction with a directive that plaintiffs could seek relief through a *habeus corpus* petition in the Northern District of Illinois but did not make any finding as to the constitutionality of the extradition statute).

51. John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1481 (1988) (observing that the judicial branch is better equipped to protect individual rights).

52. Sidali v. Immigr. & Naturalization Serv., 107 F.3d 191, 195 (3d Cir. 1997).

53. FED. R. EVID. 1101(d)(3). But see Part IV *infra*.

54. *E.g.,* Harshberger v. Regan, 599 F.3d 290, 293 (3d Cir. 2010).

B. The Extradition Process

The procedures for extraditing a fugitive from the United States to a foreign country are governed by sections 3181 through 3184 of the extradition statute under title 18 of the U.S. Code, as well as the governing treaty between the United States and the foreign requesting country.[55] The power to extradite has been interpreted by federal courts to have derived from the Executive Branch's "power to conduct foreign affairs," thus categorizing it as an executive function instead of a judicial one.[56]

In the United States, the process begins with a foreign country formally requesting that U.S. Department of State surrender one or more individuals who are located within the jurisdiction of the United States.[57] The individual sought is referred to as the "defendant" or "fugitive."[58] The formal request must contain the information and/or documents enumerated in the governing treaty.[59] For instance, the extradition treaty between the United States and the Republic of Peru provides that a requesting party seeking the surrender of an individual charged with a criminal offense must provide the receiving party with:

- identity of the person sought;
- facts surrounding the nature of the offense;
- a procedural history of the case;
- text of the laws describing essential elements of the crimes and the applicable punishment;

55. *In re* Extradition of Bolanos, 594 F. Supp. 2d 515, 517 (D.N.J. 2009).

56. *Sidali*, 107 F.3d at 193.

57. U.S. DEP'T OF JUST., JUSTICE MANUAL, CRIMINAL RESOURCE MANUAL §§ 601-622, https://www.justice.gov/archives/jm/criminal-resource-manual-601-699 (last updated Jan. 22, 2020).

58. *See generally id.*

59. *In re* Extradition of Sindona, 584 F. Supp. 1437, 1446 (E.D.N.Y. 1984) (indicating that the extraditing magistrate "must determine whether: (1) there is a valid extradition treaty . . . ; (2) [the fugitives] are the persons sought; (3) the offenses with which they are charged are extraditable; (4) the requirements of 'double criminality' are satisfied; (5) there is probable cause to believe that [the accused] committed the offenses for which their extradition is requested; (6) the required documents are presented in accordance with the laws of the United States, translated and duly authenticated by a United States Consul; and (7) all other treaty requirements and procedures have been followed").

- "a copy of the warrant or order of arrest issued by a judge or other competent authority;"
- "a copy of the charging document; and"
- "such evidence as would be sufficient to justify the committal for trial of the person if the offense had been committed in the Requested State."[60]

After receipt by the U.S. Department of State, both the U.S. Department of State and the U.S. Department of Justice review the request.[61] Thereafter, upon the approval of both departments, the extradition request is then forwarded to the federal district where the fugitive is located.[62] In that federal district, the extradition request is assigned to an Assistant U.S. Attorney who begins the extradition process by filing a complaint.[63] In cases where the requesting foreign country requests for the "provisional arrest" of the fugitive, the Assistant U.S. Attorney files a Complaint for Provisional Arrest.[64]

Upon the filing of the complaint, a federal Magistrate Judge, acting as an "extradition [magistrate]," is assigned and schedules a "probable cause hearing."[65] At the probable cause hearing, the extraditing magistrate determines the extraditability of the fugitive.[66] As discussed *infra*, the Federal Rules of Evidence do not apply.[67] Instead, section 3190 under title 18 of the U.S. Code, along with rule 1101 of the Federal Rules of Evidence, governs the admissibility of the evidence in a probable cause hearing.[68] At this stage, an extraditee is not entitled to an "Article III judge[.]"[69] Instead, the extraditee is presented before an extraditing magistrate who is not operating under his or her normal capacity under the judicial branch.[70] This point is critical because it means that the

60. Extradition Treaty Between the United States of America and Republic of Peru, Peru-U.S., July 26, 2001, T.I.A.S. No. 03-825.

61. JUSTICE MANUAL, *supra* note 57, at §§ 612-13.

62. *Id.* § 613.

63. *Id.* § 614.

64. *Id.* § 615.

65. *Id.* § 619.

66. *See id.*

67. FED. R. EVID. 1101(d)(3).

68. *See* 18 U.S.C. § 3190.

69. JUSTICE MANUAL, *supra* note 57, § 619; *see also* ADMIN. OFF. OF THE U.S. CTS., *About Federal Judges*, https://www.uscourts.gov/judges-judgeships/about-federal-judges (last visited on Mar. 9, 2020) (explaining that the term "Article III Judges" refers to the judicial branch of government as mentioned in Article III of the U.S. Constitution).

70. *In re* Extradition of Aquino, 697 F. Supp. 2d 586, 597 (D.N.J. 2010) ("Indeed, a magistrate . . . is endowed with limited authority in the extradition process, as extradition

extradition magistrate is not acting under its judicial powers.[71] Instead, the federal Magistrate Judge (or federal District Judge) draws its power from, and is limited by, the Executive Branch, which directs the extraditing magistrate to review the evidence only for "probable cause."[72] This procedural flaw—using Magistrate Judges as extradition magistrates—may lead to questions as to the constitutionality of international extradition. Although Magistrate Judges usually wear "Article III" hats and are independent of the Executive Branch, the statute converts them to mere extradition rubber stampers for the Executive Branch despite courts' desire not to be classified as such.[73]

C. What is Probable Cause?

In *Locke v. United States*,[74] Chief Justice Marshall observed that "the term 'probable cause,' according to its usual acceptation, means" less evidence than would ordinarily "justify condemnation."[75] In extradition proceedings, an extraditing magistrate finds probable cause "when the evidence presented supports a reasonable belief that a fugitive committed the charged offenses."[76] In short, the finding of probable cause signifies that the evidence is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt."[77] Thus, as courts have explained, probable cause is

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has been deemed a matter of foreign policy thereby falling within the discretion of the executive branch.") (citing Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997) and *In re* Metzger, 46 U.S. 176, 188 (1847)).

71. *In re Aquino*, 697 F. Supp. 2d at 597.

72. *Id.* at 596–97.

73. The desire to avoid having magistrates serve as "mere" rubber stampers has been expressed in many decisions. Aguilar v. Texas, 378 U.S. 108, 111 (1964), *abrogated on other grounds by* Illinois v. Gates, 462 U.S. 213 (1983); *see also* United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984); Santos v. Thomas, 830 F.3d 987, 1006 (9th Cir. 2016); Skaftouros v. United States, 667 F.3d 144, 158 (2d Cir. 2011).

74. 11 U.S. (7 Cranch) 339, 348 (1813).

75. *Id.* Chief Justice Marshall originally explained the meaning of probable cause in 1807 while he was sitting as a committing magistrate during the prosecution of an individual for treason where he held that "he should not require evidence to convince himself that the defendant was guilty, but only that 'furnishing good reason to believe that the crime alleged had been committed by the person charged with having committed it.'" Jimenez v. Aristeguieta, 311 F.2d 547, 562 (5th Cir. 1962) (quoting United States v. Burr, 8 U.S. (4 Cranch) 455 (1807)).

76. *In re* Extradition of Lehming, 951 F. Supp. 505, 514 (D. Del. 1996); *In re* Extradition of Marzook, 924 F. Supp. 565, 579 (S.D.N.Y. 1996).

77. Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973).

"more than surmise or suspicion,"[78] but may be less than the standard requiring guilt to be proven beyond a reasonable doubt.[79]

In this regard, the extraditing magistrate's inquiry into whether there is probable cause, and eventual extraditability of a defendant, is limited to determining whether:

> 1) "there is an applicable extradition treaty between the requesting country and the requested country that is full force and effect;"[80]
>
> 2) "there are charges pending against the proposed extraditee in the requesting country;"[81]
>
> 3) "the treaty authorizes extradition for the crime alleged to have been committed;"[82] and
>
> 4) "there is competent legal evidence to support a finding of probable cause as to the charge for which the extradition is sought."[83]

Magistrates conduct this inquiry during *one* preliminary hearing—after the parties have fully briefed the question of whether the government has met all elements of the extradition requirements.[84] However, the Fourth Amendment to the U.S. Constitution, which provides that "no [w]arrants shall issue, but upon probable cause . . .,"[85] is not divorced from the probable cause hearing.[86] When presenting probable cause in the extradition hearings, courts have taken the stance that Fourth Amendment protection applies to guard against "arbitrary arrest, including persons arrested pursuant to a treaty, and that the government must conform its conduct to the requirements of the Constitution when carrying out its treaty obligations."[87] In this regard,

78. Reis v. United States Marshal, 192 F. Supp. 79, 82 (E.D. Pa. 1961) (quoting United States v. Johnston, 292 F. 491, 493 (D. Wash. 1923)); *In re Lehming*, 951 F. Supp. at 514.

79. *See Jimenez*, 311 F.2d at 562.

80. *In re* Extradition of Bolanos, 594 F. Supp. 2d 515, 517 (D.N.J. 2009).

81. *Id.*

82. *Id.*

83. *Id.*

84. *See* JUSTICE MANUAL, *supra* note 57, § 619 (stating that the extradition preliminary hearing is a "probable cause hearing").

85. U.S. CONST. amend. IV.

86. *See* Reid v. Covert, 354 U.S. 1, 16–18 (1957).

87. Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 TEX. INT'L L.J. 277, 307 (2002); Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983).

"the court must consider whether probable cause exists for the detention as well as for the actual surrender."[88]

But the extradition proceeding is also subject to the doctrine of non-contradiction, which refers to the government's ability to present the court with evidence against the extraditee, who has limited recourse to refute the presented evidence.[89] Unlike a typical federal court hearing, an extraditee may not present "contradictory evidence" in his defense, *i.e.,* an alibi or evidence that refutes the evidence provided by the foreign country requesting extradition.[90] Thus, an extraditee is only permitted to introduce evidence that is "explanatory,"[91] meaning that the extraditee, as discussed *infra*, may only refute the finding of probable cause by offering evidence that provides "reasonably clear-cut proof [that is] of limited scope and have some reasonable chance of negating a showing of probable cause."[92] The result is that while a country seeking to extradite an individual is allowed to introduce evidence of guilt, and potentially omit exonerating evidence, the extraditee may not provide evidence that contradicts the charges or simply impugns the credibility of witnesses or even provides exonerating evidence.[93] In some circuits, courts stack the deck even further in the government's favor by holding that the evidence submitted by the requesting country, such as affidavits, declarations, and depositions, must be taken as true in the extradition process.[94]

D. What Evidence is Admissible During a Probable Cause Hearing

Section 3190 of the extradition statute under title 18 of the U.S. Code governs the admissibility of evidence presented at the probable cause hearing.[95] In particular, section 3190 provides that "[d]epositions, warrants, or other papers . . . offered in evidence" during the extradition hearing are admissible, so long as such evidence is "legally authenticated so as to entitle them to be received for similar purposes by the tribunals

88. Powers, *supra* note 87, at 307.

89. *In re* Extradition of Sindona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) ("The rule is that the accused has no right to introduce evidence which merely contradicts the demanding country's proof, or which only poses conflicts of credibility.").

90. *Id.* at 685; *see also* Messina v. United States, 728 F.2d 77, 80 (2d Cir. 1984).

91. In re *Sindona*, 450 F. Supp. at 685.

92. *Id.*; *see also* Ntakirutimana v. Reno, 184 F.3d 419, 429 (5th Cir. 1999); Collins v. Loisel, 259 U.S. 309, 316 (1922); Charlton v. Kelly, 229 U.S. 447, 461 (1913); *In re* Extradition of Lehming, 951 F. Supp. 505, 514 (D. Del. 1996); In re *Sindona*, 450 F. Supp. at 685; *In re* Extradition of Wadge, 15 F. 864, 866 (S.D.N.Y. 1883).

93. *See* Grin v. Shine, 187 U.S. 181, 184, 192 (1902); In re *Sindona*, 450 F. Supp. at 685.

94. *E.g.*, *In re* Extradition of Atta, 706 F. Supp. 1032, 1050–51 (E.D.N.Y. 1989); *In re* Extradition of Pineda Lara, No. 97 Cr. Misc. 1, 1998 WL 67656, at *8 (S.D.N.Y. Feb. 18, 1998).

95. 18 U.S.C. § 3190; *Charlton*, 229 U.S. at 461.

of the [requesting] foreign country."[96] This means that "[d]epositions, warrants, or other papers" that are submitted by the requesting foreign country are deemed admissible in a United States court as long as they are accompanied with a "certificate of the principal diplomatic or consular officer of the United States resident in such foreign country."[97] Thus, evidence that ordinarily is inadmissible during trial in U.S. courts is admissible in an extradition proceeding at the probable cause stage.[98]

For instance, hearsay evidence that is routinely *excluded* as evidence at trial in U.S. courts,[99] unless the evidence falls within one of the hearsay exceptions,[100] is routinely *included* and admissible[101] during a probable cause hearing, even if the criminal procedure rules of the requesting country exclude hearsay evidence during the trial process.[102] Courts justify the inclusion of such evidence, reasoning that the extraditing magistrate's only function when overseeing an extradition proceeding is to "determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify conviction."[103] In addition, statements (even unsworn statements) provided by the requesting country in support of probable cause are routinely accepted as true.[104]

Nonetheless, evidence in support of extradition is also affected by Rules 1101(c), 1101(d)(3) and 1101(e) of the Federal Rules of Evidence. Rule 1101(e) provides that "[a] federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules."[105] This seems to support the notion that *any* evidence under the proscribed categories—"[d]epositions, warrants, or other papers"—is admissible.[106] However, Rule 1101(c) of the Federal Rules of Evidence provides direct support for the proposition that privilege applies as soon as a federal court is engaged in any proceeding, including extraditions. In particular, Rule 1101(c) plainly provides that

96. § 3190.
97. *Id.*
98. Harshbarger v. Regan, 599 F.3d 290, 293 (3d Cir. 2010) ("Evidence that might be excluded at a trial, including hearsay evidence, is generally admissible at extradition hearings."); *see* FED. R. EVID. 802.
99. FED. R. EVID. 802.
100. *See* FED. R. EVID. 803, 804.
101. Harshbarger v. Regan, 599 F.3d 290, 293 (3d Cir. 2010).
102. *In re* Extradition of Aquino, 697 F. Supp. 2d 586, 588–89 (D.N.J. 2010).
103. Sidali v. Immigr. & Naturalization Serv., 107 F.3d 191, 199; *see also* Collins v. Loisel, 259 U.S. 309, 317 (1922).
104. *E.g.*, *In re* Extradition of Marzook, 924 F. Supp. 565, 592–93 (S.D.N.Y. 1996).
105. FED. R. EVID. 1101(e).
106. 18 U.S.C. § 3190.

the "rules on Privilege apply to *all* stages of a case or proceeding."[107] To hammer the proverbial point, Rule 1101(d)(3) further provides that: the Federal Rules of Evidence, "*except for those on privilege*—do not apply to . . . miscellaneous proceedings such as: extradition or rendition . . . ."[108] Although the advisory committee notes explain that the extradition statute is "administrative in character,"[109] the advisory committee notes are silent as to the meaning of the phrase "except for those on privilege."[110] Nonetheless, all courts agree: while the rules of evidence, and even criminal procedure, do not apply during extradition or rendition proceedings, the "rules [governing] privilege" are preserved.[111] In federal courts, those privilege rules are governed by Rule 501 of the Federal Rules of Civil Procedure.[112] As discussed in Section III, *infra*, privileges generally protect against disclosure of confidential communications between people with certain legally recognized relations, *viz.*, attorney-client, husband-wife, doctor-patient.

III. PRIVILEGES

For centuries, common law has recognized the vital truism that the public "has a right to every man's evidence."[113] Privileges—whether constitutional, common law, or statutory—are an exception to this simple

107. FED. R. EVID. 1101(c) (emphasis added).
108. FED. R. EVID. 1101(d)(3) (emphasis added).
109. *Id.*
110. FED. R. EVID. 1101.
111. *In re* Extradition of Mathison, 974 F. Supp. 2d 1296, 1304 (D. Or. 2013) (noting that Rule 1101(d)(3) "preserv[es] the rules of privilege"); *In re* Extradition of Diaz Medina, 210 F. Supp. 2d 813, 815 (N.D. Tex. 2002) ("Neither the Federal Rules of Criminal Procedure or Federal Rules of Evidence (except the rules governing privilege) apply to extradition proceedings."); *see also* United States v. Perez, 17 F. Supp. 3d 586, 594 (S.D. Tex. 2014); *In re* Extradition of Howard, No. 2:15-00627, 2017 WL 2870088, at *7 (D. Nev. July 3, 2017); *In re* Extradition of Acevedo, No. ED CV 16-1766-R, 2017 WL 3491749, at *4 (C.D. Cal. Aug. 11, 2017).
112. FED. R. EVID. 501.
113. United States v. Bryan, 339 U.S. 323, 331 (1950) ("When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."); Jaffee v. Redmond, 518 U.S. 1, 9–10 (1996) (acknowledging that the "fundamental maxim that the public … has a right to every man's evidence" is tempered "by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,'" while holding that "a privilege protecting confidential communications . . . 'promotes sufficiently important interests to outweigh the need for probative evidence'") (citing Trammel v. United States, 445 U.S. 40, 51 (1980)).

rule.[114] Devised through federal and state common law, privileges view certain interpersonal relationships as highly valuable that must necessarily be shrouded in a cloak of confidentiality.[115] These interpersonal relationships, such as the relationship between spouses, are "peculiarly vulnerable to deterioration should their necessary component of privacy be continually disregarded by courts . . . ."[116] Nevertheless, the privileges enjoyed by these interpersonal relationships are narrowly designed because of their ability to obscure the truth and thwart justice.[117] In federal cases, Rule 501 of the Federal Rules of Evidence protects these privileges.[118]

A. Federal Common Law Privilege Under Rule 501

Under Rule 501 "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless [provided otherwise by] the United States Constitution; a federal statute; or rules prescribed by the Supreme Court."[119] The rule identifies when a witness has, without negative repercussions, the privilege of declining to reveal his evidence.[120] Promulgated in 1975,[121] the rule was

114. United States v. Nixon, 418 U.S. 683, 709–10 (1974) ("[P]rivileges . . . are designed to protect weighty and legitimate competing interests. [For example], the Fifth Amendment to the Constitution provides that no man 'shall be compelled in any criminal case to be a witness against himself.' And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

115. United States v. Byrd, 750 F.2d 585, 589 (7th Cir. 1984).

116. *Id.*

117. *Id.* (citing *Nixon*, 418 U.S. at 710 and United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983)) (acknowledging the criticism that the privilege "generally retards truth-seeking").

118. *See* FED. R. EVID. 501.

119. *Id.*

120. H.R. REP. NO. 93-1597 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7098, 7110; *In re* Rules of Evidence for United States Cts. & Magistrates, 56 F.R.D. 183 (1972) [hereinafter "*In re* Rules of Evidence"].

121. Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926. (1975).

borne from a compromise between legislators in the House and Senate after the Supreme Court presented[122] the proposed rules of evidence.[123]

The Supreme Court's proposed rules[124] set forth nine specific privileges to be recognized by federal courts: (1) required reports; (2) lawyer-client; (3) psychotherapist-patient; (4) husband-wife; (5) communications to clergymen; (6) political vote; (7) trade secrets; (8) secrets of state and other official information; and (9) identity of the informer.[125] Congress rejected these specific privileges, however, because of the rules that it abolished, as well as the criticism and controversy that the new rules amassed from scholars and practitioners—regarding at the proposed abolishment of the spousal communications privilege as discussed *infra*.[126] In the end, a single rule (Rule 501) was adopted.[127]

B. History of the Federal Common Law Spousal Privileges

The common law spousal privilege is comprised of a set of privileges that courts, through several decisions, have assigned to spouses. The spousal privilege is comprised of two independent rules: (1) adverse spousal testimony privilege, and (2) spousal communications privilege.[128]

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122. Justice William O. Douglas was the sole dissenter to the proposed rules. *See In re* Rules of Evidence, *supra* note 120, at 185. Justice Douglas's concern was that he did not believe that the proposed rules of evidence were rules of "practice and procedure" and, therefore, did not believe the proposed rules were within the purview of the Rules Enabling Act, which authorizes the Supreme Court to submit proposed rules to Congress. *Id.*; 28 U.S.C. § 2072. In addition, Justice Douglas believed that the Supreme Court is a mere "conduit to Congress" that has no role in writing, supervising, appraising, or weighing the proposed rules and, despite the public expectation that the Court is the "imprimatur" of the rules, the court is "so far removed from the trial arena that we [it has] no special insight [and] no meaningful oversight to contribute." *In re* Rules of Evidence, *supra* note 120, at 185.

123. H.R. REP. NO. 93-1597, at 7110 (1974) (Conf. Rep.); H.R. REP. NO. 93-650 (1973) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7075.

124. An Advisory Committee on the Rules of Evidence composed of judges, scholars, and practitioners led the proposal of the rules. MINUTES OF THE DECEMBER 1966 MEETING OF THE ADVISORY COMMITTEE OF THE RULES OF EVIDENCE (Dec. 21, 1966), https://web.archive.org/web/20140713113444/http://federalevidence.com/pdf/FRE_Amendments/Pre1975/EV12-1966-min.pdf.

125. *In re* Rules of Evidence, *supra* note 120, at 186.

126. S. REP. NO. 93-1277, at 7053 (1974) (Conf. Rep.); Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1354 (1973) (noting that what "clearly" concerned Congress was new rules on privileges in Article V because it is an area of law that is "extremely sensitive").

127. H.R. REP. NO. 93-1597, at 7100–01 (1974) (Conf. Rep.).

128. Trammel v. United States, 445 U.S. 40, 53 (1980); Wolfle v. United States, 291 U.S. 7, 14 (1934); *see also* United States v. Singleton, 260 F.3d 1295, 1297 (11th Cir. 2001). Professor Michael Mullane posits the theory that the dual spousal privileges,

The adverse spousal testimony privilege governs the ability of a witness-spouse to testify on behalf of or against a defendant-spouse.[129] In general, only the witness-spouse controls the privilege of whether to testify against or for the defendant-spouse,[130] whereas the spousal communications privilege governs what sort of communications between spouses are privileged and confidential.[131] The marital communications privilege applies where there is "(1) a valid marriage and (2) words, or acts intended to be a communication, exchanged between the spouses that are (3) confidential, meaning that they are not exchanged in the presence of, or likely to be overheard, by third parties."[132] Unlike the adverse testimonial privilege, the defendant-spouse controls whether a witness-spouse can reveal the confidential communications even after the marriage has dissolved.[133]

These spousal privileges originate from the old English rule "that husband and wife were incompetent as witnesses for or against each other" because of their self-interest in the outcome of the case[134] and the old legal fiction that husband and wife are one person.[135] More

communications and testimonial, accomplish different purposes: "the Marital Communications Privilege can be understood as intended to foster stable marriages," while the adverse testimonial privilege "is intended to protect existing marriages from . . . interventions by the state." Michael W. Mullane, Trammel v. United States*: Bad History, Bad Policy, and Bad Law*, 47 ME. L. REV. 105, 132 (1995).

129. *Trammel*, 445 U.S. at 52–53.

130. *Id.* at 53.

131. *Id.* at 41.

132. United States v. Carlson, 946 F. Supp. 2d 1115, 1125 (D. Or. 2013).; *see also Wolfle*, 291 U.S. at 14. The court in *Wolfle* declared that communications between spouses that are intended to be confidential are presumptively privileged. *Id.* These "confidential . . . communications" apply only to "utterances or expressions intended by one spouse to convey a message to the other." United States v. Lustig, 555 F.2d 737, 748 (9th Cir. 1977). The communication, however, does not protect "observations" that may be perceived by third parties. *Id*.

133. United States v. Miller, 588 F.3d 897, 904 (5th Cir. 2009) ("The confidential communications privilege survives the marriage and may be asserted by either spouse with respect to communications that occurred during the marriage even after the marriage has terminated.") (citing United States v. Entrekin, 624 F.2d 597, 598 (5th Cir. 1980)). While the spousal communications privilege survives dissolutions, this rule only applies to communications made *during* marriage. *Singleton*, 260 F.3d at 1300. Communications made after permanent separation are not privileged. *Id.*; *see also* United States v. Byrd, 750 F.2d 585, 591–94 (7th Cir. 1984); United States v. Porter, 986 F.2d 1014, 1018–19 (6th Cir. 1993); United States v. Frank, 869 F.2d 1177, 1179 (8th Cir. 1989); United States v. Roberson, 859 F.2d 1376, 1378–82 (9th Cir. 1988); *In re* Witness Before Grand Jury, 791 F.2d 234, 236–39 (2d Cir. 1986).

134. Hawkins v. United States, 358 U.S. 74, 75 (1958).

135. 1 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 601, at 728–29 (1905) (citing 1 Coke, Commentary upon Littleton (19th ed. 1832), 6. b.) ("[I]t hath been resolved by the justices that a wife cannot be produced either

importantly, courts believed that the rule was necessary to foster peace in the family home and avoid pitting one spouse against another "in a trial where life or liberty is at stake" for the sake of the family unit, as well as the public at large.[136]

In 1958 a unanimous court in *Hawkins* affirmed this reasoning, when it held that a lower court erred when it allowed a wife to willingly testify against her husband over his objections.[137] The Court rejected the prevailing interpretation by lower courts that *Funk v. United States*[138]—which overturned a lower court's finding that a spouse was *incompetent* to testify against a defendant-spouse[139]—stood for the proposition that the adverse spousal privilege no longer applied.[140] Instead, the Court carefully articulated how *Funk* left adverse spousal privilege open for further examination, and ultimately, the court reasoned that *Funk* did not involve, and therefore did not abolish, adverse spousal testimony.[141]

The Supreme Court's Proposed Rules almost abolished spousal communication privilege when in 1972, the Court included proposed Rule 505—Husband and Wife Privilege ("Proposed Rule 505").[142] Proposed Rule 505 codified *Hawkins*'s general rule that in criminal proceedings, a defendant-spouse has the "privilege" to foreclose a witness-spouse's

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against or for her husband, *quia sunt duae animae in carne unâ*."). Wigmore, who traces the disqualification of a spouse as witness to Sir Edward Coke's First Institute published in 1628, dismisses the oneness of spouses as a "metaphysical fiction" that is so absurd that it does not merit a counter argument. WIGMORE, *supra*, at 729.

136. *Hawkins*, 358 U.S. at 75. Wigmore, in tracing the history of the testimonial ban between spouses, noted two additional lines of reasoning: (1) affectional bias that is assumed to exist within the marriage, and (2) the fantastical believe that a husband expected his wife to perjure herself for his benefit. WIGMORE, *supra* note 135, at 729.

137. *Hawkins*, 358 U.S. at 79.

138. 290 U.S. 371 (1933).

139. *Hawkins*, 358 U.S. at 76.

140. *Id.*

141. *Id.* Throughout the years, several exceptions have been crafted to protect the witness-spouse's ability to testify against defendant-spouse for crimes committed against the witness-spouse, children, and property. *See, e.g.*, Wyatt v. United States, 362 U.S. 525, 526, 528 (1960) (recognizing an exception to *Hawkins* where one spouse commits a crime against the other); United States v. Allery, 526 F.2d 1362, 1367 (8th Cir. 1975) (recognizing that *Hawkins* does not apply in crimes against the children of either spouse); Herman v. United States, 220 F.2d 219, 226 (4th Cir. 1955) (recognizing that *Hawkins* does not apply where one spouse commits a crime against the other spouse's property). The privilege also does not apply to communications regarding present or future criminal activity. United States v. Marashi, 913 F.2d 724, 730–31 (9th Cir. 1990); United States v. Parker, 834 F.2d 408, 411 (4th Cir. 1987). But see United States v. Evans, 966 F.2d 398, 401 (8th Cir. 1992), and United States v. Sims, 755 F.2d 1239, 1243 (6th Cir. 1985), which have held that the "partners in crime" rule is narrowly limited to communications regarding "patently illegal activity." *Evans*, 966 F.2d at 401; *Sims*, 755 F.2d at 1243.

142. *In re* Rules of Evidence, *supra* note 120, at 244–47.

testimony.[143] However, Proposed Rule 505 extinguished the marital communications privilege because the amended rule did not recognize the need for confidentiality between spouses or for the traditional protection against "marital dissension."[144] The Supreme Court reasoned that confidentiality should not apply to communications between parties who are unlikely to assume that their conversations are confidential.[145] Congress rejected Proposed Rule 505 along with the other specific privileges.[146] Instead, as noted in section III.A, Congress promulgated an all-encompassing rule, Rule 501 (Privilege in General), to cover all common law privileges as interpreted by federal courts "in the light of reason and experience."[147] In this regard, Congress directed courts to examine a presented issue before it, and ask whether the issue constituted an important and long-standing public policy that merits privilege protection.[148] A court's "experience" includes not only a survey of federal common law but also a survey of the privileges adopted by the states.[149] This examination reflects Congress's view that "the recognition of a privilege based on a confidential relationship and other privileges should be determined [by federal courts] on a case-by-case basis" and signals Congress's support for the continued recognition of privileges, such as the husband-wife privilege.[150]

In *Trammel v. United States*, the Court re-examined and partly overruled *Hawkins*.[151] The *Trammel* Court adopted the rule that only a witness-spouse has the privilege to refuse to testify adversely.[152] Under this rule, the witness-spouse may not be compelled, by defendant-spouse or another (such as a prosecutor), to testify or be foreclosed from testifying.[153] The *Trammel* Court explained that the modification was necessary because the broadness and far-reaching effect of the spousal communications privilege did not exist in any other common law privilege,[154] and the notion that a privilege had the effect of securing a

143. *Id.* at 244–45.
144. *Id.* at 245–46 (noting that martial communications, unlike other privileges, are not based on professional relationships that are "expected to inform the other of the existence of privilege").
145. *Id.*
146. H.R. REP. NO. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082.
147. *Id. See also* FED. R. EVID. 501.
148. *See generally* Jaffe v. Redmond, 518 U.S. 1, 6 (1996).
149. *Id.*
150. S. REP. 93-1277 at 7059.
151. Trammel v. United States, 45 U.S. 40 (1980).
152. *Id.* at 53.
153. *Id.*
154. *Id.* at 51–52.

silent partner-in-crime was iniquitous.[155] Further, the Court noted that the rule was "more likely to frustrate justice than foster family peace," creating the outward "effect of permitting one spouse to escape justice at the expense of the other."[156] Thus, the Court believed that the modification was necessary to "further[ ] the important public interest in marital harmony without unduly burdening legitimate law enforcement needs."[157] The witness-spouse is allowed to assert the adverse testimonial privilege in all testimony against a defendant-spouse, including nonconfidential matters and those that took place before marriage.[158]

Under *Trammel*, the spousal communications privilege as enunciated by *Wolfle* remains undisturbed,[159] presumptively confidential and privileged.[160] The spousal communications privilege extends to words or acts intended as communications to the spouse made during, but not before, a valid marriage.[161] The spousal communications privilege, however, does not extend to communications while the spouses are irreconcilably separated[162] *or* communications made in furtherance of a criminal activity *or* communications that spouses did not reasonably protect from being overheard by third parties.[163] The privilege withstands divorce, and its endurance is premised on the import of the public policy that it is necessary to encourage openness and honesty in a marriage.[164] Public disclosure, according to this policy, would have a chilling effect on marital relations.[165]

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155. *Id.*
156. *Id.* at 52–53.
157. *Id.* at 53.
158. *Id.* at 51, 53.
159. *See id.* at 40; Wolfle v. United States, 291 U.S. 7, 14 (1934). *See also* Blau v. United States, 340 U.S. 332, 333 (1951).
160. *Wolfle*, 291 U.S. at 14
161. United States v. Marashi, 913 F.2d 724, 729 (9th Cir. 1990), (citing Pereira v. United States, 347 U.S. 1, 6 (1954)).
162. United States v. Singleton, 260 F.3d 1295, 1300 (11th Cir. 2001); *see also supra* text accompanying note 133.
163. *Marashi*, 913 F.2d at 730-31. *But see* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1531 (1999) ("Even if the benefits of marital privilege are slight, the costs in valuable evidence forgone also may be slight; so, on balance, there may be little gain from abolition. If the privilege were abolished, and this were widely known, spouses would be much less likely to make damaging admissions to each other; so abolition . . . would not create a cornucopia of valuable evidence . . . . [A]bolishing marital privilege might cause such admissions to dry up.").
164. Anne N. Deprez, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege*, 56 IND. L.J. 121, 131 & nn.66–68 (1980).
165. *Id.*

C. Arguments in Favor of Eliminating the Spousal Privileges

Despite the public benefits of spousal privileges, the "purchase price" of this privilege, like any other privilege, is the injustice of excluding reliable and probative evidence.[166] For this reason, some argue that while there is a natural abhorrence to being forced to reveal a spouse's most intimate communications, this reaction is nothing but a simple "sentiment" that should not interfere with a court's quest for the truth and justice.[167] Other attacks[168] primarily revolve around the concept that there is no evidence that married people know that the privilege exists, or that they rely on this privilege when they decide to communicate with their spouse or how much information to reveal.[169] In this regard, critics believe that communications occur, and will continue to occur, regardless of the privilege because of the "trust they place in the loyalty and discretion of each other" and not because they are shielded from public disclosure in some future court proceeding in which a majority of married couples are unlikely to participate.[170]

The next line of attack involves the perception that "married couples no longer care about privacy like they supposedly did when they lived in an agrarian society."[171] The modern *laissez-faire* attitude and practice of

166. Jaffee v. Redmond, 518 U.S. 1, 18–19 (1996) (Scalia, J. dissenting).

167. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2228 at 217 (McNaughton rev. 1961).

168. The argument here is that the privilege does not encourage spouses to do what they otherwise would have done anyway with or without a privilege—communicate with a spouse. In this way, this privilege differs from attorney-client privilege where a client might be reluctant to share things with an attorney, but once the client realizes there is a privilege that keeps his information confidential, he would be more willing to reveal confidences. But this reasoning is weakened by the many relationship article and blogs that are widely and easily available that lecture about confidentiality in marriages. *See, e.g.* Mike Tucker, *Relationship Tips for a Happy Marriage Part 98: Confidentiality*, MAD ABOUT MARRIAGE (May 21, 2014), https://madaboutmarriage.com/2014/05/21/relationship-tips-for-a-happy-marriage-part-98-confidentiality/ (explaining that "[c]onfidentiality is an essential part of any healthy environment" and warning about the "many ways in which sharing confidential information from marriage with a third party can go terribly wrong"). *See also*, Sylvia Smith, *12 Things to Never Tell Your Friends About Your Relationship*, MARRIAGE.COM, https://www.marriage.com/advice/relationship/12-things-to-never-tell-your-friends-about-your-relationship/ (last updated Nov. 21, 2018); Kristina Otterstrom, *Rights and Responsibilities of a Married Person*, LAWYERS.COM, https://www.lawyers.com/legal-info/family-law/matrimonial-law/rights-and-responsibilities-of-a-married-person.html (last visited Sep. 1, 2021).

169. 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE, § 86, at 523 (7th ed. 2013).

170. *Id.*

171. 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE, § 5572, at 538-39 (1989).

publicly airing familial issues purportedly indicates that "marital privacy is no longer an esteemed value."[172]

Critics, like Milton C. Regan, Jr., also point to the disparate gender impact of the spousal communications privilege to argue that the spousal privilege has exceeded its purpose.[173] In this context, the privilege is misogynistic in its application because of who usually invokes it, thus allowing the perpetuation of "male domination in the marriage" to prevent a wife's public disclosure of confidential communication, a privilege that inevitably benefits men more often than women.[174] Indeed, it was partly this argument, framed as an "obvious and odious" history, that paved the way towards the complete abolishment of all spousal privileges in New Mexico,[175] the first and only state in the nation to do so.[176] Ironically, the original reaffirmance of the spousal communications privilege was led by a husband who refused to testify as to the whereabouts of his wife who was being sought by law enforcement in *Blau v. United States*.[177] In *Blau*, the Supreme Court accepted the reasoning that the husband's knowledge of his wife's whereabouts was obtained through marital communications,[178] which the Court presumed to be confidential and allowed the privilege to stand when the government failed to rebut.[179] Pitted against this history, it is hard to think of spousal communications privilege as misogynistic.[180]

Finally, critics relegate confidential spousal communications to a subservient role because when compared to the relationship between a layperson and a professional, spousal communications have none of the

172. *Id.*

173. Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2051 (1995). Indeed, Regan argues that the disparate gender impact of the privilege, which mainly protects a husband from his wife, "serves to reinforce a traditional ethic of self-sacrifice for women within marriage." *Id.* at 2051. *See also* State v. Gutierrez, No. S-1-SC-36394, 2019 WL 4167270, at *7 (N.M. Aug. 30, 2019); Kimberly A. Connor, *Critique of the Marital Privileges: An Examination of the Marital Privileges in the United States Military through the State and Federal Approaches to the Marital Privileges*, 36 VAL. U. L. REV. 119 (2001).

174. *See* Mikah K. Story, *Twenty-First Century Pillow-Talk: Applicability of the Marital Communications Privilege to Electronic Mail*, 58 S.C. L. REV. 275, 280 (2006).

175. State v. Gutierrez, 482, P.3d 700, 710.

176. *Id.* at 718 (Vigil, J., concurring).

177. Blau v. United States, 340 U.S. 332, 334 (1951).

178. *Id.* at 333.

179. *Id.* at 333–34.

180. *Id. See also*, EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 3.2.3 (3d ed. 2020) ("The assumption is that there is a causal relationship between the creation of the privilege and the occurrence of the desired behavior; but for the existence of the privilege, the typical person would be unwilling to engage in the behavior.").

underpinning expectations of confidentiality or the legal guarantees.[181] According to this argument, evidence that may be created in a professional-layperson relationship that relies on confidentiality is an "evidentiary wash."[182] This means that, without the privilege, evidence against the party who wishes to retain the confidentiality would not be created in the first place.[183] In other words, "but for the privilege[,] the evidence would not have come into existence."

Nonetheless, the criticism against the spousal communications privilege seems to either ignore or discard the fact that the Supreme Court has recognized that married people have a constitutional right to privacy in their intimate relationships, a right which is "older than the Bill of Rights."[184] Thus, "the abolition of the [spousal communication] privilege would offend the spirit of the constitutional guarantees."[185] In addition, it also seems misguided to place a professional relationship, which is based on a contractual obligation, over a marital relationship. Marital relationships, unlike professional relationships, are bounded not only by loyalty but an exchange of vows, vows that specify that neither will betray the confidence of the other.[186] Unlike professional relations, however, marital obligations are usually longer lasting than any professional relationship—one based on a few hundred dollars per hour.

IV. EXTRADITION AND MARITAL PRIVILEGES

A. Why Should the Marital Communications Privilege Apply in Determining Probable Cause in Extradition Hearings?

Evidence based on privilege is not the same as evidence that is filtered through the Federal Rules of Evidence.[187] While the latter were promulgated to balance fairness when offering evidence that is relevant and to keep out evidence that may not come from a reliable source, the former was promulgated to protect communications between people with

181. *Gutierrez*, 482 P.3d at 708.
182. *Id.*
183. *Id.*
184. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965). *See also* Deprez, *supra* note 164, at 133 (explaining that despite the "privilege's obstructive impact on litigation … its abolition may not be feasible [because] Constitutional privacy rights may be infringed"). *Accord Griswold*, 381 U.S. at 483 (holding that there is a right of privacy emanating through the penumbras of the Bill of Rights).
185. WRIGHT & GRAHAM, *supra* note 171, § 5572.
186. *See supra* text accompanying note 170.
187. *See* Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145, 145–46 (2004) [hereinafter referred to as "Imwinkelried, *Questioning Wigmorean Absolutism*"].

certain types of confidential relationships.[188] As such, interpreting that privileges do not apply in a probable cause hearing would render the privileges protected under Rules 501, 1101(c) and 1101(d)(3) as superfluous and obliterate Congress's careful construction (and foray into the "rule making dialogue") that allows privileges to be determined by federal courts in "light of its reason and experience."[189] This reasoning is further bolstered by the Supreme Court's finding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[190] In *Daubert*, the Court found that the Federal Rules of Evidence are "legislatively enacted" and that, as such, courts must interpret them "as [they] would any statute."[191]

Like it or not, this interpretation of legislative power equates federal rules with statutes. The statutory influence of the Rules Enabling Act, which gives the Supreme Court the power to "prescribe general rules of practice and procedure,"[192] and also provides that "*[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect*[,]" supports this view.[193] As such, not allowing the privilege to stand against probable cause could not possibly have been intended by the drafters of section 3190. And, if that were the intent, it is likely that Rules 501, 1101(c) and 1101(d)(3) supersede that interpretation.[194]

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188. *Id.* Professor Imwinkelried aptly explains the importance of privileges by invoking the words of former Supreme Court Justice Arthur Goldberg during his testimony before the Congress's Special Subcommittee on Reform of the Federal Criminal Laws:

> [Privilege law] is the concern of the public at large. [Privileges] involve the relations between husband and wife. As the Supreme Court suggested in Griswold v. Connecticut [381 U.S. 479 (1965)] the marital privilege constitutes the basis of the family relation and antedates even the adoption of our Constitution. They involve the relations between lawyer and client, a privilege that long antedates the adoption of our Constitution. They relate to the fundamental rights of citizens.'

Id. (alteration in original).

189. Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677 (2002); *see also* FED. R. EVID. 501.

190. 509 U.S. 579, 587 (1993) (applying the "traditional tools of statutory construction" to construe the provisions of Rule 803(8)(c) of the Federal Rules of Evidence).

191. *Daubert*, 509 U.S. at 587. *See also* United States v. Salerno, 505 U.S. 317, 322 (1992) (finding that "[t]o respect [Congress'] determination, [the Court] must enforce the words that it enacted."). *Also compare* Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993) [hereinafter referred to as "Imwinkelried, *A Brief Defense*"] (defending the Supreme Court's use of legislative intent), *with* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1310 n.12, 1325 (1992) (criticizing the Supreme Court's view that the Federal Rules of Evidence must be interpreted as statutes because of its "legislatively enact[ment]").

192. 28 U.S.C. § 2072(a).

193. § 2072(b) (emphasis added).

194. *See id.*

The supersession clause in the Rules Enabling Act provides support for this conclusion.[195] The caveat, of course, is that the rules promulgated by the Supreme Court may not "abridge, enlarge or modify any substantive right."[196] In addition, as Professor Genetin points out, the "rulemaking authority of Congress and the Supreme Court is not [necessarily] coextensive [because] Congress may enact substantive or procedural law, while the Supreme Court is limited, under the Rules Enabling Act and by the separation of powers principle."[197] Nonetheless, because it is the Supreme Court's emphatical "province and duty of the judicial department to say what law is,"[198] Congress, as Professor Genetin explains, "may [not] override procedural or evidentiary Rules" that are constitutional in nature.[199] This goes back full circle to *Griswold*'s constitutional right of privacy in a marriage and the notion that confidential communications between spouses are constitutionally protected and may not be overridden by statutes such as § 3190.[200]

When reading the Rules 1101(c) and 1101(d)(3) through this lens and on the same level as § 3190 and Rule 1101(e), the tension is palpable.[201] Did Congress overlook privilege when proclaiming that "[d]epositions, warrants, or other papers" that are submitted by the requesting foreign country are deemed admissible *in spite of their privileged content*?[202] The answer is likely no, because, as previously noted, the privilege protecting communications between spouses has been around for centuries.[203] It is more likely that that Congress assumed that the extraditing magistrate would consider the application of privileges in light of their "reason and experience," which includes an examination of how and when Rules

195. *See id.*; *see also* Henderson v. United States, 517 U.S. 654, 668–69 (1996) (holding that Rule 4 of the Federal Rules of Civil Procedure supersedes section 2 under the Admiralty Act).

196. § 2072(b).

197. Genetin, *supra* note 189, at 739; *see also* FED. R. EVID. 501.

198. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

199. Genetin, *supra* note 189, at 686; *see also* Dickerson v. United States, 530 U.S. 428, 437 (2000) (holding that Congress does not have the authority to enact statutes that override judicially created rules, such as the *Miranda* warnings, that articulate constitutional requirements).

200. *See* Imwinkelried, *Questioning Wigmorean Absolutism*, *supra* note 187, at 146 (citing *Hearing on Rules of Evidence Before the Special Subcomm. on Reform of Fed. Crim. Laws, Comm. on the Judiciary*, H.R. REP., 93rd Cong. 142, 143–44 (1973) (statement of Hon. Arthur J. Goldberg)).

201. *See generally* FED. R. EVID. 1101; 18 U.S.C. § 3190.

202. *See* § 3190.

203. *See generally supra* Part III.B. *See also supra* text accompanying note 135.

1101(c) and 1101(d)(3) apply when reviewing the "[d]epositions, warrants, or other papers" submitted by the foreign country.[204]

Despite the arguments regarding the constitutionality of the spousal communications privilege and the omnipotence of the Supreme Court's pronouncement of judicially created constitutional decrees, it bears repeating that Congress had the opportunity to do away with the husband-wife privilege when it was proposed by the Supreme Court, but it did not.[205] Congress did not passively accept the Supreme Court's proposal.[206] Instead, Congress gutted Proposed Rule 505, along with other proposed rules on privilege, and came up with one simple rule: Rule 501.[207] And, along with the simplicity of Rule 501's application, it also came up with Rule 1101 cementing Congress's clear intent: magistrates, who are specifically mentioned under Rule 1101, are directed "to identify and disregard[208] privileged information" during "all stages of a case or proceeding," including "miscellaneous proceedings."[209] Congress's instruction could not be any clearer.

B. Application of Spousal Communications Privilege in Montejo Alfaro

In extradition proceedings, the need to adhere to Rule 501 and the privileges afforded thereunder is critical when viewed through the prism of the extraditing magistrate's decision to certify the extraditability of Montejo.[210] As discussed *supra*, the bulk of the evidence supporting probable cause against Montejo came from (1) his wife's (Mendoza's) statements; (2) the appearance of a "luggage tag" or "boarding pass" on a piece of luggage left in Mendoza's apartment in 2011; and (3) the theory that Montejo and Mr. Franco Rotthier are the same person.[211]

But if all statements in Peru's Extraditing Request are not tested for creditability, and are taken as true as most courts instruct,[212] then the extraditing magistrate should have taken as true Mendoza's repeated

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204. *See* § 3190; Port v. Heard, 594 F. Supp. 1212, 1219–20 (S.D. Tex. 1984) (refusing to extend "any privilege beyond that of the well-established spousal privilege"); *see also* Trammel v. United States, 445 U.S. 40 (1980); Wolfle v. United States, 291 U.S. 7 (1934); Hawkins v. United States, 358 U.S. 74 (1958).

205. *See In re* Rules of Evidence, 56 F.R.D. 183.

206. Genetin, *supra* note 189, at 688-92.

207. *See* H.R. REP. NO. 93-650 (1973).

208. This does not mean that law enforcement cannot listen to confidential information that is supplied by a spouse. United States v. Carlson, 946 F. Supp. 2d, 1115, 1125–26 (2013).

209. *Id.*

210. *See In re* Montejo Alfaro, No. 18-4127, slip op. at 11 (D.N.J. June 3, 2019).

211. *See supra* notes 1–32 and accompanying text.

212. *See In re* Marzook, 924 F. Supp. 565, 592 (1996).

statements that she did not know anything about the drugs, just like it had taken as true that Mendoza acted under the direction of her husband.[213] In this scenario, the criminal enterprise exception to the martial communications privilege does not apply, and Mendoza's statements vanish.[214] Thus, all that is left is a "luggage tag" (or "boarding pass," depending on the interpretation of the translation)[215] in Mendoza's closet with Mr. Franco Rotthier's name,[216] which may implicate Mendoza in light of Ormeño 's statement, *not* Montejo. Under this scenario, with no other evidence that Mr. Franco Rotthier and Montejo are the same person, it is hard to conceive the finding of probable cause by the extraditing magistrate.

V. CONCLUSION

The focus of this Note is *not* Montejo's guilt or innocence, although it is hard not to question the sheer lack of evidence to sustain probable cause. The fundamental premise here is that probable cause cannot be so attenuated as to fall or rise on the simple statement, "My husband told me to do it." The confidential marital communications privilege, like other privileges, is more than a simple veil to be pierced. Because if it is allowed in these types of miscellaneous hearings, then the outer limits of the privilege will be pushed until centuries of common law are obliterated in other types of hearings.

213. *See supra* notes 1–32 and accompanying text; *In re* Montejo Alfaro, slip op. at 11.
214. *See supra* note 141 and accompanying text.
215. *See In re* Montejo Alfaro, slip. op. at 8 (acknowledging the "imprecision of the translated documents").
216. *Id.* at 9.