Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States

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EXTRADITION LAW AT THE CROSSROADS:
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CONSTITUTIONAL PROCEDURAL
PROTECTIONS TO FUGITIVES FIGHTING
EXTRADITION FROM THE UNITED STATES

Lis Wiehl*

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(9th Cir. 1997), petition for rehearing with suggestion for rehearing en banc granted, Oct. 2,
1997 (9th Cir. argued Dec. 18, 1997), who were so gracious in providing information and
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Late in the morning of October 18, 1995, a team of federal agents entered the offices of the law firm of White & Case in Los Angeles carrying a federal warrant for the arrest of Giancarlo Parretti, a one-time Italian waiter who had risen to become the owner of MGM-United Artists, one of the major conglomerates in the American entertainment industry. Mr. Parretti was at the firm to attend a deposition in one of many international lawsuits spawned by his highly leveraged purchase of MGM-United Artists. The warrant authorized his arrest so that he could be held to answer an anticipated formal request by French authorities for his extradition to France to face fraud and embezzlement charges stemming from the MGM-United Artists deal. The agents arrested Parretti without incident, thus beginning the proceedings that would become known as Parretti v. United States.\(^1\) No voices were raised, no guns were drawn. In the world of international extradition law, however, the result of the ensuing battle over Mr. Parretti’s extradition would soon become, at least figuratively, a shot heard around the world, the latest in a decade-long series of cases which threaten to wipe out a century of U.S. law regulating the arrest and detention of international fugitives found in the United States. Those cases are the subject of this article.

**INTRODUCTION**

For more than a hundred years, Congress and the federal courts have fashioned a body of law governing the arrest and detention of international fugitives found in the United States and the subsequent

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1. Parretti v. United States, 112 F.3d 1363, 1367 (9th Cir. 1997), *petition for rehearing with suggestion for rehearing en banc granted*, Oct. 2, 1997 (9th Cir. argued Dec. 18, 1997). The case was argued and submitted on Nov. 21, 1995 and decided on May 6, 1997.
extradition of those fugitives to the countries where the fugitives face prosecution for extraditable crimes.\textsuperscript{2} U.S. law governing the arrest,

\begin{quote}
2. The process of international extradition is one "whereby one sovereign surrenders to another sovereign a person sought as an accused criminal or a fugitive offender." M. \textsc{cherif bassiouuni}, \textit{international extradition: united states law and practice} 5 (2d rev. ed. 1987); M. \textsc{whiteman}, \textit{digest of international law} 727–1122 (1962). Extradition applies to those who are merely charged with an offense but have not been brought to trial; to those who have been tried and convicted and have subsequently escaped from custody; and to those who have been convicted in absentia. It does not apply to a person merely suspected of having committed an offense but against whom no charge has been laid or to a person whose presence is desired as a witness or for obtaining or enforcing a civil judgment. \textit{Id.} at 227.

International extradition can only be requested or granted pursuant to treaty. \textsc{bassiouuni}, \textit{supra}, at 56. Today, 104 countries have bilateral extradition treaties with the United States. U.S. \textsc{dept. of state, treaties in force: a list of treaties and other international agreements of the united states in force on jan. 1, 1997} 1–315 (1997).

Most cases on the extradition of international fugitives have been fought in the federal courts rather than in the state courts because the power to extradite has always been vested in the executive branch, pursuant to the various extradition treaties entered into by the Secretary of State, and pursuant to the federal extradition statute. The present statute is codified at 18 U.S.C. § 3184 (1994), and is virtually identical to the original extradition statute enacted in 1848. \textit{See Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. Section 1 of the original Act became Section 5270 of the revised statutes in 1876. Section 5270 in turn became 18 U.S.C. § 651 in the 1940 edition of Title 18 of the United States Code, and 18 U.S.C. § 3184 in the 1948 codification.}

As a practical matter, extradition requests by the United States' extradition treaty partners have frequently been made to the Department of State, which has referred them to the Department of Justice for assignment to the U.S. Attorneys in the federal judicial districts in which the foreign fugitives have been found, for the commencement of extradition proceedings in the federal courts of those districts. However, state courts as well as federal courts have been able to exercise jurisdiction over extradition proceedings. Indeed, the present federal statutory scheme governing extradition provides that [w]henever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized to do so by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged.


Most arrest warrants in extradition proceedings are termed "provisional" because the federal extradition statute allows foreign authorities to request the issuance of a warrant of arrest for a fugitive by U.S. authorities even before the foreign authorities have transmitted to the U.S. the formal package of documents in which the justification for arrest is detailed in full. \textit{See 18 U.S.C. § 3184.} The full package of documents, which is known as the formal extradition request, typically includes the charging documents and an evidentiary record comprised of affidavits, translations, ambassadorial certifications, and apostilles required by the relevant extradition treaty. The justification for allowing courts to issue provisional arrest warrants without the benefit of first seeing the evidentiary record is the need to arrest fugi-
detention, and extradition of international fugitives has evolved alongside the law of arrest and detention in domestic criminal cases, and yet, many constitutional protections afforded to defendants in domestic cases have never been extended to international fugitives arrested and detained in the United States on warrants in aid of extradition requests. Courts have often taken the view that extradition proceedings are not criminal in nature and are instead creatures of treaties. Extraditions are also seen to implicate the executive branch's conduct of foreign affairs. Consequently, the courts have traditionally declined to give international fugitives important procedural protections which could delay, complicate, or even thwart the extradition process.

3. Because the federal courts have traditionally taken the view that the extradition process is not a criminal proceeding in which guilt or innocence are determined, see, e.g., Neely v. Henkel, 180 U.S. 109 (1901), they have often refused to accord fugitives in extradition cases many of the procedural safeguards that are available to criminal defendants. For example, courts have held that: the fugitive has no right to discovery or even to cross-examination of any witnesses who testify at the extradition hearing, Messina v. United States, 728 F.2d 77 (2d Cir. 1984); his or her right to present evidence at the hearing is severely limited, Messina, 728 F.2d at 80; the Sixth Amendment's guarantee of a speedy trial does not apply to an extradition hearing, Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976); the Federal Rules of Evidence are inapplicable to extradition proceedings, Melia v. United States, 667 F.2d 300 (2d Cir. 1981); Merino v. United States Marshal, 326 F.2d 5 (9th Cir. 1963)); the Federal Rules of Criminal Procedure do not apply to extradition hearings, FED. R. CRIM. P. 54(b)(5) states, "[t]hese rules are not applicable to extradition and rendition of fugitives"; and a fugitive's right to controvert the evidence introduced against him is extremely limited, Hooker v. Klein, 573 F.2d 1360 (9th Cir. 1978); Caltagirone v. Grant, 629 F.2d 739 (2nd Cir. 1980).

The limited nature of the procedural protections available to fugitives in extradition cases is described more fully in Part I, infra.

For a helpful discussion of the historical view of extradition law as a creature apart from criminal law and procedure, see John G. Kester, Some Myths of United States Extradition Law, 76 Geo. L.J. 1441 (1988).

4. In the words of Justice Holmes:

It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender.


Although the Supreme Court in one early case referenced extraditions as cases of a criminal nature, Rice v. Ames, 180 U.S. 371 (1901), a year later the Court stated,

Good faith toward foreign powers, with which we have entered into treaties of extradition, does not require us to surrender persons charged with crime in violation of those well-settled principles of criminal procedure which from time immemorial have characterized Anglo-Saxon jurisprudence. Persons charged with crime in
In the last two decades, however, federal courts have increasingly questioned the basis for according fewer constitutional protections to fugitives in international extradition cases than are accorded to defendants in domestic criminal cases. These courts have suggested that some of the traditional reasons for treating extradition cases differently no longer hold up to scrutiny. In May of 1997, relying on these earlier decisions, a three-judge panel of the United States Court of Appeals for the Ninth Circuit broke with a hundred years of tradition—including some ambiguous but long-established Supreme Court precedent—and rejected outright many of the justifications for withholding certain constitutional procedural protections from arrestees in extradition cases. In *Parretti v. United States*, the Ninth Circuit ruled, for the first time by any court, that the Fourth Amendment prohibition against illegal seizures is violated whenever a court issues a warrant for the provisional arrest of an international fugitive in an extradition matter without a prior evidentiary showing by the government of probable cause. In this context, probable cause may be defined as a showing of competent evidence sufficient to enable a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that a crime has been

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foreign countries, who have taken refuge here, are entitled to the same defenses as others accused of crime within our own jurisdiction. We are not prepared, however, to yield our assent to the suggestion that treaties of extradition are invasions of the right of political habitation within our territory, or that every intendment in proceedings to carry out these treaties shall be in favor of the party accused.... In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, viz., submit themselves to the laws of their country....

Grin, 187 U.S. at 184–85.

5. See, e.g., United States v. Williams, 480 F. Supp. 482 (D. Mass. 1979), rev'd on other grounds, 480 F.2d 482 (D. Mass. 1979); Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980); In re Extradition of Russell, 805 F.2d 1215 (5th Cir. 1986); Sahagian v. United States, 864 F.2d 509 (7th Cir. 1988); Spatola v. United States, 741 F. Supp. 362 (E.D.N.Y. 1990). These cases are discussed in Part I, infra.


7. In some cases, the formal extradition request is transmitted before or at the same time that a warrant of arrest is sought. On these occasions, the arrest warrants are not termed provisional. The warrant in the *Parretti* case was a provisional warrant, as are the majority of warrants in extradition cases. Telephone Interview with Frances Fragos Townsend, Director, Office of International Affairs [hereinafter OIA], Department of Justice, (Aug. 15, 1997).
committed and that the person whom the government wishes to arrest is the person who committed it.\(^8\)

The government's ability to obtain a warrant from a U.S. court for the provisional arrest of an international fugitive in an extradition case without being required to make a prior evidentiary showing of probable cause has been a prominent feature of U.S. extradition law. In domestic criminal procedure, by contrast, there has been perhaps no more important constitutional safeguard than the Fourth Amendment's prohibition that "no Warrants shall issue, but upon probable cause," coupled with the derivative requirement that the government, when seeking a warrant of arrest from a judge, make a showing of competent evidence from which the court can find probable cause to believe that the person whose arrest is sought committed a crime justifying his arrest.\(^9\) Until recently, no court had ever questioned whether the Warrant Clause of the Fourth Amendment should require the government to make the same evidentiary showing of probable cause in support of a request for a provisional arrest warrant in an extradition matter as that required under the Fourth Amendment in a domestic criminal case.\(^10\)

9. In full, the Fourth Amendment to the U.S. Constitution provides:

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.
10. In the twenty years before Paredes, several courts raised the question but managed to skirt the constitutional question by resting their decisions on other grounds. See Caltagirone, 629 F.2d at 748; Russell, 805 F.2d at 1217; Sahagian, 864 F.2d at 511; United States v. Williams, 480 F. Supp. 482, 485 (D. Mass. 1979), rev'd on other grounds, 611 F.2d 914 (1st Cir. 1979); and Spatola, 741 F. Supp. at 366. These cases are discussed in Part I, infra.
In yet a second part of the decision the Parretti panel declared unconstitutional a longstanding presumption at law that a fugitive arrested on an extradition warrant should be denied bail after arrest.\textsuperscript{11} Henceforward, the court ruled, the government would bear the burden of establishing that the arrestee posed a risk of flight before a judge would be able to detain him for the duration of the extradition proceedings.\textsuperscript{12} Historically, defendants in domestic criminal cases have benefited from procedural protections including the Bail Reform Act;\textsuperscript{13} the presumption favoring a defendant's pretrial release on bond; and the requirement that the government bear the burden of proving that the defendant should be detained until trial because he is dangerous or poses a "risk of flight."\textsuperscript{14} While the government has usually shouldered this burden in domestic cases, the burden in extradition cases has traditionally been placed upon the arrestee, who has consequently had to battle a nearly insurmountable presumption that the arrestee should remain detained until the extradition matter is litigated to its conclusion, even if the arrestee can satisfy the court that the arrestee poses no risk of flight.\textsuperscript{15} In the last fifteen years, several courts and commentators have questioned whether this presumption might be constitutionally infirm.\textsuperscript{16} The Parretti court went even further and held that the denial of bail for a foreign fugitive in an extradition proceeding, absent a showing by the government that the fugitive poses a continuing risk of flight, violates the Due Process Clause of the Fifth Amendment, which commands that "No person shall be . . . deprived of . . . liberty . . . without due process of law."\textsuperscript{17} In so ruling, the court fundamentally shifted the burden of proof required for detention in international extradition cases in the Ninth Circuit, from the arrestee to the government. The Parretti court thus rejected a muddled

\textsuperscript{11} Exparte Sternaman, 77 F. 595, 597 (N.D.N.Y. 1896).

\textsuperscript{12} Parretti, 112 F.3d at 1384.

\textsuperscript{13} Id.


\textsuperscript{15} In pertinent part, the Fifth Amendment to the U.S. Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

\textsuperscript{16} See Wright v. Henkel, 190 U.S. 40 (1903).

but longstanding body of jurisprudence and created a split with every other court of appeals that has addressed the issue.  

The impact of Parretti and other recent cases questioning the constitutionality of provisional arrests and detentions is potentially sweeping. Together, these decisions reject long-established government practice and appear to flout nearly a hundred years of jurisprudence on arrest, bail, and post-arrest detention of international fugitives pending extradition. Indeed, they appear to conflict with the Supreme Court's ruling nearly a hundred years ago on the bail issue. The Supreme Court may now have to address these questions.

Arguably, the Court may be ready to decide the Fourth Amendment issue raised in Parretti and its predecessors. In Michigan v. Doran, in the analogous context of domestic interstate extradition, the Court held that a U.S. asylum state must give full faith and credit to a requesting U.S. state's probable cause determination. In so ruling, the Court in

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18. Wright, 190 U.S. at 40. As is shown in Part IV of this article, the Parretti panel attempted to reconcile its holding with the Supreme Court's longstanding pronouncement on bail in extradition matters. The panel's attempt to portray its holding as ultimately compatible with the Supreme Court's view on bail in extradition cases is not entirely persuasive and appears to be an attempt to insulate the holding from an inevitable claim that the panel effectively "overruled" a longstanding decision of the highest court in the land. Should the Supreme Court wish to adopt the view of the Parretti panel without admitting that it has changed the law, the Parretti panel has supplied the Court with a way in which to do so. See Part II.B.3, infra.

19. Wright, 190 U.S. at 40. See also the cases discussed in Part I.C, infra, applying the special circumstances doctrine to the question of bail release pending extradition proceedings.

20. In a telephone interview with Richard J. Beada, counsel for Mr. Parretti (July 1, 1997) and in a telephone interview with William J. Genego, counsel for Mr. Parretti (July 21, 1997), both lawyers told the author that they will appeal to the Supreme Court if the Ninth Circuit en banc overrules the decision of the three-judge panel. The author has also interviewed various OIA officials, who have said that the government will appeal the Parretti decision to the Supreme Court if the decision of the three-judge panel withstands en banc review.

21. Michigan v. Doran, 439 U.S. 282 (1978). The subject of interstate domestic extradition warrants is beyond the scope of this article. Nevertheless, the Fourth Amendment issue in domestic extradition cases is extremely similar to the Fourth Amendment issue in international extraditions, and a review of the domestic cases is helpful in understanding the issue in the international context. For a useful summary of the domestic cases, see Thomas R. Trenkner, Annotation, Necessity That Demanding State Show Probable Cause To Arrest Fugitive In Extradition Proceedings, 90 A.L.R. 3d 1085; Note, Interstate Rendition and the Fourth Amendment, 24 RUTGERS L.REV. 551 (1970).

Interstate extradition is governed by U.S. CONST. art. 4, § 2; by the federal domestic extradition statute, 18 U.S.C. § 3182 (1994); and by the Uniform Criminal Extradition Act, 11 U.L.A. § 59 (1974) (where adopted by the states). None of these provisions expressly requires that, as a predicate for the issuance of an arrest warrant by a court of the asylum state, the demanding state furnish the asylum state with an evidentiary showing of probable cause to believe that the fugitive committed the crime charged. See Trenkner, supra, at 1088. The early rule appears to have been that no such requirement existed. See id.
Doran managed to evade an express ruling on whether the Fourth Amendment compelled the asylum state to examine the evidence upon which the requesting state’s probable cause determination was made. To Justice Blackmun, the ruling’s emphasis on the Full Faith and Credit Clause missed the point and failed to address the Fourth Amendment issue expressly. Dissenting in Doran, Justice Blackmun lay down a challenge:

I am not willing, as the Court appears to me to be, to bypass so readily, and almost to ignore, the presence and significance of

However, after Mapp v. Ohio, 367 U.S. 643 (1961), in which the Supreme Court ruled that the Fourth Amendment is fully enforceable against the states, a number of courts have recognized the necessity that the demanding state furnish the asylum state with sufficient facts to support a finding of probable cause to believe that the person whose extradition is sought committed the crime charged. See Trenkner, supra, at 1089. Some courts have held that even where a probable cause determination has earlier been made in the demanding state, a second such determination should nevertheless be made in the asylum state, unless the first determination of probable cause was a grand jury indictment. See id. at 1089–90. However, some courts have allowed the arrest to be made in the asylum state even before the supporting documentation of probable cause has been forwarded by the demanding state, permitting the latter a reasonable time to fill the “affidavit gap”—much akin to the use of provisional arrest warrants in international extraditions. See, e.g., Grano v. State, 257 A.2d 768, 773–74 (Del. Super. Ct. 1969); In re Simpson, 586 P.2d 1389, 1390 (Kan. Ct. App. 1978).

Even after Mapp, some courts have continued to adhere to the old view that the demanding state need not under any circumstances furnish the asylum state with evidence establishing probable cause that the fugitive committed the crime as a predicate to issuance of an arrest warrant. See, e.g., In re Ierardi, 321 N.E.2d 921, 924–25 (Mass. 1975). These courts have emphasized that the purpose of the Constitution’s Extradition Clause and of the state and federal extradition statutes is the expeditious and summary return of the fugitive to the demanding state, where the fugitive can raise his Fourth Amendment arguments. See id. at 924. This appears to have been the view of the majority in Doran, which relied on the Full Faith and Credit Clause. See, e.g., Doran, 439 U.S. at 282. Other courts have said that if a probable cause showing is required, it is not a full-blown showing that the fugitive committed the crime charged in the demanding state, but only a limited showing that the fugitive is duly charged with a crime and that he is a fugitive from justice. See, e.g., State v. Hughes, 229 N.W.2d 655, 661 (Wis. 1975). Similar arguments have surfaced at one point or another in the recent international extradition cases in which the probable cause issue has been raised, especially in Parretti, 112 F.3d at 1363. A crucial distinction must be borne in mind, however: namely, that in an international extradition the demanding country may have charged the fugitive according to standards and procedures that are radically less mindful of due process considerations than are U.S. standards. Furthermore, after the fugitive is extradited from the United States to the demanding country, the courts of that country may not be inclined to hear (let alone redress) the arrestee’s claim that his arrest in the United States violated the Warrant Clause of the Fourth Amendment. In contrast, in a domestic extradition case, a court in the asylum state can more safely assume that a fugitive who has been charged in another state has at least been charged according to the probable cause standard that is universally imposed upon all the states through the Fourth and Fourteenth Amendments. Moreover, courts are required by the Constitution to give full faith and credit to the judicial proceedings of the demanding state. U.S. CONST. art. IV, § 2, cl. 2.
the Fourth Amendment in the extradition context. That Amendment is not mentioned at all in the discussion portion of the Court’s opinion . . . . Despite the obvious importance of the issue, the Court refuses the opportunity afforded by this case to clarify the requirements of the Fourth Amendment in interstate extradition. Instead, the Court avoids the question on which certiorari was granted by holding that, even if the Fourth Amendment does apply to interstate extradition, its requirements, in this case, were satisfied . . . . This convenient assumption, in my view, perpetuates confusion in an area where clarification and uniformity are urgently needed.

In Parretti, the Ninth Circuit seems to have taken up this challenge. The Parretti decision is neither an aberration nor an isolated phenomenon, but the culmination of a series of federal court decisions in the past two decades in which courts have shown themselves willing to read more of the Constitution into the process of arrest and detention in international extradition cases than in the past. The essence of these decisions—that a greater number of constitutional protections should apply even in the treaty-based world of the law of arrest and detention in extraditions—will not easily be dismissed. Petitioners in other extradition cases will likely view their chances in a new light, emboldened to attempt similar constitutional challenges to their own extradition proceedings.

In fact, Parretti and other recent decisions have already complicated the Government’s ability to arrest and detain fugitives wanted by other countries in pending extradition cases. The trend of these decisions may also affect the United States’ foreign policy and its relations with its extradition treaty partners. If the government now finds it more difficult to arrest and detain foreign fugitives found in the United States, the Secretary of State may soon find it more difficult both to secure

22. Doran, 439 U.S. at 290–92 (Blackmun, J., dissenting) (citations omitted). Justice Blackmun was concerned with whether the Fourth Amendment should be read to require the court in an asylum state to examine the evidence relied on by the requesting state in establishing probable cause. In his view, the Fourth Amendment required that the “asylum state should be allowed to scrutinize the charging documents . . . to ascertain that a detached and neutral magistrate made a determination of probable cause.” Id. at 298. Accordingly, the Full Faith and Credit Clause did not excuse a court in the asylum state from its Fourth Amendment obligation to verify the basis for the requesting state’s probable cause determination.


24. See, e.g., In re Extradition of Michael Peter Spitzauer (No. 97-009M-01) (W.D. Wash. 1997). In addition to the Spitzauer case, the OIA has confirmed that lawyers in at least three other extradition matters—in Connecticut, California, and Washington—have raised Parretti as a defense to arrest and detention of foreign fugitives. Telephone Interview with Theresa Schubert, Department of Justice, OIA, (July 24, 1997).
reciprocal arrests of fugitives abroad and to negotiate new extradition treaties.25 To the extent that Parretti and its forerunners signal a greater judicial willingness to extend more constitutional protection to fugitives in extradition cases, they raise the possibility that future courts will grant such fugitives a panoply of criminal procedural rights.

In some quarters, these decisions will no doubt be welcomed as long-overdue steps towards modernizing the arcane and sometimes archaic law of international extradition, much of which pre-dates the landmark constitutional rulings that have defined our criminal procedure in this century.26 Others, however—especially those in the government who are charged with upholding the United States' treaty obligations—believe that these decisions will have a chilling effect on the ability of the Secretary of State to extradite fugitives and will in turn cause our treaty partners to be less receptive to extradition requests from the United States.27

Part I of this article will describe the historical evolution of U.S. extradition law as a field parallel to, but separate from, domestic criminal procedure. Part I will show that the government, rather than having to make an evidentiary showing of probable cause to believe that the fugitive actually committed the crime charged in the country requesting his extradition, has historically been able to obtain a provisional extradition arrest warrant merely upon the sworn statement of a government

25. See Government's Petition for Rehearing with Suggestion for Rehearing En Banc at 14, Parretti (No. 95-56586):

The resulting "safe harbor" for international fugitives in this circuit will adversely impact the Secretary of State's ability to comply with treaty obligations and in turn negotiate the arrest and surrender by foreign countries of fugitives from U.S. charges. If even a fraction of foreign fugitives flee, it will significantly compromise the enforcement and negotiation of foreign agreements.

Id. at 2.

26. As one commentator has observed, extradition case law has been based mainly upon:

interpretations of antiquated Supreme Court decisions that date mostly from the four decades that straddle the turn of the twentieth century—an era when constitutional safeguards of criminal procedure were undeveloped and meager, and due process of law meant something less than it does today . . . . The time is overdue to recognize the stakes in extradition hearings and to stop pretending that they are little more than squabbles over venue. Before a person . . . can be plucked from home and deposited in the dock of a foreign criminal court, he ought to be allowed to go beyond usually fruitless challenges to whether on the face of the requesting papers he is adequately charged with a crime.


27. "All you need is another case like Parretti, and you've got a huge potential for international harm. These countries are going to get mighty annoyed, and they will reciprocate with like treatment." Telephone Interview with Sarah Criscitelli, Department of Justice, OIA (July 30, 1997).
attorney "on information and belief" that the fugitive was duly charged in another country with having committed an offense enumerated as an extraditable crime in the applicable extradition treaty. Part I will also describe the longstanding presumption against bail after arrest on an extradition warrant and the increasing willingness of some courts to question the traditional justifications for denying international fugitives in extradition cases some of the constitutional procedural protections given to domestic criminal defendants. 28

Part II of this article describes the Parretti case and the Ninth Circuit's holding that the federal extradition statutory scheme of Title 18, United States Code, Section 3184, violates the Fourth Amendment to the extent that it authorizes the issuance of a provisional arrest warrant by a court without a prior evidentiary showing of probable cause to believe that the fugitive committed the crime charged abroad. Part II will also examine the court's ruling that the longstanding presumption against bail for an arrestee in an extradition case is an unconstitutional violation of the accused's Fifth Amendment right to due process to the extent that it permits his detention even if he can satisfy the court that he does not pose a risk of flight.

Part III explores some of the implications and effects of Parretti and the other recent cases questioning the constitutionality of provisional arrests and detentions, including the ways in which these decisions have already made the extradition process more difficult for the government.

Finally, Part IV of the article shows that those courts that have questioned the constitutionality of provisional arrest warrants and the presumption against bail have relied on several critical assumptions in arriving at their decisions. While the government has not always challenged these assumptions, they can and perhaps will be tested in the event of review by the Supreme Court. The author suggests that the liberalizing trend, if permitted to proceed much further, may serve to undermine the process of international extradition. Even those who advocate extending new procedural protections to fugitives may find future victories hollow, if nations frustrated by the increasing difficulty of attaining reciprocal extradition resort to new methods outside the extradition process altogether to secure the return of fugitives.

I. BACKGROUND: THE LIMITED NATURE OF CONSTITUTIONAL PROCEDURAL PROTECTIONS IN THE U.S. LAW OF INTERNATIONAL EXTRADITION

Because the U.S. federal courts have traditionally taken the view that the extradition process is not a criminal proceeding in which guilt or innocence is determined, they have declined to accord fugitives in extradition cases many of the procedural safeguards that are available to criminal defendants. One of the earliest and most frequently cited statements of this view is found in Justice Harlan's opinion in Neely v. Henkel, where the fugitive challenged his extradition on the grounds that the extradition statute was unconstitutional to the extent that it permitted the fugitive to be sent for trial to a foreign legal system lacking the procedural safeguards the fugitive would have enjoyed in the United States:

It is contended that the [extradition statute] is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges, and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States .... The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.31

A more modern incarnation of the Neely view can be found in the opinion of the district court in United States v. Galanis:

An extradition proceeding is not a criminal prosecution, and the constitutional safeguards that accompany a criminal trial in this country do not shield an accused from extradition pursuant to a valid treaty.33

29. See supra, note 4.
33. Id. at 1224 (citing Neely, 180 U.S. at 109). The Galanis court later stated:

Regardless of what constitutional protections are given to persons held for trial in the courts of the United States or the constituent states thereof, those protections cannot be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation, acting according to its traditional processes and within the scope of its authority and jurisdiction.
As a result of this view, courts have held that the fugitive has no right to discovery;\textsuperscript{34} he may not cross-examine anyone who testifies at the extradition hearing;\textsuperscript{35} he may not cross-examine the affiants or deponents on whose affidavits or depositions the foreign complaint is based;\textsuperscript{36} his right to present evidence at the hearing is severely limited;\textsuperscript{37} the Sixth Amendment’s guarantee of a speedy trial does not apply to an extradition hearing;\textsuperscript{38} the Federal Rules of Evidence do not apply to

\begin{quote}
\textit{Id.} (quoting Gallina v. Fraser, 177 F. Supp. 856, 866 (D. Conn. 1959), aff’d 278 F.2d 77 (2d Cir. 1960)).

The court in \textit{Galanis} added: “The fact that the United States ‘participates’ in the arguable denial of a constitutional protection by surrendering the defendant to the demanding nation does not implicate the United States in an unconstitutional action.” \textit{Id.} at 1224 (citing Holmes v. Laird, 459 F.2d 1211 (D.C. 1972)).

\textit{See also} Romeo v. Roache, 820 F.2d 540, 543–44 (1st Cir. 1987) (“Extradition proceedings . . . are generally not considered criminal prosecutions.”); Merino v. United States Marshal, 326 F.2d 5, 13 (9th Cir. 1963), where the court stated that the nature of an extradition hearing is akin to a “preliminary hearing,” and that the principles of due process and fair hearing “are not applicable to a preliminary examination in an international extradition case.”

In a similar vein, the Federal Rules of Evidence state: “Extradition and rendition proceedings are . . . essentially administrative in character.” \textit{Fed. R. Evid.} 1101 advisory committee’s note.

34. \textit{Messina v. United States}, 728 F.2d 77 (2d Cir. 1984). The court found no merit in appellants’ contention that the extradition proceedings were deficient because the district court did not grant appellants’ discovery motions. “As has been pointed out repeatedly, ‘[a]n extradition hearing is not the occasion for an adjudication of guilt or innocence.’” \textit{Id.} at 80 (quoting Melia v. United States, 667 F. 2d 300, 302 (2d Cir. 1981)).

35. As in the case of a grand jury proceeding, a fugitive has no right to cross-examine witnesses or introduce evidence to rebut that of the prosecutor. \textit{See} Charlton v. Kelly, 229 U.S. 447 (1913); \textit{see also} United States v. Y. Hata & Co., 535 F.2d 508, 512 (9th Cir. 1976).

36. It is one of the objects of [the extradition statute] to obviate the necessity of confronting the accused with the witnesses against him; and a construction of this [statute], or of the treaty, that would require the demanding government to send its citizens to another country to institute legal proceedings would defeat the whole object of the treaty.


37. \textit{See Messina}, 728 F.2d at 80.


Orders of extradition are \textit{sui generis}. They embody no judgment on the guilt or innocence of the accused but serve only to insure that his culpability will be determined in another and, in this instance, a foreign forum . . . . Extradition orders do not, therefore, constitute “final decisions of a district court,” appealable as of right under 28 U.S.C. § 1291.

\textit{Id.} at 482 (citations omitted). “Appellant does not dispute the well-entrenched rule that extradition proceedings are not to be converted into a dress rehearsal trial.” \textit{Id.} at 484. “[T]he reasonable doubt standard lies at the foundation of our notions of due process in criminal cases . . . . Plainly, however, these interests apply with less force in the context of an international extradition proceeding.” \textit{Id.} (citations omitted). “[T]he Sixth Amendment’s guarantee to a speedy trial, limited by its terms to criminal prosecutions, is inapplicable to international extradition proceedings.” \textit{Id.} at 485 n. 9 (citation omitted).
extradition proceedings; the Federal Rules of Criminal Procedure do not apply to extradition hearings; a fugitive’s right to controvert the evidence introduced against him is extremely limited; the constitutional prohibition against double jeopardy does not apply in the context of extradition; a fugitive who defeats an extradition attempt cannot claim the protection of double jeopardy or res judicata in a later extradition proceeding brought on the same charge; the exclusionary rule does not apply in extradition proceedings; hearsay is allowed in extradition proceedings; unsworn summaries of witness statements can

As stated in the lower court decision in the same case, "The extradition procedures afforded by statute seek to preserve an element of judicial surveillance over a procedure which is basically an action of international comity." Jhirad v. Ferrandina, 401 F. Supp. 1215, 1219, aff’d, 536 F.2d 478 (2d Cir. 1976) (quoting Jhirad v. Ferrandina, 362 F. Supp. 1057, 1060 (S.D.N.Y. 1973)); see also Sabatier v. Dambrowski, 453 F. Supp. 1250, 1255 (D.R.I. 1978), aff’d, 586 F.2d 866 (1st Cir. 1978) (stating that the Sixth Amendment right to speedy trial is not applicable in extradition context).


40. See FED. R. CRIM. P. 54(b)(5) ("These rules are not applicable to extradition and rendition of fugitives . . .").

41. Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978).

42. See id. at 1365 ("[C]onstitutional considerations do not constitute a bar to reinstated extradition proceedings . . .").

There is no constitutional right to be free from double jeopardy resulting from extradition to the demanding country . . . The Fifth Amendment right not "to be twice put in jeopardy of life or limb" is available only to prosecutions in this country. The essential elements of a plea of double jeopardy are identity of successive sovereigns and an identity of alleged offenses.


43. Mirchandani v. United States, 836 F.2d 1223, 1226 (9th Cir. 1988); see also Quinn v. Robinson, 783 F.2d 776, 786 n.3 (9th Cir. 1986) ("The Government is free to reinstitute an extradition request after it has been denied in a first extradition proceeding."); Hooker, 573 F.2d at 1367–68 (stating that res judicata does not apply because denial of extradition is not a final judgment on the merits); Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986); Collins v. Loisel, 262 U.S. 426, 429–30 (1923) (letting second extradition request go forward based on new affidavits); Voloshin v. Ridenour, 299 F. 134 (5th Cir. 1924) (allowing second provisional arrest).

44. Where the court refused to apply the exclusionary rule to extradition proceedings:

Application of the exclusionary rule as urged herein would mean that appellant, convicted and sentenced to seven years imprisonment in Canada, could gain permanent sanctuary in the United States on the ground that his allegedly illegal arrest in connection with an unrelated crime precluded forever his identification by Canadian police as "fruit of the poisonous tree."

Simmons v. Braun, 627 F. 2d 635, 637 (2d Cir. 1980).

45. Quinn v. Robinson, 783 F.2d 776, 815 (9th Cir. 1986); see also O’Brien v. Rozman, 554 F.2d 780, 783 (6th Cir. 1977) (hearsay permitted); United States ex rel. Klein v. Mulligan, 50 F.2d 687, 688 (2d Cir. 1931).
be used in support of a finding that the fugitive is extraditable;\footnote{Zanazanian v. United States, 729 F.2d 624, 627 (9th Cir. 1984); see also Emami v. United States District Court, 834 F.2d 1444, 1450-51 (9th Cir. 1987).} and, the extradition proceeding may go forward even if the accused is not sane.\footnote{Romeo v. Roache, 820 F.2d 540, 544 (1st Cir. 1987). Romeo relied on Charlton v. Kelly, 229 U.S. 447, 462 (1913) (holding, without discussing due process, that evidence of insanity is not to be considered on habeas corpus), and declined to follow In re Extradition of Artukovic, 628 F. Supp. 1370, 1375 (C.D. Cal. 1986) (holding that fifth and sixth amendments bar extradition proceeding if accused is incompetent).}

Historically, two of the more important procedural anomalies of the law of arrest and detention in extraditions have been, first, the government's ability to obtain a provisional arrest warrant for an international fugitive without having to make an evidentiary showing of probable cause to believe that the fugitive committed the crime charged,\footnote{See Part I.A., infra.} and second, the nearly irrebuttable presumption that the fugitive, once arrested, should remain detained pending the extradition proceedings.\footnote{See Part I.C., infra.}

Both practices have been established for nearly a hundred years; both have recently come under increasing scrutiny and criticism; and both were firmly declared unconstitutional for the first time by the three-judge panel in \textit{Parretti}. They are discussed in turn in the sections that follow.

\textbf{A. The Government's Ability to Obtain a Provisional Arrest Warrant without Making a Prior Evidentiary Showing of Probable Cause to Believe That the Fugitive Committed the Offense Charged Abroad}

One of the most important quirks of extradition law has been the government's ability to obtain a provisional arrest warrant from a judge or magistrate in aid of an impending extradition request by a foreign government without having to make an evidentiary showing of probable cause to believe that the fugitive actually committed the crime charged abroad.\footnote{See, e.g., \textit{Ex parte} Sternaman, 77 F. 595, 597 (N.D.N.Y. 1896).} The federal extradition statutory scheme has never by its terms required an evidentiary submission as a predicate for the issuance of a provisional arrest warrant. Prior to \textit{Parretti}, no court had decided expressly whether the Warrant Clause of the Fourth Amendment required that the government make an evidentiary showing of probable cause to believe that a crime had been committed, and that the fugitive committed it, before a provisional warrant properly could issue in an international extradition case.
Nearly a hundred years ago, however, the issue was raised at least implicitly in several extradition cases before the Supreme Court. While the Court offered language which appeared to favor a requirement that warrants be based on attached depositions or other documentary evidence, it also offered conflicting language suggesting that warrants could issue merely on "information and belief." Moreover, the Court appeared to embrace a lower court decision holding that an extradition arrest warrant could properly be obtained on information and belief alone. In *Ex Parte Sternaman*, the district court set forth what the Supreme Court would later describe as "the general doctrine in respect of extradition complaints." Interpreting the requirements of the extradition statute, the court in *Sternaman* stated:

The complaint . . . need not be drawn with the formal precision of an indictment. If it be sufficiently explicit to inform the accused person of the precise nature of the charge against him it is sufficient. The extreme technicality with which these proceedings were formerly conducted has given place to a more liberal practice, the object being to reach a correct decision upon the main question—is there reasonable cause to believe that a crime has been committed? The complaint may, in some instances, be upon information and belief. The exigencies may be such that the criminal may escape punishment unless he is promptly apprehended by the representatives of the country whose laws he has violated. From the very nature of the case it may often happen that such representative can have no personal knowledge of the crime. If the offense be one of the treaty crimes, and if it be stated clearly and explicitly so that the accused knows exactly what the charge is, the complaint is sufficient to authorize the commissioner to act.

Before it endorsed *Sternaman* in *Yordi*, the Supreme Court appeared to suggest in an earlier case that an extradition arrest warrant should be supported by documentary evidence. In *Rice v. Ames*, the

52. *Yordi*, 215 U.S. at 230, citing *Ex parte Sternaman*, 77 F. at 597.
54. *Ex Parte Sternaman*, 77 F. at 596–97. The court in *Sternaman* then stated that the "foregoing propositions are, it is thought, sustained by the following authorities: In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645; In re Roth, 15 Fed. 506; In re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6,369; Ex parte Van Hoven, 4 Dill. 415, Fed. Cas. No. 16,859; In re Breen, 73 Fed. 458; Ex parte Lane, 6 Fed. 34; In re Herres, 33 Fed. 165; Castro v. De Uriarte, 16 Fed. 93; In re Macdonnell, 11 Blatchf. 79, Fed. Cas. No. 8,771." *Id.* at 597.
Court ruled that several counts of a complaint in an extradition matter were legally insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the objects of the treaty as is possible in cases of a criminal nature. A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion. We do not wish, however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. This would defeat the whole object of the treaty. [The extradition statute makes special provision that the complaint may be accompanied with] depositions, warrants or other papers offered in evidence. If the officer of the foreign government has no personal knowledge of the facts, he may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding, which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts. This will afford ample authority to the commissioner for issuing the warrant. 56

Thus, to the extent that the Court in Rice appeared to permit the issuance of an arrest warrant on information and belief, supported only by a statement of the source or grounds for that belief and by an attached copy of the foreign indictment, the Court appears to have shied away from requiring an evidentiary showing of probable cause. Just a few years later, the Court stated in Grin v. Shine:

In the construction and carrying out of [extradition] treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. Here the [extradition] proceeding is manifestly taken in good faith, a technical noncompliance with some

56. Rice, 180 U.S. at 374–76.
formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations . . . . All that is required by . . . [the extradition statute] is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government having knowledge of the facts, or in the absence of such person, by the official representative of the foreign government based upon depositions in his possession. 57

The Grin Court did not indicate whether the issuing U.S. magistrate ought to see copies of these depositions before issuing a warrant, or whether it was sufficient that the magistrate merely be assured that the foreign authorities had such depositions in their possession before they made their complaint. 58

In Yordi, the Court seized upon Rice's use of the phrase "upon information and belief" with apparent approval, without emphasizing what it had emphasized in Rice, namely, that a complaint sworn to on information and belief should ideally be supported by attached depositions of witnesses having actual knowledge of the facts. 59 In Yordi—which is summarized in the syllabus of the United States Reports as standing for the proposition that the evidentiary record from the demanding country need not be fastened to the U.S. complaint so long as the complaint so clearly and explicitly states a treaty crime that the accused knows the nature of the foreign charge—60—the Court found that the magistrate actually had reviewed depositions in the foreign case. While the demanding country had not transmitted these depositions to the court at the time it sought the fugitive's arrest, it had supplied them in an earlier hearing involving the same fugitive, and the issuing commissioner had made clear his reliance on them in issuing the extradition arrest warrant. "We think the evidence produced at the [earlier] hearing justified the detention of the accused and corrected any irregularity in the complaint." 61 Thus, the syllabus' summary of Yordi notwithstanding, the case can be read for the proposition that an arrest warrant application in an extradition case should be based upon some form of attached deposition or documentary evidence and not merely on a government lawyer's allegations on information and belief.

The Court then appeared to retreat from an evidentiary requirement in the 1911 case of Glucksman v. Henkel: "The complaint is sworn to

58. See id.
59. See Yordi, 215 U.S. at 231 (citing Rice, 180 U.S. at 371).
60. Id. at 227–233
61. Id. at 232.
upon information and belief, but it is supported by the testimony of witnesses who are stated to have been deposed and whom therefore we must presume to have been sworn. That is enough."62 Here, although the Court arguably endorsed the proposition that the complaint should be supported by witness testimony, it made the requirement less meaningful by allowing such “testimony” without assurances that the witnesses were sworn under oath at the time they testified.63

Fourteen years after Glucksman the Court endorsed yet another complaint sworn on information and belief, in Fernandez v. Phillips. “[The complaint] alleged that the complainant was informed ‘through the diplomatic channel’ that the appellant was duly and legally charged [in Mexico] with the crime, and on behalf of that government prayed the arrest. Of course whatever form of words was used, the complaint necessarily was upon information . . . .”64 However, the Court noted with approval that by the time of the extradition hearing, many pages of evidence had been appended to the complaint.65

B. Provisional Arrests in Aid of Extradition
Requests: Modern Practice

The modern-day legacy of Sternaman, Fernandez, and Yordi is that the government, when seeking provisional arrest warrants for fugitives in international extradition matters, has been allowed to furnish the court with a complaint and warrant application specifying only a minimum of information.66 Specifically, when faced with a diplomatic

63. Id. at 514.
65. Id. at 313.
66. This includes the fugitive’s name, the offense charged, the date and place that the charging instrument was issued, the circumstances of the crime, the inclusion of the offense in the applicable extradition treaty as an extraditable offense, a description and identification of the accused, and his whereabouts, if known.

The policy of the U.S. government is to accommodate such requests ‘in the best possible way,’ even though presumably such requests will be granted only if the necessary documentation includes information that the fugitive is likely to flee before the formal request is filed and an opportunity for an arrest warrant to issue pursuant thereto.

BASSIOUNI, supra note 2, at 525. (citing 1975 U.S. Department of State, Digest of United States Practice in International Law, 175–76).

See also United States ex Rel. Petrushansky v. Marasco, 325 F.2d 562 (2d Cir. 1963). See, e.g., In re Kraiselburd, 786 F.2d 1395, 1396–97 (9th Cir. 1986) (Kennedy, J.) (“A request for provisional arrest [under treaty with Argentina] need only be accompanied by a declaration that an arrest warrant exists . . . .”); United States v. Wiebe, 733 F.2d 549, 554 (8th Cir. 1984) (explaining that provisional arrest requires only complaint alleging existence of treaty and that fugitive committed a crime enumerated therein).
request by foreign authorities for the issuance of a provisional arrest warrant for a fugitive found in the United States, the Department of Justice has used a form complaint and warrant application for submission to the appropriate judicial officer in the judicial district where the fugitive has been discovered. The complaint form, typically executed and sworn to on information and belief by an Assistant United States Attorney (AUSA) in that district, cites Title 18, United States Code, Section 3184 for the authority to request a provisional arrest warrant.\(^6\) The form requires the inclusion of only the following information: (1) the existence and nature of the foreign charge against the fugitive; (2) the existence of a foreign warrant for the arrest of the fugitive; (3) a brief synopsis of the facts underlying the foreign charge; (4) a statement that the fugitive is believed to be in the United States, and a more specific indication of his whereabouts, if known; (5) a physical description of the fugitive; (6) a request for a provisional arrest warrant; (7) a statement that the AUSA has been informed through the diplomatic channel that the foreign country will make a formal diplomatic request for extradition of the fugitive within the period of time allowed by the relevant extradition treaty; and (8) the fugitive poses a risk of flight.\(^6\)

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67. The authority of federal and state courts to issue warrants of arrest in aid of extradition requests has always been established by the federal extradition statute, which is presently codified at 18 U.S.C. § 3184 (1994):

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.


68. See, e.g., Complaint in \textit{In re} Extradition of Spitzauer (W.D. Wash.) (CR97-09M). By contrast, the United States Attorneys' Manual urges U.S. prosecutors seeking the provisional arrest abroad of a fugitive from American justice to provide the foreign authorities with
The form has never required that the prosecutor state the source of the information verifying the existence of the underlying foreign charge. Nor has the form required the inclusion of particular facts to support the government's belief that the accused poses a risk of flight. On the form, the government simply requests that a provisional arrest warrant be issued pursuant to Section 3184 and that the court "take such other actions" as required by the provisions of the relevant treaty, "including the seizure of any items or materials in the fugitive's possession at the time of apprehension." 69

It is important to emphasize that the statutory scheme permits the government to seek—and the court to issue—a provisional arrest warrant even before the requesting country has made a formal extradition request or supplied the U.S. court with affidavits or other competent evidence that the fugitive committed a crime. 70 Most extradition treaties specify a deadline following (rather than prior to) the fugitive's arrest by which the requesting country must gather and transmit through the diplomatic channel the various charging documents, affidavits, ambassadorial or consular certifications, translations, and apostilles which the government will in turn submit to the court for consideration at a formal extradition hearing on the government's request for an order certifying the extraditability of the fugitive. 71 Thus, unlike domestic federal cases

"sufficient information . . . to establish probable cause that a crime was committed and that the fugitive committed it." USAM at 9-15.231.

69. See Complaint at 2, Spitzauer (CR97-09M). The reference in the form complaint to the seizure of the fugitive's property is included because many extradition treaties to which the United States is a party include a provision for the seizure of any items which could be used as evidence against the fugitive after he is returned to the requesting country for trial. See, e.g., Extradition Treaty of 1930 and Amendments, Jan. 31, 1930, U.S.-Austria art. X, 46 Stat. 2779. If the fugitive is ultimately extradited, the seized evidence is surrendered with him to the requesting country.


71. Id. The individual treaties specify various deadlines by which the requesting country must transmit the formal extradition request, including the documentary evidence upon which the government will rely at the extradition hearing on its request for an order from the court certifying to the Secretary of State that the fugitive is extraditable. Some treaties require the transmittal to be made within forty-five days of the fugitive's arrest. Others allow sixty days, and still others [i.e., Austria] up to ninety days to elapse before the documentary evidence must be transmitted.

At the formal extradition hearing, which can be held as long as three months after the fugitive's arrest (or even longer, if the fugitive requests more time to prepare for the hearing), "the evidence of criminality may be heard." Id. The government's burden at the hearing is to establish that: (1) there are criminal charges pending in the requesting state; (2) the charges are included in the relevant treaty as extraditable offenses; (3) the extradition treaty is of full force and effect; and (4) the documentary evidence transmitted by the requesting country establishes probable cause to believe that a crime was committed and that the person before the court committed it. See, e.g., United States v. Barr, 619 F. Supp. 1068, 1070 (E.D. Pa.)
in which the government is required to make an evidentiary showing of probable cause before the court will issue an arrest warrant, in extradition cases the government has been able to arrest a fugitive provisionally and then wait until the formal extradition hearing months later before making an evidentiary showing of probable cause.\textsuperscript{72} Formal extradition hearings have routinely occurred three or more months after arrest.\textsuperscript{73}

The justification for provisional arrest has traditionally been the imperative that the fugitive, once located, be seized immediately, before he has a chance to flee—an imperative which cannot wait while the authorities in the requesting nation laboriously assemble, translate, certify, and transmit the documentary evidence upon which a finding of probable cause can be made.\textsuperscript{74}

When an alleged fugitive has been located in a foreign country it is often important to effect his arrest at once to prevent his

\begin{footnotesize}
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\item \textsuperscript{72} Telefon Interview with John Harris, Department of Justice, OIA (Sept. 10, 1997).
\item \textsuperscript{73} Whiteman, \textit{supra} note 2, at 931. Furthermore, Whiteman writes, “Generally, the provisional arrest and detention of an alleged fugitive may be obtained by the requesting State on the basis of a minimum of information.” Id. at 929.
\item \textsuperscript{74} Bassiouni, \textit{supra} note 2, at 527. See also Kester, \textit{supra} note 3, at 1464.
\end{itemize}
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further flight. For this purpose, most extradition laws and treaties provide that the alleged fugitive may be arrested and temporarily detained for a period of time to enable the requesting State to furnish the necessary documentation in support of its request for his extradition.\textsuperscript{75}

One scholar has observed that the essential purpose of the provisional arrest warrant

is to detain an individual for fear that he may flee pending arrival of the formal documents of extradition. The practice and practicality of situations in which a ‘provisional arrest’ is requested are that the requesting state rushes its request in the form of a telex or diplomatic cable that states a few facts, seldom sending with it sufficient evidence that would satisfy a U.S. judge that some evidence of ‘probable cause’ exists.\textsuperscript{76}

Thus, the standard for obtaining a provisional arrest warrant in an extradition matter has been considerably less burdensome on the

\textsuperscript{75} WHITEMAN, supra note 2, at 920.

\textsuperscript{76} BASSIOUNI, supra note 2, at 526. At least one court has taken the view that the “urgency” justifying a provisional arrest need not be “merely temporal in nature” but can involve “other considerations including importance to the country seeking extradition and foreign policy concerns of the United States.” United States v. Leitner, 784 F.2d 159, 161 (2d Cir. 1986).

It is true that the treaty partners moved slowly in arresting Leitner, and we take with a grain of salt the Government's claim that it could not locate him, despite the fact that he was driving a taxi and going to law school under his own name and apparently visiting his parents almost every weekend. [The district judge] did not explicitly address the urgency question, but he did find that the interest in producing extraditable persons "is magnified where a defendant is charged with acts of terrorism."... [H]e treated "urgency" as less related to immediacy than to the importance of the case given the nature of the crime, the risk of flight, and the interests of the countries in extradition. The broader interpretation of the term that takes into account the interests of the treaty parties seems the appropriate one.

\textit{Id.}

Information as to the “urgency” of provisional arrests seems to have been included in applications for provisional arrest warrants as early as the nineteenth century, as the court noted in United States v. Messina, 566 F. Supp. 740, 743-44 (E.D.N.Y. 1983). See, e.g., Department of State, Memorandum Relative to the Extradition of Fugitives from the United States in British Jurisdiction, app. 2, May 1890, (reprinted in IV J. MOORE, A DIGEST OF INTERNATIONAL LAW, § 606, at 359, 361 (1906)). “It is clear that the rationale for provisional arrest is to prevent flight in advance of the formal request. Thus extradition treaties frequently provide for such arrest "[w]ith a view to preventing the escape of alleged fugitives from justice." “ Messina, 566 F. Supp. at 743 (quoting IV G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 326, at 103 (1942)). As the court in Messina observed, by 1968 most extradition treaties permitted provisional arrest to effect a fugitive’s arrest at once to prevent his further flight. \textit{Id.} (quoting 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 25, at 920 (1968)).
government than the standard for obtaining an arrest warrant in a domestic criminal case. To obtain an arrest warrant in a domestic criminal case, the government must provide the judicial officer with competent evidence yielding a "substantial basis for . . . concluding that probable cause exists." By "competent evidence" the court means sworn affidavits or testimony that would "warrant a man of reasonable caution" to believe that the suspect has committed a crime. By contrast, when the government has sought provisional arrest warrants in extradition matters, it has not been required to show competent evidence supporting probable cause. Instead, the government has been required to provide little more than a synopsis of the charges brought by the requesting country.

C. The Presumption That the Fugitive, once Arrested, Should Remain Detained Pending the Extradition Proceeding: The Doctrine of Special Circumstances

Ninety-four years ago the Supreme Court held that a person arrested on an extradition warrant carries the burden of demonstrating to the satisfaction of the court that there are "special circumstances" justifying bail. In *Wright v. Henkel*, the Court premised a presumption against bail in extradition matters on the United States' compelling interest in fulfilling treaty obligations:

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted.

Thus, "while bail should not ordinarily be granted," a court may extend such relief after considering any applicable "special circumstances." Ever since *Wright*, the courts of every circuit have applied a presumption against bail in extradition proceedings and have required a


78. Id.; see also Berger v. New York, 388 U.S. 41, 55 (1967) ("Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe than an offense has been or is being committed.").

79. Wright v. Henkel, 190 U.S. 40, 63 (1903).

80. Id. at 62.

81. Id. at 63.
showing of "special circumstances" to justify release. As a practical matter, arrestees have rarely been able to demonstrate special circumstances, a challenge which has often resembled passing the proverbial camel through the eye of the needle.

82. The extradition statutory scheme, 18 U.S.C. § 3184 (1994), does not address the question of bail. And, because international extradition matters are not considered criminal cases, courts have held that the Bail Reform Act, 18 U.S.C. § 3141 (1994), which governs the allowance of bail in domestic criminal cases and applies only to offenses against the United States that are triable in U.S. courts, does not apply in extraditions. See, e.g., Kamrin v. United States, 725 F.2d 1225, 1227–28 (9th Cir. 1984). Thus, given the absence of statutory guidance, the question of bail in extradition matters has been determined by looking to federal caselaw, starting with Wright v. Henkel.

Since Wright v. Henkel was decided in 1903, the federal courts have frequently held that bail ordinarily should not be allowed in international extradition proceedings, and should be permitted only when special circumstances exist. See generally In re Kirby, 106 F.3d 855, 858 (9th Cir. 1996); United States v. Leitner, 784 F.2d 159 (2d Cir. 1986) (per curiam); United States v. Williams, 611 F.2d 914 (1st Cir. 1979); Hu Yau-Leung v. Soscia, 649 F.2d 914 (2d Cir. 1981). See, e.g., Martin v. Warden, 993 F.2d 824, 827 n.4 (11th Cir. 1993) (court is "bound by Supreme Court and . . . Circuit precedent" to apply "special circumstances" standard); Salerno v. United States, 878 F.2d 317 (9th Cir. 1989) (applying "special circumstances" test); Beaulieu v. Hartigan, 554 F.2d 1 (1st Cir. 1977) ("Unlike the situation for domestic crimes, there is no presumption favoring bail. The reverse is rather the case."); United States v. Taitz, 130 F.R.D. 442, 444, 446 (S.D. Cal. 1990) (suggesting that even where a person demonstrates that he is not a flight risk, he is not entitled to bail unless he can also show "special circumstances"); In re Klein, 46 F.2d 85 (S.D.N.Y. 1930) (bail poses "grave risk of frustrating the efforts of the executive branch of the government to fulfill treaty obligations."); United States ex rel. McNamara v. Henkel, 46 F.2d 84 (S.D.N.Y. 1912) ("[A]dmission to bail and extradition should be in practice an unusual and extraordinary thing."); In re Mitchell, 171 F. 289 (S.D.N.Y. 1909) (allowing bail in extradition proceedings "only in the most pressing circumstances, and when the requirements of justice are absolutely peremptory.").

83. The courts have found that most circumstances are not "special": In re Extradition of Russell, 805 F.2d 1215, 1216–17 (5th Cir. 1986) ("being a tolerable bail risk is not in and of itself a 'special circumstance.'"); Kamrin, 725 F.2d at 1228; Williams, 611 F.2d at 915; United States v. Hills, 765 F. Supp. 381 (E.D. Mich. 1991) (absence of flight risk, involvement in civil litigation, and claim of constitutional and procedural defenses to raise later at extradition hearing did not overcome presumption against bail); Leitner, 784 F.2d at 159; Klein, 46 F.2d at 85; Russell, 805 F.2d at 1217 (neither financial hardship, nor the need to consult with attorney about pending civil lawsuit or about the extradition matter itself amount to special circumstances); In re Extradition of Artukovic, 628 F. Supp. 1370, 1374–75 (C.D. Cal. 1986) (neither advanced age nor infirmity comprise special circumstances); In re Extradition of Smyth, 976 F.2d 1535 (9th Cir. 1992) (absence of flight risk and need to consult with counsel and witnesses in complex extradition do not amount to special circumstances); United States v. Tang Yee-Chun, 657 F. Supp. 1270, 1271–72 (S.D.N.Y. 1987); Koskotas v. Roche, 931 F.2d 169, 175 (1st Cir. 1991) (arrestee's involvement in other civil proceedings is not a special circumstance); In re Extradition of Rouvier, 839 F. Supp. 537, 540–41 (N.D. Ill. 1993) (availability of bail in requesting country is not a special circumstance).

84. Special circumstances have occasionally been found, including some which other courts have found not to be special: Mitchell, 171 F. at 290 (release on bond so respondent could attend civil trial which would affect greatly his interests, but with proviso that he be returned to custody when trial was over); Hu Yau-Leung, 649 F.2d at 914 (special circumstances existed where fugitive was only sixteen years old and no suitable juvenile detention facility was avail-
By comparison, in domestic criminal cases the presumption ordinarily has been that an arrestee should be released on bail or bond unless the government moves for his detention and proves he presents either a risk of flight or a danger to the community.45

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45 United States v. Taitz, 130 F.R.D. 442 (S.D. Cal. 1990) (combination of unusual factors amounted to special circumstances, including: health problems experienced by fugitive during incarceration; bail would have been available in requesting country; detention was overly restrictive of fugitive’s religious freedom; and, fugitive made prima facie showing that crime charged abroad might not be an extraditable offense under the treaty); In re Extradition of Morales, 906 F. Supp. 1368, 1375 (S.D. Cal. 1995) (unusual delay in conducting extradition hearing was a special circumstance); United States v. Kin-Hong, 83 F.3d 523, 524 (1st Cir. 1996) ("'special circumstances' may include a delayed extradition hearing."); Salerno, 878 F.2d at 317 (unusual delay in the appeal process can be a special circumstance that will justify bail under the Wright v. Henkel standard); In re Extradition of Kirby, 106 F.3d 855, 863–65 (9th Cir. 1996) (special circumstances shown by combination of five factors, including (1) long delays during extradition proceedings, (2) a similarly-situated fugitive in a related extradition case had been granted bail, (3) requesting country likely would not credit arrestees for time spent in U.S. custody, (4) a 'cloud' hung over the proceedings because a court in an unrelated case had declared the extradition statute unconstitutional, and (5) arrestees, who were Irish Republican Army supporters wanted by Great Britain, enjoyed the “sympathy and concern” of many Americans); In re Extradition of Nacif-Borge, 829 F. Supp. 1210, 1221 (D. Nev. 1993) (special circumstance existed where bail would have been available in requesting country if defendant could post security in amount of eighty percent of alleged tax debt, and where fugitive posed no risk of flight or danger to community); and, In re Gannon, 27 F.3d 362 (E.D. Pa. 1998) (determining availability of bail in requesting country was special circumstance). Compare Gannon and Nacif-Borge with Rouvier, 839 F. Supp. at 540–41 (rejecting as contradictory to Supreme Court and federal appellate decisions view that entitlement to bail in requesting country is special circumstance, since most arrestees would be entitled to bail, contravening longstanding presumption that bail should be the exception rather than the rule).

One court surveyed “the more contemporary reported cases” and reported that “granting of bail pending completion of the extradition proceedings has been the rule rather than the exception.” Beaulieu v. Hartigan, 430 F. Supp. 915, 916 n.2 (D. Mass. 1977), rev’d, 553 F.2d 92 (1st Cir. 1977). The district court in Beaulieu cited and discussed only six cases, however.

In a number of cases in which bail has been granted, the courts have done so with no discussion of whether special circumstances were found. See, e.g., Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976); Vardy v. United States, 529 F.2d 404, 405 (5th Cir. 1976); Shapiro v. Ferrandina, 478 F.2d 894, 898 (2d Cir. 1973); United States v. Clark, 470 F. Supp. 976, 977 (D. Vt. 1979); In re Sindona, 450 F. Supp. 672, 675 (S.D.N.Y. 1978); United States v. Galanis, 429 F. Supp. 1215, 1231 (D. Conn. 1977); Jhirad v. Ferrandina, 355 F. Supp. 1155 (S.D.N.Y. 1973), rev’d on other grounds, 486 F.2d 442 (2d Cir. 1973); Wacker v. Bisson, 370 F.2d 552 (5th Cir. 1967); In re Extradition of D’Amico, 177 F. Supp. 648, 650 (S.D.N.Y. 1959).

85. Ever since the passage of the Judiciary Act of 1789, federal law has provided a conditional right to bail for defendants arrested on criminal charges. That Act provided, in relevant part:

And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion . . . .

Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789) (codified as amended at 18 U.S.C. §§ 3141–50 (1986)). Under the current bail statute, the presumption of pretrial release is still the rule, but the statute authorizes pretrial detention of persons charged with certain serious felonies upon a finding that no conditions of release can reasonably assure their appearance at trial or the safety of any other person or of the community. See 18 U.S.C. § 3142(e–g). The government
Until the *Parretti* case, no court had addressed the question of whether the application of the special circumstances test in denying bail in the absence of a finding of flight risk violated the Due Process Clause of the Fifth Amendment. There were, however, indications that the special circumstances doctrine might be vulnerable to a constitutional challenge.

D. The Trend toward Increasing Scrutiny of the Special Circumstances Doctrine and of the Presumption against Bail in Extradition Proceedings

In the decade prior to *Parretti*, courts and commentators began to question the constitutionality of both the doctrine of special circumstances and the presumption against bail in extradition cases. As one commentator has noted, “the United States cases on bail in extradition are all over the lot, and the ‘special circumstances’ rule frequently breaks down . . . . [T]o deny prehearing release to [someone] who would qualify if charged in a federal indictment, for instance, would make no sense at all. The best approach [would be] to analyze all extradition cases in terms of risk of flight.” Another observer has remarked that “courts in international extradition cases should focus on the accused’s risk of flight rather than on the presence or absence of ‘special circumstances,’” although this same observer carries the burden of showing that detention is appropriate, although there is now a rebuttable presumption that detention should be ordered in cases where the defendant is charged with certain serious felonies which could be punished by imprisonment of ten or more years. See 18 U.S.C. § 1342(e).

86. See *Parretti* v. United States, 112 F.3d 1363, 1381 (9th Cir. 1997) (“The government, apparently conceding that no court has ever discussed or even alluded to the due process question, responds that *Wright v. Henkel ...* and its progeny have held *sub silentio* that the ‘special circumstances’ standard is constitutional by repeatedly applying it to deny bail in extradition cases.”).

87. See generally United States v. Messina, 566 F. Supp. 740 (E.D.N.Y. 1983) (“[T]here may be [a constitutional] question when American citizens are held without bail in advance of a formal extradition request and without a showing of exigent circumstances.”).

88. See Part I.E., infra.


90. Hall, *supra* note 17, at 600.

To imprison a defendant (who cannot show “special circumstances”) in the name of national interests when the defendant presents no perceptible risk to those interests (because he poses no perceptible risk of flight) smacks of a punitive restraint, proscribed by the due process clause . . . . Risk of flight is the most crucial factor (in the bail decision) in protecting the national interests in extradition. So long as the accused poses no threat to the community, the national interests are fully served if the accused does not abscond. That the accused presents “special circumstances” adds nothing to the protection of these interests. Conversely, if the accused is likely to flee, the governmental interests are vulnerable, no matter what the “special circumstances.”
added that "the burden of proving acceptability of release is properly on the arrestee."  

In a similar vein, the court in the 1983 case of *United States v. Messina* assessed the government's claimed justifications for the fugitive's provisional arrest and his detention during the extradition proceedings and stated:

The court does not suggest that the rule of *Wright v. Henkel* is constitutionally infirm . . . Nevertheless, the question of urgency goes to the question of whether there are 'legitimate reasons' for detaining a person with a presumption against bail . . . [T]here may be an eighth amendment question when American citizens are held without bail in advance of a formal extradition request and without a showing of exigent circumstances."

In the 1977 case of *Beaulieu v. Hartigan*, the district judge surveyed recent cases dealing with the issue of bail in the extradition setting and concluded:

In none of the cases . . . was a district judge who granted bail subsequently reversed by a reviewing court. Analysis of these cases leads me to the conclusion that the 'special circumstances' doctrine of *Wright*, though still viable, must be viewed, in the light of modern concepts of fundamental fairness, as providing a district judge with flexibility and discretion in considering whether bail should be granted in these extradition cases. The standard of scrutiny and concern exercised by a district judge in an extradition case should be greater than in the typical bail situation, given the delicate nature of international relations. But one of the basic questions facing a district judge in either situation is whether, under all the circumstances, the petitioner is likely to return when directed to do so. Fundamentally, it is a judgment call by the district court based on the

Id. at 614–15.  
91. Hall, supra note 90, at 613.  
93. Id. (citations omitted). The Eighth Amendment to the U.S. Constitution provides "[e]xcessive bail shall not be required." U.S. CONST. amend. VIII. An unreasonable denial of bail might violate the excessive bail clause. *Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("Bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment.").  
tottality of the circumstances, including the extremely important
consideration of this country’s treaty agreements with other na-
tions.95

Finally, in a case pre-dating Parretti, the Ninth Circuit affirmed a
denial of bail because of the seriousness of the offense charged and the
considerable risk of flight, but made no reference to Wright v. Henkel or
the doctrine of special circumstances.96 The suggestion is that the court
approached the issue primarily from the standpoint of flight risk.97

E. The Trend toward Increasing Judicial Scrutiny of
Provisional Arrest Warrants

Just as some courts have shown a growing uneasiness with the spe-
cial circumstances doctrine, others have shown a similar discomfort
with provisional arrest warrants issued without a prior evidentiary
showing of probable cause. In the past ten years, several appellate pan-
els of the United States Courts of Appeals for the Second, Fifth, and
Seventh Circuits have questioned the constitutionality of allowing a
provisional arrest warrant to issue without a prior evidentiary showing
of probable cause but have managed to avoid deciding the constitutional
issue.98 Nevertheless, these courts appear to have signaled a growing
judicial impatience with the traditional justifications for allowing provi-
sional arrest warrants to issue on information and belief, and, more
broadly, with the traditional view that fugitives in extradition cases have
limited recourse to constitutional procedural protections.99

95. Id.
96. See Magisano v. Locke, 545 F.2d 1228, 1230 (9th Cir. 1976).
97. Id.
98. See Caltagirone v. Grant, 629 F.2d 739, 748 (2d. Cir. 1980); In re Extradition of
Russell, 805 F.2d 1215, 1217 (5th Cir. 1986); Sahagian v. United States, 864 F.2d 509, 512–
1979) (expressing doubt as to the constitutionality of a thirty-day provisional detention based
solely on information that the fugitive had been charged with an extraditable crime), rev’d on
other grounds, 611 F.2d 914 (1st Cir. 1979); Spatola v. United States, 741 F. Supp. 362, 366
(E.D.N.Y.1990) (magistrate avoided the constitutional question raised by fugitive’s Fourth
Amendment challenge to the provisional arrest warrant by finding that probable cause had
been established).

Some academicians and legal commentators have criticized the practice of obtaining
provisional warrants without a prior evidentiary showing of probable cause to believe the
fugitive committed the crime charged abroad. See, BASSIOUNI, supra note 2, at 527–28; see
also M. Cherif Bassiouni, Extradition Reform Legislation in the United States: 1981–1983,
17 AKRON L. REV. 495, 522–25 (1984); Note, Probable Cause and Provisional Arrest Under
Certain Extradition Treaties: Caltagirone v. Grant, 7 N.C. J. INTL. L. & COM. REG. 121
(1982); Kester, supra note 3, at 1464–65.
99. See, e.g., In re Extradition of Burt, 737 F.2d 1477 (7th Cir. 1984). The Burt case of-
fers an excellent example of one court’s willingness to reject traditional impediments to
Before Parretti, in Caltagirone v. Grant, the Second Circuit came closer than any court had previously come to addressing the constitutional issue. The court raised "grave questions concerning the constitutional propriety" of issuing an arrest warrant solely on the basis of the government's assurance of the existence of a foreign arrest warrant. The court avoided the constitutional question by interpreting an constitutional scrutiny of the conduct of the executive branch in extradition cases. In his appeal from a denial of his petition for habeas corpus relief, Burt invoked the Due Process Clause of the Fifth Amendment to argue that the government's delay in deciding to extradite him to Germany violated his due process right to be free from unjustified prosecutorial delay, especially because the government had made an earlier, tentative decision not to extradite him. The government responded that the district court should not even have considered Burt's due process argument because it was beyond the traditional scope of habeas review in extradition cases. Specifically, the government argued that the court was constrained by Fernandez v. Phillips, 268 U.S. 311 (1925), to consider only certain questions in a habeas challenge to an extradition order. In the oft-cited Fernandez opinion, Justice Holmes had written: "[Habeas Corpus] is available only to inquire whether the magistrate had jurisdiction, whether the offence [sic] charged is within the treaty and, by somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." Id. at 312.

The Burt panel acknowledged that under Fernandez the scope of habeas review in extradition cases had been limited, but it then distinguished between traditional habeas challenges to the findings of the magistrate and constitutional challenges to the conduct of the executive branch in deciding to extradite the accused.

We hold that federal courts undertaking habeas corpus review of extraditions have the authority to consider not only procedural defects in the extradition procedures that are of constitutional dimension, but also the substantive conduct of the United States in undertaking its decision to extradite if such conduct violates constitutional rights. Such a view recognizes ... that the broad language of Fernandez, which on its face would appear to restrict the scope of inquiry here, must be construed in the context of its time and the context of subsequent development of the scope of habeas corpus review.

Burt, 737 F.2d at 1484.

The Burt panel relied heavily on an earlier Fourth Circuit decision in Plaster v. United States, 720 F.2d 340 (4th Cir. 1983), in which the court similarly expanded the traditional scope of habeas review of an extradition order:

It is critical to note ... that neither Fernandez v. Phillips nor the cases that have followed it have considered the scope of habeas corpus in connection with a claim that the actions of the United States government in extraditing the petitioner would violate his constitutional rights. It is well settled ... that the United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution, and that treaty obligations cannot justify otherwise unconstitutional government conduct.

Id. at 348-49 (citing Reid v. Covert, 354 U.S. 1, 16-19 (1957) (plurality opinion), and Rosado v. Civiletti, 621 F.2d 1179, 1195-96 (2d Cir. 1980) (citations omitted)).

The panel in Burt also found some authority for the suggestion that the limited scope of review applies only to the extradition ruling and not to procedural issues, Garcia-Guillern v. United States, 450 F.2d 1189, 1191 (5th Cir. 1971); David v. Attorney General, 699 F.2d 411 (7th Cir. 1983).

100. Caltagirone, 629 F.2d at 748.
101. Id.
extradition treaty between the United States and Italy to require a full
evidentiary showing of probable cause to believe that a crime had been
committed, and then holding that the provisional arrest warrant, which
had issued solely on the basis of the existence of an Italian arrest war-
rant, violated the treaty because it was issued without probable cause. 102

The relevant language in the U.S.-Italian treaty read:

In case of urgency a Contracting Party may apply for the provi-
sional arrest of the person sought pending the presentation of
the request for extradition through the diplomatic channel . . . .
The application shall contain a description of the person sought,
an indication of intention to request the extradition of the person
sought and a statement of the existence of a warrant of arrest . . .
against that person, and such further information, if any, as
would be necessary to justify the issue of a warrant of arrest had
the offense been committed . . . in the territory of the requested
Party. 103

The Italian treaty provided for the issuance of a provisional arrest
warrant in the United States upon a showing that an Italian arrest war-
rant had been issued and upon "such further information as would be
necessary to justify the issue of the warrant of arrest had the offense
been committed" in the United States. 104 The Caltagirone panel read the
"further information" provision of the treaty to require a showing of
probable cause prior to the issuance of a warrant. 105

Likewise, in Sahagian v. United States, 106 the Seventh Circuit
avoided the constitutional question by reading the "further information"
language of the treaty between the United States and Spain as requiring
a showing of probable cause. The treaty provided:

In case of urgency a Contracting Party may apply to the other
Contracting Party for the provisional arrest of the person
sought . . . The application shall contain a description of the
person sought, an indication of intention to request the extrad-
tion of the person sought and a statement of the existence of a

102. Id. at 747 ("The overwhelming evidence that Article XIII [of the treaty] itself pro-
hibits provisional arrest without probable cause relieves us of the need to examine the
constitutional propriety of a treaty that purports to permit such arrests.").
103. Id. at 744 n.9 (quoting Treaty of Extradition, Jan. 18, 1973, U.S.-Italy, art. XIII, 26
U.S.T. 493).
104. Id.
105. Id. at 744 ("Had the offense . . . been committed in the United States, a showing of
probable cause would have been necessary to justify the issuance of an arrest warrant.").
106. Sahagian v. United States, 864 F.2d 509 (7th Cir. 1988).
warrant of arrest . . . and such further information, if any, as may be required by the requested Party. 107

The Seventh Circuit read the "further information" language of the treaty to require a showing of probable cause as a predicate to the issuance of a provisional arrest warrant, thereby skirting the Fourth Amendment question. 108 However, unlike the court in Caltagirone, which dealt with the arrest of a foreign national by U.S. authorities, the Sahagian court was called upon to determine the legality of a foreign arrest of a U.S. citizen. The court found that his provisional arrest abroad had been supported by probable cause because the arrest had been based on a complaint and warrant issued in the United States. 109

A Fifth Circuit decision similarly avoided the Fourth Amendment issue by finding that a showing of probable cause had in fact been made. 110 As the court in Russell stated: "Assuming without deciding that the Treaty requires a showing of probable cause to support a provisional arrest . . . we agree with the district court that the magistrate had enough evidence before him to show probable cause to detain [the fugitive]." 111

In sum, in order for the constitutional question to be decided squarely, a case had to arise in which, first, the relevant extradition treaty could not be construed as requiring a showing of probable cause as a predicate for a provisional arrest warrant, and in which, second, the issuing magistrate issued a warrant based solely on the requesting country's allegations and not on actual evidence. That case would finally come in Parretti v. United States. When it came, however, Parretti would raise not only the constitutionality of the government's procedures for obtaining provisional arrest warrants, but also the constitutionality of the traditional presumption that the fugitive, once arrested, should be denied release on bail.

107. Id. at 511. See also Parretti v. United States, 112 F.3d 1363, 1373 (9th Cir. 1997) (discussing Sahagian, 864 F.2d at 509).
108. Sahagian, 864 F.2d at 513 ("As contemplated by Article XI [of the Spanish treaty], the federal officials obtained Sahagian's provisional arrest and detention pending extradition after obtaining an arrest warrant from a magistrate based upon a showing of probable cause.").
109. Id.
110. In re Extradition of Russell, 805 F.2d 1215, 1217 (5th Cir. 1986).
111. Id. at 1217. See also Spatola v. United States, 741 F. Supp. 362, 366 (E.D.N.Y. 1990) (noting that magistrate had avoided the constitutional question raised by defendant's Fourth Amendment challenge to the warrant for his provisional arrest by finding probable cause).
II. IN THE MATTER OF THE EXTRADITION OF GIANCARLO PARRETTI

On May 6, 1997, a three-judge panel of the United States Court of Appeals for the Ninth Circuit held that Giancarlo Parretti's arrest violated the Fourth Amendment because the provisional arrest warrant issued by a United States Magistrate Judge had not been supported by an evidentiary showing sufficient, under standards applicable to domestic warrants, to establish probable cause to believe that Parretti had committed the offenses charged against him in France, the requesting country. The court also held that Parretti's detention following his provisional arrest violated the Due Process Clause of the Fifth Amendment absent a showing that he posed a risk of flight, notwithstanding the government's interest in enforcement of extradition treaties. In so ruling, the court deemed both the extradition treaty with France and the relevant portions of the federal extradition statute unconstitutional.

A. The Procedural Background to the Parretti Decision

In 1990, a corporation headed by Giancarlo Parretti, an Italian citizen and resident, bought MGM-United Artists (MGM-UA) for $1.3 billion, in a transaction that was widely reported in the media. The transaction, which was highly leveraged, gave rise to MGM-Pathe Communications Corporation, and spawned a number of lawsuits.

112. Parretti, 112 F.3d at 1363. Judge Pregerson, Circuit Judge, filed a dissent expressing the view that the court should have dismissed Parretti's appeal under the fugitive disentitlement doctrine, which allows the court the discretion to dismiss an appeal by an appellant who becomes a fugitive while his appeal is pending. Id. at 1390-91. In 1996, while his appeal was still pending in the Ninth Circuit, Giancarlo Parretti fled the United States. Id. at 1390. When a criminal defendant becomes a fugitive from justice, courts have discretion to dismiss the defendant's appeal because his absence "disentitles the defendant to call upon the resources of the Court for determination of his claims." Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam). Citing this doctrine, Judge Pregerson wrote that Parretti's appeal should be dismissed. Id. at 1390-91. In deciding not to dismiss the appeal, the majority answered:

First, Parretti is not seeking further relief from this court.... We are simply issuing an opinion explaining our earlier action, as we promised to do in the order we issued prior to his flight. We believe that the government and the district court, among others, are entitled to that explanation.

Parretti, 112 F.3d at 1380 n.21.

113. Id. at 1384.

114. Id. at 1377-78.

115. Parretti himself was by then a well-known figure in the world of international business, and he has continued to draw widespread media attention. See, e.g., Peter Truell, Authorities Can Track Fugitive Financiers, But They Can't Bring Them in, N.Y. TIMES, Jan. 16, 1997, Section D, at 1; Reuters, Extradition Ordered for Italian Financier, N.Y. TIMES, Jan. 1, 1996, at 43.

116. Parretti, 112 F.3d at 1365.
On May 3, 1995, a French magistrate issued a warrant for Parretti's arrest, charging him with misappropriation of company assets, forgery, fraud, and making false statements in judicial proceedings in France, in connection with litigation over the MGM-UA deal. At the time the warrant issued and for the ensuing five months Parretti was in his native country of Italy, where, he would later maintain, the French authorities could have sought his arrest and extradition. France did not seek his arrest and extradition while he was in Italy.

On October 9, 1995, Parretti entered the United States to appear in Delaware Superior Court, where he was under indictment for perjury and evidence tampering in a suit relating to the MGM-UA purchase, and from there to travel to California to attend a deposition also concerning the MGM-UA deal. On October 10, French authorities forwarded a diplomatic note to the State Department requesting Parretti's provisional arrest pursuant to article IV of the Treaty of Extradition between the United States and France, so that he could be held pending a formal request for his extradition. The government filed a "Complaint for Provisional Arrest Warrant," to which an AUSA for the Central District of California, "acting on behalf of the Government of France, swore on information and belief." The Complaint summarized the allegations in the French arrest warrant, namely, that Parretti had looted the French company Europe Image Distribution, one of MGM-Pathe's subsidiaries, and that he had forged documents and made false statements. The

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117. In France, the arrest warrant served as the charging document. Id. at 1363.
118. Id. at 1365.
119. Id. at 1367.
120. Id.
121. Id. at 1365.
123. At the time French authorities sought Parretti's provisional arrest and even at the time of his arrest in the United States, France had not yet made a formal request for his extradition. Article IV of the U.S.A. France Extradition Treaty provided for the person provisionally arrested to be held for up to forty days pending a request for extradition. Id. at 1365. The Parretti panel interpreted article IV to authorize an arrest and detention without a firm commitment from France that it would even decide to seek extradition at the end of the forty-day period: "Article IV provides for the ... person 'provisionally arrested' to be held for up to 40 days pending a possible request that the fugitive be extradited." Parretti, 112 F.3d at 1365 (emphasis added). However, the reality appears to have been that France fully intended to seek Parretti's extradition when it decided to ask U.S. authorities to arrest him pursuant to the extradition treaty. In the Complaint filed by the government with its application to the court for a provisional arrest warrant, the AUSA stated: "I am informed through diplomatic channels that the Requesting State will make a regular diplomatic request for the extradition of Parretti." Id.
124. Id.
125. Id.
French warrant was not attached to the Complaint, nor were any affidavits or other documentary evidence.\textsuperscript{126} As the Parretti court later observed: "The sole basis for the allegations of wrongdoing made in the AUSA's Complaint is the French Arrest Warrant. In other words, the AUSA simply alleges on information and belief that the French arrest warrant contains various allegations of wrongdoing by Parretti."\textsuperscript{127}

On the basis of the Complaint, United States Magistrate Judge Joseph Reichmann issued a provisional arrest warrant, and Parretti was arrested by federal agents while being deposed at the Los Angeles offices of the White & Case law firm on October 18, 1995.\textsuperscript{128}

At a detention hearing two days later, Parretti argued that his arrest had violated the Fourth Amendment because the provisional arrest warrant had not been supported by competent evidence establishing probable cause.\textsuperscript{129} He also moved for release on bail, arguing that he posed no risk of flight or danger to the community, and that "special circumstances" existed justifying his release.\textsuperscript{130} The circumstances which he alleged to be 'special' were, in combination, that: a French bank, Credit Lyonnais, with which he was involved in litigation, was misusing the extradition process to obtain an advantage in its litigation with him; his continued detention could pose a significant risk to his health; he was elsewhere embroiled in civil litigation which would affect his interests and which would require his participation; the offenses charged in France would likely be ruled non-extraditable offenses under the treaty; and, he was facing criminal charges in Italy, for which an Italian court had also requested his return to that country, and that the Italian request might have priority over the French request.\textsuperscript{131}

At a supplemental detention hearing ten days later, Parretti did not re-argue some of his earlier reasons supporting bail, including: that the extradition process was being misused on behalf of Credit Lyonnais; that the health concerns; and that he needed to participate in civil litigation elsewhere. Instead, he now asserted that: (1) there would be a delay in the extradition matter because the State of Delaware was likely to request that the extradition be deferred until he could be tried on criminal charges there; (2) Italy was entitled to his return before France (even

\begin{footnotesize}
\begin{enumerate}
\item[126.] \textit{Id.}
\item[127.] \textit{Id.}
\item[129.] \textit{Parretti}, 112 F.3d at 1365.
\item[130.] \textit{Id.}
\item[131.] Unofficial transcript of detention hearing, Oct. 20, 1995 (on file with author).
\end{enumerate}
\end{footnotesize}
though Italy had not yet made a proper extradition request through the diplomatic channel); (3) France’s extradition request would likely be defeated because the French charges did not have U.S. counterparts as required by the U.S.-France extradition treaty, and (4) his provisional arrest violated the Fourth Amendment because the complaint had failed to establish probable cause.\footnote{132}

The government disputed that any of these circumstances was “special,” and argued in addition that Parretti was a flight risk.\footnote{133} On the issue of probable cause, the government answered that the issuing magistrate had made a probable cause determination, which had in turn been “supported by specific facts that are set forth in the Complaint, relaying facts that were conveyed to the U.S. by France,” albeit “in an informal way” and not “in a way of formal evidence.”\footnote{134} “[N]othing,” said the AUSA, “prohibits that.”\footnote{135}

Magistrate Judge Reichmann rejected Parretti’s Fourth Amendment argument, stating that the government’s recital of the allegations of the French warrant was “sufficient at this stage,”\footnote{136} and ordered Parretti detained pending the extradition proceedings. Magistrate Judge Reichmann did not find that Parretti was a flight risk, but found that Parretti had failed to demonstrate any “special circumstances” overcoming the presumption against bail.\footnote{137}

Parretti filed an application for a writ of habeas corpus in the district court, arguing that the provisional arrest warrant had violated the Fourth Amendment’s Warrant Clause because it had been issued without a prior showing of competent evidence supporting probable cause to believe that he had committed any of the offenses charged in France.\footnote{138} Relying on \textit{Caltagirone v. Grant},\footnote{139} he argued that the Complaint had not purported to establish—and the Magistrate had not purported to find—probable cause.\footnote{140} Parretti also argued that Magistrate Judge Reichmann had not only failed to make a probable cause determination, but had effectively declared at the detention hearing that such a determination was not necessary by stating that the government’s recital of the allegations in the French warrant was “sufficient at this stage.”\footnote{141}
In his habeas petition, Parretti also renewed his bail application. He took issue with the notion that even where a person demonstrates that he is not a flight risk, he is not entitled to bail unless he can also show special circumstances. "For the government to restrain a person's liberty there must be a compelling state interest," he began. While "the government does have an interest in making sure it can fulfill its obligation to surrender the person if extradition is determined to be appropriate," that interest "can be protected adequately by making bail available to those persons who do not pose a risk of flight." Accordingly, the Court should rule that the Due Process interest in personal liberty requires that a person arrested pursuant to a provisional arrest warrant may be detained and denied bail only on grounds that there are no conditions short of detention that will reasonably assure his or her appearance at the extradition hearing.

As proof that he was not a risk of flight, Parretti offered his record of making his court appearances in the various lawsuits and criminal proceedings against him in the United States and abroad.

As a fallback, Parretti argued that even if the court were to reject his due process argument that the special circumstances test is unconstitutional, there were four special circumstances justifying his release on bail. This time, he offered a reformulated combination of some of the circumstances he had put forward at the two bail hearings: (1) probable success in defeating the French extradition request on the merits after the extradition hearing; (2) his need to participate in other civil

142. Id.
143. Id.
144. Id. at 22 (citing United States v. Salerno, 481 U.S. 739 (1987)).
145. Petition for Writ of Habeas Corpus at 23–24 (CV95-7593-JMI), Parretti (No. 95-3133M).
146. Id.
147. Id. at 24–26.
148. Parretti v. United States, 112 F.3d 1363, 1367 (9th Cir. 1997) (Parretti citing Salerno v. United States, 878 F.2d 317 (9th Cir. 1989), for support on this point).
litigation during the period pending his extradition proceedings;\textsuperscript{149} (3) his deteriorating medical condition (high blood pressure, kidney stones, and a urinary tract infection);\textsuperscript{150} and (4) the failure of the French authorities earlier in the year to make an effort to extradite him from Italy during the five months after the issuance of the French warrant—a failure which, he claimed, showed that France did not really need for him to be held for the forty-day period allowed by the treaty for the preparation of the formal extradition request.\textsuperscript{151}

In its response, the government answered Parretti’s bail argument first, with the premise that “‘[t]here is a presumption against bail in an extradition case.’”\textsuperscript{152} Then, citing Russell,\textsuperscript{153} the government argued that in the face of the presumption against bail, to justify his release Parretti was required to demonstrate both the absence of flight risk and the presence of special circumstances.\textsuperscript{154} “Thus, even if Parretti were able to show that he is not a flight risk, only ‘special circumstances’ would justify the granting of bail,” and, “the burden of showing such ‘special circumstances’ is placed on the extraditee” and “remains on the extraditee even if he demonstrates that he is not a flight risk.”\textsuperscript{155} On risk of flight, the government stressed that Parretti had the resources and means to flee; he had only marginal ties to the United States; he was being investigated by federal authorities in California for racketeering, fraud, tax fraud, and money laundering, and would have no incentive but to flee once federal charges became imminent; he had a history of failing to appear for legal proceedings, namely, a prior failure to show up for an Immigration and Naturalization Service hearing in Los Angeles five years earlier; and he had a record of deceit (a Delaware civil court had found that he lied in testimony before that court).\textsuperscript{156}

executive branch, to review and even take no action on an order by a federal court certifying a fugitive as extraditable. In the interim, a number of courts have declined to follow Lobue. Parretti’s Lobue argument appears to have been somewhat of a ‘kitchen sink’ argument made on the offhand chance that the court might follow Lobue despite the fact that other courts were resoundingly declining to do so.

The panel in Parretti never reached his Lobue argument, having found and ruled for Parretti on other constitutional grounds. Parretti, 112 F.3d at 1377 n.18. Accordingly, any further discussion of Lobue is beyond the scope of this article.

149. See Parretti, 112 F.3d at 1367 (Parretti cited United States v. Williams, 611 F.2d 914, 915 (1st Cir. 1979) on this point).
150. Parretti cited Salerno on this point. Id.
151. Id.
152. Government’s Response to Petition for Writ of Habeas Corpus at 18, Parretti (No. CV95-7593-JMI) (quoting from Salerno v. United States, 878 F.2d 317 (9th Cir. 1989)).
153. In re Extradition of Russell, 805 F.2d 1215, 1217 (5th Cir. 1986).
155. Id. (citing Salerno, at 317–318).
156. Id. at 21–24.
The government then argued that even if Parretti could establish that he did not present a risk of flight, requiring him nevertheless to establish special circumstances would not violate the Due Process Clause.\textsuperscript{57} Citing \textit{Wright v. Henkel},\textsuperscript{158} the government stated that Parretti's position on the bail issue "is contrary to both Supreme Court and Ninth Circuit precedent" and "would do away with the 'special circumstances' requirement in all cases."\textsuperscript{159} The government then rebutted each of Parretti's four claimed special circumstances: the French charges were likely to be ruled extraditable by the magistrate; Parretti's need to participate in civil litigation during the pendency of his extradition proceedings could be accommodated if necessary; France's failure to request his extradition from Italy when it could have done so months before his entry into the United States was not a special circumstance, especially in view of Italy's freedom (and its tendency) to refuse to extradite its own citizens to other countries; and, the Bureau of Prisons could provide appropriate medical care for his ailments.\textsuperscript{160}

On the question of probable cause for the issuance of the provisional arrest warrant, the government responded that both the extradition treaty with France and the extradition statute "must be properly interpreted to require a showing of probable cause and thus to comply with any Fourth Amendment requirement."\textsuperscript{161} The government cited the rule that treaties and statutes should be interpreted to comply with constitutional requirements whenever possible.\textsuperscript{162} "Applying the presumption that Treaties and statutes should be interpreted whenever possible in such a way as to render them constitutional, such an interpretation is proper and ensures compliance with any applicable probable cause requirement imposed by the Fourth Amendment."\textsuperscript{163} The question remained, however, whether the treaty and statute required a showing of probable cause to believe that the fugitive committed the crime charged, or probable cause to believe, simply, that he was duly charged by the requesting country with an extraditable crime. The government's answer was that 'probable cause' in support of a provisional arrest warrant in an

\textsuperscript{157} Id. at 25.
\textsuperscript{158} Wright v. Henkel, 190 U.S. 40, 62–63 (1903).
\textsuperscript{160} Id. at 21–28.
\textsuperscript{161} Id. at 34.
\textsuperscript{162} Id. at 43–44 (citing Kent v. Dulles, 357 U.S. 116, 128–30 (1958)) (interpreting treaty, court applies historic mandate to construe ambiguous enactments in a manner that comports with the Constitution).
\textsuperscript{163} Id. at 34.
extradition case should be something less than probable cause in support of a domestic arrest warrant in a criminal case. 164

It remains an open issue what type of probable cause must be shown by a complaint seeking provisional arrest. Extradition proceedings do not result in a United States determination as to guilt or innocence; rather, the final determination made by a United States court is one of probable cause to believe the foreign offenses charged were in fact committed by the person whose extradition is sought. Arguably, the probable cause showing required for provisional arrest should be something less. To hold otherwise would mean that the complete extradition showing would be required at the preliminary stage of the provisional arrest, a practical impossibility in many cases in which the arrest must be arranged with haste to avoid further flight. Accordingly, to justify provisional arrest, the government submits that all that must be shown is probable cause to believe either that the individual is duly charged in the foreign country, or, alternatively, that the extradition request itself will be successful, that is, probable cause to believe it likely that the government will be able to establish the prerequisites for extradition. 165

Since probable cause to believe that the fugitive committed the crime charged is the standard used at the formal extradition hearing to determine whether a person should be extradited, the government argued, that same standard should not be used to determine whether the fugitive should be arrested and held while awaiting the formal extradition request, especially where a showing of probable cause would be a "practical impossibility in many cases in which the arrest must be arranged with haste to avoid further flight." 166

Perhaps to be safe, however, the government immediately assured the court that it need not resolve whether a provisional arrest warrant could issue without an evidentiary showing of probable cause to believe the fugitive committed the crime charged abroad, "because the complaint in this case established probable cause to believe that Parretti committed the offenses with which he is charged in France." 167

Contrary to Parretti's claims, the complaint does far more than simply set out the existence of a French warrant charging

164. Id. at 36 n.10.
165. Id.
166. Id. at 37.
167. Id. at 37.
Parretti. The complaint describes in detail both the nature of the offenses charged and the specific facts relied upon by the French warrant to support those charges. This recitation of facts is sufficient to establish probable cause to believe both that Parretti has committed the French offenses with which he is charged and that those acts are extraditable. Though this recitation of the facts is based on information and belief communicated through the warrant itself, such a recitation is sufficient for a finding of probable cause.

The government rejected Parretti’s claim that Magistrate Judge Reichmann had not made a judicial finding of probable cause, and the government answered that Judge Reichmann had indeed concluded that the complaint provided sufficient facts to establish probable cause.

The district court denied Parretti’s habeas petition, ruling that the provisional arrest had been lawful because the Complaint for Provisional Arrest Warrant “alleges more than sufficient facts, with more than sufficient particularity, to establish probable cause to believe that Parretti committed the offenses with which he is charged in France.”

The district court rejected the view that the government was required to make an evidentiary showing up front, as a predicate for the issuance of a warrant, saying that an evidentiary showing could wait until the

168. Id. at 46–47. In support, the government cited In re Extradition of Russell, 805 F.2d 1215 (5th Cir. 1986), in which the detainee, like Parretti, had challenged his arrest on Fourth Amendment grounds for lack of a showing of probable cause. In finding that the magistrate judge had enough evidence before him to show probable cause, the court in Russell adopted the view that “the evidence at the provisional arrest stage [can] be informal,” and noted further that “several cases have approved the use of a complaint based on information and belief rather than personal knowledge.” Id. at 1217 (citing Yordi v. Nolte, 215 U.S. 227, 232 (1909); Grin v. Shine, 187 U.S. 181, 193 (1902)). In Russell, however, unlike in Parretti, the magistrate had before him copies of a number of letters and other documents which made out a case against Russell, and not just a foreign warrant or complaint.

What of the two Supreme Court cases cited in Russell? In Yordi, as discussed earlier in Part I.A., supra, while the syllabus of the case in the U.S. Reports suggested that an arrest warrant could issue without an evidentiary foundation, as long as the complaint so clearly and explicitly stated a crime covered by the relevant extradition treaty that the accused could understand the charge, in fact, the Yordi Court found that the warrant in that case had been supported by an evidentiary showing (depositions). Yordi, 215 U.S. at 230.

In Grin, the Court suggested that the complaint had to be based on the oath of someone who had actual knowledge of the facts, or, absent such a person, by an official who could at least base his complaint upon depositions. Grin, 187 U.S. at 193.


170. Findings of Fact, Conclusions of Law, and Order Denying Application for Bail and Habeas Corpus Petition, filed Nov. 15, 1995, at 5–6; Excerpt of Record at 5–6, Parretti (No. CV95-7593-JMI).
expiration of the forty-day period which the treaty allowed France for the transmittal of the formal extradition documents.\(^{171}\)

The district court found that Parretti was not a flight risk but nevertheless denied his bail request.\(^{172}\) Stating the rule that bail in extradition cases is "only granted in exceptional circumstances,"\(^{173}\) the court found that Parretti had not established any of the first three special circumstances which he had claimed, and found that the fourth circumstance—that France had not requested his extradition from Italy—was not a special circumstance as a matter of law.\(^{174}\) Specifically, the district court found that Parretti was likely to be found extraditable after an extradition hearing; his detention would not interfere with his participation in the civil suits against him; he was receiving sufficient medical attention in jail; and France’s earlier failure to extradite him from Italy was not a special circumstance as a matter of law.\(^{175}\)

Shortly thereafter, Parretti filed a motion in the U.S. Court of Appeals for the Ninth Circuit seeking emergency review of the district court’s order, renewing his arguments on both the legality of the provisional warrant and the refusal of bail.\(^{176}\) On November 21, 1995, a motions panel granted Parretti’s motion and ordered his immediate release on two independent grounds: first, that his arrest violated the Fourth Amendment because the government had failed to make the necessary evidentiary showing of probable cause to believe Parretti had committed an extraditable offense; and second, that his detention violated the Due Process Clause of the Fifth Amendment in light of the district court’s finding that he was not a flight risk.\(^{177}\) The order of the motions panel was unpublished, but the panel retained jurisdiction and indicated that an opinion might follow.\(^{178}\)

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171. Excerpt of Record at 150–51, Parretti (No. CV95-7593-JMI). Reporter’s Transcript of Proceedings at 7–8, Parretti (No. CV95-7593-JMI). At oral argument on the habeas petition, counsel for Parretti argued that “all that [the Government is] doing is regurgitating to the court what they have obtained from the warrant from France. We don’t know what the investigating magistrate based those statements on.” Parretti, 112 F.3d at 1366. The district judge, James M. Ideman, responded: “That’s what they got [sic] 40 days to clear up and to make a presentation in their extradition proceedings.” Id.

172. Reporter’s Transcript of Proceedings (Nov. 9, 1995) (on file with the author).


174. Findings of Fact, Conclusions of Law, & Order Denying Application for Bail and Habeas Corpus Pet.; see also Parretti, 112 F.3d at 1367.

175. Parretti, 112 F.3d at 1367.

176. At the time he filed the emergency motion, Parretti also filed notice of appeal. The appeal and the motion proceedings were consolidated later under Ninth Circuit cause number 95-56586. See also Parretti, 112 F.3d at 1368 n.5.

177. Id. at 1368 (citing United States v. Parretti (No. 95-56586) (9th Cir. Nov. 21, 1995) (order granting release from custody)).

178. Parretti, 112 F.3d at 1367–68 n.7.
After the unpublished order issued, the government filed a petition for rehearing with suggestion for rehearing *en banc*. The government now raised a new argument on the issue of probable cause, arguing that the Secretary of State's decision to enforce an extradition treaty authorizing provisional arrest upon information of a foreign warrant reflects the Secretary's determination that the foreign nation's charging procedures are sufficiently reliable to justify according the foreign government full faith and credit sufficient to satisfy the probable cause requirement of the Fourth Amendment. The government argued that under the doctrine of judicial non-inquiry, the federal courts must defer to the Secretary's decision and accept at face value the foreign warrant as a basis for issuing a warrant for provisional arrest.\(^{179}\)

Under the rule of non-inquiry, courts in extradition cases have generally declined to inquire into non-justiciable matters such as the requesting country's motive for seeking the fugitive's extradition, or the procedures or treatment which await a surrendered fugitive in the requesting country.\(^{180}\) In making the argument based on this rule, the government echoed the broader separation of powers argument it has often made in other cases where its foreign policy interests are involved. The government has often argued that courts should defer to the executive branch where foreign affairs and political questions are implicated.\(^{181}\)

The government offered yet another argument in the petition for rehearing, this one on the form of evidence on which any finding of probable cause should be based. Specifically, the government argued that the French magistrate's "determinations of fact" should be considered sufficient because a provisional arrest warrant "may be based on facts reported on information and belief without supporting affidavits, deposition testimony, or other competent evidence."\(^{182}\) The Government relied on *Yordi v. Nolte*, where the Court had rejected the argument that an extradition complaint must be sworn to by persons having actual

\(^{179}\) Id. at 1368.

\(^{180}\) See, e.g., Glucksman v. Henkel, 221 U.S. 508, 512 (1911) ("We are bound by the existence of an extradition treaty to assume that the trial will be fair.").


\(^{182}\) Government's Petition for Rehearing with Suggestion for Rehearing En Banc at 9, *Parretti* (No. 95-56586).
knowledge of the facts alleged. The government relied further on In re Extradition of Russell and Grin v. Shine, both of which, it claimed, supported the view that a complaint could be based on information and belief rather than on sworn personal knowledge. The petition was denied "without prejudice," "subject to renewal" if and when the panel published its order or issued a written opinion.

In the meantime, the extradition matter went forward. Eight days after Parretti was ordered released by the Ninth Circuit, the government filed France’s formal request for Parretti’s extradition with the Magistrate Judge, including a voluminous package of authenticated and certified affidavits and other documentary evidence. During the next five months, Parretti and the government studied the extradition package and filed briefs on whether the extradition documents satisfied the formal and substantive requisites for an order of extraditability. On May 10, 1996, the formal extradition hearing was held before the Magistrate Judge. Parretti appeared. On May 31, 1996, the Magistrate Judge found Parretti extraditable on all charges alleged in the French warrant, and entered an order certifying to the Secretary of State that Parretti was extraditable. With the consent of the government, the Magistrate Judge continued Parretti’s release on bail pending the filing of a petition for writ of habeas corpus. On July 1, 1996, Parretti filed a habeas petition in the U.S. District Court for the Central District of California, collaterally attacking the order certifying his extraditability. In December of 1996, while his habeas petition was pending, Parretti fled the country. On March 12, 1997, the district court dismissed his habeas petition with prejudice under the fugitive disentitlement doctrine.

On May 6, 1997, the Ninth Circuit issued a published opinion explaining and expanding on its November 21, 1995 order releasing

184. In re Extradition of Russell, 805 F.2d 1215 (5th Cir. 1986).
186. See the discussion of these cases in Part I, supra note 10.
187. Order Denying Rehearing With Suggestion for Rehearing En Banc, Parretti (No. 95-56586) (9th Cir. filed Jan. 10, 1996); see also Parretti, 112 F.3d at 1367 n.7.
188. In re Extradition of Parretti (No. 95-CV-81) (C.D. Cal. Filed Nov. 29, 1995).
189. Id.
190. Id.
191. Id.
192. Id.
195. Parretti, 112 F.3d at 1380 n.21.
196. Id. at 1368 n.6. On the fugitive disentitlement doctrine, supra note 112.
B. The Parretti Decision

1. The Requisite Probable Cause Showing

Before turning to the merits of the government's argument, the Ninth Circuit acknowledged that this argument raised a constitutional question of "first impression." The panel looked to cases from the Second, Seventh, and Fifth Circuits and found that those courts had avoided answering the constitutional question by interpreting the

197. Parretti, 112 F.3d at 1363.
199. Order Granting Petition for Rehearing En Banc, Parretti (No. 95-56586) (9th Cir. filed Oct. 2, 1997).
200. See Government's Petition for Rehearing En Banc, filed June 19, 1997, Parretti, (No. 95-56586) and Order Granting Petition for Rehearing En Banc, Parretti (No. 95-56586) (9th Cir. filed Oct. 2, 1997); Parretti, 112 F.3d at 1363 (reheard en banc on Dec. 18, 1997).
201. Parretti, 112 F.3d at 1372. As a predicate matter, the panel rejected the government's argument that the court was barred by the rule of judicial non-inquiry from making an independent evaluation of the sufficiency of the foreign government's charging procedures. The panel observed that the rule of judicial non-inquiry was meant to prevent the courts from endeavoring to decide such non-justiciable questions as the general fairness of a foreign country's legal and penal systems, or the motive of the requesting country in seeking extradition. "The rule of judicial non-inquiry was not designed to relieve the federal courts of our 'unflagging obligation' to decide actual cases or controversies that come before us." Id. at 1369-70 (citation omitted). The court stressed that an inquiry into whether the foreign charge was sufficiently supported by evidence establishing probable cause was a fully justiciable one. "[T]he government invites us to extend the rule of judicial non-inquiry to the paradigmatic justiciable question whether an arrest warrant has been issued in violation of the Fourth Amendment. We respectfully decline the government's invitation." Id. at 1369. To hold otherwise, the panel noted, would amount to giving full faith and credit to a foreign charging document and to "clothe foreign arrest warrants with a presumption of compliance with the Fourth Amendment." Id. at 1371.

It strikes us as curious that the government asks us to give full faith and credit to a foreign charging document at the provisional arrest stage even though we do not give it full faith and credit for probable cause purposes at the extradition hearing stage . . . . Just as we do not accept the foreign charging document as a substitute for the customary showing of probable cause at the extradition hearing, we see no reason to accept it as a substitute for a judicial determination of probable cause at the provisional arrest stage.

Id.

202. See Caltagirone v. Grant, 629 F.2d 739 (2nd Cir. 1980); Sahagian v. United States, 864 F.2d 509 (7th Cir. 1988); In re Extradition of Russell, 805 F.2d 1215 (5th Cir. 1986).
relevant treaties in those cases to require an evidentiary showing of probable cause before the issuance of a provisional arrest warrant.\textsuperscript{203}

However, neither the article [of the French treaty] authorizing provisional arrests, nor any other provision of the French treaty can fairly be so interpreted ... [I]n stark contrast to the treaties with Italy [\textit{Caltagirone}] and Spain [\textit{Sahagian}], ... the treaty with France contains no 'further information' requirement, nor any other language that might fairly be interpreted as requiring a showing of probable cause as required by the Fourth Amendment.\textsuperscript{204}

The panel then turned to the enabling statute:

We could also avoid reaching the Fourth Amendment question by interpreting 18 U.S.C. Section 3184, which authorizes the issuance of arrest warrants pursuant to extradition treaties, as requiring a traditional showing of probable cause. Unfortunately, like the French treaty, Section 3184 cannot fairly be so read. Section 3184 allows an arrest warrant to issue on the basis of a "complaint . . . charging [the person to be arrested] with having committed" an extraditable offense. Once again, all Section 3184 requires is a showing that the fugitive has been charged with committing an extraditable crime. Section 3184 does not require an independent judicial determination of probable cause to believe the fugitive committed the offense.\textsuperscript{205}

The court concluded, therefore, that it was "obligated to reach the constitutional question that the Second, Fifth, and Seventh Circuits managed to avoid."\textsuperscript{206}

The panel then rejected the government’s argument that provisional arrests are different from other arrests in that they are for a "limited purpose" of holding an individual charged with an extraditable crime for a limited time so that the foreign government can gather and transmit

\textsuperscript{203} In keeping with time-honored precepts of judicial restraint, we too could avoid the constitutional question raised by the government’s argument if the treaty with France, like the treaty with Italy considered in \textit{Caltagirone} and the treaty with Spain considered in \textit{Sahagian}, could fairly be interpreted as requiring a showing of probable cause in addition to the existence of a foreign arrest warrant.

\textit{Parretti,} 112 F.3d at 1372–73.

\textsuperscript{204} \textit{Id.} at 1373.

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} \textit{Id} at 1375.
the evidence necessary for extradition. The court found that the government had failed to provide any "cogent reason" why the limited purpose of a provisional arrest warrant should mean that the Fourth Amendment can be interpreted to allow for the provisional arrest of Parretti without an independent determination of probable cause:

To repeat, the Warrant Clause states, "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation" . . . . The clarity of this language allows for no exceptions, regardless whether the government's purpose in making the arrest is to enforce treaties or our own domestic laws . . . . When a person is arrested and detained, he is deprived of his most precious liberty, freedom from restraint by the government . . . . The severity of that deprivation does not vary with the government's purpose in making the arrest. Even if it did, the command of the Warrant Clause is immutable.

The court therefore rejected what it called "the government's invitation to carve out an exception to the probable cause requirement of the Warrant Clause" for provisional arrests pursuant to treaties. The court also rejected the government's "practical" argument that to require it to make a full showing of probable cause for a provisional arrest warrant would be to require "the complete extradition showing at the provisional arrest stage, which would make the later extradition hearing redundant." This argument had "no merit" because the difference between the provisional arrest and the extradition hearing does not lie in the requirement of probable cause: "The difference lies in the fact that before extraditability may be certified, the fugitive is entitled to a hearing . . . at which he may introduce evidence and raise certain affirmative defenses."

The court also rejected the government's contention that a probable cause requirement for the issuance of a provisional arrest warrant would create a "practical impossibility" because fugitives would be able to flee before the requesting government could gather and transmit the evidence required for extradition. First, the court noted that because some extradition treaties, including the ones discussed in Caltagirone and Sahagian, already require a probable cause showing before provisional arrest, it must be possible to comply with such a requirement. Second,

207. Id.
208. Id.
209. Id.
210. Id. at 1376.
211. Id.
212. Id. at 1377. In his Ninth Circuit brief, Parretti had argued that the government's assertion of practical impossibility did not apply in this case because he had notified two
the panel said that "the hurdles created by the Fourth Amendment in the path of treaty enforcement are no different from the hurdles created for our own law enforcement officers. . . ."213

The court thus rejected the government's argument that a warrant for provisional arrest may constitutionally be issued on the existence of a foreign arrest warrant charging the fugitive with having committed extraditable crimes but unsupported by evidence establishing probable cause.214 Instead, the court held that both the extradition treaty with France and Section 3184 violated the Fourth Amendment to the extent they purported to allow for the issuance of a provisional arrest warrant without an independent judicial determination of probable cause.215

2. Proof of Probable Cause

The court then turned to whether there had been any proof of probable cause justifying the issuance of Parretti's arrest warrant. Parretti had contended that the arrest warrant was issued on the basis of "no evidence whatsoever."216 He had argued that the arrest warrant had issued solely on the basis of the allegations contained in the French arrest warrant, and that "allegations are not fact."217 The panel agreed with him, finding that the government had failed to make the evidentiary showing required to obtain a provisional arrest warrant:

In sum, Parretti is correct that the government's probable cause showing consisted of nothing more than naked allegations. They may have been relayed to the State Department by a reliable source, but those allegations without supporting affidavits or other competent evidence provide no basis for a judicial determination whether there is probable cause to believe that Parretti committed an extraditable crime. In essence, the government is

different nations of his travel plans well in advance of coming to the United States, and that this case did not involve an emergency because the charges had been under investigation since September, 1991, with the warrant being issued on May 3, 1995. "There is no doubt that if the French officials who are responsible for translating and preparing the necessary extradition papers were locked in the Metropolitan Detention Center, and could only be released after the papers were completed, that paperwork would have been done long ago." Emergency Motion Under Circuit Rule 27-3 at 14-15, Parretti (CV 95-7593-JMI) (C.D. Cal.).

213. Parretti, 112 F.3d at 1377.
214. Id. at 1377-78.
215. Id.
216. Id. at 1378.
217. "According to the information and belief allegations of the AUSA's Complaint, the facts alleged in the French arrest warrant were obtained from 'investigations' by unidentified French authorities and from unidentified experts, shareholders, and employees . . . . The government presented no affidavits, deposition testimony or other competent evidence." Id.
asking us to equate the existence of a foreign arrest warrant with a showing of probable cause.\textsuperscript{218}

The court rejected the government’s claim that it was sufficient to relay the factual findings of the French magistrate on information and belief. Without finding that the French magistrate was inherently unreliable, the panel embraced Parretti’s argument that the complaint was constitutionally deficient because it failed to indicate the sources of the information presented. Thus, even if the information in the complaint might indeed turn out to be reliable, the court was unwilling to make that leap of faith without some understanding and corroboration of the source of that information.\textsuperscript{219} The court rejected as “misplaced” or “miscite[d]” the government’s reliance on \textit{Yordi}, \textit{Russell}, and \textit{Grin}.\textsuperscript{220}

In holding that Parretti’s arrest violated the Fourth Amendment because the government had failed to make the necessary evidentiary showing of probable cause, the court left unanswered the question of just how much evidence is enough to establish probable cause to sustain the issuance of a provisional arrest warrant and in what form that evidence should be presented to the magistrate. The government would

\begin{itemize}
  \item \textsuperscript{218} \textit{Id.} at 1379.
  \item \textsuperscript{219} \textit{Id.} at 1379–80.
  \item \textsuperscript{220} In \textit{Yordi},
  \begin{quote}
    \textit{I}f the magistrate had before him ample evidence consisting of the record of the foreign judicial proceedings that had resulted in the foreign warrant for Yordi’s arrest, including the testimony of witnesses . . . . Thus the magistrate was able to determine ‘that the prosecution against the accused was based on real grounds, and not upon mere suspicion of guilt’ . . . . It is true, as the government says, that the \textit{Yordi} Court rejected the argument that an extradition complaint must be sworn to by persons having personal knowledge of the facts alleged. However, the Court did so in order to acknowledge that evidence used to support probable cause findings could take the form of ‘depositions, warrants, or other papers offered in evidence, . . . if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended.’
  \end{quote}

  The panel similarly observed that in \textit{Russell} the magistrate had before him sworn testimony, and that the statement in \textit{Grin} that “[a]ll that is required . . . is that a complaint shall be made under oath” was qualified by that Court’s explanation that the complaint “may be made by any person . . . having knowledge of the facts, or, in the absence of such person, by the official representative of the foreign government based upon depositions in his possession. . . .” \textit{Id.} (quoting \textit{Grin} v. \textit{Shine}, 187 U.S. 181, 193 (1902)).

  In citing these cases for the proposition that probable cause was established by the AUSA’s information and belief allegations contained in the French arrest warrant, the government effectively returns to the theory that lies at the core of its argument: that the Fourth Amendment allows a warrant for ‘provisional arrest’ to be issued for treaty purposes without an evidentiary showing of probable cause.

  \textit{Id.} at 1379–80.
\end{itemize}
now have to present more than an underlying warrant from a foreign
government; but the question remained how much of a record would be
enough and upon what sources the government could rely in making
such a record. The court noted only that the government had "presented
no affidavits, deposition testimony, or other competent evidence" that
could have provided Judge Reichman with a substantial basis for con-
cluding that probable cause existed.221

3. Due Process and the Presumption against Bail

In addition to his claims based on the Fourth Amendment, Parretti
had argued that his detention without bail prior to his extradition hearing
deprived him of liberty in violation of the Fifth Amendment guarantee
to due process.222 Parretti based his argument on the fact that the district
court denied bail even after refusing to find that he posed a risk of
flight.223 In denying Parretti bail, the district court relied on a finding
that he had failed to demonstrate that there were special circumstances
warranting bail in his case.224

The Ninth Circuit majority concluded that it was not bound by
Wright v. Henkel and its progeny because no court had actually
considered whether due process might foreclose application of the
special circumstances test.225 Yet, as the government pointed out later in

221. Id. at 1378.
222. Id. Under Article IV of the U.S.-France Treaty, a requesting country has forty days
after a provisional arrest warrant is executed to submit a formal request for extradition. As a
result, a person arrested on a provisional arrest warrant may be jailed for forty days, even
without a showing that he is a flight risk. Treaty of Extradition between the United States and
France, supra note 122, art. IV.
223. At Parretti's bail hearing, the district court said "I can't say he's a flight risk ... I
don't see him as a flight risk." The court nevertheless denied bail and said, "Mr. Parretti,
unfortunately, must remain in custody for the remainder of the 40 days." Emergency Motion
Under Circuit Rule 27-3 at 27, Parretti, (CV 95-7593-JMI) (C.D. Cal.).
225. The government, apparently conceding that no court has ever discussed or even
alluded to the due process question, responds that Wright v. Henkel ... and its
progeny have held sub silentio that the "special circumstances" standard is con-
stitutional by repeatedly applying it to deny bail in extradition cases. Specifically,
the government contends that "[i]t cannot be presumed that this court's and the Su-
preme Court's earlier decisions ignored due process concerns in adopting and
applying the 'special circumstances' standard." Pet. For Reh'g at 12. Not surpris-
ingly, the government cites no authority in support of this startling proposition. It
is a time honored principle of stare decisis that "[q]uestions which merely lurk in
the record, neither brought to the attention of the court nor ruled upon, are not to
be considered as having been so decided as to constitute precedents."

Parretti, 112 F.3d at 1381–82 (quoting Webster v. Fall, 266 U.S. 507, 511 (1925), and citing
its Petition for Rehearing and Suggestion for Rehearing En Banc, in *Wright* itself the petitioner had lodged a due process challenge to the court's denial of bail:

In *Wright* itself, however, the petitioner claimed that "the denial of the right to give bail . . . constitutes a deprivation of liberty without due process of law." . . . Accordingly, in the very case that established the special circumstances test, the Court considered and rejected a due process argument in the context of bail pending extradition.\(^\text{226}\)

The *Parretti* court concluded that earlier cases upholding detention without a showing of flight risk had been based exclusively on the need to ensure safety of the community:\(^\text{227}\)

Both *Parretti* and the government rely on *United States v. Salerno*. . . . In *Salerno*, the Supreme Court rejected a due process challenge to the Bail Reform Act of 1984 . . . which authorized pre-trial detention without bail upon a showing that no release condition would reasonably assure the safety of the community. After declaring that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," the Court held that the safety of the community was a sufficiently "legitimate and compelling" government interest to justify the "carefully limited exception" carved out by Congress in the Bail Reform Act of 1984. . . . Such carefully limited exceptions are permitted only when the government’s interest is "sufficiently weighty" to subordinate "the individual’s strong interest in liberty" to "the greater needs of society."\(^\text{228}\)

The court declined to “carve out another exception to the rule that ‘liberty is the norm’ in order to deprive extraditees of their personal liberty pending extradition hearings."\(^\text{229}\)

As the government puts it, detention is necessary to “avoid any risk that the extraditee may flee [before an extradition hearing]” . . . . In other words, the government maintains that its interest

\(^{226}\) Government’s Petition for Rehearing with Suggestion for Rehearing En Banc at 7–8, *Parretti* (No. 95-56586) (citations omitted).

\(^{227}\) *Parretti*, 112 F.3d at 1383. The panel observed that a review of detention jurisprudence by *Salerno* “demonstrates that the need to protect the community from danger was the common thread running through all of the cases permitting the pre-trial detention of persons who are not found to be flight risks.” *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 748–49 (1987)).

\(^{228}\) *Id.* (quoting *Salerno*, 481 U.S. at 748–49).

\(^{229}\) *Id.* at 1382.
in fulfilling its treaty obligations is so compelling that it justifies detention pending every extradition hearing regardless of how negligible the risk of flight.\textsuperscript{230}

While the court acknowledged that the government had important interests in enforcing extradition treaties, the majority found that those interests do not justify automatic detention without bail.\textsuperscript{231} "The problem with the government's argument is the implicit premise that its interest in the enforcement of extradition treaties is materially different from and greater than its interest in the enforcement of our own criminal laws. . . . The Government fails to suggest any difference, and we can fathom none."\textsuperscript{232} The court noted that had Parretti been arrested on domestic fraud charges, absent a showing that he was dangerous or that he posed a flight risk, "it would be unthinkable that he could be held without bail pending trial."\textsuperscript{233}

[T]he government asks us to break new constitutional ground in holding that Parretti's "strong interest in liberty," \textit{Salerno}, 481 U.S. at 750 . . . may be "subordinated," \textit{id.}, to the government's interest in avoiding the risk of being unable to carry out its treaty obligations, however attenuated that risk might be. On that logic, the government would never have to prove that an extraditee was a flight risk. All extraditees could be detained without bail before their extradition hearings regardless of the magnitude of the risk of flight. Such a far-reaching exception to the principle that "liberty is the norm" cannot be justified by the government's asserted interest in taking no risk that it will be unable to deliver an extraditee if he is found to be extraditable. Enforcement of our own laws, which, after all, is the governmental interest served by extradition treaties, does not justify pre-trial detention absent a finding of flight risk or dangerousness, and we see no reason, and the government suggests none, why its interest in fulfilling its treaty obligations is different from or any more compelling than its interest in enforcing our own criminal laws. Just as the government's asserted interest in

\begin{itemize}
  \item \textsuperscript{230} \textit{Id.} (quoting Government's Response to Habeas Petition).
  \item \textsuperscript{231} Parretti himself acknowledged that the government does "have an interest in making sure it can fulfill its obligation to surrender the person if extradition is determined to be appropriate under the Treaty." Emergency Motion under Circuit Rule 27-3, at 28, \textit{Parretti}, (CV 95-7593-JMI) (C.D. Cal.) (citation omitted). But Parretti argued that this interest can be protected by "making bail available to persons who do not pose a risk of flight, and denying bail to those who do." \textit{Id.}
  \item \textsuperscript{232} \textit{Parretti}, 112 F.3d at 1383.
  \item \textsuperscript{233} \textit{Id.}
\end{itemize}
avoiding all risk that a defendant will not appear for trial is not sufficient to justify pre-trial detention, the government's asserted interest in avoiding all risk that an extraditee will not appear for an extradition hearing cannot justify pre-hearing detention.\footnote{234}

The panel then held that "until such time as an individual is found to be extraditable, his or her Fifth Amendment liberty interest trumps the government's treaty interest unless the government proves to the satisfaction of the district court that he or she is a flight risk."\footnote{235} Thus, the panel placed the burden of showing flight risk on the government.

III. SOME POTENTIAL CONSEQUENCES OF THE RECENT DECISIONS

The government responded to the majority's holding in Parretti with a petition for rehearing en banc. This petition suggested some of the potential implications the Parretti decision will have for international policy and domestic jurisprudence. The government predicted, for example, that the Parretti ruling, if allowed to stand, would have devastating consequences for the conduct of the nation's international relations:

The resulting "safe harbor" for international fugitives in this circuit will adversely impact the Secretary of State's ability to comply with treaty obligations and in turn negotiate the arrest and surrender by foreign countries of fugitives from U.S. charges. If even a fraction of foreign fugitives flee, it will significantly compromise the enforcement and negotiation of foreign agreements.\footnote{236}

During the Parretti en banc hearing, the government argued that the three-judge panel had imposed unprecedented and unwarranted barriers to extradition and that these barriers would impede the apprehension of

\footnote{234. Id. at 1384.}
\footnote{235. Id. One commentator who has advocated abandoning the special circumstances doctrine in favor of a risk-of-flight test has argued that the burden should nevertheless remain with the arrestee, who should be made to demonstrate that he is not a flight risk. See Hall, supra note 18, at 615–16:

Given that the international extradition process is expressly aimed at persons who have fled the criminal justice process at least once, it is reasonable to require that the defendant show that he will not flee again. Practical considerations of proof also support placing the burden on the accused . . . . The government . . . typically has far less information about the suspect than it would at a comparable time in a domestic criminal case. If it is likely the defendant will be in a better position to bring forth information and prove the appropriateness of release on bail.

236. Government's Petition for Rehearing En Banc at 2, Parretti (No. 95-56586).}
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fugitives. Noting France's recent decision not to extradite convicted murderer Ira Einhorn to the United States, the government's lawyer implied that a diplomatic quid pro quo is necessary to keep foreign policy on course and to keep open the flow of fugitives arrested abroad and wanted on criminal charges here.

In the government's view, the Due Process Clause does not compel the Ninth Circuit's ruling because the presumption against bail is justified by the common sense notion that a person who has refused voluntarily to submit to a foreign government's judicial system poses a risk of flight. The presumption is also justified by the government's heightened interest in avoiding flight by foreign fugitives:

> Flight not only renders the government unable to comply with its treaty obligation in the case at issue, but may also have wide-ranging effects on foreign relations by impacting the government's ability to convince foreign governments that it is worth their while to enter into agreements with the U.S.

The government further argued "that the 'special circumstances' test for granting bail adequately addresses those situations in which an extraditee's liberty interest so outweighs the government's interest that continued detention is not warranted."

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238. Audiotape of the argument before the en banc panel, Parretti, Dec. 18, 1997 (audiotape on file with author).

239. Government's Petition for Rehearing with Suggestion for Rehearing En Banc at 2, Parretti (No. 95-56586). Judge Reinhardt recognized this point in his concurring opinion in Parretti, when he took issue with Judge Norris' view that the government's interest in upholding its treaty obligations in extraditions is really nothing more than a desire to secure reciprocal help from other countries in aid of domestic law enforcement.

> I disagree that the government's interests in fulfilling its treaty obligations stems solely from its interest in domestic law enforcement. The failure of a country to deliver on its promises can have many unpredictable consequences quite apart from the effects on its ability to secure the assistance of others when it is the one that desires to obtain or exercise the right to extradite. It is important to the nation's overall ability to work effectively in the international arena that it be thought of as a country that keeps its commitments.

Parretti, 112 F.3d at 1390.

240. Government's Petition for Rehearing with Suggestion for Rehearing En Banc at 3, Parretti (No. 95-56586). The government pointed out that the court essentially applied to extradition proceedings the standards of the Bail Reform Act, 18 U.S.C. § 3141 (1994). Courts have held, however, that the Act is inapplicable in the extradition context. See, e.g., Kamrin v. United States, 725 F.2d 1225, 1227-29 (9th Cir. 1984); In re Heilbronn, 773 F. Supp. 1576, 1578 (W.D. Mich. 1991).
In addressing the Fourth Amendment issue, the government was adamant about the far-reaching implications of the *Parretti* decision: "[T]he requirement of a traditional probable cause showing is at odds with the limited purpose of provisional arrests, denies appropriate deference to the foreign charging document, and intrudes on the Secretary of State's exclusive discretion to inquire into the nature of foreign criminal processes." The government acknowledged that the Fourth Amendment is implicated by a provisional arrest but maintained that the probable cause inquiry should focus on the reason for that arrest, asking only whether there is a sufficient basis to initiate an extradition hearing with a showing of probable cause to believe that the extraditee is named in a validly issued foreign warrant charging extraditable crimes.

By requiring an evidentiary showing for a foreign judicial official's recitation of allegations and facts, the government argued, *Parretti* will unnecessarily diminish the government's ability to use provisional arrest warrants:

Extradition treaties authorize provisional arrest as a means of allowing temporary detention while the foreign country prepares an extradition packet containing the very evidentiary support that the panel now requires to justify provisional arrest. Eliminating the ability to arrest on less than a full evidentiary showing effectively ensures that some fugitives discovered in the U.S. will be able to flee before the foreign country can assemble, translate, and transmit evidence needed to satisfy the requisite showing.

In the *Parretti* case, for example, the evidence offered at the extradition hearing included volumes of documents, most of which had been translated from French into English. According to the government, requiring the same evidentiary showing of probable cause at the provisional arrest stage as at the extradition hearing itself would result in a "practical impossibility" in many cases, including *Parretti*'s.

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242. Id.
243. Id. at 17.
244. Id. at 18. In a telephone interview, George Cardona, the AUSA who handled the *Parretti* extradition case, said: "There was a huge practical problem in getting all of the documents translated. We had documents from Luxembourg, Germany, Spain, Italy, Finland, and France, all of which had to first be translated into French, and then into English." Telephone Interview with George Cardona, AUSA (July 1, 1997).
245. According to the panel, the evidentiary showing at the provisional arrest stage and at the extradition hearing must be the same; it is only the fact that an extraditee
Apart from the potential consequences predicted by the government in *Parretti*, the recent decisions questioning the constitutionality of provisional arrests and denial of bail have raised and left unanswered many questions which have already begun to plague federal prosecutors and officials at the Department of Justice. Some of these consequences became clear in the first extradition matters to be heard after the publication of *Parretti*. For example, in one extradition case in which the fugitive was arrested pre-*Parretti* on a provisional warrant application extremely similar to *Parretti*’s, the government suddenly found itself post-*Parretti* facing a number of *Parretti*-based motions, including a motion for the fugitive’s immediate release. As in *Parretti*, the Government had not submitted foreign affidavits or deposition testimony in support of the Complaint. The court was able to deny the motion and refrain from ruling on the legality of the arrest because in the interim since the fugitive’s provisional arrest the requesting country (Austria) had transmitted the full extradition package, including deposition testimony and documentation of probable cause, and the government had filed an “amended complaint,” obtained a second warrant, and re-arrested the accused in compliance with the requirements of *Parretti*. In yet another case, which began after *Parretti* was decided, the Government delayed its application for a provisional warrant for several weeks in order to gather and translate enough documentation to support a finding of probable cause. The arrest was ultimately accomplished because the fugitive stayed put during the time the government was assembling the documentation. However, had he been in motion, or had he

can present defenses at the extradition hearing that makes the two procedures different. Accordingly, it could indeed have been a 'practical impossibility' to gather the evidence necessary under the panel's holding to arrest Parretti while he remained in the U.S.

Government’s Petition for Rehearing with Suggestion for Rehearing En Banc at 18, *Parretti* (No. 95-56586).

246. The author has conducted extensive telephone interviews with federal prosecutors involved in the *Parretti* case and appeal, and with various authorities from the OIA. Pursuant to Department of Justice policy, most of these prosecutors and officials asked not to be named in this article.

247. *In re Extradition of Michael Peter Spitzauer* (No. 97-009M-01) (W.D.Wash. 1997).

248. In *Spitzauer*, the effect of *Parretti* was equally dramatic in terms of the bail question. Whereas before *Parretti* Mr. Spitzauer's counsel had not even contested his detention, after the decision Spitzauer moved for a bail hearing. The hearing lasted through two days of testimony on whether Mr. Spitzauer was a flight risk before the court finally reordered him detained. *Id.*

learned of the extradition request, the government would not have been able to stop him from fleeing.\textsuperscript{250}

Even before \textit{Parretti}, the government responded to the Second Circuit's decision in \textit{Caltagirone} by amending its extradition treaty with Italy to remove the "further information" requirement for arrest. The amended treaty "removes the impediment to provisional arrest under the present treaty...and brings the provisional arrest article into accord with those in the great majority of our treaties."\textsuperscript{251}

The government's response to \textit{Caltagirone} has been to amend extradition treaties to remove the "further information" language whenever the opportunity has arisen. According to the OIA, only our extradition treaties with the United Kingdom, Canada, Germany, Israel, Japan, and Spain now contain provisions for "further information."\textsuperscript{252} This language was removed because the government believed that \textit{Caltagirone} was wrongly decided, and the government did not want the door to be open to the claim that the government must demand such "further information" as to probable cause before provisional arrests can be made.\textsuperscript{253}

The implications of this trend toward according greater constitutional protections to fugitives fighting extradition from the United States are dramatic: according to the OIA, the government now has more than ninety international extradition treaties which do not contain the "further information" or probable cause language.\textsuperscript{254} The judicial trend toward requiring probable cause for provisional arrests may inevitably necessitate amendment of those treaties to include such language.


\textsuperscript{252} Telephone Interview with John E. Harris, Deputy Director of the OIA, U.S. Department of Justice, August 18, 1997.

\textsuperscript{253} The Italian treaty negotiated in 1973 contained the 'further information' language, but that language was removed during the 1983 treaty negotiations with Italy. The language was removed precisely because the government did not want to appear to agree with the proposition that probable cause is required for provisional arrest. The government thought that \textit{Caltagirone} was wrongly decided, so we did not want to make it look like we thought there was a constitutional right to probable cause for provisional arrests.

\textit{Id.}

\textsuperscript{254} \textit{Id.}
IV. EXTRADITION LAW AT THE CROSSROADS: A SUGGESTED APPROACH TO EVALUATING THE TREND TOWARD EXTENDING GREATER CONSTITUTIONAL PROCEDURAL PROTECTIONS TO FUGITIVES FIGHTING EXTRADITION FROM THE UNITED STATES

If Parretti and its predecessors communicate a single message, it is that U.S. law concerning arrest and detention in extradition is at a crossroads. Behind us lie more than a hundred years of caselaw and some ancient shibboleths which have justified denying extradition arrestees some important procedural safeguards that are given to defendants in domestic criminal cases. What lies ahead will depend on whether those shibboleths or assumptions stand up to renewed scrutiny. To the extent that they do not stand up, the recent trend is likely to continue, and extradition fugitives are likely to win even more constitutional procedural protection. If the old justifications for treating extraditions as a world apart are still valid, however, or if new ones can be found, the constitutional ‘movement’ in extradition law may not be able to travel much further.

Guidance and leadership from the Supreme Court are overdue. The Court has not addressed the bail issue in extradition since Wright v. Henkel in 1903, and has not heard a case addressing the standards for the issuance of provisional warrants in nearly as long. Certainly after Parretti—and arguably after Caltagirone, Russell, Sahagian, and Williams—the circuits have been split on the issue of the government’s probable cause burden in support of a provisional arrest warrant. On the bail issue, the cases applying the special circumstances doctrine have been consistent only in their inconsistency, even before Parretti threw out the doctrine entirely. In reviewing Parretti the Court could address both issues.

If and when it takes up these questions, the Court—or any other court called upon to do so—should examine closely not only the old assumptions for treating extraditions differently, but also several key assumptions on which the three-judge panel in Parretti relied.

The first such assumption is that the Warrant Clause of the Fourth Amendment cannot and does not allow for a varying standard of probable cause depending on the interests at stake. As the Parretti court stated:

To repeat, the Warrant Clause states, “[N]o Warrants shall issue, but upon probable cause, supported by Oath or Affirmation”. . . .The clarity of this language allows for no exceptions, regardless of whether the government’s purpose in making the arrest is to enforce treaties or our own domestic laws . . .
command of the Warrant Clause that no warrant issue but upon probable cause is immutable.\textsuperscript{253}

Whatever the appeal of this view, it is not borne out by practice or history. Warrants have been permitted to issue upon varying showings, for varying purposes. The government has been able to obtain administrative search warrants on showings not of "probable cause," but merely of "reasonable belief or suspicion."\textsuperscript{256} The government did not bring this to the court's attention in \textit{Parretti}. Moreover, federal law has long permitted the arrest and detention of certain persons who are not even charged with committing crimes—specifically, material witnesses—in order to assure that they will be present to testify in criminal trials.\textsuperscript{257} While a warrant for the arrest of a material witness, like a criminal arrest warrant, must be based upon a showing of probable cause, the party seeking the warrant has only been required to show two simple things: the testimony of the witness is material, and it may become impracticable to secure his presence by subpoena.\textsuperscript{258} This is really just a way of

\begin{itemize}
\item 255. \textit{Parretti} v. United States, 112 F.3d 1363, 1375 (9th Cir. 1997).
\item 256. \textit{Marshall} v. Barlow's, Inc., 436 U.S. 307, 320–21 (1978); see Michigan v. Clifford, 464 U.S. 287, 294–95 (1984) (administrative warrant may issue on showing that fire was of undetermined origin, search would not impinge on victim's privacy, and search would be executed at reasonable and convenient time); Martin v. International Matex Tank Terminals-Bayonne, 928 F.2d 614, 623–25 (3d Cir. 1991) (administrative search warrant may issue on showing of reasonable belief or suspicion that OSHA violated); \textit{In re Kelly-Springfield Tire Co.}, 13 F.3d 1160, 1166 (7th Cir. 1994); International Molders' and Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 553 (9th Cir. 1986) (administrative search warrant may issue on showing of reasonable likelihood that establishment contained illegal aliens; specific description of every suspected alien not required); \textit{Tri-State Steel Constr., Inc. v. Occupational Safety & Health Review Comm'n}, 26 F.3d 173, 177 (D.C. Cir. 1994) (administrative search warrant may issue on showing of specific evidence of existing OSHA violation).
\item 257. In relevant part, the material witness statute provides:
\begin{quote}
If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of [the Bail Reform Act].
\end{quote}
\end{itemize}

In addition to material witness warrants, it is interesting to compare provisional arrest warrants with another kind of arrest warrant which federal courts issue routinely to capture fugitives from state prosecution, under the statute penalizing "Unlawful Flight to Avoid Prosecution" (or "UFAP"), 18 U.S.C. § 1073 (1994). That statute provides in relevant part: "Whoever moves or travels in interstate or foreign commerce with intent . . . to avoid prosecution . . . under the laws of the place from which he flees . . . [for] a felony . . . shall be
saying that his presence is necessary for a judicial proceeding, and it cannot be secured in any other way. The same can be said of a provisional arrest warrant—that the fugitive is someone whose presence is necessary for a judicial proceeding, and that his provisional arrest is the only way to secure his presence until an evidentiary showing of probable cause can be made. In Parretti, the Government did not make this comparison.

While an obvious difference is that a material witness will not ordinarily face charges after his arrest, this does not alter the fact that the two standards both require findings of "probable cause," but probable cause to believe that very different sorts of events have occurred. One standard requires a showing that a crime has been committed and that the defendant committed it. The other requires a showing that a witness' testimony is material and unobtainable unless he is arrested. Why, then, can the Fourth Amendment not allow a warrant to issue on a showing of probable cause to believe that yet a third kind of event has occurred, namely, that a fugitive is charged abroad with an extraditable crime? The answer depends on whether the government's interests are of a sufficient magnitude to justify arrest.

The second untested assumption of the Parretti panel is that the governmental interests at stake in extraditions are no greater than the interests at stake when the government seeks to arrest and detain criminals in domestic cases. As the Parretti panel stated it:

Enforcement of our own laws, which, after all, is the governmental interest served by extradition treaties, does not justify...
pre-trial detention absent a finding of flight risk or dangerousness, and we see no reason, and the government suggests none, why its interest in fulfilling its treaty obligations is different from or any more compelling than its interests in enforcing our own criminal laws.\footnote{260}

This assumption, too, is subject to challenge. The federal government's interests in international comity and mutual treaty compliance are arguably greater than its interests in purely domestic law enforcement. These heightened interests might justify a denial of some procedural protections to international fugitives in extraditions in a way that could not be similarly justified in a domestic criminal matter. The case can certainly be made that in extradition cases the government has interests that extend well beyond mere reciprocity. These interests include peace and commerce with other nations. In Parretti, the government could have explored at much greater length the various ways in which its interests in treaty compliance might sometimes surpass its interests in domestic law enforcement. It did not. A reviewing court should do so.

Third, in its holding on the bail issue, the Parretti court assumed that it was not bound by the Supreme Court's ruling in Wright v. Henkel because no court had actually considered whether due process might foreclose the denial of bail to an arrestee who did not pose a risk of flight or a danger to the community.\footnote{261} On this point the panel's assumption may not be correct. In Wright itself the petitioner claimed that "the denial of the right to give bail... constitutes a deprivation of liberty without due process of law."\footnote{262} In the very case that established the special circumstances test, the Court considered and rejected a due process argument in the context of bail pending extradition.

Moreover, the panel appears to have clearly erred in asserting that "the only governmental interest that has ever been deemed sufficiently weighty to justify pre-trial or pre-hearing detention without bail absent a finding of flight risk is the safety of the community."\footnote{263} As has just been mentioned, federal courts routinely order the detention of material wit-

\footnote{260. Parretti v. United States, 112 F.3d 1363, 1384 (9th Cir. 1997). In his concurring opinion, Judge Reinhardt described the government's interest somewhat differently:}

\footnote{The government frequently has a significant interest in seeing that criminals who have fled to, or happen to be in, this country are punished for their foreign crimes—if only because those crimes may have a substantial effect, direct or indirect, on American interests both at home and abroad.}

\footnote{Id. at 1390.}

\footnote{261. Id. at 1382.}

\footnote{262. Wright v. Henkel, 190 U.S. 40, 43 (1903).}

\footnote{263. Parretti, 112 F.3d at 1383.}
nesses in criminal prosecutions—persons who are not even charged with crimes—for no other reason than the impracticability of securing the testimony of these witnesses by subpoena. Pre-trial detention has also been ordered for defendants who have engaged in obstruction of justice, or who, it is feared, will otherwise tamper with a witness or with evidence. Some of these situations may implicate the safety of the community, but not all of them do. The government did not alert the Parretti court to either of these justifications. Again, however, a reviewing court should consider them.

Furthermore, even if one is inclined to abandon the special circumstances test and replace it with a risk-of-flight analysis, one should not necessarily assume, as the three-judge panel in Parretti appears to have done, that the presumption against bail should also be abandoned, and that the burden of proof should fall upon the government. Acting on this assumption may be a proverbial example of throwing out the baby with the bathwater. The special circumstances doctrine and the presumption against bail are two very different things and are not inexorably intertwined. It is possible to dispense with the former while preserving the latter. The case can certainly be made that a rebuttable presumption against bail in an extradition case—in which, after all, the fugitive has presumptively fled already once—may be as fitting as other presumptions against bail that are already codified in our domestic laws. One example is the rebuttable presumption in the Bail Reform Act that certain defendants in drug cases punishable by ten or more years in prison should be detained. To rebut the presumption, the fugitive would be permitted to satisfy the court, as Mr. Parretti did, that he is not a flight risk.

One particularly troubling aspect of the Parretti panel's ruling is its lack of deference to the executive branch in the foreign affairs arena. Courts have traditionally shown considerable deference to the State Department in extradition cases, even when deciding justiciable questions that are fully within the purview of the courts. The fact that a question is a justiciable one—such as the "paradigmatic justiciable question" whether a warrant application is supported by probable cause—does not

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266. For the view that the burden of disproving risk of flight should rest with the fugitive, see Hall, supra note 16, at 615–16. See also Mary Coombs, Case Note, 92 AM. J. INT’L L. 91, 94 (1998).

267. For a comprehensive discussion of this tradition of deference, see HENKIN, supra note 181; KÖH, supra note 181; FRANCK, supra note 181.

268. Parretti, 112 F.3d at 1369.
mean that the court in its treatment of that question should show no deference to the executive branch. Even where, as in Parretti, the doctrine of judicial non-inquiry is held not to apply because the question at issue is a justiciable one, some deference to the executive branch may nevertheless be appropriate because foreign affairs are implicated. One example of this in the extradition context is the question whether a valid extradition treaty is in force between the United States and its treaty partner at the time of an extradition request. This question is a "paradigmatically justiciable" question, yet the courts have traditionally shown great deference to the views of the Secretary of State when confronted with it.\footnote{269}

In Parretti, the court seems to have assumed that deference to the executive branch should be shown only if the question is a non-justiciable one barred from judicial consideration by the rule of non-inquiry. That rule, however, is not the only form that judicial deference can take. Just as the courts have shown great deference to the executive's views when deciding whether a valid extradition treaty is in force, the Parretti panel could have shown similar deference to the executive's determination that France's charging procedures comported with the Fourth Amendment's probable cause standard. That executive determination was not made lightly. Each year, counsel for the State Department and the Department of Justice carefully screen and review hundreds of extradition requests and reject many of them for failure to satisfy U.S. charging standards.\footnote{270} Such deference need not be conclusive. However, the State Department's voucher for the reliability of the foreign charging procedures is a factor that should be given at least some weight in a court's decision whether to issue a provisional warrant upon an application sworn to by a government attorney.

One might also ask why the courts should be unwilling to accept the government's assurances of the reliability of a foreign government's charging procedures and yet be willing every day to sign arrest warrants in domestic cases in which probable cause is established largely by the government's assurances of the reliability of information provided by

\footnote{269. See, e.g., Sayne v. Shipley, 418 F.2d 679 (5th Cir. 1969) (advice by State Department as to whether extradition treaty is in effect is entitled to great weight and importance); Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954) (on the question whether an extradition treaty has been terminated or is still in effect, the views of the political department of the government, if not conclusive, are at least of great weight and importance); In re Ryan, 360 F. Supp. 270 (E.D.N.Y. 1973) (based on certification by the Secretary of State that extradition treaty was in effect, claim of detainee that the treaty was not in effect was denied); Galanis v. Pallanck, 568 F.2d 234 (2d Cir. 1977).

270. Telephone Interview with Frances Fragos Townsend, Director, OIA U.S. Department of Justice (Aug. 15, 1997); Telephone Interview with Sarah Criscitelli, OIA U.S. Department of Justice (July 30, 1997).}
unnamed confidential informants who are often criminals themselves. In both instances the government offers assurances of reliability. Something appears to be awry when courts reject government assurances of the reliability of accusations made by treaty partners but routinely accept assurances of the reliability of accusations made by drug dealers and other informants.

Another troubling aspect of the Parretti decision is the panel's apparent lack of concern for the potential practical consequences of the ruling. International fugitives are frequently on the move when their whereabouts are pinpointed. They are often in transit, subject to a narrow window in which they can be seized. The difference between making an arrest and losing the trail can be a matter of days or even hours. Meanwhile, the often voluminous evidentiary records upon which foreign charges are based must be assembled, translated, and transmitted through the diplomatic channel. By the time these foreign documents arrive, a fugitive's trail may have grown cold. If the government is forced to wait to obtain an arrest warrant, any warrant that it subsequently obtains may be useless.

It would be an ironic and unintended consequence of the Parretti ruling if the government now found it necessary to resort to pretext arrests of international fugitives on domestic charges simply to buy time until extradition warrants could be obtained in compliance with Parretti. It is not difficult to imagine government agents, for example, desperately searching for any grounds available on which to arrest such fugitives simply to hold them on domestic charges long enough to permit foreign records to arrive through the diplomatic channel. Some of these arrests might be legitimate, given the possibility that international fugitives who have entered the United States may have violated immigration or customs laws, passport control laws, or currency reporting requirements in the process. When legitimate domestic charges cannot

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271. Because international fugitives are likely to enter the United States furtively or at least with awareness that they are wanted elsewhere, and because they may be carrying with them the proceeds or evidence of crimes committed abroad, they become obvious targets for investigation of a variety of possible violations of federal law—violations for which they may reasonably come under suspicion simply by virtue of their transit through U.S. ports of entry. Entrants can be investigated, for example, for making any materially false statement in any immigration-related document or for using an alias with the purpose of evading immigration laws. 18 U.S.C. Secs. 1015, 1546 (1994). International fugitives found in this country may also have committed passport fraud or made false statements in passport applications. 18 U.S.C. Secs. 1542–1544 (1994). They are also open to investigation more generally for fraud in connection with any false identification documents they may be carrying 18 U.S.C. Sec. 1028 (1994) and for any materially false statement made to a government agency. 18 U.S.C. Sec. 1001 (1994). Fugitives traveling with large sums of money may be investigated for possible customs violations or for currency reporting offenses if they fail to disclose sums greater than $10,000. 31 U.S.C. Sec. 5316 (1994). They can also be investigated for
be brought, however, there may arise the temptation to manufacture charges by setting up confrontations between federal agents and fugitives—confrontations during which the chances are high that fugitives will violate the law. For example, a fugitive who “resists, opposes, impedes, intimidates, or interferes” with a federal law enforcement officer engaged in the performance of his official duties can be charged with a felony. It is not difficult to imagine federal agents making contact with a fugitive, notifying him that he is wanted abroad, and requesting an interview about his activities in the United States. One can also imagine that the fugitive might run, lie, obfuscate, or become evasive, argumentative, or belligerent. The agents could freely interpret his response as resistance or opposition.

It would be equally ironic if, as a result of the rationale applied in Parretti, foreign law enforcement officers felt justified in resorting to “self-help” remedies—for instance, illegally abducting and repatriating fugitives found in the United States. This possibility is not far-fetched. U.S. agents resorted to exactly such a gambit when they spirited out of Mexico a Mexican national accused in the murder of a federal Drug Enforcement Administration agent. Still another unintended consequence of the ruling may be an increasing willingness on the part of the government to deport or expel fugitives under the immigration laws, thereby bypassing the extradition laws altogether. Many fugitives found in the United States already have criminal records abroad. A record for conviction of a serious prior offense abroad makes a foreign fugitive found in the United States deportable, with limited avenues of appeal.

None of these potential consequences bodes well for the continued viability of the extradition process. If the recent trend toward extending greater procedural safeguards to extradition arrests leads to unintended consequences such as these, proponents of this trend should perhaps be careful what they wish for. If the end result is that extradition arrests become too difficult to accomplish, we are likely to see more attempts to circumvent the extradition process entirely—to pull an “end run” around it whenever possible. The victories won by those who would wish the extradition process to incorporate more of the procedural safeguards accorded to domestic criminal defendants may be pyrrhic.

transporting in interstate or foreign commerce any stolen or fraudulently obtained property. 18 U.S.C. Sec. 2314 (1994).


275. At least one commentator has suggested that the extradition process be transformed into a “mini-trial”: 275
Ultimately, the key assumptions relied upon by the panel in Parretti do not appear to withstand close inspection. First, the government’s interests in its relations with its extradition treaty partners extend well beyond securing reciprocal arrests of U.S. fugitives found abroad and enforcing domestic law. When the United States’ treaty relations are strained, its foreign relations are strained. The quality of these relations affects not only domestic law enforcement but also international commerce. Most importantly, the United States’ compliance with its extradition treaties bears directly on the reliability of the United States as a treaty partner in other areas as well, including international security treaties.

The government’s interests in its international treaty relations and its stewardship of foreign affairs generally justify considerable deference from the courts to the government’s needs and its views in extradition matters—certainly more deference than was shown by the Ninth Circuit in Parretti. Such deference could allow for a provisional arrest warrant in an extradition case to issue on a standard of probable cause that varies from the standard required for the issuance of a domestic criminal warrant.

Finally, the Warrant Clause of the Fourth Amendment may be compatible with a varying definition of probable cause that depends on the purpose of the warrant sought. To insist that probable cause can mean only probable cause to believe that the fugitive committed the crime charged makes no sense, when courts routinely issue warrants for the arrest of people not even charged with committing crimes—material witness warrants, for example. For the purpose of obtaining provisional arrest warrants in extradition cases, probable cause may consequently be defined as “probable cause to believe that the fugitive is duly charged abroad with an extraditable offense.” Even if one were to insist that a provisional arrest warrant could not issue without a finding that the fugitive committed the crime abroad, the courts could nonetheless give considerable deference to the executive branch’s sworn assurances of the proven reliability of the requesting State’s charging procedures. This deference is justified by the interests at stake and the exigencies in-

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It would be more forthright and dependable for Congress to enact a statute to provide for something closer to a mini-trial of the accused in the United States to test whether the accusations and evidence adequately approach United States standards, and also to consider whether the accused may really have an unanswerable defense.”

Kester, supra note 3, at 1447.
That being said, the extradition statute and the various extradition treaties to which the United States is a party may still be unconstitu-
tional to the extent that they allow so much time to pass after the fugitive's arrest—in some instances up to ninety days—before the "evidence of criminality may be heard." In an era of rapid electronic communications and instant transmission of documents by facsimile, due process may require the "evidence of criminality" to be transmitted much more quickly than the treaties and the statute allow. While a ninety-day period might have made sense in the days of the clipper ship or the steamer, today it seems an anachronism. In domestic cases, the federal courts have fashioned post-arrest deadlines by which the govern-
ment must present evidence of probable cause to a magistrate, even when the magistrate has already seen such evidence in the complaint. In extradition cases, similar rules could be applied by the courts, or perhaps devised by Congress, requiring the requesting State to furnish

276. The author recognizes that there are times when the government can and should be able to compile the paperwork necessary to establish probable cause that the fugitive committed the crime charged and that as a policy matter the government should strive to compile such paperwork where feasible, thereby lessening the need for provisional arrest warrants. If, for example, the government agents involved in tracking a particular fugitive are confident that the fugitive, once discovered, will not flee, then the OIA should demand no less from the foreign government than it demands from our prosecutors who seek to secure the extradition of fugitives found abroad. As a policy matter, the government should expect no less from our extradition partners than it does from its own prosecutors. Perhaps the best illustration of this point comes from Attorney General Janet Reno, who has praised the efforts of U.S. prosecu-

I have been particularly gratified to learn that, when necessary, you are willing to 'go the extra mile' by preparing extradition documents which include more than the bare minimum called for in the applicable treaty, and which are crafted to meet the special evidentiary or authentication requirements contained in the domestic laws of our treaty partners. Moreover, when necessary in provisional arrest cases, you are prepared to draft, translate, and submit these documents to the OIA well before the treaty deadline.

Id.


278. See 18 U.S.C. § 3060 (1994), which requires that even after an arrest on a warrant, "a preliminary examination shall be held... to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it." The statute requires that the hearing "shall be held within a reasonable time following initial appearance," meaning within ten days if the defendant is in custody and twenty days if he is free on bond pending trial. 18 U.S.C. § 3060 (1994). In a similar vein, the Supreme Court has fashioned the so-called "forty-eight hour rule" for warrantless arrests, requiring the government to present evidence establishing probable cause to a magistrate no later than forty-eight hours after a warrantless arrest. See County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991).
evidence of criminality as rapidly as possible, even before the applicable
treaty allows for the final extradition package to be transmitted. Even in
the present era, the assembly and transmission of the formal extradition
package can take weeks, largely because of the time required for trans-
lation and the subsequent transmission of the documents from the
foreign prosecutor or investigating magistrate to the foreign ministry of
justice, which must then transmit them to the U.S. ambassador for certi-
fication and apostilles. The U.S. ambassador must then forward the
documents to the foreign ministry in the requesting country for trans-
mission to the U.S. State Department, which must then transmit them to
the Department of Justice, which checks them carefully before finally
sending them to the U.S. Attorney in the district of arrest.

One could fashion a rule that a less formal interim package be
transmitted earlier than the formal extradition package, directly from the
foreign ministry of justice to the Department of Justice, even if it meant
that the informal package lacked the apostilles and ambassadorial certi-
fications required for the final package. Such an informal transmission
could suffice for the purpose of satisfying the magistrate within a rea-
sonable time of the arrest that the formal documents expected at the
subsequent formal extradition hearing would establish probable cause to
believe that the arrestee committed the offenses charged abroad. We
Formalistically, an interim package would suffice for such a limited
purpose as long as it comport with the requirements of a domestic
complaint and warrant application: a sworn statement by a trained law
enforcement officer or investigator, setting forth facts gathered firsthand
by that officer or learned from the reports of other officers or investiga-
tors, establishing the elements of the offense charged and satisfying the
court of the reliability of any witnesses or confidential informants
whose statements have been relied upon.

279. How much time would be reasonable? The answer might differ in each case, de-
pending on such variables as the complexity of the foreign charges, the need for translation,
the number of documents involved, and the idiosyncrasies of the foreign authorities. In com-
plex cases involving multiple charges, the magistrate might reasonably insist upon an
expedited transmittal of documentation relating to a single charge in order to satisfy the court
quickly that the provisional arrest and detention are justified. Rather than adopt a single
bright-line deadline, the better approach might be to permit the court to inquire of the gov-
ernment how quickly an interim package could be transmitted, based on the variables of the
particular case. The court could make this inquiry at the time the provisional warrant appli-
cation is presented or at the arrestee’s initial appearance in court after the arrest.
EPILOGUE

As of this writing, Giancarlo Parretti is believed to be living in Italy, in the olive-growing region near Orvieto, where he was raised. His lawyers say they hear from him only occasionally, and only by facsimile.