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INTRODUCTION

When a foreign country requests the extradition of an alleged fugitive from the United States, the suspect is protected from unjustified extradition in a number of ways. First, a valid extradition treaty must exist between the two countries before the United States will extradite. [1] If there is such a treaty, and a foreign government requests the extradition of an individual, the executive cannot transfer the individual until a judicial hearing is held. [2] At this hearing the requesting country must submit some evidence of the suspect's criminality before extradition will be permitted. [3] This evidence production requirement is an Anglo-American practice that most countries do not follow. [4]

The *amount* of evidence that must be submitted by a requesting country to obtain extradition from the United States is not specified by statute. [5] The applicable statute, 18 U.S.C. § 3184, simply calls for the magistrate to permit extradition if "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention. . . ." [6] All United States extradition treaties therefore contain a proviso specifying the amount of evidence that will be required. [7]

Most treaties contain a proviso stating that before the United States will grant extradition, the requesting country must submit "such evidence of criminality as, according to the laws of the place where the fugitive shall be found, would justify his committment for trial had the crime or offense been there committed." [8] In 1903 the United States Supreme Court interpreted the phrase "laws of the place where the fugitive shall be found" to require that the magistrate apply the bindover standard of the *state of the union* where the alleged fugitive is found when assessing the sufficiency of the evidence. [9] Thus, the traditional proviso incorporates the evidentiary standard applied in state preliminary hearings, a proceeding which deter-

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mines if there is sufficient evidence to bind an accused over for a domestic trial. [10]

Within the last decade the United States has become concerned that the application of different state bindover standards leads to inconsistent treatment of extradition requests, because different amounts of evidence are required to extradite from different states. [11] The proposed solution to this problem is to modify all new extradition treaties to provide that "extradition shall be granted only if the evidence be found sufficient according to the laws of the requested Party . . . to justify his commitment for trial if the offense of which he is accused had been committed in its territory. . . ." [12] The essential difference between the two provisos is that the phrase "law of the place where the fugitive shall be found," which refers to the state bindover standard, is replaced by "laws of the requested Party," which refers to the federal bindover standard.

This article argues that it is appropriate to require that requesting countries meet the uniform federal bindover standard to obtain extradition from the United States, rather than a more stringent state standard. The federal bindover standard of probable cause accomplishes the purpose of United States extradition procedure better than any other evidentiary standard. It affords an alleged fugitive more protection from unjustified extradition than is available in most countries. Furthermore, the reasons advanced by advocates of a more stringent bindover standard in the domestic criminal setting do not apply to extradition hearings.

ACHIEVING CONSISTENT EVIDENTIARY REQUIREMENTS FOR EXTRADITION

Although nearly all states require a finding of "probable cause" to bind a suspect over for trial, [13] states require different amounts of evidence to meet this standard. On the one hand, many states appear to require approximately the same amount of evidence to bind a suspect over for trial as is required to arrest a suspect under the fourth amendment. [14] This standard is met if the evidence introduced against the suspect provides "a reasonable ground for the inference that the charge may be well founded. . . . The proof need only be such as to afford good reason to believe that the offense was committed and by the defendant." [15]

On the other hand, Massachusetts, for example, requires more evidence to bind over for trial than is required to arrest, and has explicitly defined the amount of evidence required to bind over as a "directed verdict" rule:

> The examining magistrate should view the case as if it were a trial and he were required to rule on whether there is enough credible evidence to send

> the case to the jury. Thus the magistrate should dismiss the complaint when, on the evidence presented, a trial court would be bound to acquit as a matter of law. . . . [16]

Although no evidentiary standard can provide a clear understanding of the precise amount of evidence required, [17] the Massachusetts standard is much more stringent than other standards. [18] Moreover, states even vary in their application of the same standard. [19]

The variety of state bindover standards raises problems in extradition hearings because, when the traditional proviso is controlling, state bindover standards determine the sufficiency of the requesting country's evidence. In 1903 the United States Supreme Court in *Pettit v. Walshe* [20] interpreted the traditional proviso to require that the magistrate apply the bindover standard of the state of the union where the fugitive is apprehended when assessing the sufficiency of the evidence. The Court reasoned that state rather than federal law should be applied because, at that time, there was no federal law that could be applied. [21]

Changing circumstances have eroded the justification for the *Pettit* rule. Because of the promulgation of federal rules of criminal procedure, continued application of varying state standards no longer makes sense, [22] especially since extradition is a national act of the United States [23] and these cases are almost invariably filed in the federal courts. [24] Yet even the most recent extradition cases have consistently followed the *Pettit* interpretation. [25] In *Shapiro v. Ferrandina,* the Second Circuit quoted *Pettit* on this point and stated that, "[a]s both parties recognize, the phrase 'laws of the place where the person sought shall be found' refers to the laws of the state where the arrest occurs rather than to the laws of the United States." [26] In *Greci v. Birkness,* [27] a 1976 case construing a new proviso, the First Circuit commented that if it were confronted with the traditional proviso it would apply the state bindover standard despite the lessened force of the *Pettit* interpretation since the advent of federal rules governing criminal procedure. [28]

Because different state bindover standards require different amounts of evidence, under the traditional proviso it is possible for a requesting country to submit evidence which is sufficient to obtain extradition from a state with a probable cause bindover standard but insufficient to obtain extradition from a state with a higher bindover standard. In *Greci* the First Circuit had to deal with this possibility when it interpreted a revised proviso in the new United States-Italy extradition treaty. In *Greci* the alleged fugitive was found in Massachusetts, one of the states which requires the most evidence to bind over a suspect for trial. The court concluded that if the revised proviso called for the Massachusetts bindover standard, then Italy's evidence would be insufficient to obtain extradition. [29] But if the

revised proviso called for the federal bindover standard, as Italy contended, then Italy's evidence would be sufficient to obtain extradition.

The court examined the negotiating history of the treaty to determine which standard the parties had intended to apply. During the 1970 negotiations with the United States on the new extradition treaty, Italy had requested that the traditional proviso be changed. The Italian delegation wanted federal law to be applied in assessing the sufficiency of evidence rather than state law, and the U.S. negotiators agreed to change the treaty language accordingly. Concluding that both the negotiating history and the language of the treaty itself required application of the federal bindover standard, the First Circuit remanded the case to the district court so a magistrate could assess the sufficiency of the evidence under the federal bindover standard; apparently there was sufficient evidence to meet this standard. [30]

After the 1970 negotiations with Italy that led to the incorporation of the revised proviso into the United States-Italy extradition treaty, the United States decided to modify all of its new extradition treaties to require application of the federal bindover standard rather than state standards. [31] There are two convincing reasons for this treaty modification. First, since there are now federal rules of criminal procedure it no longer makes sense to require federal courts, which hear extradition cases, to apply state law. [32] Second, since extradition is a national act the amount of evidence required to extradite from the United States should be determined by uniform national law rather than by various state laws. [33]

THE MOST APPROPRIATE STANDARD FOR ASSESSING SUFFICIENCY OF THE EVIDENCE IN AN EXTRADITION HEARING

Recognizing that a uniform standard should be applied to assess the sufficiency of evidence required to extradite does not solve the problem of which standard should be chosen. The federal bindover standard, [34] defined as probable cause to arrest under the fourth amendment, [35] appears to be the minimum amount of evidence that could be submitted to obtain extradition for two reasons. First, to justify extradition most U.S. extradition treaties (whether they contain the traditional proviso or the revised proviso) require the requesting country to submit sufficient evidence to bind a suspect over for trial under U.S. law. [36] Since this treaty requirement adopts a United States rule of criminal procedure, its application is implicitly subject to constitutional limitations. Under the fourth amendment, a suspect cannot be detained for trial without a "timely judicial determination of probable cause. . . ." [37] The treaty language would thus seem to

incorporate this standard to justify the accused's detention prior to extradition.

Second, even if the treaty language does not demand this minimum standard, dicta in *Caltagirone v. Grant* [38] suggests that a judicial finding of probable cause to arrest for extradition purposes is constitutionally mandated. If the Constitution requires probable cause for the *arrest* of an alleged fugitive, then U.S. authorities presumably could not *extradite* a fugitive absent a finding of probable cause.

In *Caltagirone,* Italy applied for the provisional arrest of Francesco Caltigirone pursuant to the extradition treaty with the United States. [39] Under the section of the treaty authorizing provisional arrests, [40] either nation may ask the other signatory to hold a suspect for forty-five days pending a decision by the requesting country to seek formal extradition. On the basis of Italy's request, U.S. authorities arrested Caltigirone and incarcerated him without bail. Caltigirone challenged the validity of his arrest and detention in the absence of any probable cause determination by a United States judicial authority. The Second Circuit construed the ambiguous treaty language to require a probable cause showing to support the provisional arrest.

Although this treaty construction permitted the court to resolve the case without reaching constitutional issues, the court was clearly concerned with the constitutional implications of the arrest of an alleged fugitive without a showing of probable cause:

> [I]n the Government's view, a foreign state could apply for, and the Government could effect, the unlimited detention of Caltigirone by stringing together an infinite strand of forty-five day provisional arrests, all without a judicial determination of probable cause or a formal extradition request. This elaboration of the Government's view raises grave questions concerning the constitutional propriety of any interpretations of Article XIII [the provisional arrest provision] which does not require a showing of probable cause.
> . . .
>
> We doubt that the tenuous relationship between an application for provisional arrest and a subsequent request for extradition implicates a sufficiently strong foreign policy interest in the executive to justify a departure from usual fourth amendment protections. [41]

Furthermore, in the court's view, holdings which deny fifth and sixth amendment protections in extradition proceedings [42] are not dispositive on the issue of fourth amendment applicability. Because an extradition hearing is not deemed a trial or criminal proceeding, [43] the terms of these amendments limit their applicability to extradition. [44] But, the fourth amendment is not so limited. [45] Thus, a finding of probable cause presum-

ably must precede the extradition of a fugitive, perhaps in the extradition hearing itself or at least prior to the arrest.

While the probable cause to arrest may be the minimum standard for extradition, a comparison of the extradition hearing to the preliminary hearing is necessary to determine what the *best* standard is. Courts have often compared extradition hearings to preliminary hearings, which are judicial proceedings applicable to United States domestic criminal prosecutions. In *Benson v. McMahon* [46] the United States Supreme Court held that extradition hearings should be of the character of preliminary hearings, and within the last decade courts have continued to compare extradition hearings and preliminary hearings as a way of explaining what form extradition hearings should take. [47]

The preliminary hearing is held shortly after the arrest of a criminal suspect. Its primary function is "to determine whether there is sufficient indication that a crime has been committed by the accused to justify his further detention and to screen out weak and unsubstantiated cases which do not justify any further attention." [48] The evidentiary standard that must be met to bind a suspect over for trial in a federal preliminary hearing is "probable cause." [49] It is similar to the amount of evidence required to issue an arrest warrant, and to hold a defendant at an initial appearance who has been arrested without a warrant. [50] As noted previously, many states also apply this standard. [51]

Although commentators have apparently ignored the relative merits of different U.S. evidentiary standards in the context of extradition [52] there is extensive discussion of this topic in the preliminary hearing context. [53] Because of the similarity between the form of the extradition and preliminary hearings, and because the evidentiary standards for the preliminary hearings have always been adopted for extradition hearings, it is valuable to examine these discussions relating to the appropriate standard for preliminary hearings. Some domestic courts and commentators have proposed that a higher standard than probable cause be used in the bindover determination. The reasons for preferring a higher bindover standard in domestic criminal proceedings are not, however, applicable in the context of international extradition.

Congress required a preliminary hearing to assure that there was probable cause to arrest under the fourth amendment. [54] Commentators who advocate a more stringent bindover standard believe that since the primary function of the preliminary hearing is to screen out charges that should not go to trial, more evidence should be presented than the amount required for arrest. [55] They contend that the magistrate must refuse to bind over a suspect at a preliminary hearing if the evidence presented is such that a jury would not be permitted to convict. [56] Thus they advocate the directed verdict standard that Massachusetts employs. [57]

One commentator [58] provides a helpful framework for understanding the difference between preliminary hearings which use the "probable cause to arrest" standard and those that use the "directed verdict" standard. He presents two alternative conceptual models of the preliminary hearing, neither of which is employed in its pure form by any jurisdiction: the "backward-looking" model and the "forward-looking" model.

The backward-looking model "stresses the preliminary and nonfinal nature of the hearing and places emphasis upon the fact that the proceeding is not a trial but is only an initial screening mechanism occurring very shortly after the accused has been arrested." [59] Its primary concern is with the legality of the arrest and the validity of the detention of the arrested person. The bindover standard is therefore the same as probable cause to arrest. The federal bindover standard and the standards of most states correspond to the backward-looking model.

The primary concern of the forward-looking preliminary examination "is whether there is a sufficient probability of conviction at trial to warrant further proceedings." [60] This would be more akin to a trial since the concern is with the legal guilt or innocence of the accused. The Massachusetts standard corresponds to the forward-looking model.

Commentators have presented a number of reasons why a forward-looking preliminary hearing is preferable to a backward-looking hearing; for the most part these reasons do not apply to extradition hearings. The primary reason in support of the forward-looking model is that, if insufficient evidence is presented to enable a jury to find the defendant guilty, there is no justification for submitting the defendant and the state to the costs of a full trial. [61] For this reason the forward-looking model allows the defendant to raise affirmative defenses at the preliminary hearing. It is futile to bind a defendant over for trial if he will be acquitted because he has a valid affirmative defense. [62]

Other reasons for requiring the higher "directed verdict" standard of proof are that: it permits the defendant and the prosecutor to freeze the testimony of witnesses and evidence before trial; it allows discovery of evidence by both sides; it allows the prosecution to test its witnesses before trial and helps to avoid the double jeopardy proscription if its case is insufficient; it may encourage guilty pleas at earlier stages in the judicial process; and it prevents unjustified incarceration of a defendant prior to trial (if bail is unavailable). [63] An express assumption among those who advocate a directed verdict standard at the preliminary hearing is that police practices are now sufficiently sophisticated so that evidence of criminality can be presented at a preliminary hearing immediately after arrest: "it is difficult to defend binding over the defendant while the police search for evidence that will support a conviction." [64]

All but two of the reasons presented in favor of the directed verdict

standard in preliminary hearings involve attempts to improve the function of the trial. [65] These reasons are not relevant in the context of extradition since the trial that will take place in the requesting country will not draw on information gathered in the American extradition hearing. [66] The two remaining reasons are intended to afford the defendant greater protection —preventing unjustified incarceration prior to trial and reducing the possibility that a trial will be held if sufficient evidence to convict is not presented.

The issue of reducing unjustified pretrial incarceration will not be discussed here because modification of bail requirements for alleged fugitives seems to be a better means of accomplishing this purpose than increasing the evidentiary standard. [67] But the desire to afford a suspect greater protection from an unjustified trial is a valid reason for applying the directed verdict standard in an extradition hearing. Many of the existing requirements of American extradition procedure are intended to protect the alleged fugitive from unjustified extradition, including the requirement that the requesting country submit sufficient evidence of the suspect's criminality. [68]

The United States, however, has a legal obligation to the requesting country under an extradition treaty, [69] and the interest in fulfilling the terms of the treaty should be balanced against the desire to protect the alleged fugitive from unjustified extradition. American courts have consistently held that an alleged fugitive is not entitled to a trial to protect himself from extradition, [70] and that there is an obligation for the United States to live up to its treaty obligations with other countries. As the United States Supreme Court stated in *Grin v. Shine,* "[t]hese treaties should be faithfully observed and interpreted, with a view to fulfilling our just obligation to the other powers, without sacrificing the legal or constitutional rights of the accused." [71]

The consequences imposed on a suspect who loses at an extradition hearing are much more severe than those imposed after losing at a preliminary hearing. This suggests that a higher evidentiary standard would be more appropriate at an extradition hearing. However, most countries do not require a requesting country to submit *any* evidence of guilt prior to extraditing a suspect. The United States already protects alleged fugitives to a far greater extent than most countries. [72] Also, the constitutional rights of an alleged fugitive are protected by the requirement that the requesting country submit sufficient evidence to meet the probable cause to arrest standard. [73] Foreign countries are already disturbed by this unusual requirement because it makes extradition more difficult. [74] It would be contrary to American judicial precedent, [75] and would worsen our relations with countries with whom we have extradition treaties, [76] to require that they meet a directed verdict standard in the extradition hearing.

Moreover, United States judges are not equipped to apply the directed verdict standard in extradition hearings. If a directed verdict standard were required in extradition hearings the magistrate would have to know the substance of the crime to be able to assess whether a fact-finder could find the accused guilty on the evidence presented. In this situation it would be equally inappropriate to apply the substantive law of the United States or the law of the foreign country.

It would not be fair to the requesting country if the magistrate assessed the evidence in light of American substantive law requirements because American law may impose different evidentiary requirements to find a suspect guilty of a specific crime. It is conceivable that a requesting country could submit evidence to support an extradition request that would be sufficient to find the alleged fugitive guilty of the crime in that country, but which would be insufficient under American law to send the case to a jury.

It would also be unreasonable to require that the requesting country submit sufficient information to the American magistrate so that he could apply the directed verdict standard in light of the substantive law of the requesting country. Although it would be possible to require the requesting country to submit an explanation of its criminal law so that the magistrate could apply the directed verdict standard, this would lead to complex problems in the pleading and proof of the foreign law. [77] Also this would create an extradition hearing which comes close to a trial on the merits since the magistrate would have to conclude, after a judicial assessment of the requesting country's evidence, that it would be possible to find the accused guilty under the laws of that country. Although it is difficult to specify exactly what constitutes probable cause, the magistrate only needs to find a sufficient reason to believe that the suspect committed the act in question. This should not be a difficult standard to apply. [78]

CONCLUSION

U.S. treaties have traditionally required states requesting extradition to submit enough evidence to comply with the bindover standard of the state where the fugitive is found. Because of the varying state standards, magistrates in extradition hearings may not be able to decide consistently on extradition requests. The decision to require that requesting countries meet the federal bindover standard solves the problem of the inconsistent application of United States extradition treaties. Moreover, the federal standard is superior because it affords an alleged fugitive significant protection from unjustified extradition while taking account of our responsibilities to foreign countries with whom we have extradition treaties.

The present method of imposing the federal standard is, however, questionable. The United States is inserting the revised proviso into all new extradition treaties, but the treaties are renegotiated infrequently. [79] As long as a treaty contains the traditional proviso the possibility exists that more evidence will have to be submitted to achieve extradition from states which have a higher bindover standard. It would make more sense to revise the United States extradition statute [80] so that it explicitly requires that the requesting country submit sufficient evidence to meet the federal probable cause standard. Foreign governments would have no reason to object to such a change since the federal bindover standard is lower than some state standards imposed on the requesting states under the old proviso.

Unfortunately, the proposed revisions of the extradition statute that are currently before Congress do not explicitly call for the federal standard. [81] Congress should impose a uniform, federal standard to ensure consistency in U.S. responses to extradition requests and to fairly balance the interests of the accused and the requesting state.

NOTES

[1] Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (the duty to surrender an alleged fugitive exists only when created by treaty); Holmes v. Laird, 459 F.2d 1211, 1219 n.59 (D.C. Cir. 1972) (same), *cert. denied,* 409 U.S. 869 (1972); McElvy v. Civiletti, 523 F.Supp. 42, 47 (S.D. Fla. 1981) (same). Other nations may choose in the exercise of comity to extradite alleged fugitives *to* the United States in the absence of a treaty, but the Executive branch of the U.S. government has no power to do this. Annot., 24 A.L.R. FED. 940, 942, 943-44 (1975).

This article does not discuss all the requirements for extradition from the U.S. For such a description, see generally M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 502-537 (1974); Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula,* 15 WAYNE L. REV. 733 (1968-69); Note, *United States Extradition Procedures,* 16 N.Y.L.F. 420 (1970).

[2] The right to a hearing is guaranteed by statute, 18 U.S.C. § 3184 (1976) *(quoted, infra* note 6), and is also guaranteed under the due process clause of the fifth amendment, Sayne v. Shipley, 418 F.2d 679, 686 (5th Cir. 1969) (the fifth amendment right may be satisfied by the statutorily required hearing or by a habeas corpus review of an administrative decision to extradite), *cert. denied,* 398 U.S. 903 (1970).

[3] I. A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 150-52 (1971).

[4] *Id.* at 150. A number of other countries, however, do require some evidence of guilt to extradite. *Id.* at 157-58.

[5] This note will refer to different "amounts of evidence" required to extradite or to bind a suspect over for trial. This is understood to mean the degree of probability of guilt that must be established by evidence before extradition or bindover will be permitted.

Although there is no statutory provision setting a uniform standard for the amount of evidence needed to extradite, 18 U.S.C. § 3190 (1976) specifies the type of evidence that may be submitted by the requesting country. That section provides:

> Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such

hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

A report jointly prepared by the Senate Judiciary Committee, and the Departments of Justice and State, 126 CONG. REC. S13238 (daily ed. Sept. 23, 1980) (report submitted by Sen. Kennedy), describes the evidence that is customarily submitted by requesting countries as follows:

The Federal Rules of Evidence do not apply in extradition proceedings, where unique rules of wide latitude govern the reception of evidence on behalf of the foreign government. It is settled law that hearsay is advisible, and the foreign government usually presents its case by submitting affidavits, depositions and other written statements in order to satisfy the requirements of the applicable treaty.

[6] 18 U.S.C. § 3184 (1976) reads as follows:

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. 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.

[7] *E.g.*, Treaty on Extradition, Dec. 3, 1971, United States–Canada, Art. 10, para. 1, 27 U.S.T. 1022, T.I.A.S. No. 8237; Treaty on Extradition, June 22, 1972, United States–Denmark, Art. 6, para. 1, 25 U.S.T. 1293, T.I.A.S. No. 7864; Treaty for the Extradition of Criminals, Apr. 29, 1886, United States–Japan, Art. V, para. 3, 24 Stat. 1015; T.S. No. 191.

[8] CONG. REC., *supra* note 5, at S13238. *E.g.*, *supra* note 7.

[9] Pettit v. Walshe, 194 U.S. 205, 217, 218 (1904). For the purposes of this article, the word "state" will be used to refer to states of the union and the word "country" will be used to refer to foreign countries.

[10] A suspect can be bound over for trial in the United States in either a preliminary hearing or a grand jury proceeding. However, in keeping with their tendency to analogize extradition hearings to preliminary hearings, the courts in extradition cases have looked to the preliminary hearing bindover standard rather than the grand jury standard. *See infra* notes 46-53 and accompanying text. The revised proviso, *infra* note 12 and accompanying text, has been interpreted to call for the federal preliminary hearing standard (probable cause) rather than the federal grand jury standard. *See* Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980); CONG. REC., *supra* note 5 at S13238. The distinction is important because there is some confusion about whether the grand jury bindover standard is the same as the preliminary hearing standard of probable cause. Some grand juries appear to require a prima facie case before a suspect will be bound over for trial. *See* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1025-26 (5th ed. 1980). Because of this confusion and because of the judicial

tendency to analogize the extradition hearing to the preliminary hearing, this note analyzes the possible evidentiary standards by considering the standards employed in preliminary hearings.

11 CONG. REC., *supra* note 5, at S13238.

12 Treaty on Extradition, Jan. 18, 1973, United States–Italy, art. V, 26 U.S.T. 493, T.I.A.S. No. 8052 (an example of the new treaties containing the modified provision). *See also* CONG. REC., *supra* note 5, at S13238 n.45.

13 Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L. J. 771, 776-77 n.21 (1974) [hereinafter cited as Note, *Function of the Preliminary Hearing*]. *See* F. MILLER, PROSECUTION 83 (1969).

14 *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 990 (5th ed. 1980) [hereinafter cited as MODERN CRIMINAL PROCEDURE]; Note, *Function of the Preliminary Hearing, supra* note 13 at 776 n.21.

15 Note, *Function of the Preliminary Hearing, supra* note 13 at 776 n.21 (quoting the Administrative Office of the United State's MANUAL FOR UNITED STATES COMMISSIONERS 10 (1948)).

The Supreme Court defined probable cause to arrest as follows:

> Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed [by the person to be arrested].

MODERN CRIMINAL PROCEDURE, *supra* note 14 at 268 (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

The D.C. Circuit in United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) surveyed a number of definitions of probable cause to arrest and stated:

> [P]robable cause exists when known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that an offense has been or is being committed. . . . It is "a plastic concept whose existence depends on the facts and circumstances of the particular case," Bailey v. United States, 128 U.S. App. D.C. 354, 357, 389 F.2d 305, 308 (1967), . . . Because of the kaleidoscopic myriad that goes into the probable cause mix "seldom does a decision in one case handily dispose of the next," Hinton v. United States, 137 U.S. App. D.C. 388, 391, 424 F.2d 876, 879 (1969).

16 Myers v. Commonwealth, 363 Mass. 843, 850, 298 N.E.2d 819, 824 (1973) (citing People v. Bernstein, 95 N.Y.S.2d 696, 699 (N.Y.C. Magis. Ct. 1950)); Stefanik v. State, 363 N.E.2d 1099, 1102 (1977) (citing People v. Bernstein, *supra* at 699). *See also* Greci v. Birknes, 527 F.2d 956, 958 n.2 (1st Cir. 1976) (the First Circuit recognizes that greater evidence of guilt is required to meet the higher Massachusetts standard).

Alabama may also be applying the higher standard, MODERN CRIMINAL PROCEDURE, *supra* note 14 at 990-91, and several New York courts also formerly applied the standard for a number of years, Note, *Function of the Preliminary Hearing, supra* note 13 at 780 n. 44.

17 Commentators have noted that probable cause to arrest remains "an exceedingly difficult concept to objectify," W. LAFAVE, I SEARCH AND SEIZURE at 449 (1978) (quoting Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317 (1971)), and that there is no easy answer to the question of what constitutes probable cause. MODERN CRIMINAL PROCEDURE, *supra* note 14 at 268.

18 *See* Note, *Function of the Preliminary Hearing, supra* note 13 at 780 n.44. *See also* MODERN CRIMINAL PROCEDURE, *supra* note 14 at 989-91. The probable cause to arrest and directed verdict standards represent the outside parameters of lowest and most stringent requirements. Wisconsin applies an intermediate standard by requiring more evidence to bind over for trial than is required to arrest, *supra* at 990, but no case specifying how much extra evidence is needed to bind over has been found. *See e.g.*, State v. Williams, 47 Wis. 2d 242, 248, 177 N.W.2d 611, 614-15 (1970), State v. Knoblock, 44 Wis. 2d 130, 134, 170 N.W.2d 781, 783 (1969). *See also*

State v. Berby, 81 Wis. 2d 667, 683, 260 N.W.2d 798, 801 (1978); State v. Sirisun, 90 Wis. 2d 58, 61-62, 279 N.W.2d 484, 485 (1979). If states in addition to Massachusetts and Wisconsin require different amounts of evidence to bindover for trial, inconsistencies in the interpretation of treaties increase, see *infra* notes 19, 21-29, strengthening the rationale for requiring a uniform bindover standard in extradition treaties. *See infra* notes 32-33 and accompanying text. This article, however, will discuss only these two evidentiary standards at length since they represent the outside parameters and appear to be the only standards that are well-defined enough to be used as a uniform standard in U.S. extradition hearings.

19 *See* MODERN CRIMINAL PROCEDURE, *supra* note 14 at 992; Gerstein v. Pugh, 420 U.S. 103, 119-20 (1975).

20 Pettit v. Walshe, 194 U.S. 205 (1903).

21 *Id.* at 217.

22 *See* Greci v. Birknes, 527 F.2d 956, 958 n.3 (1st Cir. 1976); Application of D'Amico, 185 F.Supp. 925, 930 n.6 (S.D.N.Y. 1960), 286 F.2d 320 (2d Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

23 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1968).

24 CONG. REC., *supra* note 5 at S13236.

25 *See, e.g.*, O'Brien v. Rozman, 554 F.2d 780, 783 (6th Cir. 1977) (citing Pettit v. Walshe and holding that the law of Michigan, where the alleged fugitive was found, rather than the law of Canada, the requesting country, determined the sufficiency of the evidence to extradite), Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973) (discussed in text at note 26).

But see Application of D'Amico, 85 F.Supp. 925, 928 (S.D.N.Y. 1960) where the court held that the evidentiary requirement in an extradition hearing " . . . is in essence the same as the test of whether 'there is probable cause to believe that an offense has been committed and that the defendant has committed it' under Rule 5 of the Federal Rules of Criminal Procedure, 18 U.S.C.A." This analysis is incorrect because it ignores the Supreme Court's holding in Pettit requiring that the *state* standard be applied, not the federal standard. The same error of explicitly requiring the federal bindover standard was also made in Schonbrun v. Dreiband, 268 F.Supp. 334 n.4, and in Note, *United States Extradition Procedures*, 16 N.Y.L.F. 420, 441 n.108 (1970).

26 478 F.2d 894, 901 (2d Cir. 1973).

27 527 F.2d 956 (1st Cir. 1976).

28 527 F.2d at 958 n.3. *See* FED. R. CRIM. P. 5.1 for the definition of the federal bindover standards.

29 The court stated: "We infer from their comments that both the magistrate and the district court would have found the evidence insufficient under the state standard." Greci v. Birknes, 527 F.2d at 958 n.2.

30 Greci v. Birknes, 527 F.2d at 957 (the magistrate in the first extradition hearing determined that the evidence met the probable cause standard).

31 CONG. REC., *supra* note 5 at S13238.

32 Both federal and state courts are currently empowered to conduct extradition hearings. 18 U.S.C. § 3184 (1969). Most of the hearings, however, are held in federal court. CONG. REC., *supra* note 5 at S13236.

33 *See* CONG. REC., *supra* note 5 at S13238.

34 FED. R. CRIM. P. 5.1(a). *See infra* notes 50-52 and accompanying text (discussion of the federal standard).

35 U.S. CONST. amend. IV reads:

> 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.

[36] *See supra* notes 8 and 12 and accompanying text.

[37] Gerstein v. Pugh, 420 U.S. 103, 126 (1975).

[38] 629 F.2d 739 (2d Cir. 1980).

[39] Treaty on Extradition, Jan. 18, 1973, United States–Italy, *supra* note 12.

[40] *Id.* at art. XIII.

[41] 629 F.2d at 748.

[42] *See* Jhirad v. Ferrandina, 536 F.2d 478, 485 n.9 (2d Cir. 1976), *cert. denied* 429 U.S. 833 (1976) (sixth amendment guarantee of a speedy trial not applicable to an extradition hearing); Caltagirone v. Grant, 629 F.2d at 748 n.19 (fifth amendment guarantee clause against double jeopardy does not apply to extradition proceedings).

[43] Collins v. Loisel, 259 U.S. 309, 316 (1922) (an extradition hearing is not a trial; the double jeopardy clause only applies to trials).

[44] U.S. CONST. amend. V states in part: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb. . . ," and amend. VI states in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

[45] Caltagirone v. Grant, 629 F.2d at 748 n.19. *See* U.S. CONST. amend. IV, *quoted supra* note 35.

[46] 127 U.S. 457 (1888).

[47] Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980); Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977); United States ex. rel. Bloomfield v. Gengler, 507 F.2d 925, 927 (2d Cir. 1974); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973); Jhirad v. Ferrandina, 377 F.Supp. 34, 36 (S.D.N.Y. 1974).

[48] Note, *Function of the Preliminary Hearing, supra* note 13 at 771.

[49] FED. R. CRIM. P. 5.1.

[50] 48 F.R.D. 553, 571 (1970) (Advisory Committee Note on proposed Federal Rule of Criminal Procedure 5.1).

[51] *See supra* note 14.

[52] *E.g.*, SHEARER, *supra* note 3 at 163-65, believes the Anglo-American insistence on evidence before allowing extradition is better than no evidence requirement at all. Shearer does not, however, recognize that there are several U.S. bindover standards, nor does he discuss various evidentiary standards that could be used.

[53] *See* MODERN CRIMINAL PROCEDURE, *supra* note 14 at 989-994; Note, *Function of the Preliminary Hearing, supra* note 13; 48 F.R.D. at 567-73 (preliminary draft of proposed amendment to the Federal Rules of Criminal Procedure regarding the preliminary hearing and the accompanying Advisory Committee Note).

[54] Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 483 (1980).

[55] *See* MODEL PRE-ARRAIGNMENT CODE § 330.5 commentary at 597 (1975); Arenella, *supra* note 55 at 479 (Arenella does not advocate a strict standard, but examines the reasons presented in its favor).

[56] *See* Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A. L. REV. 635, 692; MODEL PRE-ARRAIGNMENT CODE, *supra* note 55.

[57] Myers v. Commonwealth, *supra* note 16.

[58] Note, *Function of the Preliminary Hearing, supra* note 13.

[59] *Id.* at 776.

[60] *Id.* at 779.

[61] *Id.* at 784.

[62] *Id.* at 781.

[63] *Id.* at 783-87.

[64] Graham v. Letwin, *supra* note 56 at 692.

[65] The following reasons for the directed verdict standard, discussed *supra* at notes 60-64 and accompanying text, are intended to improve the post-preliminary hearing judicial process: The directed verdict standard (1) avoids the cost to society of a full trial; (2) permits the defendant and prosecutor to freeze the testimony of witnesses and evidence before trial; (3) permits discovery of evidence; (4) allows the prosecution to avoid the double jeopardy proscription if its case is insufficient; and (5) encourages plea-bargaining at earlier stages in the judicial process.

[66] *See* M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 523 (1974):

> Inasmuch as the actual trial of the accused (assuming he is merely charged with an offense) is to take place in the requesting State if and when he is extradited, the extradition hearing which the requested State may accord the accused normally limits the scope of its inquiry to whether a proper case for extradition has been made out under the applicable law and/or treaty on the basis of the evidence furnished by the requesting State in support of its extradition request.

(quoting 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW 998-99 (1968)).

[67] *See generally* Note, *The Right to Bail in United States Extradition Proceedings*, this volume.

[68] *See, e.g.*, 18 U.S.C. § 3184 (1976) (requiring a treaty and a hearing); 18 U.S.C. § 186 (1976) (the Secretary of State is not explicitly required to deliver a person committed under §§ 3184 or 3185); 18 U.S.C. § 3188 (1976) (any judge may free a person committed for extradition if he is not delivered to the foreign country within two months after commitment); 18 U.S.C. § 3190 (1976) (evidence is only admissible in an extradition hearing if it would be admissible for similar purposes by the tribunals of the requesting country).

[69] Terlinden v. Ames, 184 U.S. 270 (1902).

[70] *See* Benson v. McMahon, 127 U.S. at 463; Shapiro v. Ferrandina, 478 F.2d at 900-01; Jhirad v. Ferrandina, 377 F.Supp. at 36.

[71] 187 U.S. 181, 184 (1902).

[72] SHEARER, *supra* note 3 at 150-65.

[73] *See* discussion of Caltagirone v. Grant, *supra* text accompanying note 39. *See also* Caltagirone v. Grant, *supra* note 39 at 748 (it appears that an alleged fugitive does have certain constitutional rights when in the U.S.).

[74] Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 726 (1968-69); SHEARER, *supra* note 3 at 158-163.

[75] *See* Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980) (the court cites numerous extradition cases which applied the probable cause standard to support the proposition that applying a federal bindover standard should not require more evidence than probable cause).

[76] *See* SHEARER, *supra* note 3 at 158-63 (European governments are already disturbed that we require them to submit any evidence of guilt at all to obtain extradition).

[77] *Cf.* R. SCHLESINGER, COMPARATIVE LAW 50 (3d ed. 1970) (discusses problems of pleading and proof in foreign civil law, but this discussion appears equally applicable to criminal law situations).

[78] *See supra* note 15 and accompanying text.

[79] Of the ninety-six extradition treaties to which the U.S. is a party, only twenty-one have entered into force after Jan. 1, 1970. 18 U.S.C. § 3181.

[80] 18 U.S.C. ch. 209, Extradition (1976).

[81] *See* H.R. 6046, 97th Cong., 2d Sess. (1982) (amending chapter 209 of title 18, United States Code, relating to extradition); S. 1940, 97th Cong., 1st Sess. (1981) (same); S. 1639, 97th Cong., 1st Sess. (1981) (same).