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NOTES

A Recommended Approach to Bail in International Extradition Cases

Pretrial release of the accused is a fundamental safeguard of individual liberty in American criminal procedure.¹ Indeed, since passage of the Judiciary Act of 1789,² federal law has provided a conditional right to bail for those arrested on criminal charges.³ However, in international extradition cases, such arrestees have no statutory right to bail⁴ largely because of the competing national interest in complying with extradition treaties. Nevertheless, courts have granted bail in international extradition cases under a "special circumstances" standard announced by the Supreme Court in 1903.⁵

The amorphous "special circumstances" standard has resulted in an incoherent approach to bail in international extradition cases. Early decisions read the standard literally, allowing bail "only when the justification [was] pressing as well as plain."⁶ In recent years, some courts have liberalized the bail standard, placing primary emphasis on the accused's risk of flight,⁷ while other courts, notably the

1. See notes 33-34 *infra* and accompanying text. Although the term "bail" is often limited to release in which security is taken, see BLACK'S LAW DICTIONARY 127 (5th ed. 1979), the term "pretrial release" may include release on personal recognizance, conditions, and/or bond. See, e.g., 18 U.S.C. § 3142(a) (Supp. IV 1986). This Note, however, will use the terms synonymously.

2. The Judiciary Act of 1789 provided, in 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) (current version at 18 U.S.C. §§ 3141-3150 (Supp. IV 1986)).

3. With passage of the preventive detention provision of the Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1985 (codified as amended at 18 U.S.C. §§ 3141-3150 (Supp. IV 1986)), Congress restricted the right to pretrial release in light of perceived overriding governmental interests. The preventive detention provision, 18 U.S.C. § 3142(e) (Supp. IV 1986), authorizes pretrial detention of persons charged with certain serious felonies upon a finding that no release conditions can reasonably assure the safety of any other person or the community. See 18 U.S.C. §§ 3142(e)-(g) (Supp. IV 1986); see also notes 38-43 *infra* and accompanying text.

4. None of the international extradition statutes discuss bail. See 18 U.S.C. §§ 3181, 3184-3186, 3188-3193, 3195 (1982 & Supp. IV 1986). The domestic federal bail statutes apply only to persons charged with "any offense against the United States." 18 U.S.C. § 3041 (1982 & Supp. IV 1986) (incorporated in 18 U.S.C. § 3141 (Supp. IV 1986)); see also FED. R. CRIM. P. 54(b)(5) ("These rules [including the pretrial release provision, 46(a)] are not applicable to extradition and rendition of fugitives . . .").

5. *Wright v. Henkel*, 190 U.S. 40, 63 (1903); see Part II *infra*.

6. *In re Klein*, 46 F.2d 85, 85 (S.D.N.Y. 1930); see also notes 66-67 *infra* and accompanying text.

7. See notes 68-69 *infra* and accompanying text.

United States Courts of Appeals for the First, Second, and Fifth Circuits, continue to interpret the standard more literally.⁸ These other courts focus on whether specific "special circumstances" are present; a low risk of flight, by itself, does not justify release. Thus, lower courts have not agreed on whether the determinative factor in the bail decision in international extradition cases should be the presence of specific "special circumstances" or the accused's risk of flight. The lower courts have also failed to clarify whether the bail standard should be the same both before and after the extradition hearing.⁹

This confusion in the lower courts indicates that a reexamination of the eighty-four-year-old "special circumstances" standard is in order. Modern increases in transnational crime, particularly in terrorism and drug trafficking, and increasing extradition requests to (and by) the United States¹⁰ underscore the need for a consistent approach to bail in international extradition cases.

This Note proposes such a consistent approach, arguing that courts in international extradition cases should focus on the accused's risk of flight rather than on the presence or absence of specific "special circumstances." Part I briefly discusses the international extradition process and outlines the important societal and individual interests at stake in the bail decision. Part II discusses the origin and evolution of the judicial approaches to bail in international extradition cases and demonstrates the inconsistency in the lower courts' treatment. Part III suggests an approach for making bail decisions in international extradition cases. It argues that the determinative factor in the bail decision should be the accused's risk of flight, not the presence of specific "special circumstances." Part III also shows that the burden of proof in the bail decision is properly on the accused, and it argues that the standard for bail should be more stringent after the accused has been determined extraditable.

8. *United States v. Williams*, 611 F.2d 914 (1st Cir. 1979); *United States v. Leitner*, 784 F.2d 159 (2d Cir. 1986); *United States v. Russell*, 805 F.2d 1215 (5th Cir. 1986); *see also* notes 70-74 *infra* and accompanying text.

9. *See* notes 75-76 *infra* and accompanying text.

10. Roger M. Olsen, Deputy Assistant Attorney General, stated in congressional hearings: With the tremendous growth of wide-bodied jet international air travel and high speed telecommunications in the past decade, and with the United States' increased realization, during that same period, of its responsibilities to the international community and to itself in effectively combatting the rapidly increasing volume of transnational criminal activity — particularly international narcotics trafficking and terrorism — there has been a corresponding growth in the number of extradition requests by and to the United States. While the volume of such requests seldom exceeded twenty per year prior to 1970, in 1979 [the United States] opened 127 extradition cases, and in 1982, 338 cases.

Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House of Representatives Comm. on the Judiciary, 98th Cong., 1st Sess. 34 (1983) [hereinafter *Reform of Extradition Laws*]; *see also Extradition Act of 1981: Hearing on S. 1639 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 15-16 (1981) [hereinafter *Senate Hearing on Extradition Act of 1981*] (statement of Michael Abbell, Director of the Office of International Affairs, Department of Justice).

I. THE BAIL DECISION IN INTERNATIONAL EXTRADITION CASES: COMPETING INTERESTS AT STAKE

A. The Extradition Process

International extradition is the process "whereby one sovereign surrenders to another sovereign a person sought as an accused criminal or a fugitive offender."¹¹ The practice existed in ancient civilizations¹² and has been recognized in United States law since early in the nation's existence.¹³ Under federal law, international extradition may only be granted pursuant to treaty;¹⁴ currently the United States has extradition treaties with more than 100 nations.¹⁵

Treaties¹⁶ and federal statutes¹⁷ govern the extradition process.

11. M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 5 (2d rev. ed. 1987); see generally *id.*; 6 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 727-1122 (1968).

12. See Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L.J. 525, 525 (1964) ("[International extradition] has been demonstrable since the ancient times of the Chaldeans, the Egyptians, and the Chinese . . ."). One of the oldest recorded documents in diplomatic history (c. 1280 B.C.) is a peace treaty between Egypt and a Hittite prince that includes an extradition provision. H.R. REP. NO. 627, 97th Cong., 2d Sess., pt. 1, at 1 & n.1 (1982).

13. An extradition provision was included in one of the first United States bilateral agreements, the Jay Treaty. See Jay Treaty, Nov. 19, 1794, United States-Great Britain, art. XXVII, 8 Stat. 116, 129, T.S. No. 105.

14. See 18 U.S.C. §§ 3181, 3184 (1982); *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933); *United States v. Rauscher*, 119 U.S. 407, 411-12 (1886).

15. See M. BASSIOUNI, *supra* note 11, at 933-48 (list of U.S. extradition treaties in force at July, 1987).

16. Typically, extradition treaties include: (1) a list of extraditable offenses; (2) a list of circumstances in which extradition is to be prohibited (e.g., when the offense qualifies as a "political offense"); (3) general procedural guidelines, including required supporting documentation (e.g., description of the accused, statement of facts of the case, text of applicable laws, warrant for arrest issued by judicial officer of the requesting state, evidence justifying arrest and committal); (4) a provision for "provisional arrest," which allows arrest of the accused, prior to receipt by the requested state of supporting documentation, if there is a high risk that the accused will soon flee. See, e.g., Treaty on Extradition, Dec. 3, 1971, United States-Canada, 27 U.S.T. 983, T.I.A.S. No. 8237; see generally Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 739-50 (1969).

17. 18 U.S.C. §§ 3181, 3184-3186, 3188-3193, 3195 (1982 & Supp. IV 1986). The primary international extradition provision is § 3184, which provides:

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.

Briefly, the requesting nation initiates the process¹⁸ by filing a verified complaint with the United States government.¹⁹ An extradition judge or magistrate then issues a warrant for the accused's arrest.²⁰ After the accused is arrested, an extradition hearing is held to determine whether the requesting nation has established a proper cause for extradition.²¹

The extradition hearing has two major functions. The court determines whether the extradition request is in compliance with a valid extradition treaty between the United States and the requesting nation,²² and it decides whether there is sufficient evidence to surrender the accused to the requesting nation. The latter requirement is satis-

18. For more detailed discussions of extradition procedures, see M. BASSIOUNI, *supra* note 11, at 501-620; 6 M. WHITEMAN, *supra* note 11, at 905-1122; and Note, *United States Extradition Procedures*, 16 N.Y. L.F. 420 (1970).

19. 18 U.S.C. § 3184 (1982). Traditionally, the United States has favored the extradition of all extraditable persons, including United States nationals. See *Charlton v. Kelly*, 229 U.S. 447, 465 (1912) ("persons" in extradition treaty includes "citizens"); see also 1976 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 118 (letter of Ambassador Robert J. McCloskey, Assistant Secretary of State for Congressional Relations); Shearer, *Non-Extradition of Nationals*, 2 ADEL. L. REV. 273, 287-88 (1966). However, unless an extradition treaty specifically provides for extradition of "all persons," the United States will not generally extradite United States nationals. Most treaties to which the United States is a party provide that neither party will be bound to extradite nationals; under these treaties, the United States will usually prevent extradition of nationals. See M. BASSIOUNI, *supra* note 11, at 457-59; Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 19 (1968); see also *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10-11 (1936); 6 M. WHITEMAN, *supra* note 11, at 873-75. But see Note, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 B.C. INTL. & COMP. L. REV. 293, 300 n.77 (1986) ("Though not bound to extradite nationals under [such treaty provisions], in recent years U.S. policy has favored such rendition.").

20. 18 U.S.C. § 3184 (1982). Most extradition treaties to which the United States is a party provide for provisional arrest in cases of "urgency," e.g., when the accused is likely to flee soon. See H.R. REP. NO. 627, 97th Cong., 2d Sess., pt. 1, at 10 n.17 (1982); M. BASSIOUNI, *supra* note 11, at 524-30. A provisional arrest involves arrest and detention of the accused before the formal documentation for the arrest is received from the requesting state. See *id.* Treaties provide for a maximum detention period under the provisional arrest, typically forty-five to sixty days. *Id.*, at 530; see, e.g., Treaty on Extradition, Jan. 21, 1972, United States-Argentina, art. 12, 23 U.S.T. 3501, 3513, T.I.A.S. No. 7510 (forty-five-day limit).

However, if habeas corpus challenge to detention is made, the detention period may exceed the treaty detention-period maximum if the habeas claim is not heard within the treaty limit. See *Caltagirone v. Grant*, 629 F.2d 739, 749-50 (2d Cir. 1980) (accused detained ninety-seven days under provisional arrest without showing of probable cause even though maximum detention period in extradition treaty was forty-five days). In *Caltagirone*, the Second Circuit limited the possibility of detention without probable cause by holding that probable cause must be shown before a provisional arrest when the extradition treaty specifically requires, for provisional arrest, "further information . . . as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the [United States]." 629 F.2d at 744 n.9, 748. For arguments that such a probable cause showing is required by the fourth amendment for *all* provisional arrests, see M. BASSIOUNI, *supra* note 11, at 527-28. See also 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).

21. 18 U.S.C. § 3184 (1982).

22. Specifically, the court must determine whether the alleged offense is extraditable under the treaty, if any prohibitions against extradition mentioned in the treaty are applicable, and that

fied by evidence establishing probable cause to believe the accused committed the alleged offense or by a showing that the accused has been convicted of the offense in the requesting nation.²³

The decision of the extradition judge or magistrate may not be appealed, although the accused may obtain limited review of a decision to extradite by writ of habeas corpus.²⁴ If the accused is declared extraditable, the judge or magistrate orders his detention and certifies the evidence to the Secretary of State, who makes the final decision to extradite.²⁵ If the accused is not surrendered to the requesting nation within two months of the commitment order, he may be released.²⁶

B. *The National Interest in Treaty Compliance*

When a requesting nation has followed the procedures prescribed by an extradition treaty and the accused is found to be extraditable, the United States has a substantial interest in surrendering him in compliance with the treaty. First, the United States has a clear interest in ridding itself of foreign criminals, especially since extradition is normally used only for those charged with, or convicted of, serious, often violent, crimes.²⁷ Without a reliable extradition practice, the

all treaty requirements and procedures are followed. *See generally* M. BASSIOUNI, *supra* note 11, at 545.

23. Determining the guilt or innocence of the accused is *not* a function of the extradition hearing. *See, e.g.,* Collins v. Loisel, 259 U.S. 309, 314-16 (1922); Benson v. McMahon, 127 U.S. 457, 463 (1888); Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir.) ("The person charged is not to be tried in this country for crimes he is alleged to have committed in the requesting country. That is the task of the civil courts of the other country."), *cert. denied*, 454 U.S. 894 (1981); Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *In re D'Amico*, 185 F. Supp. 925, 928 (S.D.N.Y. 1960) ("[The test to determine extraditability] 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."), *appeal dismissed sub nom. United States ex rel. D'Amico v. Bishopp*, 286 F.2d 320 (2d Cir.), *cert. denied sub nom. Farace v. D'Amico*, 366 U.S. 963 (1961); *see also* M. BASSIOUNI, *supra* note 11, at 545.

Because the extradition hearing is not a trial on the merits, procedural protections provided by the Federal Rules of Evidence, the sixth amendment guarantees of speedy trial and of confrontation, and the fifth amendment prohibition against double jeopardy are not applicable. *See* Caltagirone v. Grant, 629 F.2d 739, 748 n.19 (2d Cir. 1980); M. BASSIOUNI, *supra* note 11, at 557 & n.178; *see also* Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

24. *See* Collins v. Miller, 252 U.S. 364, 369 (1920); Jimenez v. Aristeguieta, 290 F.2d 106, 107 (5th Cir. 1961); M. BASSIOUNI, *supra* note 11, at 579-85. Traditionally, habeas corpus review in international extradition cases has been limited to questions of jurisdiction, the existence of a valid extradition treaty, and the existence of "any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *see also* Jimenez v. Aristeguieta, 311 F.2d 547, 555 (5th Cir. 1962). More recently, however, some courts have expanded review on habeas corpus to include "the substantive conduct of the United States in undertaking its decision to extradite if such conduct violates constitutional rights." *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984); *see also* Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983).

25. 18 U.S.C. §§ 3184, 3186 (1982). The Secretary of State has only rarely denied extradition. *See* M. BASSIOUNI, *supra* note 11, at 602; Note, *supra* note 19, at 298-99 & n.60.

26. 18 U.S.C. § 3188 (1982).

27. *See Senate Hearing on Extradition Act of 1981, supra* note 10, at 5 (statement of Michael

United States would risk becoming a haven for such dangerous international fugitives.²⁸

Perhaps a more important reason for the United States to extradite in compliance with its extradition treaties is the likely reciprocal consequences of noncompliance. If the United States fails to deliver a bona fide extraditee, it will breach its obligation under international law.²⁹ In response, the aggrieved nation may reciprocate by breaching its own obligation to extradite criminals to the United States, possibly debilitating United States law enforcement in future cases.³⁰ With the rise of terrorism, drug trafficking, and other transnational crimes, a breakdown of international cooperation in criminal law enforcement could be disastrous.³¹ The United States, therefore, has a strong interest in complying with extradition-treaty obligations. Releasing an extraditee on bail, which provides an opportunity to abscond, puts this interest in treaty compliance at risk.³²

Abbell, Director, Office of International Affairs, Department of Justice) ("A great number of [extradition cases], about a third of them, represent serious crimes of violence, including numerous murder cases. Another third represents major narcotics trafficking cases. Another third represents major fraud cases, white collar crime cases."); *see also Reform of Extradition Laws*, *supra* note 10, at 34-35.

28. "Today, in view of the development of the airplane and other modes of high speed transportation, the United States is much more accessible to these fugitives and it is necessary to streamline our extradition procedures so as not to become a haven for such fugitives." S. REP. NO. 605, 95th Cong., 1st Sess., pt. 1, at 984 (1977); *see also* Note, *supra* note 19, at 299 ("Air travel, advanced weaponry, drug trafficking, and guerilla warfare pose new challenges to the suppression of international crime and the preservation of national security.").

29. *See* *Wright v. Henkel*, 190 U.S. 40, 62 (1903); M. BASSIOUNI, *supra* note 11, at 102-03.

30. Under international law, a treaty violation by one nation may entitle the other contracting nation to suspend performance of, or abrogate, its own obligations under the treaty. *See, e.g.,* Vienna Convention on the Law of Treaties, May 23, 1969, art. 60, 8 I.L.M. 679; L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 480-83 (2d ed. 1987) [hereinafter HENKIN & PUGH]; *see also* H.R. REP. NO. 998, 98th Cong., 2d Sess. 14 (1984):

When [a bona fide extraditee] is found by the United States Government and is not surrendered to the foreign country because such person failed to return for an extradition hearing, the United States may be seen as not fully complying with its treaty obligations. If the requesting country concludes that the United States is not meeting its treaty obligations, it may not be willing to cooperate when the United States next seeks extradition of a person for a crime committed in this country.

See also Reform of Extradition Laws, *supra* note 10, at 48 (statement of Rep. Hughes) ("It is the question of comity with other countries. Our own credibility is on the line when we are requested to produce a defendant and we mess up and we can't produce."); H.R. REP. NO. 627, 97th Cong., 2d Sess., pt. 1, at 36 (1982) (recognizing "potential adverse consequences to United States foreign relations and . . . reciprocal law enforcement needs" from noncompliance with extradition treaties); Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 711 (1969).

31. *See* Bassiouni, *supra* note 19, at 19 ("Nothing can more further world public order than the confidence of the nations of the world that no other nation will offer asylum or refuge to common criminals or stand in the way of their prosecution and/or punishment."); *see also* note 28 *supra*.

32. 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 . . . 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. The enforcement of the bond, if forfeited, would hardly meet

C. The Individual Interest in Prehearing Liberty

While the government has a strong interest in prohibiting his release on bail, a potential extraditee has a similarly strong interest in remaining free prior to the extradition hearing. Historically, in domestic criminal cases, the individual interest in pretrial liberty has been highly valued.³³ Justice Jackson observed that without the conditional privilege of pretrial release, "even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense."³⁴ Courts, however, never have translated this high regard for pretrial liberty into an absolute right to pretrial release.³⁵ Pretrial detention is constitutionally permissible so

the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment.

Wright v. Henkel, 190 U.S. 40, 62 (1903).

33. "[R]elief against abusive pretrial imprisonment was one of those fundamental aspects of liberty which was of most concern during the formative era of English law." Foote, *The Coming Constitutional Crisis in Bail* (pt. 1), 113 U. PA. L. REV. 959, 968 (1965). But cf. Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1139, 1177 (1972) (noting that until the Bail Reform Act of 1966, pretrial release could generally only be obtained by execution of a bail bond: "To [those who could not afford a bail bond] any claim that release on bail might have anything to do with the protection of individual liberties would have appeared to be a cruel hoax."). For background on the origins of bail in American and English criminal procedure, see Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977), and E. DE HAAS, *ANTIQUITIES OF BAIL* (1940).

International law prohibits arbitrary detention, and, increasingly, U.S. courts have considered international human rights standards as a guide to U.S. law. See, e.g., Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388-89 (10th Cir. 1981); HENKIN & PUGH, *supra* note 30, at 995-97 (citing cases).

34. Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring); see also Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."); 2 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* 126 (1984) ("There is little reason to doubt the proposition that pretrial detention has a significant adverse impact upon the ability of a defendant to vindicate himself at trial or secure leniency in sentencing.").

However, the Supreme Court apparently does not consider pretrial detention to implicate the presumption of innocence. See Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("[The presumption of innocence] has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."); see also Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 550-51 (1986). But cf. Stack v. Boyle, 342 U.S. 1, 4 (1951); United States v. Salerno, 107 S. Ct. 2095, 2109-10 (1987) (Marshall, J., dissenting).

35. The eighth amendment to the United States Constitution provides "[e]xcessive bail shall not be required." U.S. CONST. amend. VIII. The Supreme Court has not read the excessive bail clause to establish a constitutional right to pretrial release. See United States v. Salerno, 107 S. Ct. 2095, 2104-05 (1987); see also Carlson v. Landon, 342 U.S. 524, 545-46 (1952) (no constitutional right to bail in a civil deportation case: "Indeed, the very language of the Amendment fails to say all arrests must be bailable."); United States v. Edwards, 430 A.2d 1321, 1331 (D.C. 1981) ("While the history of the development of bail reveals that it is an important right, and bail in noncapital cases has traditionally been a federal statutory right, neither the historical evidence nor contemporary fundamental values implicit in the criminal justice system requires recognition of the right to bail . . . to be of constitutional dimensions."), cert. denied, 455 U.S. 1022 (1982). But there is authority for the proposition that an "unreasonable" denial of bail might violate the excessive bail clause. See 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

long as it is "regulatory," not "punitive."³⁶ For example, courts may deny bail to defendants considered likely to flee if released.³⁷

Although the Supreme Court in *United States v. Salerno*³⁸ recently allowed further contraction of the conditional right to pretrial liberty in domestic criminal cases, it expressly recognized that the suspect's pretrial liberty should be denied only in limited circumstances. In *Salerno*, the Court upheld the preventive detention provision of the Bail Reform Act of 1984,³⁹ which authorizes pretrial detention of arrestees

Eighth Amendment."); Hunt v. Roth, 648 F.2d 1148, 1157 (8th Cir. 1981) ("If the eighth amendment has any meaning beyond sheer rhetoric, the constitutional prohibition against excessive bail necessarily implies that unreasonable denial of bail is likewise prohibited."), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982); *see also* United States v. Salerno, 107 S. Ct. 2095, 2108 (1987) (Marshall, J., dissenting).

Legal scholars have also debated the proper interpretation of the excessive bail clause. Compare Duker, *supra* note 33, at 89 (excessive bail clause does not create a constitutional right to bail: "The constitutionally protected right is merely a guarantee against bail that is 'excessive.'") and Meyer, *supra* note 33, at 1179-80 (same) with Foote, *supra* note 33, at 965 (excessive bail clause creates a constitutional right to bail: "[T]he particular form in which the bail question appears in the Constitution is the result of an historical accident, and . . . the most plausible resolution of this constitutional riddle is to find an intention to grant such a right.").

Even if the Supreme Court were to conclude that a constitutional right to bail arose out of the excessive bail clause of the eighth amendment, the right would clearly *not* be an unconditional right to pretrial release. *See* note 37 *infra*; *see also* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 399 (1970); Note, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. CIN. L. REV. 153, 195-98 (1986).

36. Under the due process clause, the Supreme Court recognizes "a distinction between *punitive* measures that may not constitutionally be imposed prior to a determination of guilt and *regulatory* restraints that may." Bell v. Wolfish, 441 U.S. 520, 537 (1979) (emphasis added). And, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." United States v. Salerno, 107 S. Ct. 2095, 2101 (1987). The punitive/regulatory distinction turns largely on "whether an alternative purpose [other than punishment] to which [detention] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnote omitted).

37. Professor Berg has stated:

Assuring the defendant's appearance at trial has long been a ground for denying release. The very mention of the institution of bail in the eighth amendment shows that the Constitution allows limitations to be placed on a criminal defendant prior to trial in order to assure that he or she will be brought to justice.

Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 688 (1985); *see also* Bell v. Wolfish, 441 U.S. 520, 531 (1979); Stack v. Boyle, 342 U.S. 1, 4 (1951) ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.") (citing *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835)).

Pretrial detention has also been upheld for enemy aliens in time of war, dangerous resident aliens pending deportation proceedings, dangerous mentally unstable defendants, and defendants who present a danger to witnesses. *See* United States v. Salerno, 107 S. Ct. 2095, 2102 (1987) (citing cases to show that the Supreme Court has "repeatedly held that the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.").

38. 107 S. Ct. 2095 (1987).

39. With passage of the Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1985 (codified as amended at 18 U.S.C. §§ 3141-3150 (Supp. IV 1986)), Congress expanded the power of federal courts to deny bail in domestic criminal cases. In addition to authorizing pretrial detention of defendants posing a risk of flight, 18 U.S.C. § 3142(b)-(f) (Supp. IV 1986), as did the prior law, the Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 216, 217 (codified as amended at 18 U.S.C. §§ 3146-3152 (1982)) (amended 1975, 1982, 1984, 1986), the 1984 Act authorizes preven-

considered dangerous, against challenges under the due process clause of the fifth amendment and the excessive bail clause of the eighth amendment. While recognizing an "individual's strong interest in [pretrial] liberty,"⁴⁰ the Court held that the "compelling [societal] interests"⁴¹ in crime prevention and community safety outweigh the individual interest in pretrial liberty.⁴² Consequently, defendants considered dangerous may be imprisoned prior to a determination of guilt at a trial.⁴³ While this affirmation of preventive detention represents a significant encroachment on the right to pretrial liberty,⁴⁴ the Court, significantly, recognized that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."⁴⁵ Thus, even *Salerno*, which went as far as any case in restricting the right to pretrial liberty, recognized that due process requires that the individual interest in pretrial liberty be denied only in limited circumstances.

In extradition cases, the individual interest in prehearing liberty⁴⁶ is arguably even stronger than in domestic cases. In addition to the burdens of imprisonment present in domestic cases,⁴⁷ extradition requires the transport of the defendant to another jurisdiction. Justice Blackmun recognized (in an *interstate* extradition case) the increased burden on individual liberty in such cases:

tive detention — detention of arrestees who "will endanger the safety of any other person or the community" if released before trial. 18 U.S.C. § 3142(b)-(f) (Supp. IV 1986). Although the 1984 Act maintains pretrial release as the general rule, it was intended to mark "a significant departure from the basic philosophy of the Bail Reform Act [of 1966], which [was] that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings." S. REP. NO. 225, 98th Cong., 1st Sess. 3, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3185-86 [hereinafter S. REP. NO. 225]. For general discussions of the Bail Reform Act of 1984, see Alschuler, *supra* note 34, at 512-20, and Berg, *supra* note 37, at 699-711.

40. *Salerno*, 107 S. Ct. at 2103.

41. 107 S. Ct. at 2102.

42. 107 S. Ct. at 2103. For arguments that a balancing approach is inappropriate to determine the constitutionality of preventive detention, see *Salerno*, 107 S. Ct. at 2110-11 (Marshall, J., dissenting); Alschuler, *supra* note 34; Tribe, *supra* note 35, at 380-90; Note, *supra* note 35, at 178-79.

43. Although the Bail Reform Act establishes no time limit on pretrial detention, "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Salerno*, 107 S. Ct. at 2101. Generally, the Speedy Trial Act, Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986)), requires trial within seventy days from the date of indictment or hearing before a judicial officer. 18 U.S.C. § 3161(c)(1) (1982).

44. In a strong dissent, Justice Marshall, joined by Justice Brennan, characterized preventive detention as "consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, . . . long . . . thought incompatible with the fundamental human rights protected by our Constitution." *Salerno*, 107 S. Ct. at 2106 (Marshall, J., dissenting).

45. 107 S. Ct. at 2105.

46. Note that in the extradition context, the immediate individual interest is not in pretrial liberty, but in pre-extradition hearing liberty. For discussion of the extradition hearing, see notes 21-23 *supra* and accompanying text.

47. See note 34 *supra* and accompanying text.

The extradition process involves an "extended restraint of liberty following arrest" even more severe than that accompanying detention within a single State. Extradition involves, at a minimum, administrative processing in both the asylum State and the demanding State, and forced transportation in between. It surely is a "significant restraint on liberty."⁴⁸

It follows that the burden on liberty of *international* extradition is more severe than that in a comparable domestic criminal arrest. In an international extradition case, the "forced transportation" is to a foreign nation which may have a legal system less protective of defendants' rights than the American system. A potential extraditee, therefore, has a substantial interest in prehearing liberty.

II. THE "SPECIAL CIRCUMSTANCES" STANDARD

Despite the important individual interest in prehearing liberty, an arrestee in an international extradition case has no statutory right to prehearing release.⁴⁹ However, the Supreme Court has said that release may be granted in such cases — but only when the accused can show the presence of "special circumstances."⁵⁰ This section traces the origin and development of the "special circumstances" standard for bail in international extradition cases.

A. Wright v. Henkel

In 1903, the Supreme Court addressed the issue of bail in international extradition cases in *Wright v. Henkel*.⁵¹ Wright, a United States citizen,⁵² was arrested and incarcerated pursuant to an extradition request by Great Britain for a fraud charge.⁵³ Before the extradition hearing, Wright requested release on bail, claiming he was ill and that confinement could seriously aggravate his illness.⁵⁴ The extradition

48. *Michigan v. Doran*, 439 U.S. 282, 296 (1978) (Blackmun, J., concurring) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975)).

49. Neither current international extradition statutes, see note 4 *supra*, nor prior versions, see Bassiouni, *supra* note 20, at 497 & nn.10-11 (describing amendments to original statutes), discuss bail. There have been several recent congressional attempts, none successful, to codify a bail standard for international extradition cases. See *id.* at 522-29; see also H.R. REP. NO. 998, 98th Cong., 2d Sess. 7 (1984).

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

51. 190 U.S. 40 (1903).

52. For discussion of extradition of U.S. nationals, see note 19 *supra*. The United States-Great Britain extradition treaty at issue in *Wright* provided for extradition of "all persons" charged with extraditable crimes, Treaty on Boundaries, Slave Trade, and Giving Up Criminals, Aug. 9, 1842, United States-Great Britain, art. X, 8 Stat. 572, 576; apparently there was no question that this included nationals, as neither the Supreme Court opinion, *Wright*, 190 U.S. 40 (1903), nor the lower court opinion, *In re Wright*, 123 F. 463 (C.C.S.D.N.Y. 1903), addressed this issue.

53. 190 U.S. at 40-41.

54. Wright filed an affidavit of his physician "to the effect that [Wright] was suffering from

commissioner⁵⁵ denied Wright's bail request, and the circuit court affirmed on the ground that there was no statute authorizing bail in international extradition cases.⁵⁶

Wright appealed the bail denial to the Supreme Court. The Court affirmed, applying a rather convoluted analysis. First, the Court found not only a lack of statutory authorization for bail in international extradition cases, but also that the granting of bail *after* the extradition hearing would be inconsistent with the extradition statute.⁵⁷ The statute then in force provided that, upon a finding that the accused was extraditable, the extradition official was to "issue his warrant for the commitment of the person so charged to the proper [jail], *there to remain until such surrender shall be made.*"⁵⁸ The Court also noted that post-extradition hearing release on bail would jeopardize the national interest in compliance with treaty obligations — obligations which "might be impossible to fulfill if release on bail were permitted."⁵⁹ The Court then concluded, without addressing possible distinctions between pre- and post-extradition hearing bail requests, that the reasoning supporting bail denial after the extradition hearing "would seem generally applicable to release pending examination."⁶⁰ Thus, the Court affirmed the denial of Wright's pre-extradition hearing bail request.

Despite the Court's statutory and policy-based findings militating against bail, it refused to hold that bail could never be granted in international extradition cases:

We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or

bronchitis and a severe chill, which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment." 190 U.S. at 43.

55. In 1968, the office of United States commissioner was abolished and replaced by a system of United States magistrates. Act of Oct. 17, 1968, Pub. L. No. 90-578, tit. 3, § 301(a)(3), 82 Stat. 1107, 1115 (codified as amended at 18 U.S.C. § 3041 (1982 & Supp. IV 1986)); H.R. REP. NO. 1629, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 4252, 4253-54. Thus, the current extradition statute provides that extradition hearings will be conducted by judges or *magistrates*, not commissioners. See 18 U.S.C. § 3184 (1982).

56. "It is not difficult to conceive of some sufficient reason why the United States, having assumed certain treaty obligations, should provide a scheme for carrying them out which should not provide for enlargement on bail . . ." *In re Wright*, 123 F. 463, 464 (C.C.S.D.N.Y.), *affd. sub nom. Wright v. Henkel*, 190 U.S. 40 (1903). The circuit court cited *In re Carrier*, a case involving a Canadian request for extradition in which the court affirmed a denial of bail due to lack of statutory authority: "[I]n our day, bail is not allowed in any case except in pursuance of some statute." 57 F. 578, 579 (D. Colo. 1893).

57. 190 U.S. at 62. *Wright* involved a *pre*-extradition hearing bail request.

58. Act of Aug. 12, 1848, ch. 167, § 1, 9 Stat. 302 (emphasis added) (current version at 18 U.S.C. § 3184 (1982)). This statute is largely identical to the current extradition statute, 18 U.S.C. § 3184 (1982). Both the extradition law then in force and current law allow release of the accused if surrender to the requesting state does not occur within two months of the commitment order. Act of August 12, 1848, ch. 167, § 4, 9 Stat. 302, 303; 18 U.S.C. § 3188 (1982).

59. 190 U.S. at 62.

60. 190 U.S. at 62.

that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the *special circumstances*, extend that relief.⁶¹

In this way, the Supreme Court opened the door to bail in international extradition cases despite the absence of statutory authorization for bail in such cases.⁶² The Court did not, however, articulate what circumstances would be sufficiently "special" to merit bail,⁶³ nor has the Court since addressed the bail decision in international extradition cases. Not surprisingly, lower court interpretations of the "special circumstances" standard have been inconsistent.

B. Evolution of the "Special Circumstances" Standard

The "special circumstances" standard announced in *Wright* did not establish a test for bail that genuinely considers the burdens on individual liberty that result from bail denial in international extradition cases.⁶⁴ Rather, *Wright* stands for the primacy of the national interests in criminal law enforcement and treaty compliance⁶⁵ except, perhaps, in limited, "special" cases. By itself, the individual liberty interest was given little weight in *Wright*.

Early lower court opinions after *Wright* generally echoed this near-complete deference to national interests. For example, in *United States ex. rel. McNamara v. Henkel*,⁶⁶ the court denied a bail request, stating that "admission to bail and extradition should be in practice an unusual and extraordinary thing."⁶⁷ More recently, some courts have

61. 190 U.S. at 63 (emphasis added).

62. Although the Court's "special circumstances" statement was dictum, see Comment, *Bail in Extradition Cases*, 4 AM. J. INT'L. L. 422, 426 (1910), the Court's statement has spawned the "special circumstances" standard for bail in international extradition cases. See H.R. REP. NO. 998, 98th Cong., 2d Sess. 14 (1984) ("The authority of courts to grant such releases is now firmly established in the law of extradition."); see also Part II.B *infra*.

63. Examples of "special circumstances" lower courts have found sufficient to merit release on bail include: the accused's status as a party in a concurrent civil action involving "a very large sum of money," *In re Mitchell*, 171 F. 289, 289 (S.D.N.Y. 1909); an anticipated delay of more than two months until the extradition hearing due to difficulty in obtaining witnesses, *In re Gannon*, 27 F.2d 362 (E.D. Pa. 1928); and the lack of a suitable detention facility for a juvenile, *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir.), cert. denied, 459 U.S. 971 (1981). See also *Artukovic v. Boyle*, 107 F. Supp. 11, 15 n.4 (S.D. Cal. 1952), revd. on other grounds *sub nom. Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.), cert. denied, 348 U.S. 818 (1954).

64. See notes 34, 46-49 *supra* and accompanying text.

65. See Part I.B *supra*.

66. 46 F.2d 84 (S.D.N.Y. 1912).

67. 46 F.2d at 84. A similar view was taken by the court in *In re Klein*:

[W]e have been admonished to exercise the power [to grant bail in international extradition cases] very sparingly and only when the justification is pressing as well as plain. . . .

. . . [Otherwise, the courts] would incur grave risk of frustrating the efforts of the executive branch of the government to fulfill treaty obligations.

46 F.2d 85, 85 (S.D.N.Y. 1930); cf. *In re Mitchell*, 171 F. 289, 289 (S.D.N.Y. 1909) (While recognizing that "the power should be exercised only in the most pressing circumstances, and when the requirements of justice are absolutely peremptory," Judge Learned Hand allowed bail when the accused was the plaintiff in a concurrent civil suit involving "all the fortune of the

liberalized the "special circumstances" standard and recognized more fully the important individual interests at stake in the bail decision. This liberalized approach has been best articulated in *Beaulieu v. Hartigan*:

[T]he "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 to court when directed to do so.⁶⁸

Courts following this liberalized approach to bail focus primarily on the accused's risk of flight rather than on the presence of "special circumstances."⁶⁹

Not all modern courts, however, have followed this trend toward liberalization of the *Wright* standard. In *United States v. Williams*,⁷⁰ the First Circuit, citing the early post-*Wright* cases,⁷¹ focused on

prisoner." However, release was to end as soon as the civil suit terminated.); *In re Gannon*, 27 F.2d 362 (E.D. Pa. 1928) (bail granted where extradition hearing had to be delayed more than two months due to difficulty in obtaining witnesses).

68. 430 F. Supp. 915, 917 (D. Mass.), *revd. mem.*, 553 F.2d 92 (1st Cir.), *vacated*, 554 F.2d 1 (1st Cir. 1977). Although *Beaulieu* was reversed, various cases and other sources illustrate the liberalized approach to bail advocated by the *Beaulieu* court. *See, e.g.*, *United States v. Messina*, 566 F. Supp. 740, 742 (E.D.N.Y. 1983) ("There has apparently been a less stringent standard in practice than in theory."); 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 156 [hereinafter 1977 DIGEST] ("In general it is the practice of United States courts to allow persons provisionally arrested to remain at large on bond if there is no evidence that the person is about to flee.") (quoting a May 20, 1977, State Department response to diplomatic notes requesting the provisional arrest and extradition of certain individuals); M. BASSIOUNI, *supra* note 11, at 536 & n.113 ("[T]he contemporary decisions among United States courts have expressed a more liberal view of the *Wright* test. Indeed, 'granting bail pending the completion of the extradition proceedings has been the rule rather than the exception.'") (quoting *Beaulieu*, 439 F.Supp. at 916, which cites cases granting bail); *see also United States v. Leitner*, 784 F.2d 159, 160 (2d Cir. 1986) ("[S]ome courts have noted a trend toward liberalization in bail . . ."); M. BASSIOUNI, *supra* note 11, at 539 ("The ready availability of bail in the context of financial crimes is an observation that is virtually beyond dispute (unless there is a showing of flight-prone behavior).").

The trend toward a more liberal standard for bail in international extradition cases is also evidenced by cases in which courts have granted bail without discussion of special circumstances, apparently ignoring the *Wright* standard. *See, e.g.*, *Freedman v. United States*, 437 F. Supp. 1252, 1255 (N.D. Ga. 1977); *see also M. BASSIOUNI, supra* note 11, at 537 n.115 (citing eleven cases in which bail was granted without discussion of special circumstances). It seems likely that these courts evaluated the bail request by considering factors important in domestic bail decisions, particularly the defendant's risk of flight. *See* note 37 *supra*.

69. *See, e.g., Beaulieu*, 430 F. Supp. at 917; *Artukovic v. Boyle*, 107 F. Supp. 11, 15 n.4 (S.D. Cal. 1952), *revd. on other grounds sub nom. Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818 (1954); *see also* 1977 DIGEST, *supra* note 68, at 156; *cf. Magisano v. Locke*, 545 F.2d 1228, 1230 (9th Cir. 1976) (affirming bail denial on grounds of seriousness of offense charged and high risk of flight; no reference to *Wright* or special circumstances).

70. 611 F.2d 914 (1st Cir. 1979).

71. *See* notes 66-67 *supra* and accompanying text.

whether or not "special circumstances" were present. The court said, "[T]he discomfiture of jail and even applicant's arguable acceptability as a tolerable bail risk are not special circumstances."⁷² Similarly, the Second Circuit, in *United States v. Leitner*,⁷³ held that the determinative factor in the bail decision is a finding of special circumstances, not a low risk of flight: "Bail . . . is appropriate in 'special circumstances.' Even a low risk of flight would not be dispositive."⁷⁴

Thus, lower courts have not agreed on what should be the determinative factor in the bail decision: the presence of "special circumstances" or the likelihood that the accused will flee if released. Lower court decisions also have not clarified whether the bail standard should be the same before and after the extradition hearing. The First Circuit interpreted *Wright* to require application of the more stringent approach both before and after the hearing,⁷⁵ while other courts have advocated a more liberalized standard in prehearing bail decisions.⁷⁶ The inconsistent interpretations of the "special circumstances" standard for bail in international extradition cases demonstrate its failure to provide guidance for lower courts.

III. A RECOMMENDED APPROACH TO BAIL IN INTERNATIONAL EXTRADITION CASES

The disarray in the lower courts and the increasing importance of international extradition⁷⁷ necessitate reconsideration of the approach to bail in international extradition cases. This section suggests an approach to such cases that recognizes the individual's liberty interest as well as the strong national interest in preventing an extraditee's flight. More specifically, it suggests that courts explicitly shift the focus in the bail decision from "special circumstances" to the arrestee's risk of flight. This shift in emphasis would allow greater consideration of the arrestee's interest in prehearing liberty without jeopardizing the societal interests in criminal law enforcement and treaty compliance. Because the typical extraditee has a proven proclivity to flee, and because information as to risk of flight is likely to be more accessible to the

72. 611 F.2d at 915 (citations omitted).

73. 784 F.2d 159 (2d Cir. 1986).

74. 784 F.2d at 161; *see also* *United States v. Russell*, 805 F.2d 1215, 1217 (5th Cir. 1986) ("We adhere to the traditional approach that absent special circumstances bail should be denied pending an extradition hearing.").

75. *Williams*, 611 F.2d 914 (1st Cir. 1979).

76. *See* *United States v. Leitner*, 784 F.2d 159, 160 (2d Cir. 1986) ("[S]ome courts have noted a trend toward liberalization in bail, at least in the provisional arrest context."); *United States v. Messina*, 566 F. Supp. 740, 742 (E.D.N.Y. 1983); *Beaulieu v. Hartigan*, 430 F. Supp. 915, 916 & n.2 (D. Mass.) (citing cases to show that "[i]n the more contemporary reported cases, granting of bail pending completion of the extradition proceedings has been the rule rather than the exception"), *revd. mem.*, 553 F.2d 92 (1st Cir.), *vacated*, 554 F.2d 1 (1st Cir. 1977); M. BASSIOUNI, *supra* note 11, at 536-37 (citing cases).

77. *See* note 10 *supra* and accompanying text.

arrestee, the burden of proving acceptability of release is properly on the arrestee. This section also recommends that, for bail requests made after the extradition hearing, the primary focus should be on risk of flight. In posthearing cases, however, a court should rarely grant bail since, at this point, the national interest in extradition is heightened, and the individual interest in release is diminished.

A. Focus on Low Risk of Flight

Although the First, Second, and Fifth Circuits require a showing of specific "special circumstances" in order to allow bail in international extradition cases,⁷⁸ some lower courts focus primarily on the accused's risk of flight.⁷⁹ This latter approach, which gives greater consideration to the important individual interest in prehearing liberty, also provides a more concrete rationale for courts to decide the bail issue.

In *Wright v. Henkel*,⁸⁰ the Supreme Court did not directly address the proper impact of a low risk of flight. However, in suggesting the "special circumstances" standard, the Court certainly must have meant, at the very least, to require a low risk of flight; surely the Court did not mean to countenance release of those likely to flee, no matter what the "special circumstances." Consequently, *Wright* implies a low risk-of-flight requirement. The more difficult question is whether risk of flight should be the *primary* focus of the bail analysis.

The First and Second Circuits argue that the limiting "special circumstances" language of *Wright*⁸¹ demonstrates that the Court did not intend low risk of flight alone to be sufficient justification for release on bail.⁸² So it would seem: Given that risk of flight was the key factor in domestic bail decisions, it would be almost disingenuous to claim that the Court meant this factor alone could amount to "special circumstances."⁸³ However, the analysis should not end with the eighty-four-year-old language of the Court.

78. See notes 70-74 *supra* and accompanying text.

79. See notes 68-69 *supra* and accompanying text.

80. 190 U.S. 40 (1903).

81. See text at note 61 *supra*.

82. See *United States v. Leitner*, 784 F.2d 159, 160 (2d Cir. 1986); *United States v. Williams*, 611 F.2d 914, 914-15 (1st Cir. 1979).

83. See *United States v. Russell*, 805 F.2d 1215, 1217 (5th Cir. 1986) ("Being a tolerable bail risk is not in and of itself a 'special circumstance.'"); Note, *The Right to Bail in United States Extradition Proceedings*, 1983 MICH. Y.B. INTL. LEGAL STUD. 107, 118 n.25 ("Since assurance of appearance is a normal requirement of [bail], it cannot be a 'special circumstance.'"). But see *Artukovic v. Boyle*, 107 F. Supp. 11, 15 n.4 (S.D. Cal. 1952) (explicitly considering low-flight-risk factors as "special circumstances"), *revd. on other grounds sub nom. Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818 (1954). Still, it could be argued that the Court's "special circumstances" language was intentionally vague to allow lower court discretion and that the *Wright* Court may have considered that an extremely low risk of flight could amount to "special circumstances." The problem, of course, is that one cannot discern what the Court intended by its cryptic language in *Wright*. Significantly, however, such a reading of

In modern domestic bail cases, the Supreme Court has explicitly recognized "the individual's strong interest in liberty,"⁸⁴ even as it balances that individual interest against the societal interests at stake.⁸⁵ As the Court recently declared, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."⁸⁶ The "special circumstances" standard for bail is plainly *not* a "carefully limited exception" to the norm of liberty. Indeed, the amorphous standard leaves the individual liberty interest to the fortuity of whether the defendant can show "special circumstances." 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 practically no risk of flight) smacks of a punitive restraint, proscribed by the due process clause.⁸⁷ Such detention unnecessarily impairs the accused's ability to prepare a defense to extradition and imposes the other typical burdens of imprisonment.⁸⁸

The "special circumstances" standard cannot be justified as providing special protection to the societal interests at stake in the bail decision in international extradition cases. 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,⁸⁹ the national interests are fully served if the accused does not abscond. That the accused presents "special circumstances" adds nothing to protection of these interests. Conversely, if the accused is likely to flee, the governmental interests are vulnerable, no matter what the "special circumstances." Therefore, the primary factor the courts should consider in deciding whether to release the accused pending an extradition hearing is the risk that the accused will flee if released, since the presence of "special circumstances" is irrelevant to protection of the national interests.

In focusing on risk of flight, courts would face genuine difficulties in measurement and establishment of acceptable risk levels. Yet,

Wright — that low risk of flight may amount to "special circumstances" — allows an analysis similar to that advocated by this Note. This approach explicitly focuses on risk of flight.

84. *United States v. Salerno*, 107 S. Ct. 2095, 2103 (1987).

85. See, e.g., *Salerno*, 107 S. Ct. 2095 (1987); *Schall v. Martin*, 467 U.S. 253 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Carlson v. Landon*, 342 U.S. 524 (1952).

86. *Salerno*, 107 S. Ct. at 2105.

87. See notes 36-37 *supra* and accompanying text.

88. See note 34 *supra* and accompanying text.

89. If the court reasonably believes the arrestee would present a danger to the community if released, bail should not be granted. Bail denial in such a case follows from Supreme Court precedent in which the Court has "repeatedly held that the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Salerno*, 107 S. Ct. at 2102. As a practical question, it should be unusual for an arrestee in an extradition case to be considered dangerous, but not flight-prone. Thus, risk-of-flight consideration also would mandate bail denial in most such cases.

courts face these difficulties in all bail decisions. By focusing on risk of flight, courts would eliminate the need to determine whether circumstances are "special" enough to mandate bail.

A risk-of-flight focus would not mean that bail would be routinely granted in international extradition cases, thereby jeopardizing the national interests at stake in extradition. Although the required standard of proof on the bail issue is not susceptible of lucid articulation, the acceptable risk of flight should be lower in extradition cases than that in comparable domestic cases because of the magnitude of the national interests at stake in extradition cases.⁹⁰ Moreover, as explained in the next section, the burden of proof on the bail issue in extradition cases is properly on the defendant.

B. *Burden of Proof on Defendant*

Most courts place the burden of proof in bail decisions in international extradition cases on the defendant.⁹¹ Despite this consensus, the courts have not articulated the reasons supporting a presumption against bail other than to cite the "special circumstances" standard of *Wright v. Henkel*.⁹² A closer analysis does reveal that this burden allocation is appropriate.⁹³

Perhaps the most important reason for placing the burden of proof on the defendant is that many international extradition arrestees are likely to flee when sought on criminal charges. As one Justice Department official noted, "[T]he typical subject of an extradition request has a demonstrated propensity to flee rather than face charges, and in general is likely to continue his flight if released pending extradition."⁹⁴

90. See H.R. REP. NO. 627, 97th Cong., 2d Sess., pt. 1, at 36 (1982) ("Because of the potential adverse consequences to United States foreign relations and our own reciprocal law enforcement needs, the courts should be substantially more cautious in extradition cases than they are in ordinary criminal cases in making release decisions."); see also *Beaulieu v. Hartigan*, 430 F. Supp. 915, 917 (D. Mass.) ("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."), *revd. mem.*, 553 F.2d 92 (1st Cir.), *vacated*, 554 F.2d 1 (1st Cir. 1977).

In domestic federal criminal cases, pretrial release is allowed upon *reasonable assurance* that the defendant will not flee. 18 U.S.C. § 3142(e) (Supp. IV 1986). For pre-extradition hearing bail requests, the appropriate standard of proof might approximate a requirement of clear and convincing evidence that the defendant will not flee if released. For discussion of a possible standard of proof for *post*-extradition hearing bail requests, see note 109 *infra*.

91. See, e.g., *United States v. Leitner*, 784 F.2d 159, 160 (2d Cir. 1986) ("presumption against bail"); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981); *Beaulieu v. Hartigan*, 554 F.2d 1, 2 (1st Cir. 1977); *United States v. Messina*, 566 F. Supp. 740, 742 (E.D.N.Y. 1983); cf. *Beaulieu*, 430 F. Supp. 915, 916 (D. Mass.) ("Certainly, the ordinary presumption in favor of granting of bail is modified when a person faces a warrant of extradition."), *revd. mem.*, 553 F.2d 92 (1st Cir.), *vacated*, 554 F.2d 1 (1st Cir. 1977).

92. 190 U.S. 40 (1903).

93. But see Note, *supra* note 83, at 114-15 (arguing that before the extradition hearing there should be a presumption in favor of bail).

94. *Reform of Extradition Laws*, *supra* note 10, at 36 (statement of Roger M. Olsen, Deputy Assistant Attorney General, Department of Justice).

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.⁹⁵

Practical considerations of proof also support placing the burden of proof on the accused. Parties in international extradition cases are often in a different posture as to the availability of relevant information than are parties in comparable domestic criminal cases. The government, upon receiving an extradition request, typically has far less information about the suspect than it would at a comparable time in a domestic criminal case.⁹⁶ Especially in cases where the accused is a foreign national, which is typical,⁹⁷ it is likely the defendant will be in a better position to bring forth information and prove the appropriateness of release on bail. Thus, because extradition defendants often have a demonstrated propensity to flee, and because the relevant proof is generally more accessible to defendants, the burden of proof in bail decisions in international extradition cases is properly on the accused.

C. *Prehearing v. Posthearing Standard*

To this point, this Note has primarily addressed the issues surrounding bail requests made *before* the extradition hearing. Release may also be requested *after* the extradition hearing, pending extradition (or habeas corpus review). The question arises whether the same standard for bail should apply to pre- and post-extradition hearing bail requests. In *Wright v. Henkel*, the Supreme Court seemed to answer

95. Of course, many extradition arrestees may not be likely to flee. Especially when the arrestee is an American citizen or a foreign national with strong ties to the United States, the accused may have little motivation to flee if released on bail:

The accused is often either an American citizen or a foreign national living and working openly in this country. Those persons have . . . far less motivation to fail to appear for court hearings than defendants in ordinary criminal cases because: (1) they are trying to convince a judge not to order them extradited to a foreign country. The best way . . . is to make sure the accused appears in court as ordered; (2) bail conditions in extradition cases always entail surrender of passports or other travel documents, making unauthorized departure from the country extremely difficult; (3) particularly in the case of United States citizens or foreign nationals living here legally, there is no motive to flee the country, since those persons will be unable to live or work in most other countries without immediate detection and, often-times, very minimal extradition protections.

Senate Hearing on Extradition Act of 1981, *supra* note 10, at 70-71 (letter of William M. Goodman, private attorney with significant experience in international extradition proceedings).

96. Usually in Federal criminal cases, law enforcement authorities have had an opportunity to gather information concerning the defendant's criminal record and likelihood of flight by the time the complaint is filed or arrest warrant requested. At a comparable time in an extradition case, the United States Government may not have any information concerning the person sought other than a physical description and a request for extradition from the foreign state. . . . [I]n extradition matters, it may take longer to obtain information about flight risk and other factors related to the release decision

H.R. REP. NO. 998, 98th Cong., 2d Sess. 15 (1984); *see also Reform of Extradition Laws*, *supra* note 10, at 36.

97. *See Reform of Extradition Laws*, *supra* note 10, at 42-43 (showing that nearly 70% of those arrested pursuant to extradition requests in 1980-1982 were foreign nationals).

in the affirmative. The Court decided a *pre*hearing bail request by analyzing factors relevant to a *post*hearing request and concluded that "the same reasons which [argue against bail after the extradition hearing] would seem generally applicable to release pending examination."⁹⁸ However, lower courts have not uniformly followed this approach,⁹⁹ and the better-reasoned view is that the standard for bail should be more stringent after the extradition hearing.

The Supreme Court gave no basis for its statement in *Wright* supporting uniformity of the pre- and posthearing standards — the above-quoted statement stands alone in the opinion, providing a nexus between the Court's analysis of a posthearing bail request and the facts of *Wright*, which involved a prehearing request.¹⁰⁰ There is no indication in the *Wright* opinion that the Court considered the important distinctions between prehearing and posthearing bail requests.

After an accused has been declared extraditable at an extradition hearing, the national interest in treaty compliance is intensified. The hearing, which establishes that the accused is extraditable pursuant to treaty, cements the treaty obligation of the United States.¹⁰¹ At the same time, the individual interest in liberty to prepare a defense to extradition is diminished after extraditability has been determined at the hearing. Furthermore, the extraditee may well have increased incentive to flee after the hearing rather than face the now more certain prospect of extradition.

The distinctions between bail in the pre- and post-extradition hearing contexts are analogous to those between bail in the pre- and post-trial contexts in domestic criminal cases. In domestic federal criminal cases, the standard for bail is stricter after trial, pending appeal. Under the Bail Reform Act of 1984, a court may grant bail pending appeal only if the appeal raises "a substantial question of law or fact likely to result in reversal or an order for a new trial."¹⁰² Professors LaFave and Israel explain the stricter standard for bail requests pending appeal by noting:

the situation is different after conviction A defendant who has been convicted and has little hope for reversal might be strongly tempted to flee Another reason given is that "the presumption of innocence and the right to participate in the preparation of a defense to ensure a fair trial — are obviously not present where the defendant has already

98. 190 U.S. 40, 62 (1903); see notes 57-60 *supra* and accompanying text.

99. See notes 75-76 *supra* and accompanying text.

100. 190 U.S. at 62.

101. See text at notes 22-23 *supra*; see also Note, *supra* note 83, at 115.

102. 18 U.S.C. § 3143(b)(2) (Supp. IV 1986); see generally 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 12.4(d) (1984 & Supp. 1987); Note, *Raising a "Substantial Question": The Key to Unlocking the Door Under the 1984 Bail Reform Act*, 62 NOTRE DAME L. REV. 192 (1987).

been tried and convicted.”¹⁰³

The relevant extradition statute appears to prohibit release after the extradition hearing. Section 3184 provides that after a hearing in which the accused is determined to be extraditable, the extradition official “shall issue his warrant for the commitment of the person so charged to the proper jail, *there to remain until . . . surrender [to the requesting nation].*”¹⁰⁴ The only posthearing release contemplated by the extradition statutes is in the provision that allows automatic release after two months from the date of the posthearing commitment to jail.¹⁰⁵ However, section 3184 does not explicitly prohibit release on bail, and courts have not read it as an absolute prohibition of post-extradition hearing release. Even the strictest interpretations of the *Wright* “special circumstances” standard admit that posthearing release is possible.¹⁰⁶ For the reasons discussed in the prehearing context,¹⁰⁷ the focus in the posthearing bail decision should be on risk of flight. At the same time, the acceptable risk of flight, very low in the prehearing context,¹⁰⁸ should be even lower in the posthearing context.¹⁰⁹

IV. CONCLUSION

The United States has a strong interest in extraditing fugitives in compliance with international treaty obligations. Indeed, noncompliance may endanger the safety of United States residents, harm international relations, and provoke reciprocal noncompliance by other nations. For these reasons, courts are often hesitant to grant bail in international extradition cases. However, the “special circumstances” standard for bail, set forth by the Supreme Court eighty-four years ago, does not provide clear guidance for lower courts. The standard also does not recognize the important individual liberty interest at stake in these cases.

Given the lack of guidance provided by the “special circumstances” standard and its potentially harsh results, some modern

103. 2 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* 148 (1984) (quoting *Gallie v. Wainwright*, 362 So. 2d 936, 941 (Fla. 1978)). Of course, the analogy between the extradition hearing and the criminal trial is not perfect. The goal of the extradition hearing is *not* to determine the defendant's guilt or innocence, and an extradition-hearing defendant lacks some of the procedural safeguards of the criminal-trial defendant. See note 23 *supra*.

104. 18 U.S.C. § 3184 (1982) (emphasis added).

105. 18 U.S.C. § 3188 (1982).

106. See *Wright v. Henkel*, 190 U.S. 40 (1903); Part II.A *supra*; see also *United States v. Williams*, 611 F.2d 914 (1st Cir. 1979).

107. See Part III.A *supra*.

108. See note 90 *supra* and accompanying text.

109. A possible standard of proof would be a “reasonable doubt” standard. After the extradition hearing, release should be denied unless the defendant convinces the court beyond a reasonable doubt that he will not flee if released.

courts have liberalized the approach to bail in international extradition cases. These courts correctly focus on the defendant's risk of flight if released. Under this approach, the presence of specific "special circumstances" is irrelevant in the bail inquiry. This risk-of-flight analysis, with the burden of proof on the defendant, effectively considers the individual liberty interest in prehearing release and still protects the national interests at stake since it focuses on the factor most relevant to the protection of those interests.

— *Jeffrey A. Hall*