Michigan Journal of International Law

Volume 4 | Issue 1

1983

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Recommended Citation

Carl A. Valenstein, *The Right to Bail in United States Extradition Proceedings*, 4 MICH. J. INT'L L. 107 (1983).
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The Right to Bail in United States Extradition Proceedings

Carl A. Valenstein*

INTRODUCTION

Unlike a person charged with a non-capital offense under United States federal law, the accused in an international extradition proceeding has no statutory right to bail.[1] In *Wright v. Henkel,*[2] the Supreme Court ruled that bail should be granted in extradition proceedings only in "special circumstances." The Court based its decision on the United States Government's strong interest in fulfilling its treaty obligations to deliver the accused as requested. The accused's interests[3] have until recently received less consideration.

In practice,[4] the defendant can petition for bail during two distinct periods in the extradition process: before and after the extradition hearing. After the requesting state has filed a verified complaint with the United States Government,[5] the extradition magistrate or judge issues a warrant for the accused's provisional arrest and detention.[6] An extradition hearing is then conducted[7] to determine if sufficient evidence exists to warrant the accused's extradition.[8] If the accused is found extraditable, he will be confined awaiting surrender to the requesting state but he may collaterally attack the extradition order by filing a habeas corpus petition.[9] Until recently, the special circumstances rule has been applied uniformly to both periods of detention, but courts have increasingly expressed uneasiness with its application before a final order granting extradition.

This note examines the judicial rationale for denying bail in extradition proceedings except in special circumstances. The author maintains that the courts apply the special circumstances rule inconsistently. Moreover, a better balance should be struck between the interests of the accused and the interests of the United States Government. This can be accomplished by granting the accused in an extradition proceeding the same right to bail

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before a final order granting extradition as exists under the federal bail statute.

EVOLUTION OF THE SPECIAL CIRCUMSTANCES DOCTRINE

The first noteworthy case to treat the issue of bail in extradition proceedings was *In re Carrier,* [10] decided by the District Court of Colorado in 1893. The accused had moved to be released on bail pending the continuance of the extradition hearing, which had been delayed to await the arrival of evidence from the requesting state. The judge stated that the issue was not whether the crime alleged, larceny, was bailable at common law but rather whether bail was permitted by the extradition statute: "[I]n our day, bail is not allowed in any case except in pursuance of some statute." [11] Finding the Judiciary Act of 1789 [12] inapplicable to extradition cases, the judge ruled that the extradition statute [13] did not allow bail:

> This . . . act further shows the intention of congress to regulate all proceedings in extradition by special act, leaving nothing of substance to be borrowed from the general course of criminal procedure. [14]

Citing *In re Carrier* with approval, the Supreme Court in 1903 decided *Wright v. Henkel,* [15] which has remained the judicial basis for subsequent decisions limiting bail in extradition proceedings. Wright, a United States citizen, [16] was sought by the United Kingdom for fraud. He had been arrested on March 16, 1903 and subsequently incarcerated. On March 18, before the extradition hearing, he presented to the extradition commission a bail application stating that he was suffering from bronchitis and a severe chill, which could develop into pneumonia if he remained in confinement. [17] After losing below on his bail motion and having been found extraditable, Wright's case came before the Supreme Court, where the Court affirmed the denial of bail on June 1, 1903.

The Supreme Court concluded that the federal statute governing extradition of fugitives from the United States is inconsistent with allowing bail after a finding that the person requested is extraditable. If the extradition official so finds, the statute requires that he "issue his warrant for the commitment of the person so charged to the proper jail, *there to remain* until such surrender shall be made." [18] In addition to the statute's language, the Court reasoned that when the requesting state has done all that the extradition treaty and law require it to do, it is entitled to the delivery of the accused. [19] If the accused were released and jumped bail not only would the United States Government be unable to fulfill its treaty obligations but the entire incident "would be surrounded with serious embarrassment." [20]

Without any attempt to explore possible distinctions between bail before and after a final order granting extradition, the Court concluded that "the same reasons which induced the language used in the statute would seem generally applicable to release pending examination." [21]

Despite its strong language against bail, the Supreme Court was unwilling to prohibit outright the granting of bail:

> 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 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. [22]

The Court did not hint at what might constitute special circumstances but it apparently thought that potential injury to the accused's health did not qualify. Furthermore, the Court expressed no concern that the accused was being subjected to incarceration prior to conviction.

Subsequent cases have attempted to come to grips with the special circumstances doctrine. In *In re Mitchell,* [23] Judge Learned Hand ruled that the defendant should be released on bail pending the extradition hearing, because he was unable to consult with his attorney and had known of the extradition request for some time without attempting to flee. [24] Judge Hand noted the Supreme Court's affirmation in *Wright* of a lower court's power to grant bail in extradition proceedings in special circumstances and concluded that special circumstances existed because the "suit . . . involves all the fortune of the [accused]." [25]

While Judge Hand emphasized the lower court's power to grant bail, the court in *United States ex rel. McNamara v. Henkel* [26] stressed the inadvisability of exercising that power before a "reasonably early" extradition hearing. [27] The court stated further that it would be absurd for the United States Government to collect a surety bond from the accused, who had not violated the laws of the United States, even if the money were then passed on to the requesting state. [28]

In contrast to the rigidly anti-bail stance of the *McNamara* court, the court in *In re Gannon* [29] concluded that bail should be granted where the extradition hearing would not be held within two months of the accused's arrest. The court arrived at this conclusion reluctantly in light of the dictum of *Wright v. Henkel* that pre-hearing and post-hearing requests for bail could not be distinguished. [30] To overcome this dictum the court noted that both the United States and Canada, the requesting state, shared a regard for the liberty of every subject until a hearing determines that right to have been forfeited. [31] Given that the accused, if he jumped bail, would

have to flee from two powerful governments, the court reasoned that the risk of non-appearance was slight.[32]

Gannon's consideration of fairness and its distinction between the granting of bail before and after the hearing did not, however, prompt other courts to follow suit. The court in *In re Klein*[33] refused to find special circumstances in the delay and "discomfort of the jail" the defendant had to suffer pending his extradition hearing. Instead the court emphasized the interests of the United States in fulfilling its treaty obligations.[34]

This brief overview of the early cases dealing with an accused's right to bail in extradition proceedings indicates a distinct rift between the courts. Some courts emphasize the interests of the United States Government in fulfilling its treaty obligations and strictly interpret the requirement of special circumstances. Others distinguish between petitions for bail before and after the hearings and stress the injustice to the accused of incarceration without bail in the pre-hearing setting. These courts seem less concerned with the risks of violating treaty obligations.[35]

This early division among lower courts in implementing the Supreme Court's special circumstances doctrine is graphically depicted in the 1977 case of *Beaulieu v. Hartigan.*[36] On the evening of March 3, 1977, Judge Tauro of the District Court of Massachusetts released defendant Beaulieu on bail while the Judge awaited further findings of fact scheduled to arrive March 9 from the extradition magistrate concerning the identification of the accused. The judge released the accused for the intervening days because: he had already been incarcerated for roughly two months; he lacked a passport; he lacked money; his parents appeared to be responsible and were present in court; his father assured the judge of the accused's appearance; the accused offered similar assurances; and he presented no danger to himself or the community.[37] Judge Tauro wrote:

> [I]t was grossly unfair to confine petitioner Beaulieu for the better part of two months before giving him a hearing on the fundamental issue of identification, having in mind that were this case to be prosecuted in the United States, the District Court would be required to give him a trial within ninety days of his arraignment . . .[38]

On March 9, the Court of Appeals reversed without prejudice Judge Tauro's order granting bail, but the judge immediately regranted bail.[39] In the course of his opinion explaining the decision to regrant bail, he reviewed the split in the early cases over the issue of what constituted special circumstances and concluded that, in the more contemporary cases, the granting of bail pending completion of the extradition proceeding "has been the rule rather than the exception."[40] Summarizing his view, Judge Tauro wrote:

> Analysis of these cases leads me to the conclusion that the "special circumstances" doctrine of *Wright*, though still viable, must be viewed, in the light of modern concepts of fundamental fairness, as providing a district judge with flexibility and discretion in considering whether bail should be granted in these extradition cases. The standard of scrutiny and concern exercised by a district judge in an extradition case should be greater than in the typical bail situation, given the delicate nature of international relations. But one of the basic questions facing a district judge in either situation is whether, under all the circumstances, the petitioner is likely to return to court when directed to do so. Fundamentally, it is a judgment call by the district court based on the totality of the circumstances, including the extremely important consideration of this country's treaty agreements with other nations. [41]

The defendant Beaulieu did return for the hearing and, having been found extraditable, filed a habeas corpus petition, which the judge denied. Nonetheless, Judge Tauro again admitted him to bail pending his appeal. In a *per curiam* opinion, [42] the First Circuit affirmed the denial of habeas corpus and vacated the bail order. The court asserted, "Unlike the situation for domestic crimes, there is no presumption favoring bail. The reverse is rather the case." [43] This assertion is questionable. While the issue is not closely examined in the contemporary cases, many modern courts apparently favor granting bail to the accused. [44] Indeed, responding to an inquiry from a foreign government, the State Department has indicated that "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." [45]

No recent cases directly examine the issue of granting bail *after* the magistrate has allowed extradition and collateral attack on the extradition order has been exhausted. However, the courts are clearly split on the conditions for granting bail before the extradition hearing or pending habeas corpus review. Given a delay before the hearing, [46] the strong likelihood of the accused's appearance in court, [47] or the potential for injury to the accused's health, [48] some courts have granted bail and others have denied it. Because the Supreme Court in *Wright v. Henkel* did not define special circumstances, courts oriented toward the accused's interests have stretched the definition to cover a number of cases in the prehearing setting. For these judges, before an order granting extradition, the accused's interest in remaining at liberty deserves protection similar to that afforded a defendant in a criminal proceeding arising under U.S. domestic law. On the other hand, some courts continue to apply the special circumstances rule quite strictly. Domestic bail doctrine still does not guide bail decisions in extradition proceedings.

RECENT LEGISLATIVE PROPOSALS

Unlike the federal bail statute, which was amended in 1966 to lower the standard for bail, [49] the provisions of the extradition statute governing bail have remained unchanged throughout the century. [50] However, Senate Bill 1940—currently before the Congress—would materially alter bail in extradition proceedings. [51] In essence, the major changes proposed are: the statutory codification of the "special circumstances" doctrine of *Wright;* the establishment of a time limit for provisional arrest absent a provision in the applicable treaty; the creation of appellate review of an extradition order with corresponding bail provisions; and the shortening of the statutory time limit on detention pending surrender to the foreign country.

Section 3192(c) of the bill provides that a person provisionally arrested pursuant to an extradition request "shall be taken *without unnecessary delay* before the nearest available court for an extradition hearing." [52] While this section does not provide for dismissal of the extradition proceeding if the accused is not taken "without unnecessary delay" to the nearest court, it expresses a consideration for the accused's interests that is wholly lacking in the old statute.

Section 3192(d)(1) provides that, before the extradition hearing, the accused should be granted bail only if there are special circumstances. This section codifies part of the Supreme Court's holding in *Wright v. Henkel* but leaves open the question of what constitutes special circumstances and thus fails to resolve the conflicts in the case law discussed above. Section 3192(d)(2) provides that, unless otherwise provided by the applicable treaty, if the accused has been provisionally arrested pursuant to a complaint unsupported by documents, the accused may be released pending the hearing if, within sixty days, the extradition tribunal has not received either the evidence required or notice that the Department of State has received and will be transmitting the evidence. [53] Under existing statutory law, no time limits exist for the receipt of evidence and the provisional arrest of the accused except where the request has been made by telegraph. However, most treaties expressly provide a two-month limit on the period of provisional arrest. [54]

Section 3192(d)(3) provides that if the Court grants bail pending the extradition hearing, "it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person as required and the safety of any other person and the community." [55] The requirement of reasonable assurance that the accused will appear is a condition for granting bail for non-capital criminal offenses arising under federal law. [56] The community safety condition is currently included in the federal bail statute only for capital offenses. [57]

The proposed reform would also create appellate review of the decision

to extradite.[58] Section 3195(b) states that if the accused has been found extraditable, then bail will be granted pending the appeal only in "special circumstances"—again left undefined. If the requested person were found non-extraditable, he may be released on bail pending the government's appeal "unless the Attorney General establishes to the court's satisfaction that the person is likely to flee or to endanger the safety of any other person or the community."[59]

Finally, § 3196(c) would permit the release of the accused after a final order granting extradition if, excluding any time during which removal was delayed by judicial proceedings, the Secretary of State does not order the accused's surrender within forty-five days after receiving the court's decision, or if the person has not left the United States within thirty days after the Secretary has ordered the requested person's surrender.[60] Under existing law, the accused may petition for release if he has not been delivered to the requesting state within sixty days after the order.[61]

These changes reflect an increased concern for the interests of the accused, particularly in the area of the time permitted for detention. They do not, however, remedy the problem of defining "special circumstances." More importantly, they do not affect the judicially established presumption against granting bail in the pre-hearing setting.

AN ALTERNATE PROPOSAL

While Senate Bill 1940 increases recognition of the accused's interests, the question remains whether the "special circumstances" rule adequately balances those interests against the interests of the United States Government. The United States does not stand alone in setting higher standards for release on bail in extradition proceedings than in cases arising under domestic criminal law,[62] but some countries grant the accused the same right before an extradition hearing that he would enjoy under domestic criminal law.[63] The United States Congress should follow suit. Prior to the extradition hearing, a requested person should have rights similar to those of a defendant under the federal bail statute.[64] On the other hand, after the extradition hearing, the accused's right to bail should be restricted—in spite of some modern courts' propensity to grant bail pending habeas corpus review.

The principal concern with lowering the standard for bail in extradition proceedings is the United States Government's international legal obligation arising from extradition treaties to deliver the accused when found extraditable. Failure to surrender the accused would not only embarrass the United States Government, but could conceivably make the requesting state less cooperative in future extradition requests by the United States.

These delicate international concerns do not affect bail in domestic proceedings and are legitimate concerns. Nonetheless, the United States Government should be able to safeguard both the accused's interests and its own treaty obligations by substituting the carefully wrought guidelines of the federal bail statute for the uncertain "special circumstances" rule.

The federal bail statute provides that for non-capital offenses, the accused must be released pending trial on either his personal recognizance or upon the execution of an unsecured appearance bond unless the judicial officer determines that such release will not assure the accused's appearance. The statute enables a judicial officer to impose an assortment of conditions upon release including placing the person in the custody of a person or organization agreeing to supervise him, placing restrictions on his travel, association, or residence, requiring the execution of an appearance or bail bond, or imposing any other condition deemed reasonable. [65]

The statute also provides general guidelines for setting conditions on release:

> [T]he judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings. [66]

Using these criteria, an extradition court or magistrate could set conditions for release that would assure the defendant's appearance. The court could, for example, seize the accused's passport or assets making flight difficult or place additional restrictions on his travel. Furthermore, the above criteria would permit extradition officials to take into account the potential embarrassment to the United States Government if this particular defendant were to jump bail. The extradition official's inquiry should center on whether the accused is a tolerable bail risk in light of the federal bail statute's general guidelines and the delicate international considerations of the particular case.

By substituting the criteria of the federal bail statute for the "special circumstances" rule before a final order granting extradition, the accused's interests will be accorded greater weight than they currently receive. No logical reason exists to distinguish between extraditees and domestic defendants with respect to presumptions of innocence and likelihood of returning for trial. It is fundamentally unfair to create a presumption against bail in extradition proceedings when the requesting state has merely filed a complaint with the United States Government. Thus, before the

requesting state has formally proven its case, establishing the identity of the accused and probable cause, [67] the defendant should be able to avail himself of the federal bail statute's presumption favoring bail. In addition to protecting the accused's interests, use of the federal bail statute would provide courts with a more familiar set of standards for granting bail and would eliminate the uncertainty of defining special circumstances. [68]

The federal bail statute should not, however, guide the decision on bail after a final order granting extradition. The situation at this stage is vastly different: an official has found that the requesting state has fulfilled all of its obligations under the existing treaty, and the United States has a greater obligation to deliver the accused. The requesting state has thus established the accused's identity and probable cause, and the accused has had an opportunity to be heard. [69] Thus, after the accused has been found extraditable, it would be advisable to retain a modified special circumstances rule with its presumption against granting bail.

Even here, however, it would be wise to provide some statutory guidelines to extradition officials to prevent uneven application of the rule. For example, the statute could read: After a final order granting extradition, the requested person should be released on bail only in special circumstances. These circumstances may include but are not limited to cases where: (1) incarceration would seriously endanger the requested person's health; (2) the requested person cannot adequately prepare his defense in the criminal proceeding to be held in the requesting state; or (3) the welfare of a third party is wholly dependent upon the requested person's release.

CONCLUSION

Present United States law governing international extradition procedure does not provide a right to bail; the federal bail statute, which establishes such a right for cases arising under federal law, does not apply to extradition. Supreme Court and lower court decisions interpreting the extradition statute have recognized the power of the judicial officer in extradition proceedings to grant bail, but only in special circumstances. Courts have differed on the meaning of the term special circumstances. Those courts concerned with the accused's interests interpret the term broadly to permit bail before the accused has been found extraditable. This approach has gained increasing support. Yet, some courts continue to adhere to a strict interpretation of the special circumstances rule; they deny bail without distinguishing between requests before and after the hearing.

A strict application of the special circumstances rule in the pre-hearing setting unfairly and unnecessarily subordinates the interests of the accused to the interest of the United States Government in fulfilling its treaty

obligations. Until the accused has had an opportunity to be heard and the requesting state has proven its case, the accused should be entitled to a presumption favoring bail similar to that which exists for domestic defendants. In contrast, an accused who has been found extraditable merits bail only in special circumstances, as provided for in current case law, but with statutory guidelines to prevent the inconsistent application of the special circumstances rule.

Legislative Note: Since this article was written H.R. 6046, 97th Cong., 2d Sess. (1982), was introduced in the House of Representatives. If adopted, H.R. 6046 would alter the existing law governing bail in extradition proceedings far more significantly than S. 1940 discussed in the text. In brief, the House bill provides that for the first ten days after arrest, the burden of proof is on the requested person to establish that he can be released without risk. § 3192(d)(2). This ten-day period would enable the United States Government to obtain additional information from the requesting state about the person sought. After the expiration of ten days, or the receipt of a complete set of information from the foreign government, the burden of justifying detention shifts to the government. § 3199(c). The bill also creates a right to appeal extradition orders, § 3195, with the burden of proof on the bail issue shifting to the requested person after a finding that he is extraditable. § 3195(3)(A). The United States Government has a special right to appeal an order granting the requested person's release. § 3195(c)(5).

The House proposal rejects the special circumstances rule, substituting essentially a three-part test based on the risk of flight, danger to the community, and potential for disruption of relations with the foreign state. § 3192(d)(2) and § 3199(c)(2). Furthermore, it establishes conditions for release similar to those contained in the federal bail statute but taking into account the unique circumstances of extradition. § 3199(c)(2)-(c)(3). The Department of Justice has opposed the House proposal to shift the burden of justifying detention to the government before an order granting extradition. *See generally* H.R. Rep. No. 627, pts. 1 and 2, 97th Cong., 2d Sess. (1982); 128 Cong. Rec. E2241-43 (daily ed. May 13, 1982).

NOTES

[1] The U.S. extradition statute does not mention bail. *See* 18 U.S.C. § 3184 (1976). The federal law governing bail for domestic criminal offenses is found in 18 U.S.C. §§ 3141-3152 (1976) and applies only to persons charged with "any criminal offense . . . which is in violation of an Act of Congress." 18 U.S.C. § 3152 (1976). Since fugitives facing extradition to a foreign country are not accused of a federal crime, nor will be tried in any federal court, the statutes governing bail do not apply. Letter from Undersecretary of State Warren Christopher to Senator Edward Kennedy (July 2, 1980), reprinted in 126 Cong. Rec. S13241 n.14 (daily ed.

Sept. 23, 1980). *See also* FED. R. CRIM. P. 54(5) (provides that Rule 46 (Release from Custody) does not apply to extradition and rendition of fugitives).

In Carlson v. Landon, 342 U.S. 524 (1952) (deportation of alien communists), the Supreme Court held that the proper reading of the eighth amendment to the United States Constitution was that excessive bail was prohibited only for those offenses which Congress had declared bailable; it did not, however, create a right to bail in all criminal proceedings. But *Carlson* has not permanently settled the issue of whether the eighth amendment creates such a right. *See, e.g.,* Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot sub nom.* Murphy v. Hunt, 102 S.Ct. 1181 (1982) (No. 80-2165), in which the Eighth Circuit Court of Appeals declared unconstitutional a provision of the Nebraska Constitution that automatically denied bail to persons charged with certain sexual offenses. The State of Nebraska defended its statute relying on the Court's decision in *Carlson.* For background on the right to bail under United States law, see KAMISAR, LAFARE & ISRAEL, MODERN CRIMINAL PROCEDURE 870-904, 144-155 (5th ed. 1980 and 1981 Supp.), Cook, RIGHTS OF THE ACCUSED: PRE-TRIAL RIGHTS 463-475 (1972).

[2] 190 U.S. 40, 63 (1903).

[3] Apart from the inequity of depriving the accused of his liberty before conviction, incarceration without bail can produce serious psychological as well as physical injury and entails a certain amount of social dislocation, *e.g.,* loss of employment and inability to support dependents. For a discussion of the prejudice to the accused in the domestic setting, see Foote, *The Coming Constitutional Crisis in Bail: II,* reprinted in, STUDIES ON BAIL (C. Foote ed. 1966) at 244. To be sure, for some fugitives the social dislocation will be minimal because they will not have had time to put down roots in the United States.

[4] The current U.S. law on international extradition is set forth at 18 U.S.C. §§ 3181, 3183-3195 (1976). For an overview of extradition procedure see generally 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727-1122 (1968); Bassiouni, *International Extradition in American Practice and World Public Order,* 36 TENN. L. REV. 1, 5-30 (1968).

[5] The requesting state must make out a complaint under oath charging the accused, who is within United States' jurisdiction, with having committed a crime provided for by the then existing extradition treaty between the United States and the requesting state. 18 U.S.C. § 3184 (1976).

[6] Most extradition treaties provide for a period of provisional arrest, commonly two months, once the requesting state identifies the accused and his alleged crime. The treaties typically leave to the legislature of the requested state the issue of whether to release the requested person on bail during that period. If the documents required to extradite the accused are not received within the stated period, the accused will normally be released from custody. 6 M. WHITEMAN, *supra* note 4, at 922-26; Reuschlein, *Provisional Arrest and Detention in International Extradition,* 23 GEO. L. J. 37, 46-73 (1934). The federal statute covering provisional arrest after an extradition request does not set a maximum amount of time (in the absence of a provision in the extradition treaty) during which the accused can be detained except for a ninety-day limit where the extradition request has been made by telegraph. 18 U.S.C. § 3187 (1976).

Recently, courts have questioned whether the issuing of a warrant for provisional arrest and detention without a prior showing of probable cause is consistent with the fourth amendment. *See, e.g.,* Caltagirone v. Grant, 629 F.2d 739, 748 (2d Cir. 1980).

[7] Extradition proceedings are not criminal prosecutions. *See, e.g.,* Benson v. McMahon, 127 U.S. 457, 463 (1888) ("We are not sitting in this court on the trial of the prisoner. . . ."); Charlton v. Kelly, 229 U.S. 447, 461 (1913); United States *ex rel.* Oppenheim v. Hecht, 16 F.2d 955, 956 (2d Cir. 1927), *cert. denied,* 273 U.S. 769 (1927). Therefore the accused has no sixth amendment right to a speedy trial. Jhirad v. Ferrandina, 536 F.2d 478, 485 n.9 (2d Cir.), *cert. denied,* 429 U.S. 833 (1976); Sabatier v. Dabrowski, 586 F.2d 866, 869 (1st Cir. 1978) ("Nothing

in the present circumstances leads us to view the sixth amendment right to a speedy trial as germane."); United States v. Clark, 470 F. Supp. 976, 979 n.1 (D. Vt. 1979).

[8] Extradition depends upon the following considerations: (1) Is the person brought before the magistrate the person named in the extradition request and supporting documents?; (2) Does a valid extradition treaty exist between the United States and the requesting state?; (3) Does the evidence show that the accused has been convicted in the requesting state or does it establish probable cause?; (4) Is the alleged crime covered in the extradition treaty?; (5) Does the case fall under any prohibitions to extraditions mentioned in the treaty (*e.g.*, the defendant is a citizen of the requested state, the offense is of a political character, or the statute of limitation has run)? *See generally* 6 M. WHITEMAN, *supra* note 4, at 943 *passim.*

[9] If the accused is not surrendered within two months he may be released from custody. *See* 18 U.S.C. § 3188 (1976). Direct appeal from an extradition order is not available. Collins v. Miller, 252 U.S. 364 (1919). Habeas Corpus review is limited to the follow issues: (1) Did the magistrate have jurisdiction? (2) Is the offense charged within the treaty? (3) Was there any evidence warranting the finding that there was reasonable ground to believe the accused guilty? Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

[10] 57 F. 578 (D. Colo. 1893).

[11] *Id.* at 579.

[12] Ch. 20, § 33, 1 Stat. 73, 91 (codified as amended at 18 U.S.C. § 3146 (1976)).

[13] Act of Aug. 12, 1848, ch. 167, 9 Stat. 302, *as amended by* Act of Aug. 3, 1882, ch. 378, 22 Stat. 215 (codified as amended at 18 U.S.C. §§ 3181, 3183-3195 (1976)).

[14] *Carrier*, 57 F. at 579.

[15] 190 U.S. 40.

[16] In the absence of a treaty provision authorizing the extradition of citizens, the United States will not extradite an American national. This follows from the Supreme Court's holding that, in the absence of a specific grant of power in the extradition treaty, the Executive is without power to surrender nationals. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 10-18 (1936). *See generally* 6 M. WHITEMAN, *supra* note 4, at 865 *passim.* Apparently, this issue was not discussed in *Wright*, and—since it predates *Neidecker*—the parties probably did not consider the issue of great importance. *But cf.* S. 1437, 95th Cong., 1st Sess. § 3211 (1977) (proposed subsection (d) would give the Secretary of State the authority to authorize the extradition of a U.S. citizen who has otherwise been found extraditable).

[17] *Wright*, 190 U.S. at 43 (appellant's allegations in petition for writ of habeus corpus).

[18] 18 U.S.C. § 3184 (1976) (originally enacted as Act of June 6, 1900, ch. 793, 31 Stat. 656) (emphasis added).

[19] *Wright*, 190 U.S. at 62.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 63.

[23] 171 F. 289 (S.D.N.Y. 1909).

[24] *Id.* at 289-90.

[25] *Id.* at 289. To some extent, an accused's fortune always depends upon the outcome of the suit. Furthermore, that the accused did not flee after hearing of the extradition request only establishes that he was likely to appear before the court. Since assurance of appearance is a normal requirement of the federal bail statute, it cannot be a "special circumstance." *See* 18 U.S.C. § 3146 (1976).

[26] 46 F.2d 84 (S.D.N.Y. 1912).

[27] *Id.*

[28] *Id.* The court seems to have missed the point that the primary purpose of the surety bond is to insure the defendant's appearance before the court and not really to compensate

the government for his escape. *See, e.g., In re* Gannon, 27 F.2d 362, 363 (E.D. Pa. 1928) ("A bail bond is process, and has no other function than to give assurance of attendance. . . .").

[29] 27 F.2d 362 (S.D.N.Y. 1930).

[30] *Id.* at 363 (quoting *Wright,* 190 U.S. at 62).

[31] *Id.* at 364.

[32] *Id.*

[33] 46 F.2d 85 (S.D.N.Y. 1930).

[34] *Id.*

[35] *See, e.g., In re* Keene's Extradition, 6 F.Supp. 308, 309 (S.D. Tex. 1934) (bail granted pending extradition hearing—no discussion).

[36] 430 F.Supp. 915 (D. Mass.), *aff'd per curiam* 554 F.2d 1 (1st Cir 1977) (order granting bail vacated and remanded).

[37] 430 F.Supp. at 919-20 (memorandum by district court judge appended to opinion, responding to unpublished circuit court order).

[38] *Id.* at 920.

[39] *Id.* at 915-916. *See supra* note 37 for history of case.

[40] *Id.* at 916. Judge Tauro cited the following cases to support his position: Shapiro v. Ferrandino, 355 F.Supp. 563 (S.D.N.Y. 1973), *modified and aff'd,* 478 F.2d 894 (2d Cir. 1973), *cert. dismissed,* 414 U.S. 884 (1973) (Petitioner, on bail in another proceeding, was put on additional bail pending probable cause hearing. After hearing, order that petitioner be placed in custody stayed pending filing of habeas corpus petition. Following denial of petition, stay continued pending appeal.); Application of D'Amico, 185 F.Supp. 925 (S.D.N.Y. 1960), *appeal dismissed, sub nom.* United States v. Bishop, 286 F.2d 320 (2d Cir.), *cert. denied sub nom.* Farace v. D'Amico, 366 U.S. 963 (1961) (Bail continued pending further proceedings in case of American citizen wanted by the Italian government for aggravated robbery and kidnapping); Artukovic v. Boyle, 107 F.Supp. 11 (S.D. Cal. 1952), *rev'd on other grounds, sub nom.* Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir.), *cert. denied,* 348 U.S. 818, *reh'g denied,* 348 U.S. 889 (1954) (Petitioner sought on murder charges. Grant of bail left undisturbed by circuit court despite its reversal of district court determination that the treaty under which petitioner was seized was no longer in effect.)

The judge noted one exception to the general trend: Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *cert. denied,* 373 U.S. 914 (1963), *further order of district court aff'd,* 314 F.2d 649 (1963). In *Jimenez,* the district court denied bail after determining that the defendant was a bad bail risk. The accused was a political refugee and ex-president of the requesting state; thus, this case presented delicate issues of international relations. 314 F.2d at 563.

[41] *Beaulieu,* 430 F.Supp. at 197.

[42] *Beaulieu,* 554 F.2d 1 (1st Cir. 1977).

[43] *Id.* at 2. Two years later in United States v. Williams, 611 F.2d 914 (1st Cir. 1979), the First Circuit again took a hard-line position against the granting of bail. The Court held that the lower court had erred in confining the "special circumstances" rule to post-hearing applications for bail and in finding special circumstances justifying bail solely because the accused's brother had been released on bail in a separate proceeding.

[44] *See, e.g., Shapiro,* 355 F.Supp. 563; *D'Amico,* 185 F.Supp. 925; *Artukovic,* 107 F.Supp. 11. For the histories of these cases, see *supra* note 40.

[45] J. Boyd, Digest of United States Practice in International Law 156 (1977).

[46] *Compare Gannon,* 27 F.2d 362 and *D'Amico,* 185 F.Supp. 925 (granting bail) with *Carrier,* 57 F. 578 and *McNamara,* 46 F.2d 84 (denying bail).

[47] *Compare Mitchell,* 171 F. 289; *Artukovic,* 107 F.Supp. 11 and *Beaulieu,* 430 F.Supp. 915 (granting bail) with *Beaulieu,* 554 F.2d 1 (denying bail).

[48] *Compare In re* Kaplan, Civ. No. 79-2219 RF, slip op. (C.D. Cal. July 29, 1979) (granting bail) with *Wright,* 190 U.S. 40 and *Klein,* 46 F.2d 85 (denying bail). *See also In re* Itaka, Misc.

No. 79-1536-M, slip op. (D.N.M. Dec. 17, 1979) (court granted bail because a third party's welfare was wholly dependent upon the accused's release).

In addition, there are some cases where bail was granted without any discussion. *See, e.g., Keene,* 6 F.Supp. 308; and Schonbrun v. Freiband, 268 F.Supp. 332 (E.D.N.Y. 1967).

49 The stated purpose of the Bail Reform Act of 1966 was "to revise existing bail procedures to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest." Before the 1966 amendment, the federal bail statute required the accused to post a bail bond, which had the effect of preventing indigent defendants from being admitted to bail. Pub. L. No. 89-465, 1966 U.S. CODE CONG. & AD. NEWS (80 Stat.) 2295.

50 18 U.S.C. § 3184 (1976). The United States extradition statute has never provided for bail. *See supra* note 1.

51 S. 1940, 97th Cong., 1st Sess. (1981). This bill is part of a continued effort to reform the federal criminal code and international extradition procedure. *Compare* the various Senate versions of the Criminal Justice Codification, Revision, and Reform Act: S.1, 93d Cong., 1st Sess., § 3212(c) (1975) (release upon showing of good cause; granted only upon (1) posting of appropriate security, (2) surrender of travel documents, and (3) imposition of "appropriate restrictions" on fugitive's movements); S.1437, 95th Cong., 1st Sess., § 3212(c) (1977) (identical provision); S.1722, 96th Cong., 1st Sess, § 3212(c) (1979) (identical provision); Amendment No. 2373 to S. 1722, § 2313(d) 126 CONG. REC. S 13233 (daily ed. Sept. 23, 1980) (release only upon showing of "special circumstances"; if released, court shall impose conditions that "will reasonably assure the appearance" of the fugitive); S.1639, 97th Cong., 1st Sess., § 3192(d) (1981) (identical provision to Amendment No. 2373). The Departments of Justice and State supported the substance of the current proposal. Letter from Attorney General Benjamin Civiletti to Senator Edward Kennedy (July 1, 1980), *reprinted in,* 126 CONG. REC. S.13235 (daily ed. Sept. 23, 1980). None of these bills have been enacted into law.

The movement to reform United States international extradition procedure is essentially a response to three changed circumstances: (1) new extradition treaties, which are inconsistent with some existing provisions; (2) court decisions materially affecting the old statutes; and (3) the tremendous increase in the number of extradition requests, necessitating streamlined procedures. S. Rep. No. 553, 96th Cong., 2d Sess. 1050 (1980).

52 S. 1940 *supra* note 51 (emphasis added). Section 3192(c) also enables the Attorney General to issue a Summons for the accused to appear at an extradition hearing as an alternative to a warrant for provisional arrest and detention.

53 *Id.*

54 *See supra* note 6.

55 S. 1940, *supra* note 51.

56 18 U.S.C. § 3146(a) (1976).

57 18 U.S.C. § 3148. Proposals have been made to insert the community safety requirement into the federal bail statute for non-capital offenses as well. *See, e.g.,* S. 1630, 97th Cong., 1st Sess. (1981); *see generally* Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform,* 48 FORDHAM L. REV. 423, 432 (1980). This proposal is based on the District of Columbia bail statute whose constitutionality was upheld in United States v. Edwards, 430 A.2d 1321, 1341-43 (D.D.C 1981).

58 S. 1940, *supra* note 51, § 3195. Under existing law the accused may seek only collateral review by filing a habeus corpus petition. *See supra* note 9.

59 S. 1940, *supra* note 51, § 3195(b)(2).

60 *Id.*

61 18 U.S.C. § 3188 (1976).

62 In Canada, courts may grant bail at their discretion, but seldom do. *See* G. LaForest, Extradition To And From Canada 92-95 (2d ed. 1977); 6 M. Whiteman, *supra* note 4, at 1035.

63 For example, Israel permits bail "to any wanted person so long as there does not exist a final declaration that he is subject to extradition." Israel Extradition Law, 1954, art. 22, 8 Laws of the State of Israel 144, 147, *reprinted in* 6 M. Whiteman, *supra* note 4, at 1033. *Accord* Extradition Law of 1874 (Belgium), Art V ("The alien may petition for release on bail in cases where a Belgian citizen enjoys this right and under the same conditions . . ."). However, the right to bail has been held not to exist after a final order granting extradition, because at that point the accused is held by the executive rather than the judiciary. *See* 6 M. Whiteman, *supra* note 4, at 1034.

64 18 U.S.C. § 3146(a),(b) (1976).

65 *Id.* at subsections (a)1-5.

66 *Id.* at subsection (b). For capital offenses, 18 U.S.C. § 3148 requires, in addition to treatment under § 3146, reasonable assurance that the person will not "pose a danger to any other person or to the community." *See supra* note 57 and accompanying text. In the extradition context, the nature of the offense for bail purposes should probably be defined by United States law because it is the American public that will be protected by the community safety requirement.

67 For the constitutionality of issuing a warrant for the accused's provisional arrest and detention before the extradition hearing without a prior showing of probable cause, see *supra* note 6. Not all United States extradition treaties require probable cause before issuing such a warrant. *Compare* Treaty of Extradition, Jan. 13, 1961, United States–Brazil, art. VIII, 15 U.S.T. 2093, T.I.A.S. No. 5691 (no provision for a showing of probable cause) with Treaty of Extradition, Jan. 18, 1973, United States–Italy, art. XIII, 26 U.S.T. 493, T.I.A.S. No. 8052 (requirement of evidence "as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party"). The extradition statute does not seem to make probable cause a prerequisite. *See* 18 U.S.C. § 3184 (1976) (The magistrate may issue a warrant "upon complaint made under oath, charging [a fugitive] . . . with having committed . . . [a] crime.").

68 International extradition proceedings are within the jurisdiction of federal authorities. United States v. Rauscher, 119 U.S. 407, 414 (1886). Thus, the federal bail standards will be familiar to the officials reviewing the bail application.

69 The accused can defend against extradition by establishing that the requesting state has not fulfilled the conditions set forth at *supra* note 8.