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Federal Appellate Jurisdiction-International Extradition-Review of Extradition Proceedings

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FEDERAL APPELLATE JURISDICTION—INTERNATIONAL EXTRADITION—REVIEW OF EXTRADITION PROCEEDINGS—The Consul General of Venezuela filed a complaint in a federal district court, pursuant to treaty[1] and statute,[2] seeking the extradition of former President Perez Jimenez for the crimes of murder and embezzlement. While the required extradition hearings were pending, Venezuela sought to use the civil deposition and subpoena procedure[3] to compel several New York banks to produce records of deposits and to give depositions concerning the accounts of Jimenez and his alleged confederates. Jimenez moved for a protective order[4] to prevent Venezuela from obtaining and using these records as evidence against him in the extradition hearings. On appeal from the denial of this motion, *held*, appeal dismissed for lack of jurisdiction. The courts of appeals have no jurisdiction of appeals from the decisions of a district judge sitting in an extradition proceeding under authority of a statute conferring this power upon "any justice or judge of the United States,"[5] since the district judge is not then acting in his capacity as a "district court of the United States."[6] *Jimenez v. Aristeguieta*, 290 F.2d 106 (5th Cir. 1961).

An extradition hearing is a civil proceeding in the nature of a preliminary criminal hearing. In such a proceeding the presiding magistrate must decide whether the evidence for the demanding government makes a prima facie case warranting the magistrate's commitment of the accused

1 Treaty of Extradition With Venezuela, Jan. 21, 1922, 43 Stat. 1698, T.S. No. 675.

2 "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 commissioner authorized to do so by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, 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 so remain until such surrender shall be made." 18 U.S.C. § 3184 (1958).

3 FED. R. CIV. P. 26, 45. The Federal Rules of Criminal Procedure are specifically inapplicable to extradition proceedings. FED. R. CRIM. P. 54(b)(5).

4 FED. R. CIV. P. 30(b).

5 18 U.S.C. § 3184 (1958).

6 28 U.S.C. § 1291 (1958). One judge concurred specially, and only upon grounds that the order was not final, and hence not appealable.

to the Secretary of State for extradition.[7] Whether there can be any direct appeal from the final decisions of a district judge sitting in extradition proceedings seems presently unsettled, although there is substantial dicta that such decisions are not appealable.[8] In the only two previously reported decisions on this issue—both also in proceedings ancillary to the attempted extradition of Jimenez—federal appellate courts have assumed jurisdiction, thus tacitly upholding a right of appeal.[9] In the principal case the Fifth Circuit has apparently overruled its prior decision without discussion or mention. The many cases which deny, by implication or dicta, the existence of a right of appeal should not be considered binding in presently deciding this issue. All involved habeas corpus proceedings, wherein the limited scope of review is well recognized.[10] Close examination of many of these decisions suggests a judicial attitude that some form of direct review of issues not reviewable in habeas corpus proceedings would be possible in other situations.[11] Also, all these cases were decided prior to, or based upon cases decided prior to, the establishment of circuit courts of appeals and the modern federal appellate structure.[12]

Since Congress admittedly has the power to provide for appeal in extradition cases,[13] the critical question raised in the extradition context is whether the statutory language "appeals from all final decisions of the district *courts* of the United States"[14] is broad enough to encompass such appeals from a district *judge*'s decisions. No legislation specifically prohibits such an appeal, nor does any legislative history suggest such an exclusionary congressional intent. The creation by the Fifth Circuit of an im-

7 Charlton v. Kelly, 229 U.S. 447 (1913); Bryant v. United States, 167 U.S. 104 (1897); Ornelas v. Ruiz, 161 U.S. 502 (1896); Benson v. McMahon, 127 U.S. 457 (1888); *Ex parte* Davis, 54 F.2d 723 (9th Cir. 1931); Sternaman v. Peck, 80 Fed. 883 (2d Cir. 1897).

8 See, *e.g.*, Collins v. Miller, 252 U.S. 364, 369 (1920), and cases cited therein; Ornelas v. Ruiz, *supra* note 7, at 508; Sternaman v. Peck, *supra* note 7; *In re* Keene's Extradition, 6 F. Supp. 308 (S.D. Tex. 1934).

9 Aristeguieta v. Jimenez, 274 F.2d 206 (5th Cir. 1960), *cert. granted sub nom.* Aristeguieta v. First Nat'l City Bank, 365 U.S. 840 (1961); First Nat'l City Bank v. Aristeguieta, 287 F.2d 219 (2d Cir. 1960), *cert. granted*, 365 U.S. 840 (1961). *Cf.* Merino v. Hocke, 289 F.2d 636 (9th Cir. 1961).

10 Sessions v. Manning, 227 F.2d 324 (4th Cir. 1955), *cert. denied*, 350 U.S. 1008 (1956); United States *ex rel.* Smith v. Baldi, 192 F.2d 540 (3d Cir. 1951), *aff'd*, 344 U.S. 561 (1953); Pelley v. Botkin, 152 F.2d 12 (D.C. Cir. 1945); Sanders v. Sanford, 138 F.2d 415 (5th Cir. 1943), *cert. denied*, 322 U.S. 744 (1944), and see text *infra*, at note 36.

11 *In re* Oteiza y Lortes, 136 U.S. 330 (1890); Benson v. McMahon, 127 U.S. 457 (1888); Sternaman v. Peck, 80 Fed. 883 (2d Cir. 1897); *Ex parte* Van Aernam, 28 Fed. Cas. 931 (No. 16824) (C.C.S.D.N.Y. 1854). See also Fernandez v. Phillips, 268 U.S. 311 (1925); Bingham v. Bradley, 241 U.S. 511 (1916); Charlton v. Kelly, 229 U.S. 447 (1913); *In re* Extradition of D'Amico, 177 F.Supp. 648 (S.D.N.Y. 1959); *In re* Vandervelpen, 28 Fed. Cas. 974 (No. 16844) (C.C.S.D.N.Y. 1877).

12 The original circuit courts of appeals were established by Act of March 3, 1891, ch. 517, § 2, 26 Stat. 826.

13 U.S. CONST. art. III, §§ 1, 2. See Fong Yue Ting v. United States, 149 U.S. 698 (1893) (dictum).

14 28 U.S.C. § 1291 (1958). (Emphasis added.)

plied exception to the appeals statute thus appears somewhat questionable.[15] The majority opinion in the principal case cited two habeas corpus cases,[16] and two irrelevant decisions[17] in stating that the term "judge of the United States,"[18] as used in the extradition statute is not synonymous with a "district court"[19] as used in the relevant appellate review statute.[20] But, as pointed out by the concurring judge,[21] it is difficult to perceive how a United States district judge, while performing judicial functions,[22] is in any way distinguishable from the district court.[23] Seemingly it is unreasonable that the instant decision should be based upon the linguistic differences in the applicable statutes.

15 It should be noted, however, that one court has dismissed such an appeal for lack of finality. Merino v. Hocke, 289 F.2d 636 (9th Cir. 1961).

16 *In re* Oteiza y Lortes, 136 U.S. 330 (1890); and Benson v. McMahon, 127 U.S. 457 (1888).

17 Todd v. United States, 158 U.S. 278 (1895), which merely refused to extend the scope of a criminal statute beyond its clear language in such a way as to prejudice the defendant; Textile Mills Security Corp. v. Commissioners, 314 U.S. 326 (1941), decided only that the court of appeals may sit en banc and still be a court of appeals under the judicial code which said that a court of appeals shall consist of three judges. For cases which have held, in various situations, that "court" and "judge" are synonymous, see *infra* note 23.

18 18 U.S.C. § 3184 (1958).

19 28 U.S.C. § 1291 (1958).

20 By the court's own unfortunate reasoning, however, it would seem that the action of the judge might be reviewable under the Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001 (1958). Section 1 defines an "agency" as "each authority . . . of the Government of the United States other than Congress, the courts, or the governments of the possessions [etc.] . . . ." Should the court of appeals in the principal case be consistent in holding the "judge" not a "court," the actions of the extradition magistrate would be within the purview of the APA. Section 10(c) of the APA makes reviewable "every final agency action for which there is no other adequate remedy in any court." This approach raises the following questions: (1) whether the judge who is performing judicial functions was intended, with reference to the APA, to be covered by "courts," and is thus exempted [*Cf.* Newman, *What Agencies Are Exempt From the APA*, 36 NOTRE DAME LAW. 320, 323 (1961)]; (2) whether this function of the judge is a discretionary one whose reviewability is negatived by § 10(a) of the APA; (3) whether the statute regarding extradition proceedings and that regarding appeals may together be so read as to deem the appeal *precluded*, rather than merely ignored, by statute, to make applicable the other exception in § 10(a). The requirement in 10(c) that the action taken by the agency be "final" would seem to be no barrier, since the reasoning in the principal case rested on the unreviewability of any action of the extradition judge.

21 Principal case at 108.

22 Nor can it be maintained that an extradition hearing is not a judicial proceeding, and Congress could not have imposed the duty of conducting such a hearing upon a district judge unless it were, they being limited to the exercise of the "judicial power of the United States." U.S. CONST. art. III, § 1. See United Steelworkers v. United States, 361 U.S. 39 (1959); Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923); ICC v. Brimson, 154 U.S. 447, 485 (1894). *Cf.* Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930).

23 See United States, Petitioner, 194 U.S. 194 (1904); United States v. McCabe, 129 Fed. 708 (1st Cir. 1904); Tsoi Yii v. United States, 129 Fed. 585 (9th Cir. 1904); United States v. Gee Lee, 50 Fed. 271 (9th Cir. 1892). *Cf. In re* Jackson, 55 Nev. 174, 28 P.2d 125 (1934); Guild v. Meyer, 59 N.J. Eq. 390, 46 Atl. 202 (1900); Commonwealth v. Shawell, 325 Pa. 497, 191 Atl. 17 (1937).

Although most extradition hearings are initiated before a federal district judge,[24] a further problem is presented because the statute also authorizes the hearings to be commenced before a United States Commissioner or any state judge of a court of record and general jurisdiction.[25] This raises the possibility that the appealability of extradition hearings might be dependent upon the forum chosen by the demanding government in originating the proceedings. However, such an unfortunate disparity of result could be avoided, at least in the case of proceedings before a commissioner. The district court which appoints the commissioner, having supervisory control over him as an officer of the court, may assume control of the proceedings whenever justice demands,[26] or control the commissioner's actions and judgments by authority of the so-called "all writs" statute.[27] If the district court reviews or refuses to review the actions of the commissioner, then these district court decisions should be appealable to the court of appeals to the same extent as if the district court were itself sitting as the examining magistrate.[28] On the other hand, the possibility of appellate review if the proceedings were originated before a state judge is entirely speculative, since there are no reported decisions or even dicta on this question. Perhaps there could be appellate jurisdiction within the state court system, with ultimate certiorari to the Supreme Court from the highest court of the state in which a decision could be had,[29] or possibly the proceedings might be removable by the defendant to a federal district court,[30] although one lower court has denied this.[31] For removal, the defendant would have to show that the proceedings were a "civil action,"[32] but if removable, appellate jurisdiction

24 Fink & Schwarz, *International Extradition: The Holohan Murder Case*, 39 A.B.A.J. 297, 299 (1953).

25 18 U.S.C. § 3184 (1958).

26 United States v. Berry, 4 Fed. 779 (D.C. Colo. 1880). See United States v. Allred, 155 U.S. 591, 595 (1895); United States *ex rel.* D'Amico v. Bishopp, 286 F.2d 320 (2d Cir. 1961); *In re* Grin, 112 Fed. 790 (N.D. Cal. 1901), *aff'd*, 187 U.S. 181 (1902).

27 The courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1958).

28 See Merino v. Hocke, 289 F.2d 636 (9th Cir. 1961). *Cf.* Application of D'Amico, 185 F. Supp. 925 (S.D.N.Y. 1960), *appeal dismissed*, 286 F.2d 320 (2d Cir. 1961). It is also significant to note that it has been held that a district court can review the actions of a commissioner in finding, in a preliminary criminal hearing, that there was probable cause to hold defendant for a grand jury. United States v. Florida, 165 F. Supp. 328 (E.D. Ark. 1958); United States v. Zerbst, 111 F. Supp. 807 (E.D.S.C. 1953).

29 28 U.S.C. § 1257 (1958).

30 "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (1958).

31 *In re* Keene's Extradition, 6 F. Supp. 308 (S.D. Tex. 1934).

32 As to the nature of the proceedings, examined in other contexts, *compare* United States *ex rel.* Oppenheim v. Hecht, 16 F.2d 955 (2d Cir.) (civil), *cert. denied*, 273 U.S. 769 (1927), *and* United States *ex rel.* Klein v. Mulligan, 1 F. Supp. 635 (S.D.N.Y.) (civil), *aff'd*,

would thereafter be the same as if the proceedings were originated in the federal district court. Thus, regardless of where the extradition proceeding is begun, the dangers of totally disparate results in appealability may be circumvented.

In examining the instant decision, the most logical theory upon which it could be rested is that the unusual nature of extradition proceedings makes them inherently unappealable—analogizing from the oft-compared preliminary criminal hearings before a United States Commissioner.[33] But this theory also has several weaknesses. First, the appealability of other extraordinary judicial proceedings, such as those for disbarment[34] and naturalization,[35] has been repeatedly recognized under the same statute. Second, a preliminary criminal hearing is truly preliminary, to be followed by other careful judicial steps which are designed to safeguard the substantive and procedural rights of the accused. But, if the right of appeal were denied, a valid extradition hearing would be the last and only such judicial proceeding available in this country. Habeas corpus proceedings provide little assistance in this regard,[36] since lying only to determine whether the magistrate had jurisdiction, whether the offense charged was within the treaty, and whether there was any legal evidence upon which the magistrate could decide that there were reasonable grounds to believe the accused guilty.[37] Since the decision of the Secretary of State, who has the final power to refuse extradition,[38] will in most cases probably be based upon the judicial determination, no good reason appears why these crucial hearings should not be as free from prejudicial error as all other cases supervised by appellate review. In the absence of express congressional exception, the courts of appeals should have jurisdiction of appeals from all final decisions of a district judge, including those in extradition cases.[39] Although the contrary historical doctrine has advantages such as elimination of delay, it is believed that direct appeal can alone insure that the district court judge keeps within the bounds of his authority.[40] Such an

50 F.2d 687 (2d Cir.), *cert. denied*, 284 U.S. 665 (1931), *with* Grin v. Shine, 187 U.S. 181, 187 (1902) (criminal), *and* Rice v. Ames, 180 U.S. 371, 375 (1901) (criminal).

33 See Collins v. Loisel, 259 U.S. 309 (1922); *In re* Oteiza y Lortes, 136 U.S. 330 (1890); Benson v. McMahon, 127 U.S. 457 (1888).

34 *In re* Patterson, 176 F.2d 966 (9th Cir. 1949); Howard v. Wilbur, 166 F.2d 884 (6th Cir. 1948); *In re* Schachne, 87 F.2d 887 (2d Cir. 1937).

35 Tutun v. United States, 270 U.S. 568 (1926); Ozawa v. United States, 260 U.S. 178 (1922); Estrin v. United States, 80 F.2d 105 (2d Cir. 1935).

36 Habeas corpus cannot be used as a substitute for direct appeal. McNamara v. Henkel, 226 U.S. 520 (1913); *Ex parte* Harding, 120 U.S. 782 (1887); Council v. Clemmer, 165 F.2d 249 (D.C. Cir. 1947).

37 See cases cited note 33 *supra*.

38 18 U.S.C. § 3186 (1958); but there can be no extradition from the United States without a prior certification by an examining magistrate, the executive having no inherent power to extradite on its own initiative. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

39 *Cf.* Merino v. Hocke, 289 F.2d 636 (9th Cir. 1961).

40 If it is true that a court of appeals has no jurisdiction in this *type* of case, then

approach would prevent, for example, what occurred in the principal case, where the demanding government turned the extradition hearings into a "fishing expedition" unconnected with their legitimate purposes.[41] The ramifications of denying the right of appeal in extradition cases should be carefully reconsidered before the historical doctrine is followed.

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the "all-writs" statute, 28 U.S.C. § 1651 (1958), would be unavailable as a means of controlling or correcting a district judge (except as to the narrow questions reviewable on habeas corpus) since this method cannot be used to acquire jurisdiction [United States v. Mayer, 235 U.S. 55 (1914); Oregon *ex rel.* Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957); Mutual Life Ins. Co. v. Holly, 135 F.2d 675 (7th Cir. 1943)], the writs being used only where the action below would serve to defeat or impair the court's appellate jurisdiction already defined. Petsel v. Riley, 192 F.2d 954 (8th Cir. 1951).

41 As to the necessity of the information desired, see First Nat'l City Bank v. Aristeguieta, 287 F.2d 219 (2d Cir. 1960), *cert. granted*, 365 U.S. 840 (1961), *reversing* 183 F. Supp. 865 (S.D.N.Y. 1960).