

Foreign Extradition, Provisional Arrest Warrants, and Probable Cause

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I. INTRODUCTION

Extradition¹ from the United States is governed by 18 U.S.C. § 3184² and, with limited exception, by treaty.³ Ordinarily, the process is initiated by a request from the foreign country to the Department of State.⁴ Because a formal request is time consuming and a fugitive is

1. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 474, at 556-57 (1987) (“Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment.”).

2. Section 3184 provides, in relevant part:

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 judge 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 . . . issue [a] warrant for the apprehension of the person . . . charged [with having committed within the jurisdiction of any such foreign government any of the crimes provided for by treaty or convention], that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered.

18 U.S.C. § 3184 (2000); see also *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997) (“In the United States, the procedures for extradition are governed by statute.”).

3. See *In re Lahoria*, 932 F. Supp. 802, 805 (N.D. Tex. 1996) (“International extradition proceedings are governed both by statute . . . and by treaty.”); see also 18 U.S.C. § 3181 (2000) (identifying countries with which the United States has bilateral extradition treaties). Comity is an exception which allows for the return of third country nationals—persons who are not citizens, nationals, or residents of the United States—absent a treaty, provided certain conditions are satisfied. § 3181(b); see also *Waits v. McGowan*, 516 F.2d 203, 208 (3d Cir. 1975) (“International extradition is governed only by considerations of comity and treaty provisions.”). See generally David P. Warner, *Bringing White-Collar Criminals to Justice—Fugitive Apprehension and Return and Obtaining Evidence Abroad*, 11 U.S.-MEX. L.J. 171, 174 (2003) (“The legal basis [for extradition], with very limited exception, is grounded on a bilateral or multilateral treaty.”). There are, of course, other ways to acquire jurisdiction over fugitives—“[t]he processes of exclusion, deportation, abduction, and rendition or surrender all play a role, together with the historic practice of informal modes of delivery of fugitives by one state to another.” Valerie Epps, *The Development of the Conceptual Framework Supporting International Extradition*, 25 LOY. L.A. INT’L & COMP. L. REV. 369, 372 n.12 (2003). See generally Ethan A. Nadlemann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT’L L. & POL. 813, 857-82 (1993) (discussing alternatives to extradition).

4. See *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009 (9th Cir. 2000) (“Extradition is ordinarily initiated by a request from the foreign state to the Department of State.”); U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 612 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00612.htm [hereinafter CRIMINAL RESOURCE MANUAL] (discussing role of the State Department); John T. Parry, *No Appeal: The U.S.—U.K. Supplementary Extradition Treaty’s Effort to Create Federal Jurisdiction*, 25 LOY. L.A. INT’L & COMP. L. REV. 543, 546 (2003) (“Any nation that has entered into an extradition treaty with the United States may make a formal diplomatic request for extradition. The State Department reviews the request and

likely to flee if he learns of it,⁵ most treaties provide for the provisional arrest of fugitives in urgent cases while the request is perfected.⁶ The Department of Justice's Office of International Affairs (OIA) reviews the request for the provisional arrest warrant and, assuming it is sufficient, forwards it to the United States Attorney for the district where the person sought to be extradited is located.⁷ The United States Attorney then files a complaint in support of an arrest warrant.⁸ This complaint is presented to a federal magistrate or judge.⁹

After the person sought to be extradited is apprehended, the requesting state provides the United States government with the additional information required to carry out the extradition under the treaty through a formal request, which then leads to an extradition hearing.¹⁰ If the judicial officer

generally forwards it to the Department of Justice, which sends it to the relevant local U.S. Attorney's office.") (footnote omitted).

5. See Harold Gill Reuschlein, *Provisional Arrest and Detention in International Extradition—A Survey of Practice and Procedure*, 23 GEO. L.J. 37, 38 (1934) (discussing the rationale underlying provisional arrest in international extradition).

6. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, § 9-15.230 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm [hereinafter U.S. ATTORNEYS' MANUAL] ("Because the time involved in preparing a formal request can be lengthy, most treaties allow for the provisional arrest of fugitives in urgent cases."); see also *Duran v. United States*, 36 F. Supp. 2d 622, 624 (S.D.N.Y. 1999) ("In order to avoid the flight of a defendant during preparation of a full formal request, many extradition treaties permit a provisional arrest to be made upon receipt of an informal request.").

7. See U.S. ATTORNEYS' MANUAL, *supra* note 6, § 9-15.700 (noting how OIA will review a request for sufficiency and then forward it to the appropriate district); Jeffrey M. Olson, Note, *Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of Parretti v. United States*, 48 CATH. U. L. REV. 161, 169-70 (1998) ("The extradition process generally commences when a requesting state issues a Request for Provisional Arrest to the requested state. The primary purpose of provisional arrest is to detain fugitives who are likely to flee once they become aware of proceedings to extradite them.") (footnotes omitted). If no provisional arrest warrant is involved, OIA will review the formal requisition and then forward it to the appropriate district. See U.S. ATTORNEYS' MANUAL, *supra* note 6, § 9-15.230.

8. See CRIMINAL RESOURCE MANUAL, *supra* note 4, § 615 ("[I]n urgent cases, the prosecutor immediately drafts a complaint for provisional arrest and executes it before a magistrate judge or district judge in the district where the fugitive is located. The judicial officer issues a warrant under the authority of the treaty and 18 U.S.C. § 3184.").

9. 18 U.S.C. § 3184 (2000).

10. *Id.* (noting that purpose of apprehension after issuance of warrant is so that the person charged "may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered."); Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 752 (1998) ("[M]ost extradition laws and treaties provide that the alleged fugitive may be arrested and temporarily detained for a period of time to enable

“deems the evidence sufficient to sustain the charge”¹¹—which in extradition proceedings means probable cause¹²—then he must certify the same to the Secretary of State, who will review the case and determine whether to issue a warrant for the surrender of the person sought to be extradited.¹³ Although there is no direct appeal from the

the requesting State to furnish the necessary documentation in support of its request for his extradition.”) (quoting 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 920 (1968)); Olson, *supra* note 7, at 172 (“After executing the provisional arrest request, the requesting state furnishes the United States with any additional information that is required for extradition under the governing statute and treaty.”).

11. § 3184.

12. See *In re Drayer*, 190 F.3d 410, 415 (6th Cir. 1999) (“An extradition proceeding is not a forum in which to establish[] the guilt or innocence of the accused; rather, the sole inquiry is into probable cause.”); *In re Artt*, 158 F.3d 462, 467 (9th Cir. 1998) (“[S]ection 3184 authorizes federal district judges to decide whether there is probable cause to believe that the potential extraditee committed an offense covered by a given extradition treaty.”); *Spatola v. United States*, 925 F.2d 615, 618 (2d Cir. 1991) (“In essence, the court must analyze if there is probable cause to believe that the individual committed acts alleged in the extradition request.”). See generally Steven Lubet & Morris Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, 198 (1980) (“The requesting country bears the burden of establishing probable cause to believe that the accused committed the charged offense.”).

13. See § 3184 (stating a judicial officer “shall certify the same . . . to the Secretary of State, that a warrant may issue . . . for the surrender of such person”); 18 U.S.C. § 3186 (2000) (“The Secretary of State may order the person committed under section[] 3184 . . . to be delivered to any authorized agent of such foreign government.”); see also *Lo Duca v. United States*, 93 F.3d 1100, 1103-04 (2d Cir. 1996) (“[T]he Secretary of State has final authority to extradite the fugitive, but is not required to do so. Pursuant to its authority to conduct foreign affairs, the Executive Branch retains plenary discretion to refuse extradition.”). Commentators agree that the Secretary of State will seldom reject an extradition request after a judicial finding of extraditability. See John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1486 (1988) (“There is little incentive for anyone in the State Department to refuse an extradition request after a court has allowed it. If extradition *is* then refused by the State Department, it is likely to be for reasons of policy and expediency rather than considerations of fairness or extradition doctrine.”); Lubet & Czackes, *supra* note 12, at 199 (“Despite . . . broad discretion, the Secretary has in fact seldom overruled a court decision in favor of extradition.”); John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT’L L. 93, 96 (2002) (“In practice . . . the Secretary rarely exercises discretion, perhaps because the needs of diplomacy outweigh the concerns of individuals who may have committed crimes.”); Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 TEX. INT’L L.J. 277, 288 (2002) (“Although the State Department has the choice to refuse to extradite, even after a court has issued a certificate of extraditability, refusal is an exceedingly rare occurrence.”); Elzbieta Klimowicz, Note, *Article 15 of the Torture Convention: Enforcement in U.S. Extradition Proceedings*, 15 GEO. IMMIGR. L.J. 183, 197 (2000) (“[T]he probability of having the Secretary of State refuse to surrender an extraditable fugitive because of inadmissible evidence is very low. In fact, in the few instances where the Secretary actually refused to surrender such an individual, the evidentiary findings of the magistrate were not questioned, only his treaty construction.”) (footnote omitted).

magistrate or judge's decision,¹⁴ review of the order is available through a petition for a writ of habeas corpus under 28 U.S.C. § 2241.¹⁵

In the last thirty years, one of the legal issues relating to foreign requests for extradition which has received increasing attention is the role that "probable cause," in the Fourth Amendment sense, plays in connection with the issuance of a provisional arrest warrant.¹⁶ In other words, when the magistrate issues a provisional arrest warrant, must he find probable cause to believe that the fugitive committed the crime underlying the extradition request, or probable cause that the fugitive has been charged with an extraditable crime by the requesting country?

This Article, which is divided into three parts, analyzes the developing case law in this area.¹⁷ First, because the probable cause standard is found in the Fourth Amendment, the Article briefly analyzes how that standard has been applied by the courts in criminal cases.¹⁸ Next, the

14. See *Valenzuela v. United States*, 286 F.3d 1223, 1228 n.11 (11th Cir. 2002) ("There is no direct appeal from extradition decisions."); *Bozilov v. Seifert*, 983 F.2d 140, 142 (9th Cir. 1992) ("An extradition order cannot be directly appealed."); *Ahmad v. Wigen*, 910 F.2d 1063, 1065 (2d Cir. 1990) ("An order granting or denying section 3184 certification is not appealable.").

15. See *Barapind v. Enomoto*, 400 F.3d 744, 748 n.5 (9th Cir. 2005) ("Decisions of an extradition court are not directly reviewable but may be challenged collaterally by a petition for habeas corpus."); *Lindstrom v. Graber*, 203 F.3d 470, 473 (7th Cir. 2000) ("Habeas corpus is the normal method of challenging an extradition order, such an order being unappealable."). In a habeas proceeding, a petitioner may challenge "whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); accord *Mainero v. Gregg*, 164 F.3d 1199, 1205 (9th Cir. 1999); *Sidali v. INS*, 107 F.3d 191, 195-96 (3d Cir. 1997); *Wigen*, 910 F.2d at 1064-65. Under 28 U.S.C. § 2253, a final order in a habeas proceeding is subject to review by the United States Court of Appeals for the circuit where the district court is located. See *In re Artt*, 158 F.3d at 468-69.

16. See *Wiehl*, *supra* note 10, at 744 ("Historically, [one] of the more important procedural anomalies of the law . . . in extradition[] [has] been . . . the government's ability to obtain a provisional arrest warrant for an international fugitive without having to make an evidentiary showing of probable cause to believe that the fugitive committed the crime charged . . .").

17. For ease of reference, the Article frequently refers to a fugitive challenging the request for his or her extradition as "petitioner." The article also refers to decisions from United States magistrates and district judges at extradition hearings as decisions of the "court." But see *Parry*, *supra* note 4, at 550 ("[T]he magistrates and district court judges who preside over extradition hearings are not 'courts' for purposes of Article III, precisely because their decisions are subject to executive review.").

18. As further explained in the text below, extradition proceedings are not considered criminal prosecutions. See *Romeo v. Roache*, 820 F.2d 540, 543-44 (1st Cir. 1987). The protections against unreasonable searches and seizures, however, apply in

Article discusses the application of the probable cause standard at extradition hearings, a practice which is well established. Lastly, the Article explores how courts have analyzed challenges to provisional arrest warrants.

II. THE FOURTH AMENDMENT AND PROBABLE CAUSE

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁹

The first clause of the amendment is directed against unreasonable searches and seizures; the second clause establishes that probable cause is the governing standard for an arrest or search warrant.²⁰

It is well established that searches and seizures “conducted outside the judicial process, without approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.”²¹ In the criminal context, to the extent searches and seizures are permitted without a warrant, they will generally be considered reasonable if supported by probable cause.²²

both the criminal and the civil context. *See* *Camara v. Mun. Court*, 387 U.S. 523, 530 (1967) (“It is . . . anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”); *Freeman v. City of Dallas*, 242 F.3d 642, 647 n.5 (5th Cir. 2001) (en banc) (“[A] ‘seizure’ may occur in both civil and criminal contexts.”).

19. U.S. CONST. amend. IV.

20. *See Freeman*, 242 F.3d at 648 (noting existence of “two separate and independent clauses” and that “[n]othing in the text suggests that warrants are required for every search or seizure, nor is the existence of a warrant a *sine qua non* for a reasonable search or seizure. . . .”); *see also* *United States v. Limares*, 269 F.3d 794, 799 (7th Cir. 2001) (“During the last 50 years the Supreme Court has understood the [first] clause of the fourth amendment . . . to require warrants in some circumstances as essential to the ‘reasonableness’ of particularly intrusive searches, such as those into dwellings.”). *See generally* Scott E. Sundby, *Protecting the Citizen “Whilst He Is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants*, 74 *Miss. L.J.* 501, 508 (2004) (“[O]ngoing debate [exists] over whether the ‘reasonableness’ or the ‘warrant’ clause should have primacy in interpreting how the Fourth Amendment should be applied.”).

21. *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

22. *See* 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 3.1(a), at 4-5 (3d ed. 1996). Exigent circumstances will support a warrantless search and seizure if there is probable cause for the intrusion. *See Ker v. California*, 374 U.S. 23, 41-42 (1963). A warrant also is not necessary to search a car if the police have probable cause to believe that it contains contraband or evidence of a crime. *See Chambers v. Maroney*, 399 U.S. 42, 48-49

The Supreme Court has observed that the probable cause standard “is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests.”²³ In other words, “probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”²⁴ These probabilities “are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.”²⁵

While probable cause to arrest and probable cause to search “contain different inquiries,”²⁶ it has been “generally assumed by the Supreme Court and the lower courts that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search.”²⁷ Additionally, “the standards applicable to the factual basis supporting the officer’s probable-cause assessment at the time of the

(1970). Similarly, the police may arrest a person without first procuring a warrant if they have probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

Some searches and seizures are not subject to probable cause or the warrant requirement. The police, for example, may briefly detain and frisk a person for investigative purposes, without a warrant or probable cause, if they have a reasonable suspicion that criminal activity may be afoot and that the person may be armed and presently dangerous. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968). Routine searches at the border are not subject to any warrant requirement, probable cause, or reasonable suspicion. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). A search incident to an arrest does not require probable cause or reasonable suspicion. *See United States v. Robinson*, 414 U.S. 218, 235 (1973). Searches conducted pursuant to consent do not require a warrant or probable cause. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Lastly, outside the criminal context, “special needs” may make the probable cause and warrant requirement impracticable. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

23. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

24. *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *see Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.”); *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (noting that probable cause and reasonable suspicion are “fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.”).

25. *Brinegar*, 338 U.S. at 175.

26. *Greene v. Reeves*, 80 F.3d 1101, 1106 (6th Cir. 1996).

27. 2 LAFAVE, *supra* note 22, § 3.1(b), at 6. As a result, “discussions by courts of the probable cause requirement often refer to and rely upon prior decisions without regard to whether these earlier cases were concerned with the grounds to arrest or the grounds to search.” *Id.*

challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment" when confronted with a request for a warrant.²⁸

In the context of a search warrant, the Supreme Court ruled in *Illinois v. Gates*²⁹ that the determination of probable cause involves a practical, common sense decision as to whether, in light of the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place."³⁰ In other words, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."³¹

In the context of an arrest, with or without a warrant,³² probable cause has been found to be present when "the facts and circumstances" known to the law enforcement officer are "sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense."³³ Probable cause to arrest "does not require indubitable or necessarily convincing evidence,"³⁴ or facts necessary to establish a conviction,³⁵ or "a prima facie showing of criminal activity,"³⁶ or "even evidence demonstrating that it is more likely than not that the suspect committed a crime."³⁷ What is required is a "fair probability" that the

28. *Whiteley v. Warden*, 401 U.S. 560, 566 (1971).

29. *Gates*, 462 U.S. at 213.

30. *Id.* at 238.

31. *Id.* at 244 n.13; *accord* *United States v. Rowland*, 341 F.3d 774, 784 (8th Cir. 2003); *United States v. Rodriguez-Suazo*, 346 F.3d 637, 644 (6th Cir. 2003); *United States v. Goddard*, 312 F.3d 1360, 1363 (11th Cir. 2002).

32. *See United States v. Villegas*, 700 F. Supp. 94, 100 (N.D.N.Y. 1988) ("The probable cause necessary for a warrantless arrest is neither greater than nor lesser than that needed for a magistrate to issue a warrant . . .").

33. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *see Wong Sun v. United States*, 371 U.S. 471, 479 (1963) ("The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed—must be measured by the facts of the particular case.") (citation omitted); *accord United States v. Morris*, 247 F.3d 1080, 1088 (10th Cir. 2001); *United States v. Hartje*, 251 F.3d 771, 775 (8th Cir. 2001); *United States v. Gordon*, 231 F.3d 750, 758 (11th Cir. 2000); *United States v. Catlett*, 97 F.3d 565, 573 (D.C. Cir. 1996).

34. *Easton v. City of Boulder*, 776 F.2d 1441, 1450 (10th Cir. 1985).

35. *See, e.g., Henry v. United States*, 361 U.S. 98, 102 (1959); *Morris*, 247 F.3d at 1088; *United States v. Reyes*, 225 F.3d 71, 75 (1st Cir. 2000); *United States v. Gray*, 137 F.3d 765, 769 (4th Cir. 1998); *Von Stein v. Brescher*, 904 F.2d 572, 578 n.9 (11th Cir. 1990).

36. *Tokar v. Bowersox*, 198 F.3d 1039, 1047 (8th Cir. 1999); *see also United States v. Cruz*, 834 F.2d 47, 50 (2d Cir. 1987) ("In order to establish probable cause, it is not necessary to make a 'prima facie showing of criminal activity' or to demonstrate that it is more probable than not that a crime has been or is being committed.")

37. *United States v. Sawyer*, 224 F.3d 675, 679 (7th Cir. 2000); *see also Piazza v. Mayne*, 217 F.3d 239, 246 (5th Cir. 2000) ("[P]robable cause 'does not demand any showing that [the belief that an offense was committed] be correct or more likely true than false.'") (alteration in original) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983)); *United States v. Moore*, 215 F.3d 681, 686 (7th Cir. 2000) ("Probable cause

suspect has committed, or is committing, a crime.³⁸ That probability is measured in terms of “something more than a bare suspicion, but need not reach the fifty percent mark.”³⁹

But probable cause to arrest or search can also arise outside the domestic criminal warrant context. For example, under 18 U.S.C. § 3144,⁴⁰ the federal material witnesses statute, a warrant for the arrest of a material witness will issue if there has been a showing, by way of affidavit⁴¹ and based on probable cause, that the witness has material knowledge of a crime, and that his or her presence is unlikely to be

requires more than bare suspicion but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer’s belief is more likely true than false.”); *United States v. Caicedo*, 85 F.3d 1184, 1192 (6th Cir. 1996) (“Probable cause . . . does not require any showing that the officer’s suspicions prove to be correct or that they are more likely true than false.”).

38. *See, e.g.*, *United States v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999).

39. *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999); *see United States v. Winchenbach*, 197 F.3d 548, 555-56 (1st Cir. 1999) (“[P]robable cause standard does not require the officers’ conclusion to be ironclad, or even highly probable. Their conclusion that probable cause exists need only be reasonable.”); *Samos Imex Corp. v. Nextel Commc’ns, Inc.*, 194 F.3d 301, 303 (1st Cir. 1999) (“The phrase ‘probable cause’ is used, in the narrow confines of Fourth Amendment precedent, to establish a standard less demanding than ‘more probable than not.’”); *Roberts v. Hochstetler*, 592 F. Supp. 703, 712 (N.D. Ind. 1983) (“[T]he proof for probable cause does not approach the level of proof needed for guilt beyond a reasonable doubt or even by a preponderance of the evidence.”); *cf. Garcia*, 179 F.3d at 269 (noting that probable cause to arrest does not mean that “a reasonable person would have thought, by a preponderance of the evidence, that a defendant committed a crime.”).

40. Section 3144 provides:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 [The Bail Reform Act] of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

18 U.S.C. § 3144 (2000).

41. *See United States v. Fuentes-Galindo*, 929 F.2d 1507, 1510 (10th Cir. 1991) (“Prior to commencing the procedure delineated in § 3144, a party must file an affidavit establishing that the circumstances contemplated in that section are present.”). *But see Daniels v. Kieser*, 586 F.2d 64, 66 n.2 (7th Cir. 1978) (discussing how the Assistant United States Attorney obtained a material witness warrant “without the affidavit required by Section 3149”). Section 3149 is the surety bond provision for section 3144. *See* § 3144; 18 U.S.C. § 3149 (2000).

achieved by subpoena.⁴² This requirement is necessary because “the arrest and detention of a potential witness is just as much an invasion of the person’s security as if she had been arrested on a criminal charge.”⁴³

An example of the application of the probable cause standard outside the domestic criminal warrant context with respect to a search is found in the Foreign Intelligence Surveillance Act (FISA).⁴⁴ Under FISA, a special court, composed of eleven federal district court judges designated by the Chief Justice,⁴⁵ may issue a surveillance warrant if it finds, in addition to certain other requirements, that there is probable cause that “the target of the electronic surveillance is a foreign power or an agent of a foreign power” and that the place or facility at which the surveillance will be “directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.”⁴⁶ With this discussion of probable cause to search and seize in place, we now turn to a brief examination of the nature of, and the procedures governing, the hearing governing a foreign request for extradition.⁴⁷

42. See *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003) (“[A]n application for a material witness warrant under § 3144 must establish probable cause to believe that (1) the witness’s testimony is material, and (2) it may become impracticable to secure the presence of the witness by subpoena.”); *Bacon v. United States*, 449 F.2d 933, 943 (9th Cir. 1971); *United States v. Feingold*, 416 F. Supp. 627, 628 (E.D.N.Y. 1976).

43. *Perkins v. Click*, 148 F. Supp. 2d 1177, 1183 (D.N.M. 2001). After arrest, a material witness may be released on personal recognizance or an unsecured appearance bond, released subject to certain conditions, or detained. 18 U.S.C. § 3142(b)-(c), (e) (2000).

44. 50 U.S.C. §§ 1801-1811 (2000 & Supp. III 2003). As the court observed in *ACLU Foundation of Southern California*, 952 F.2d 457 (D.C. Cir. 1991):

By enacting FISA, Congress sought to resolve doubts about the constitutionality of warrantless, foreign security surveillance and yet protect the interests of the United States in obtaining vital intelligence about foreign powers. FISA thus created a “secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation’s commitment to privacy and individual rights.”

Id. at 461 (citation omitted).

45. 50 U.S.C. § 1803(a) (2000 & Supp. II 2004).

46. 50 U.S.C. § 1805(a)(3)(A)-(B) (2000); see also *United States v. Squillacote*, 221 F.3d 542, 553 (4th Cir. 2000) (discussing requirements); *United States v. Megahey*, 553 F. Supp. 1180, 1183-84 (E.D.N.Y. 1982). This articulation of probable cause in the national security context is not surprising. Prior to the enactment of FISA, the Supreme Court recognized in *United States v. U.S. Dist. Court* (Keith), 407 U.S. 297 (1972):

Different standards [of probable cause] may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.

Id. at 322-23.

47. As noted earlier, in many cases, the detention is likely to be triggered by a request for a provisional arrest warrant. See *supra* notes 5-10 and accompanying text.

III. THE EXTRADITION HEARING

While extradition proceedings are *sui generis*⁴⁸ and are not considered criminal prosecutions,⁴⁹ they are, to some degree, analogous to preliminary hearings.⁵⁰ Thus, the governing standard at extradition hearings, established by federal law,⁵¹ is probable cause.⁵² At an extradition hearing, the

48. See *United States v. Doherty*, 786 F.2d 491, 498 n.9 (2d Cir. 1986) (“[E]xtradition proceedings are *sui generis* . . .”); *In re Munguia*, 294 F. Supp. 2d 893, 895 (S.D. Tex. 2003) (“[E]ach separate extradition treaty between the United States of America and a foreign nation is *sui generis*, and as a contract between two sovereigns, sets forth its own law.”).

49. See *DeSilva v. DiLeonardi*, 181 F.3d 865, 868 (7th Cir. 1999) (“Extradition . . . is not a ‘criminal prosecution.’”); *Austin v. Healey*, 5 F.3d 598, 603 (2d Cir. 1993) (“[A]n extradition hearing is not a criminal prosecution: the order of extraditability expresses no judgment on [petitioner’s] guilt or innocence.”). As the court observed in *In re Garcia*, 188 F. Supp. 2d 921 (N.D. Ill. 2002), numerous constitutional protections applicable to criminal proceedings are not present when extradition is involved:

For example, the Sixth Amendment right to a speedy trial and the Fifth Amendment right against undue delay are inapplicable to an extradition. Likewise, the Sixth Amendment right to effective counsel does not apply to extradition proceedings. The Supreme Court has found no constitutional infirmity where those subject to extradition proceedings have been denied an opportunity to confront their accusers. Finally, the Fifth Amendment guarantee against double jeopardy and the right to a Miranda warning are inapplicable to an extradition proceeding.

Id. at 933 (citations omitted); see also *Martin v. Warden*, 993 F.2d 824, 828-30 (11th Cir. 1993) (rejecting the argument that there is a constitutional right under the Fifth Amendment’s due process clause to a “speedy extradition”).

50. See *Benson v. McMahon*, 127 U.S. 457, 463 (1888) (noting that an extradition proceeding is “of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused”); *David v. Attorney General*, 699 F.2d 411, 415 (7th Cir. 1983) (“[A]n extradition hearing is of the character of a preliminary hearing and is not to be converted into a full-dress trial.”) (citations omitted).

51. See *Sidali v. INS*, 107 F.3d 191, 199 (3d Cir. 1997) (“[T]he probable cause standard applicable in extradition proceedings is identical to that used by courts in federal preliminary hearings.”); *Bovio v. United States*, 989 F.2d 255, 258 (7th Cir. 1993) (“Before [petitioner] can be certified for extradition, a court must find probable cause under federal law that he committed the offense he is charged with by the [foreign] government.”); *Castro Bobadilla v. Reno*, 826 F. Supp. 1428, 1433 (S.D. Fla. 1993) (“In extradition proceedings, probable cause is measured by the federal standard used in preliminary proceedings.”). But see *In re Schweidenback*, 3 F. Supp. 2d 113, 116 (D. Mass. 1998) (“[I]t is the state standard of probable cause that is the appropriate one to be applied.”).

52. See *Jimenez v. Aristeguieta*, 311 F.2d 547, 562 (5th Cir. 1962) (“With respect to the evidence upon which the extradition magistrate acted, it must be remembered that the extradition magistrate merely determines probable cause, making an inquiry like that of a committing magistrate and no more.”); *accord Polo v. Horgan*, 828 F. Supp. 961,

probable cause standard is defined as “evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt,”⁵³ or “the existence of a reasonable ground to believe the accused guilty.”⁵⁴ In other words, the magistrate’s role at the extradition hearing is “to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction.”⁵⁵

The judicial officer presiding over the extradition hearing “has wide latitude in admitting evidence.”⁵⁶ The Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence do not apply.⁵⁷ A person whose extradition is sought has no right to cross-examine witnesses at an extradition hearing⁵⁸ and there is no obligation on the part of the government to provide discovery or

965 (S.D. Fla. 1993) (“To certify an extradition warrant, a magistrate need only find probable cause that ‘the evidence [is] sufficient to sustain the charge.’”); *In re Ryan*, 360 F. Supp. 270, 273 (E.D.N.Y. 1973) (“The extraditing magistrate’s function is to determine whether there is any evidence sufficient to establish reasonable or probable cause to believe that the detainee committed the crimes charged.”).

53. *Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973); *accord In re Garcia*, 188 F. Supp. 2d at 932; *Sidali*, 107 F.3d at 199.

54. *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980); *accord Collier v. Vaccaro*, 51 F.2d 17, 20 (4th Cir. 1931) (“[The magistrate must] determine whether upon the evidence adduced before him there is reasonable ground to believe that the crime charged has been committed”); *In re Cervantes Valles*, 268 F. Supp. 2d 758, 772 (S.D. Tex. 2003) (“Probable cause is the existence of reasonable grounds to believe the accused committed the offense charged.”).

55. *Peters v. Egnor*, 888 F.2d 713, 717 (10th Cir. 1989) (quoting *Collins v. Loisel*, 259 U.S. 309, 316 (1922)); *cf. In re Chan Seong-I*, 346 F. Supp. 2d 1149, 1161 (D.N.M. 2004) (“The evidence showing probable cause need not be sufficient evidence to support a conviction, but need only be sufficient to warrant a finding that there are reasonable grounds to believe the relator is guilty and thus hold her for trial.”); *Ward v. Rutherford*, 921 F.2d 286, 287 (D.C. Cir. 1990) (“[The extradition hearing is] essentially a preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation.”).

56. *In re Mainero*, 990 F. Supp. 1208, 1219 (S.D. Cal. 1997); *see also In re Kraiselburd*, 786 F.2d 1395, 1399 (9th Cir. 1986) (“Admission of evidence in an international extradition proceeding is within the magistrate’s discretion.”).

57. *See* FED. R. CRIM. P. 54(b)(5) (“These rules are not applicable to extradition and rendition of fugitives”); FED. R. EVID. 1101(d)(3) (“The rules . . . do not apply . . . [to] [p]roceedings for extradition or rendition”); *In re Smyth*, 61 F.3d 711, 720-21 (9th Cir. 1995) (“[T]he rules of evidence and civil procedure that govern federal court proceedings heard under the authority of Article III of the United States Constitution do not apply in extradition hearings that are conducted under the authority of a treaty enacted pursuant to Article II.”).

58. *See Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984) (“As in the case of a grand jury proceeding, a defendant has no right to cross-examine witnesses or introduce evidence to rebut that of the prosecutor.”).

produce exculpatory evidence.⁵⁹ Credibility determinations are the province of the extraditing judicial officer⁶⁰ and the evidence at an extradition hearing may consist of hearsay.⁶¹ Furthermore, section 3190 permits the demanding country to introduce properly authenticated evidence gathered at home⁶² and the defenses available to one sought to be extradited are limited. For example, “evidence of alibi or of facts contradicting the demanding country’s proof or of a defense such as insanity may properly be excluded”⁶³ Accomplice testimony,⁶⁴ or a

59. See *Montemayor Seguy v. United States*, 329 F. Supp. 2d 883, 888 (S.D. Tex. 2004) (“The extradition law, the extradition treaty, and the United States Constitution do not require production of exculpatory evidence at an extradition hearing.”); *Prasoprat v. Benov*, 294 F. Supp. 2d 1165, 1169 (C.D. Cal. 2003) (“[A] fugitive in an extradition case has no right to discovery.”). But see *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353-54 (6th Cir. 1993) (recognizing that government must provide exculpatory evidence where it has conducted its own investigation of the offense underlying the extradition request and uncovered exculpatory information); *Quinn v. Robinson*, 783 F.2d 776, 817 n.41 (9th Cir. 1986) (“Although there is no explicit statutory basis for ordering discovery in extradition hearings, the extradition magistrate has the right, under the court’s ‘inherent power,’ to order such discovery procedures ‘as law and justice require.’”) (citations omitted).

60. See *Quinn*, 783 F.2d at 815 (“The credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate.”).

61. See *Collins v. Loisel*, 259 U.S. 309, 317 (1922) (“[U]nsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the State on a preliminary examination.”); *United States v. Kin-Hong*, 110 F.3d 103, 120 (1st Cir. 1997) (“The evidence may consist . . . entirely of hearsay.”); *In re Then*, 92 F.3d 851, 855 (9th Cir. 1996) (“[H]earsay evidence is admissible to support a probable cause determination in an extradition hearing”); *Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980) (“Hearsay evidence is admissible.”).

62. Section 3190, which is captioned “Evidence on hearing,” states:

Depositions, warrants or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

18 U.S.C. § 3190 (2000).

63. *Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2d Cir. 1973); see also *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978) (noting alibi or other evidence contradicting proof of probable cause inadmissible); *United States v. Peterka*, 307 F. Supp. 2d 1344, 1349 (M.D. Fla. 2003) (“[E]xtraditees may only introduce evidence to explain rather than contradict the evidence presented by the Government, and the court shall exclude evidence that is proffered to contradict testimony, challenge the credibility of witnesses, or establish a defense to the crimes alleged.”); *In re Cervantes Valles*, 268 F. Supp. 2d 758, 772 (S.D. Tex. 2003) (“[T]he accused has no right to present a defense to the

certified copy of a foreign conviction upon which the extradition request is based, have been held sufficient to establish probable cause.⁶⁵ Of course, the evidence presented must establish that the person sought to be extradited is the one who has been charged or convicted of the crime(s) alleged in the extradition request.⁶⁶ Ultimately, a certificate of extradition will issue if the judicial officer had jurisdiction over the subject matter and the person sought to be extradited, the offense for which extradition was sought was an extraditable offense under a treaty in effect at the time of the request, and competent evidence is presented sufficient to establish probable cause that the extraditee committed the alleged offense.⁶⁷

charges against him, such as an alibi defense, and has no right to introduce evidence which merely contradicts the demanding country's proof, or which only poses conflicts of credibility."); *In re Mainero*, 990 F. Supp. 1208, 1218 (S.D. Cal. 1997) ("Evidence that conflicts with that submitted on behalf of the demanding party is not permitted, nor is impeachment of the credibility of the demanding country's witnesses."); Powers, *supra* note 13, at 312-13 (discussing the rule of noncontradiction).

64. See *Bovio v. United States*, 989 F.2d 255, 259 (7th Cir. 1993) ("Accomplice testimony can be used to find probable cause . . ."); *In re Mainero*, 990 F. Supp. at 1227 ("[S]elf incriminating statements of accomplices are sufficient to establish probable cause in an extradition hearing."); *In re Atta*, 706 F. Supp. 1032, 1051 (E.D.N.Y. 1989) ("[T]he accomplice testimony evidence, which is, under the rules governing extradition proceedings, deemed credible even without corroboration, sufficiently demonstrates that probable cause exists to support the certification of [petitioner] for extradition."). For cases discussing how the recantation of accomplice testimony may affect the probable cause analysis, see *Eain v. Wilkes*, 641 F.2d 504, 510-12 (7th Cir. 1981); *In re Atuar*, 300 F. Supp. 2d 418, 427-31, 434-35 (S.D. W.Va. 2003); *In re Strunk*, 293 F. Supp. 2d 1117, 1125-26 (E.D. Cal. 2003); *United States v. Linson*, 88 F. Supp. 2d 1123, 1126 (D. Guam 2000); *In re Mainero*, 990 F. Supp. at 1221-26; *In re Garcia*, 890 F. Supp. 914, 923-24 (S.D. Cal. 1994); *In re Contreras*, 800 F. Supp. 1462, 1464-69 (S.D. Tex. 1992); *Gill v. Imundi*, 747 F. Supp. 1028, 1044-47 (S.D.N.Y. 1990); *Republic of Fr. v. Moghadam*, 617 F. Supp. 777, 782-84 (N.D. Cal. 1985).

65. See *Spatola v. United States*, 925 F.2d 615, 618 (2d Cir. 1991) ("[A] certified copy of a foreign conviction, obtained following a trial at which the defendant was present, is sufficient to sustain a judicial officer's determination that probable cause exists to extradite.").

66. See *Noel v. United States*, 12 F. Supp. 2d 1300, 1304 (M.D. Fla. 1998) (identification based on birthday, nationality, and appearance in photograph); *cf. In re De Jesus Alatorre Pliego*, 320 F. Supp. 2d 947, 950-51 (D. Ariz. 2004) ("[T]here is no probable cause to believe that the [person] who was arrested and sitting in the courtroom at the extradition hearing is the person that was identified by the witnesses as committing the fraud."); *In re Cervantes Valles*, 268 F. Supp. 2d at 775 ("This is a textbook case of mistaken identity, and the governments of the U.S. and Mexico, in the interests of justice, ought to have conceded that fact.").

67. 18 U.S.C. § 3184 (2000); see *In re Atuar*, 300 F. Supp. 2d at 425-26 (identifying factors); *In re Fulgencio Garcia*, 188 F. Supp. 2d 921, 925 (N.D. Ill. 2002); *In re Mainero*, 990 F. Supp. at 1216. See generally Powers, *supra* note 13, at 290 (discussing factors).

IV. PROVISIONAL ARREST

The first American treaties allowing for provisional arrest were entered into with the Netherlands and Russia in 1887.⁶⁸ This practice continued and modern extradition treaties generally allow the provisional arrest of the person sought to be extradited if urgent circumstances are present.⁶⁹ Urgent circumstances “may include the fact that the fugitive is a flight risk, is in country for only a short period of time, or is deemed to be a danger to society.”⁷⁰ Section 3184 provides for the issuance of a warrant “upon complaint made under oath, charging any person found within [the magistrate or judge’s] jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by . . . treaty or convention”⁷¹ But must the judge or magistrate also make an independent determination that there is probable cause for the arrest of the fugitive under the standard applicable to domestic criminal warrants? If so, what type of evidence is sufficient? Or, should probable cause in the context of provisional arrest warrants be measured not against the fair probability that a fugitive has committed a criminal offense, but rather, by facts demonstrating the existence of a treaty and an arrest warrant for such fugitive by the requesting country based on an offense found under the treaty? We begin our discussion with Supreme Court cases which analyzed the sufficiency of the complaint to support a warrant under section 3184’s predecessor. We then turn to the more recent cases which explicitly or implicitly have addressed the Fourth Amendment question.

68. See Reuschlein, *supra* note 5, at 44-45. “Well before the beginning of the final decade of the nineteenth century, articles providing for provisional arrest had very definitely come into general acceptance and in virtually all treaties negotiated between the several nations these articles are to be found.” *Id.* at 46.

69. See U.S. ATTORNEYS’ MANUAL, *supra* note 6, § 9-15.230 (“Every extradition treaty to which the United States is a party requires a formal request for extradition, supported by appropriate documents. Because the time involved in preparing a formal request can be lengthy, most treaties allow for the provisional arrest of fugitives in urgent cases.”); Kester, *supra* note 13, at 1464 (“Most extradition treaties contain a clause permitting the ‘provisional arrest’ of the person sought, for a limited time pending completion of a formal extradition request, if there is urgency, usually because of a danger or likelihood of imminent flight.”). If the extradition request is made at the same time or before the arrest warrant is sought, the warrant is not deemed provisional. See Wiehl, *supra* note 10, at 733 n.7.

70. 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 1631.1-1(a) (2005), available at <http://foia.state.gov/Regs/fams.asp?level=2&id=8&fam=0>.

71. 18 U.S.C. § 3184 (2000).

A. Early Cases

Between 1901 and 1925, the Supreme Court decided five cases addressing the sufficiency of an extradition complaint under section 5270 of the Revised Statutes, the predecessor to section 3184.⁷² The first of these cases was *Rice v. Ames*,⁷³ where the Court ruled that an officer of a foreign government could present a “complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding . . . or a copy of the depositions of witnesses having actual knowledge of the facts”⁷⁴ One year later, in *Grin v. Shine*,⁷⁵ the Court observed that a complaint under oath could “be made by any person acting under the authority of the foreign government having knowledge of the facts, or, in the absence

72. The original law was passed in 1848. See Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. In 1878, section 1 of this act became section 5270 of the Revised Statutes. See Wiehl, *supra* note 10, at 731 n.2. Section 5270 provided:

Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, 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 remain until such surrender shall be made.

In 1940, section 5270 became codified at 18 U.S.C. § 651 and in 1948, it became 18 U.S.C. § 3184. See Wiehl, *supra* note 10, at 731 n.2. In 1968, the Federal Magistrate Acts changed the term “commissioner” to “magistrate” in section 3184. See Federal Magistrates Act, Pub. L. No. 90-578, § 301(a)(3), 82 Stat. 1115 (1968). One commentator has noted that “[a]lthough the language has been corrected, modernized, and slightly amended, the 1848 statute continues to govern extradition proceedings today.” Parry, *supra* note 13, 134-35; see Powers, *supra* note 13, at 282 (“Although the statute has been amended . . . it remains substantially similar to the one enacted over a century and a half ago.”).

73. 180 U.S. 371 (1901).

74. *Id.* at 375-76.

75. 187 U.S. 181 (1902).

of such person, by the official representative of the foreign government based upon depositions in his possession”⁷⁶

Several years later, in *Yordi v. Nolte*,⁷⁷ the Court again confronted the sufficiency of an extradition complaint. In *Yordi*, Mexico’s consul presented a complaint for petitioner’s arrest for fraud and forgery of documents.⁷⁸ The complaint was based on information and belief.⁷⁹ At the time the consul made the complaint, however, he had before him the record of the proceedings in Mexico relating to the offense and the depositions of witnesses.⁸⁰ Rejecting the contention that the complaint was deficient because it had no evidentiary attachments, the Court held that the record from Mexico had been before the commissioner when the warrant was issued and such record “corrected any irregularity in the complaint.”⁸¹

76. *Id.* at 193. Some commentators have noted that *Grin* could be interpreted as a retreat from *Rice* with respect to the sufficiency of the extradition complaint. See Angelo M. Russo, Note, *The Development of Foreign Extradition Takes a Wrong Turn in Light of the Fugitive Disentitlement Doctrine: Ninth Circuit Vacates the Requirement of Probable Cause for a Provisional Arrest in Parretti v. United States*, 49 DEPAUL L. REV. 1041, 1056 (2000) (“The significant difference between the *Grin* and *Rice* opinions was the requirement of supplemental evidence. The Court in *Grin* did not specify whether the depositions were to be sent directly to the judge or if it was sufficient for the representative to inform the judge of their presence.”); Wiehl, *supra* note 10, at 747 (“The *Grin* Court did not indicate whether the issuing U.S. magistrate ought to see copies of these depositions before issuing a warrant, or whether it was sufficient that the magistrate merely be assured that the foreign authorities had such depositions in their possession before they made their complaint.”).

77. 215 U.S. 227 (1909).

78. *Id.* at 228.

79. *Id.*

80. *Id.*

81. *Id.* at 232. “This record from Mexico was not only before the Mexican consul when he made the complaint against Yordi, now under consideration, but the commissioner was thoroughly familiar with it, as it had been introduced in evidence before him upon the hearing of the first complaint.” *Id.* at 229-30. In *Yordi*, the Court observed:

The complaint may, in some instances, be upon information and belief. The exigencies may be such that the criminal may escape punishment unless he is promptly apprehended by the representatives of the country whose law he has violated. From the very nature of the case it may often happen that such representative can have no personal knowledge of the crime. If the offense be one of the treaty crimes, and if it be stated clearly and explicitly so that the accused knows exactly what the charge is, the complaint is sufficient to authorize the commissioner to act.

Id. at 230-31 (quoting *Ex parte Sternaman*, 77 F. 595, 597 (N.D.N.Y. 1896)). However, in light of *Yordi*’s recognition that the record from Mexico was before the magistrate at the time of the issuance of the warrant, it has been suggested that “the case can be read for the proposition that an arrest warrant application in an extradition case should be

The last two cases touching on the sufficiency of extradition complaints during this period are *Glucksman v. Henkel*⁸² and *Fernandez v. Phillips*.⁸³ In *Glucksman*, the Court, citing *Rice*, ruled that while the complaint was on information and belief, it was “supported by the testimony of witnesses who [were] stated to have [been] deposed,” and therefore, presumably sworn.⁸⁴ In *Fernandez*, the complaint was based on information obtained through diplomatic channels that petitioner had been charged with embezzlement of public funds in Mexico.⁸⁵ In rejecting the contention that the complaint had been defective, the Court noted that appended to it was a copy of the proceedings in the Mexican court establishing the commission of the crime and ordering his arrest.⁸⁶ This evidence, according to the Court, was present at the extradition hearing.⁸⁷

When testing the sufficiency of the complaint in *Rice*, *Grin*, *Yordi*, *Glucksman*, and *Fernandez*, the Court did not mention, much less rely upon, the Fourth Amendment. The focus of these cases, none of which appear to have involved provisional arrest warrants, was whether the complaint could be based on information and belief, and if it was, the evidentiary support necessary to render the complaint legally sufficient.⁸⁸ Whether the complaint needed to establish anything more than the fact

based upon some form of attached deposition or documentary evidence and not merely a government lawyer’s allegations on information and belief.” Wiehl, *supra* note 10, at 747.

82. 221 U.S. 508 (1911).

83. 268 U.S. 311 (1925).

84. *Glucksman*, 221 U.S. at 514.

85. *Fernandez*, 268 U.S. at 313.

86. *Id.*

87. *Id.* Writing for the Court, Justice Holmes stated:

Of course, whatever form of words was used, the complaint necessarily was upon information, but as appeared at the hearing it was filed by order of the Attorney General, upon request of the Secretary of State, enclosing a request for the extradition from the Mexican Government and a copy of proceedings in a Mexican Court finding that the crime was duly proved against the appellant and ordering his arrest, many pages of evidence being appended.

Id.; see Wiehl, *supra* note 10, at 748 (“[T]he Court noted with approval that by the time of the extradition hearing, many pages of evidence had been appended to the complaint.”). Relying on *Fernandez*, the court in *United States ex rel. Petrushansky v. Marasco*, 325 F.2d 562 (2d Cir. 1963), ruled that an extradition complaint filed by an Assistant United States Attorney without personal knowledge was legally valid. *Id.* at 564. Furthermore, while the complaint failed to specify the details of the crime (a murder) with which petitioner had been charged in Mexico, under the treaty, “each government [was] obligated, upon being notified by the other that it [had] issued a warrant of arrest, to procure the provisional arrest of fugitives and to detain them until supporting papers [were] received.” *Id.* That understanding, the court determined, appeared to contemplate the issuance of provisional arrest warrants under the circumstances presented in *Marasco*. *Id.*

88. See Wiehl, *supra* note 10, at 744-48 (discussing cases).

that the fugitive had been charged with an extraditable offense is not clear from these opinions. The more recent cases, when analyzing requests for provisional arrest warrants, have sought to shed light on this question.

B. Recent Cases

The first case in the last thirty years to question implicitly the constitutionality of a provisional arrest warrant based on a telephonic communication that the fugitive had been charged with an extraditable crime is *United States v. Williams*.⁸⁹ In *Williams*, defendant was arrested on the basis of a telephonic communication from Canadian authorities that he had been charged with violations of Canadian criminal law.⁹⁰ The treaty between the United States and Canada provided for the provisional arrest of a person based on an application that contained a description of the person sought, the warrant for arrest which had been issued by the requesting country, “and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested State.”⁹¹ In *Williams*, there was no indication in the opinion that the warrant was issued on anything other than the existence of the Canadian warrant.⁹²

While the principal focus in *Williams* was whether defendant was entitled to be released on bail pending his extradition hearing, the court also expressed concern about how defendant came to be detained in the first place. Specifically, the court noted that sustaining the government’s position of no bail pending the hearing would deprive the defendant “of his liberty for 30 days or more, without any showing and determination of reasonable grounds for commitment, and without an opportunity to show that his attendance at that hearing [could] be reasonably assured by bail.”⁹³ Although subsequently reversed by the United States Court of Appeals for the First Circuit, the district court granted Williams bail, rejecting the government’s contention that the interest in fulfilling treaty

89. 480 F. Supp. 482 (D. Mass. 1979), *rev’d on other grounds*, 611 F.2d 914 (1st Cir. 1979).

90. *Id.* at 483. In its opinion, the district court referred to Williams as “defendant” and the discussion above adopts that reference.

91. *Id.* at 485 n.1 (quoting Treaty of Extradition Between the United States and Canada, art. 11, Dec. 3, 1971, 991 T.I.A.S. No. 8237).

92. *See id.* at 483.

93. *Id.* at 485.

obligations overrode the “intrusion on personal liberty” presented by his detention.⁹⁴

In *United States v. Wiebe*,⁹⁵ petitioner, a Canadian national, was arrested in the United States following the execution of a provisional arrest warrant.⁹⁶ The basis for the provisional arrest warrant was a Spanish warrant which had been issued in connection with the murder of two Colombian nationals in Barcelona, Spain.⁹⁷ Following an extradition hearing, at which petitioner testified, the magistrate concluded that there was probable cause that he had committed the murders in Spain and ordered him extraditable.⁹⁸ Petitioner thereafter contested this finding in a petition for a writ of habeas corpus which the district court denied.⁹⁹

On appeal, petitioner argued that his arrest was unlawful because it was not supported by probable cause.¹⁰⁰ The United States Court of Appeals for the Eighth Circuit rejected this contention. Citing section 3184, the court ruled that a magistrate could “issue a provisional arrest warrant upon a showing in a sworn complaint of a treaty of extradition between the United States and any foreign country, and that the person sought committed in the foreign jurisdiction one of the crimes set forth in the treaty.”¹⁰¹ In *Wiebe*, the complaint alleged that petitioner was sought for murder and that murder was an extraditable offense, therefore, the magistrate had not erred in issuing the warrant.¹⁰²

A different result was reached by the court in *Caltagirone v. Grant*.¹⁰³ In *Caltagirone*, under the terms of its extradition treaty with the United States, Italy applied for the “provisional arrest” of one of its nationals pending a formal request for his extradition.¹⁰⁴ The sworn complaint prepared by the United States Attorney for the Southern District of New York simply alleged that Italian warrants charging fraudulent bankruptcy and embezzlement had been issued for petitioner’s arrest.¹⁰⁵ On the day of his arrest, petitioner moved to quash the warrant on the grounds that it

94. *Id.* at 485-88.

95. 733 F.2d 549 (8th Cir. 1984).

96. *Id.* at 550.

97. *Id.*

98. *Id.* at 552.

99. *Id.* The district court had also denied an earlier petition in which Wiebe challenged his detention on the grounds that extradition documents had not been delivered in a timely fashion under the governing treaty. *Id.*

100. *Id.* at 553. Petitioner also raised other contentions relating to the determination at the hearing that there was probable cause that he had committed the crimes for which his extradition was sought and the formal transmission of extradition documents under the treaty, both of which the court rejected. *Id.* at 552-54.

101. *Id.* at 553-54.

102. *Id.* at 554.

103. 629 F.2d 739 (2d Cir. 1980).

104. *Id.* at 743.

105. *Id.*

had been issued without a probable cause determination and the district court denied the motion.¹⁰⁶ Petitioner thereafter renewed his motion and also sought a writ of habeas corpus, both of which were denied.¹⁰⁷ On appeal, the United States Court of Appeals for the Second Circuit reversed.¹⁰⁸

The court began its analysis by noting that Article XIII of the extradition treaty with Italy contained four requirements in connection with the application for a provisional arrest warrant: a description of the person sought; an indication that a request for extradition would be forthcoming; the existence of an arrest warrant in the state seeking extradition; and “such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party.”¹⁰⁹ Had the offense for which Italy sought extradition—fraudulent bankruptcy—been committed in the United States, probable cause would have been required before the issuance of an arrest warrant for one alleged to have committed that offense.¹¹⁰ Accordingly, since the warrant for petitioner’s provisional arrest was based solely on the existence of an Italian arrest warrant, it did not conform with the treaty’s requirements.¹¹¹

With respect to the government’s contention that the probable cause determination was reserved under Article XI of the treaty to the extradition hearing pursuant to a formal request for extradition, and not to the decision involving the issuance of a provisional arrest warrant,¹¹² the court ruled that while these proceedings “differ[ed] in some way, the difference [did] not lie in the requirement of probable cause.”¹¹³ In

106. *Id.*

107. *Id.*

108. *Id.* at 750.

109. *Id.* at 744 (internal quotation omitted).

110. *Id.*

111. *Id.* at 744-47.

112. While Article XI of the treaty did not expressly provide for the presentation of evidence before a judge or magistrate establishing probable cause, the court reasoned that it was “presumably because 18 U.S.C. § 3184 already require[d] such a proceeding in all formal requests for extradition.” *Id.* at 745.

113. *Id.* at 747. The court explained:

Article XI and Article XIII both require a showing of probable cause, but the proceedings they contemplate are different in several crucial respects. Article XIII requires “information,” and lists no formalities attending its provision by the applying state. . . . Article XI, on the other hand, requires “evidence,” a word which necessarily implies a greater degree of formality in procedures than “information.” Unlike Article XIII, Article XI requires both certified

short, by interpreting the “further information” language in the treaty to incorporate a requirement of probable cause, in addition to the existence of an arrest warrant from the requesting state, the court in *Caltagirone* was able to avoid the question of whether, in the context of a provisional arrest warrant, absent such a clause, the Fourth Amendment required an independent showing of probable cause.¹¹⁴

In *In re Russell*,¹¹⁵ Colombia sought a provisional arrest warrant for petitioner in connection with a fraudulent transaction in which thirteen million dollars was transferred from a Colombian government account at the Chase Manhattan Bank in London.¹¹⁶ After the magistrate issued the warrant and petitioner was arrested, he sought relief through a petition for a writ of habeas corpus which the district court denied.¹¹⁷

On appeal, petitioner argued that the provisional arrest clause under the treaty between the United States and Colombia was unconstitutional because it provided for the arrest of American citizens without a determination of probable cause.¹¹⁸ Additionally, petitioner maintained that his arrest and detention were not supported by probable cause and therefore violated his rights under the Fourth Amendment.¹¹⁹ The United States Court of Appeals for the Fifth Circuit rejected these contentions.

The Fifth Circuit initially noted that the court in *Caltagirone* had construed the treaty at issue there as requiring probable cause in connection

depositions establishing probable cause and a copy of the actual warrant of arrest issued by the magistrate in the requesting state. . . . Moreover, under Article XI the requesting states must “prov[e],” not allege, that the relator is the person named in the warrants, and must provide an extensive documentary appendix to its request setting forth, *inter alia*, its law defining the offense, prescribing the punishment, and setting the time period in which charges may be brought.

Id.

114. *Id.* In *United States ex rel. Petrushansky v. Marasco*, 325 F.2d 562 (2d Cir. 1963), the court held that a warrant for a “provisional arrest” could be issued on the basis of a complaint that Marasco had been charged with murder in Mexico. *Id.* at 564. The court in *Caltagirone* distinguished *Marasco* on the grounds that the Fourth Amendment issue had not been raised and also that “evidence establishing probable cause was produced.” *Caltagirone*, 629 F.2d at 748 n.19.

115. 805 F.2d 1215 (5th Cir. 1986).

116. *Id.* at 1216.

117. *Id.*

118. *Id.* at 1217. That clause read in part:

In case of urgency either Contracting Party may request, through the diplomatic channel, the provisional detention of an accused or convicted person. The application shall contain a description of the person sought, a statement of intention to present the request for extradition of the person sought . . . and a statement of the existence of a warrant of arrest or a judgment of conviction against that person.

Treaty of Extradition Between the United States of America and Colombia, U.S.-Colom., art. 11(1), Sept. 14, 1979, S. TREATY DOC. NO. 97-8 (1981).

119. *Russell*, 805 F.2d at 1217.

with the issuance of a provisional arrest warrant.¹²⁰ Assuming, without deciding, that the extradition treaty with Colombia also required a showing of probable cause, the court in *Russell* found that the evidence presented to the magistrate had met that standard.¹²¹ This evidence had consisted of the sworn complaint describing the transaction, letters from petitioner to the Consul General of Colombia about it (and the Consul's response), and petitioner's testimony.¹²²

In *Sahagian v. United States*,¹²³ an American citizen who had been detained in Spain under an extradition treaty, returned to the United States, and then released after the original charges were dropped, brought suit against a number of federal officials alleging that his arrest and detention had violated his constitutional rights.¹²⁴ The treaty between the United States and Spain contained a "further information" clause in connection with a request for a provisional arrest similar to that in *Caltagirone*.¹²⁵ In rejecting Sahagian's contention that his arrest was unlawful because he had not first been indicted, the United States Court of Appeals for the Seventh Circuit observed in a footnote that there was some tension between *Russell* and *Caltagirone* over the probable cause showing in the context of provisional arrest warrants.¹²⁶ In the case before it, however, since Sahagian's arrest was supported by probable cause,¹²⁷ the court did not need to "venture into this debate or decide

120. *Id.*

121. *Id.*

122. *Id.* at 1217-18. In *Russell*, the magistrate issued a warrant for petitioner's arrest based on the complaint filed by the U.S. Attorney alleging that petitioner was a fugitive from justice and that he had been charged under a warrant with violations of the Colombian Penal Code. *In re Russell*, 647 F. Supp. 1044, 1045 (S.D. Tex. 1986), *aff'd*, 805 F.2d 1215 (5th Cir. 1986). The complaint enumerated the details of the acts charged in the warrant and also included petitioner's description and address. *Id.* at 1050-51. One week after petitioner's arrest, the magistrate held a hearing at which he took evidence and ruled that there was probable cause for petitioner's continued detention. *Id.* at 1045, 1050-51.

123. 864 F.2d 509 (7th Cir. 1988).

124. *Id.* at 510-12.

125. *Id.* at 511 ("An application for a provisional arrest is required to contain a description of the person sought, an indication of intent to extradite, a statement of the existence of an arrest warrant, and such 'further information, if any, as may be required by the requested Party.'").

126. *Id.* at 513 n.4.

127. The court ruled that the treaty did not deprive petitioner of any constitutional rights since federal officials had secured his "provisional arrest and detention pending extradition after obtaining an arrest warrant from a magistrate based upon a showing of probable cause." *Id.* at 513.

whether the debate even [had] any applicability when the United States [sought] the provisional arrest and detention of a person.”¹²⁸

The most recent circuit court opinion addressing the application of the probable cause standard to a provisional arrest warrant is *Parretti v. United States*.¹²⁹ Although that opinion was subsequently withdrawn by the Ninth Circuit when, sitting en banc, it determined that the appeal should be dismissed because of the fugitive disentitlement doctrine,¹³⁰ the court’s analysis and treatment of the issue may influence or guide judges or magistrates in the future, and thus, merits discussion here.¹³¹

In *Parretti*, petitioner, an Italian citizen, was arrested pursuant to a provisional arrest warrant under the extradition treaty between the United States and France.¹³² The warrant was based on the complaint of an Assistant United States Attorney acting on behalf of the Government of France.¹³³ The complaint alleged that petitioner had been charged in an arrest warrant issued in France with various business related crimes, that the crimes were extraditable offenses under the treaty, and that France had requested petitioner’s provisional arrest.¹³⁴ Neither the French warrant, affidavits, nor any “other competent evidence” were attached to the complaint.¹³⁵

Following his arrest, petitioner argued at his bail hearing and on his habeas petition to the district court that the provisional warrant violated the Fourth Amendment on two grounds. First, it was not based on any

128. *Id.* at 513 n.4; see *United States v. Malcolm*, 1999 U.S. Dist. LEXIS 9235, at *6 (E.D. Pa. June 15, 1999) (finding there was no need to decide whether probable cause was required for a provisional arrest because the recitation of facts in the complaint established it). *Sahagian*, of course, did not involve section 3184 since the arrest took place in Spain. *Sahagian*, 864 F.2d at 510-11.

129. 143 F.3d 508 (9th Cir. 1998) (en banc). An earlier version of the *Parretti* opinion is found at 122 F.3d 758 (9th Cir. 1997). Given the en banc court’s ruling, the panel decision has no precedential value. See *In re Kyung Joon Kim*, No. CV 04-3886-ABC (PLA), 2004 U.S. Dist. LEXIS 12444, at *3 n.1 (C.D. Cal. July 1, 2004) (recognizing that the earlier *Parretti* opinion “is not the law in [the Ninth] Circuit”).

130. See *Parretti*, 143 F.3d at 509. Developed in the late nineteenth century in the context of criminal appeals, see *United States v. \$40,877.59 in United States Currency*, 32 F.3d 1151, 1152 (7th Cir. 1994), the fugitive disentitlement establishes that a “fugitive from justice may not seek relief from the judicial system whose authority he or she evades.” Martha B. Stolley, Note, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751, 752 (1997). Equitable in nature, see *In re Prevot*, 59 F.3d 556, 562 (6th Cir. 1995), the doctrine has been applied in criminal and civil cases, at both the trial and appellate levels. See *Pesin v. Rodriguez*, 244 F.3d 1250, 1252 (11th Cir. 2001).

131. See *Olson*, *supra* note 7, at 167-68 (“Despite the withdrawal, the detrimental impact of the panel’s decision on the future of international extradition is certain because of the important constitutional questions it raises.”).

132. *Parretti*, 122 F.3d at 761.

133. *Id.*

134. *Id.*

135. *Id.*

evidence that he had committed any of the offenses with which he had been charged in the French warrant.¹³⁶ Second, the magistrate judge had failed to make a probable cause determination.¹³⁷ The district court denied the petition and, on appeal, the United States Court of Appeals for the Ninth Circuit reversed, finding that the government had failed to make the necessary evidentiary showing of probable cause to believe that petitioner had committed an extraditable crime.¹³⁸

The government initially argued that the rule of judicial non-inquiry¹³⁹ prohibited the court from looking behind the foreign warrant.¹⁴⁰ The court rejected this contention finding that it represented an “unprecedented extension of the rule of judicial non-inquiry to a justiciable case or controversy.”¹⁴¹ The court then determined that in contrast to the treaties at issue in *Caltagirone* and *Sahagian*, the treaty with France could not “fairly be interpreted as requiring a showing of probable cause in addition to the existence of a foreign arrest warrant.”¹⁴² Similarly, the court found that section 3184 could not fairly be read as requiring a showing of probable cause in connection with a provisional arrest warrant.¹⁴³

136. *Id.*

137. *Id.* at 762.

138. *Id.* at 763. The court also ruled that petitioner’s detention without bail violated his due process rights under the Fifth Amendment. *Id.* at 763-64.

139. The rule of non-inquiry provides that “[a]n extraditing court will generally not inquire into the procedures or treatment which await a surrendered fugitive in the requesting country.” *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983); *accord In re Chan Seong-I*, 346 F. Supp. 2d 1149, 1157 (D.N.M. 2004). The rationale for the rule is that such issues “properly fall[] within the exclusive purview of the executive branch.” *Escobedo v. United States*, 623 F.2d 1098, 1107 (5th Cir. 1980) (quoting *Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980)); *accord Mainero v. Gregg*, 164 F.3d 1199, 1210 (9th Cir. 1999). *See generally* Jacques Semmelman, *Federal Courts, The Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991) (arguing for strict application of the rule of non-inquiry in international extradition proceedings).

140. *Parretti*, 122 F.3d at 764-67.

141. *Id.* at 765 (“In this case, the government invites us to extend the rule of judicial non-inquiry to the paradigmatic justiciable question whether an arrest warrant has been issued in violation of the Fourth Amendment. We respectfully decline the government’s invitation.”).

142. *Id.* at 769.

143. *See id.* at 770. The court in *Parretti* observed:

Section 3184 allows an arrest warrant to issue on the basis of a “complaint . . . charging [the person to be arrested] with having committed” an extraditable offense. Once again, all § 3184 requires is a showing that the fugitive has been *charged* with committing an extraditable crime. Section 3184 does not require an independent judicial determination of probable cause to believe the fugitive committed the offense. Under § 3184, the purpose of the arrest is to allow the

Lastly, unlike *Russell*, the court determined it could not avoid the Fourth Amendment question presented by finding, on the basis of the record, that petitioner's arrest was supported by probable cause.¹⁴⁴

Confronted with the constitutional question that *Caltagirone*, *Russell*, and *Sahagian* had "managed to avoid," the court in *Parretti* held that the Fourth Amendment's warrant clause could not "be interpreted as allowing a lesser standard for arrests made for the purpose of enforcing treaty obligations than for arrests made for the purpose of enforcing our own domestic laws."¹⁴⁵ It concluded that the court in *Wiebe* had gone "astray" when it upheld the issuance of the warrant there based on a complaint that alleged petitioner had been charged with an extraditable crime.¹⁴⁶ Having determined that the treaty with France and section 3184 violated the Fourth Amendment, to the extent they permitted the issuance of provisional arrest warrants without an independent judicial determination of probable cause, the court then turned to the evidence which had been presented.¹⁴⁷ That evidence, the panel concluded, was insufficient to establish probable cause because it consisted of facts alleged in the French warrant which were not supported by "affidavits, deposition testimony, or other competent evidence."¹⁴⁸

fugitive to be brought before a magistrate so that the "evidence of criminality may [then] be heard and considered." In other words, § 3184 contemplates an arrest so that *thereafter*, at the extradition hearing, the "evidence of criminality," i.e., the existence of probable cause, may be heard.

Id.

144. *See id.* at 770.

145. *Id.* at 771.

146. *Id.* at 772. The court also found *United States ex rel. Petrushansky v. Marasco*, 325 F.2d 562 (2d Cir. 1963), unpersuasive because that case had not addressed the constitutional question. *Parretti*, 122 F.3d at 771-72.

147. *See id.* at 773.

148. *Id.* at 774 ("In applying for the warrant to arrest Parretti, all the government presented were the French magistrate's allegations of fact."); *id.* at 775 ("[The allegations] may have been relayed to the State Department by a reliable source, but those allegations without supporting affidavits or other competent evidence provide no basis for a judicial determination whether there is probable cause to believe Parretti committed an extraditable crime."). The court recognized that in *Yordi v. Nolte*, 215 U.S. 227 (1909), the Supreme Court rejected the argument that a complaint in an extradition proceeding must be sworn to by persons having personal knowledge of the crime alleged. *Yordi*, 215 U.S. at 230-31. There, however, the magistrate had before him evidence consisting of the record and evidence in the foreign proceedings, which included the depositions of witnesses. *Id.* at 228-29.

In *In re Orellana*, 2000 U.S. Dist. LEXIS 10380, at *25 (S.D.N.Y. July 26, 2000), citing *Parretti*, the court determined that the provisional arrest warrant had been issued in contravention of the Fourth Amendment because "neither the source of the information nor the grounds for the [prosecutor's] belief [were] provided in the complaint."

C. Discussion

It is well settled that at an extradition hearing under section 3184, the controlling standard is probable cause.¹⁴⁹ This is so even though section 3184 only refers to “evidence of criminality.”¹⁵⁰ Furthermore, in applying this standard to extradition hearings, neither the Supreme Court nor any lower federal court has relied on the Fourth Amendment.¹⁵¹ But what about a warrant for the provisional arrest of a fugitive so that his appearance can be secured at the hearing? Must that warrant be based on probable cause under the Fourth Amendment, and if so, probable cause of what?

As demonstrated by the discussion above, while the early Supreme Court cases provided guidance relating to the legal sufficiency of extradition complaints,¹⁵² it is only recently that courts have confronted the question of whether a provisional arrest warrant needs to be supported by probable cause in the traditional Fourth Amendment sense.¹⁵³ In that regard, the cases reveal that when the treaty allowing for a provisional arrest contained a “further information” clause,¹⁵⁴ or when the record established probable cause to issue the warrant,¹⁵⁵

149. See *supra* text accompanying notes 12, 51-52, 54.

150. 18 U.S.C. § 3184 (2000) (stating that judges review extradition warrants “to the end that the evidence of criminality may be heard and considered”); *cf.* Olson, *supra* note 7, at 176 (“[T]he statute lacks an explicit requirement that the government make a showing of probable cause for . . . extradition.”).

151. See *Spatola v. United States*, 741 F. Supp. 362, 374 (E.D.N.Y. 1990) (“[T]he requirement that there be probable cause in order to extradite ‘has not yet been interpreted as emanating from the Fourth Amendment.’”); Olson, *supra* note 7, at 176 (“Despite the absence of an explicit requirement, the U.S. Supreme Court has inferred from the statutory language a requirement of showing probable cause for extradition purposes, although no court has held the basis to be the Fourth Amendment.”).

152. See Powers, *supra* note 13, at 302 (“Early Supreme Court cases, while confusing, seemed to support the proposition that complaints could be based only on information and ‘belief.’”); Wiehl, *supra* note 10, at 745 (“While the Court offered language which appeared to favor a requirement that warrants be based on attached depositions or other documentary evidence, it also offered conflicting language suggesting that warrants could issue merely on ‘information and belief.’”).

153. See *supra* Part IV.B.

154. See *Caltagirone v. Grant*, 629 F.2d 739, 748 (2d Cir. 1980) (“In our view, the language of Article XIII so clearly demands a showing of probable cause before any warrant for provisional arrest may issue, that we need not reach the constitutional question.”).

155. See *Sahagian v. United States*, 864 F.2d 509, 513 n.4 (7th Cir. 1988) (“Because there was a showing of probable cause to support [petitioner’s] arrest and detention, we need not venture into this debate . . .”).

whether or not the treaty contained such a clause,¹⁵⁶ courts declined to decide whether, under the Fourth Amendment, probable cause needed to be shown for a provisional arrest warrant to issue.¹⁵⁷ In *Parretti*, where those considerations were not present, the Ninth Circuit ruled, in a decision which was later withdrawn, that the Fourth Amendment did not “allow[] a lesser standard for arrests made for the purpose of enforcing treaty obligations than for arrests made for the purpose of enforcing our own domestic laws.”¹⁵⁸

Implicit or explicit in those recent opinions was an application of the probable cause standard in the traditional domestic criminal sense, that is, probable cause to believe that a crime had been committed and that the petitioner committed it.¹⁵⁹ One circuit court opinion from that period, however, can be interpreted to have applied the probable cause standard, but in a different context. In *Wiebe*,¹⁶⁰ relying on section 3184, the Eighth Circuit ruled that a magistrate could issue a provisional arrest warrant upon a showing in a sworn complaint that a person sought to be extradited had been charged with an extraditable offense.¹⁶¹ The complaint there simply had alleged that petitioner was sought for murder and that murder was an extraditable offense.¹⁶² This formulation of probable cause, which looks to the existence of a treaty and the assertion that the

156. See *In re Russell*, 805 F.2d 1215, 1217 (5th Cir. 1986) (“Assuming without deciding that the Treaty requires a showing of probable cause to support a provisional arrest before an extradition hearing, we agree with the district court that the magistrate had enough evidence before him to show probable cause to detain [the petitioner.]”); *United States v. Malcolm*, 1999 U.S. Dist. LEXIS 9235, at *6 (E.D. Pa. June 15, 1999) (finding there was no need to decide whether probable cause was required for a provisional arrest because the recitation of facts in the complaint established it).

157. *Wiehl*, *supra* note 10, at 758 (“In the past ten years, several appellate panels of the United States Courts of Appeals for the Second, Fifth, and Seventh Circuits have questioned the constitutionality of allowing a provisional arrest warrant to issue without a prior evidentiary showing of probable cause but have managed to avoid deciding the constitutional issue.”); See *Russo*, *supra* note 76, at 1083 (“Most courts have avoided the question by interpreting the language of the corresponding extradition treaty as requiring probable cause.”).

158. *Parretti v. United States*, 122 F.3d 758, 771 (9th Cir. 1997), *appeal denied, rev’d en banc*, 143 F.3d 508 (9th Cir. 1998). The complaint in *Parretti* alleged that petitioner had been charged in an arrest warrant issued in France with various business related crimes, that the crimes were extraditable offenses under the treaty, and that France had requested petitioner’s provisional arrest. *Id.* at 761.

159. See *id.* at 776; *Sahagian*, 864 F.2d at 513; *Russell*, 805 F.2d at 1217-18; *Caltagirone*, 629 F.2d at 744-45.

160. 733 F.2d 549 (8th Cir. 1984).

161. *Id.* at 553-54. The court in *Parretti* observed that while the *Wiebe* court correctly cited the applicable standard, it “then went astray and inexplicably upheld a warrant even though it was based on a complaint that alleged only that *Wiebe* was charged with an extraditable crime.” *Parretti*, 122 F.3d at 772.

162. *Wiebe*, 733 F.2d at 554.

fugitive has been charged with or has committed an extraditable offense, is consistent with the Fourth Amendment.¹⁶³

As noted earlier, probable cause to arrest or search can arise outside the domestic criminal warrant context.¹⁶⁴ In other words, a “warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.”¹⁶⁵ Illustrative of this principle are material witness and FISA warrants.¹⁶⁶ In terms of the present discussion, the former provides a useful analogy.¹⁶⁷

Under the federal material witness statute,¹⁶⁸ a warrant for the arrest of a material witness may issue if there has been a showing, by way of affidavit and based on probable cause, that the witness has material knowledge of a crime, and that his or her presence is unlikely to be achieved by subpoena.¹⁶⁹ In a similar vein, section 3184 permits the issuance of a warrant “upon complaint made under oath, charging any person found within [the magistrate or judge’s] jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by . . . treaty or convention.”¹⁷⁰ As with material witness warrants, and supported by the court’s ruling in *Wiebe*, a determination of probable cause in the provisional arrest context should not be measured in the traditional domestic criminal warrant sense because the purpose of the seizure is not the initiation of a criminal prosecution, but rather, a determination of whether the fugitive should be

163. See *In re Wise*, 168 F. Supp. 366, 368 (S.D. Tex. 1957) (“Under Section 3184 of Title 18, a judge or commissioner may issue a warrant . . . if (1) there is a treaty or convention for extradition and (2) a complaint is made under oath charging [the person sought to be extradited] with having committed in [the foreign country] any of the crimes provided for by such Treaty or Convention.”).

164. See *supra* text accompanying notes 40-46.

165. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 323 (1972).

166. See *supra* text accompanying notes 44-46.

167. See *Wiehl*, *supra* note 10, at 788-89 (discussing why material witness warrants provide a useful analogy).

168. 18 U.S.C. § 3144 (2000).

169. See *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003) (“[A]n application for a material witness warrant under § 3144 must establish probable cause to believe that (1) the witness’s testimony is material, and (2) it may become impracticable to secure the presence of the witness by subpoena.”); *Bacon v. United States*, 449 F.2d 933, 943 (9th Cir. 1971); *United States v. Feingold*, 416 F. Supp. 627, 628 (E.D.N.Y. 1976).

170. 18 U.S.C. § 3184 (2000).

extradited pursuant to the foreign government's request for his or her extradition.¹⁷¹

This formulation is consistent with the governmental and individual interests at stake. Under extradition treaties, the United States has a compelling interest in maintaining foreign relations by swiftly apprehending fugitives sought by a foreign government so that a proper determination can be made as to their extraditability.¹⁷² Conversely, the liberty interest of a fugitive in an extradition proceeding, which is considered *sui generis*, is not unqualified. In other words, it is an interest already burdened by the fact that a foreign government has initiated criminal proceedings against him. Therefore, at the provisional arrest stage, the object of the probable cause inquiry should be limited to the existence of a foreign warrant charging an extraditable offense.¹⁷³

But even if a showing beyond the existence of the foreign warrant charging an extraditable offense is necessary to comply with the Fourth Amendment at the provisional arrest stage, what should be the nature of that showing? The statutory scheme governing extradition requests "has never by its terms required an evidentiary submission as a predicate for the issuance of a provisional arrest warrant."¹⁷⁴ Further, *Caltagirone* and *Russell*, and to some degree, *Sahagian*, recognized that the probable cause showing underlying a provisional arrest warrant could be more

171. See *Ward v. Rutherford*, 921 F.2d 286, 287 (D.C. Cir. 1990) ("[The extradition hearing is] essentially a 'preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation.'"). While section 3184 does not mention probable cause, the court in *Wiebe* read that requirement into the statute. See *United States v. Wiebe*, 733 F.2d 549, 553 (8th Cir. 1984). The material witness statute similarly does not identify probable cause as the standard governing the issuance of material witness warrants. See also § 3144. Courts interpreting that statute likewise have found that for a warrant to issue, there must be a determination of probable cause. See *Awadallah*, 349 F.3d at 64; *Bacon*, 449 F.2d at 943; *Feingold*, 416 F. Supp. at 628.

Under the Bail Reform Act, once arrested, a material witness may be released on personal recognizance or an unsecured appearance bond, released subject to certain conditions, or detained. 18 U.S.C. § 3142(b)-(c), (e) (2000). In extradition cases, the Act is inapplicable and there is a presumption against bail which can be overcome if the person sought to be extradited demonstrates "special circumstances." *Wright v. Henkel*, 190 U.S. 40, 63 (1903); *In re Russell*, 805 F.2d 1215, 1216 (5th Cir. 1986); *In re Mironescu*, 296 F. Supp. 2d 632, 634 (M.D.N.C. 2003).

172. See *Wiehl*, *supra* note 10, at 790 ("The case can certainly be made that in extradition cases the government has interests that extend well beyond mere reciprocity. These interests include peace and commerce with other nations.").

173. See *Wiebe*, 733 F.2d at 553-54; *In re Wise*, 168 F. Supp. 366, 368 (S.D. Tex. 1957); see also *In re Kraiselburd*, 786 F.2d 1395, 1396-97 (9th Cir. 1986) ("A request for provisional arrest need only be accompanied by a declaration that an arrest warrant exists . . .").

174. *Wiehl*, *supra* note 10, at 744.

informal than the showing at the extradition hearing.¹⁷⁵ This takes into account the realities of the extradition proceeding at that stage, when documents are being collected and prepared in connection with the presentation of the formal request for extradition leading to the extradition hearing.¹⁷⁶ Specifically, a sworn complaint setting forth the facts alleged in the foreign warrant should be sufficient to enable the magistrate or judge to make a probable cause finding that the fugitive committed the charged offense for the limited purpose of his detention pending the extradition hearing.¹⁷⁷

V. CONCLUSION

The Fourth Amendment provides in part that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹⁷⁸ Provisional arrest warrants issued pursuant to the request of a foreign government under an extradition treaty must comply with that constitutional command. As demonstrated by the discussion above, given the nature of extradition proceedings, the object of the probable cause determination at the provisional warrant stage should be the existence

175. See *Sahagian v. United States*, 864 F.2d 509, 513 n.4 (7th Cir. 1988); *Russell*, 805 F.2d at 1217; *Caltagirone v. Grant*, 629 F.2d 739, 747 (2d Cir. 1980); see also *Gerstein v. Pugh*, 420 U.S. 103, 119-20 (1975). See generally Nathaniel A. Persily, Note, *International Extradition and the Right to Bail*, 34 STAN. J. INT’L L. 407, 416-17 (1998) (“Though no court has specified it as such, the probable cause showing at the stage of provisional arrest is what might be termed a ‘second order’ probable cause showing. The government is establishing *probable cause that probable cause of criminality will be established* at the extradition hearing.”).

176. As noted by one commentator:

Most extradition treaties specify a deadline following (rather than prior to) the fugitive’s arrest by which the requesting country must gather and transmit through the diplomatic channel the various charging documents, affidavits, ambassadorial or consular certifications, translations, and apostilles which the government will in turn submit to the court for consideration at a formal extradition hearing on the government’s request for an order certifying the extraditability of the fugitive.

Wiehl, *supra* note 10, at 750.

177. The form complaint found in the Department of Justice’s Criminal Resource Manual for provisional arrests contains a section for a description of the facts upon which the foreign warrant was based. See CRIMINAL RESOURCE MANUAL, *supra* note 4, § 616; cf. FED. R. CRIM. P. 4(a) (“If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it.”).

178. U.S. CONST. amend. IV.

of a foreign warrant charging an extraditable offense. Even if the Fourth Amendment requires more, however, the showing should be less formal than that at the extradition hearing, and the facts alleged in the foreign warrant should be sufficient to support the detention of the fugitive pending the formal request for extradition and the subsequent hearing.