1998

Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of Parretti v. United States

Jeffrey M. Olson

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.edu/lawreview/vol48/iss1/9

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
GAUGING AN ADEQUATE PROBABLE CAUSE STANDARD FOR PROVISIONAL ARREST IN LIGHT OF PARRETTI v. UNITED STATES

Jeffrey M. Olson*

International extradition maintains a peculiar status in the international legal community.1 The current patchwork of treaties2 requires the

*J.D. Candidate, May 1999, The Catholic University of America, Columbus School of Law

1. Extradition is defined as the "surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." BLACK'S LAW DICTIONARY 585 (6th ed. 1990). International extradition is unique in that it is not based on customary international law, see United States v. Rauscher, 119 U.S. 407, 411-12 (1886); rather, it is based traditionally on reciprocity, comity, or a treaty. See M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 5-7 (3d ed. 1996) (discussing the fundamental bases of contemporary international extradition). Today, most extradition occurs based on treaties, either bilateral or multilateral. See id. at 6; cf. infra note 2 and accompanying text (discussing types of extradition treaties).

The history of international extradition traces its roots to a treaty between Rameses II of Egypt and the Hittite prince Hattusili III, dated near 1280 B.C. See I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971). For an overview of this history, see BASSIOUNI, supra, at 1-5 (surveying the development of international extradition). Since that time, the purpose of international extradition has evolved from the exchange of political fugitives to the cooperative efforts of states to suppress crime. See id. at 4.

2. International extradition treaties are either bilateral or multilateral. See BASSIOUNI, supra note 1, at 6. Today, most countries including the United States require a treaty in order to extradite, although there are several instances where extradition has occurred in the absence of a treaty. See id. at 6-7; see also 18 U.S.C.A. § 3181(a) (West Supp. 1998) (requiring a treaty between the United States and another country before an extradition can occur except in the case of crimes of violence against United States nationals). Since 1996, the United States has permitted extradition without a treaty when the crimes involve violence against Americans in foreign countries. See 18 U.S.C.A. § 3181 (b), (c) (West Supp. 1998) (requiring evidence of such crimes that would constitute violent crimes had they occurred in United States territory and that are not politically motivated). Such instances are rare and usually are based on the concepts of reciprocity or comity which essentially represent friendly cooperation between states. See 18 U.S.C.A. § 3181(b) (West Supp. 1998) (indicating that comity shall be the basis of extradition between the United States and a foreign country in the absence of a treaty); see also BASSIOUNI, supra note 1, at 17-18. To extradite without a treaty, a state must have enforcement jurisdiction over a fugitive. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 790-94, 813-18 (2d ed. 1995). Under international law, enforcement jurisdiction is territorial. See id. at 790. Consequently, states do not enforce their laws in another state without the consent of the other state. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 cmt. b (1987) [hereinafter
synthesis of different legal systems and customs that often conflict with
one another. A consequence of this fusion of interests and ideas is the
unique application of American law to this system. Of recent particular

RESTATEMENT (THIRD) OF FOREIGN RELATIONS].

Though criticized for the lack of uniformity among them, bilateral treaties dominate ex-
tradition practice because of their flexibility and the tradition of enacting such treaties for ex-
tradition purposes. See BASSIOUNI, supra note 1, at 16-17. Multilateral treaties are
newer and rarer but continue to earn gradual acceptance among countries as international
crime has flourished. See id. at 11-16 (discussing the major multilateral extradition trea-
ties).

3. Two areas of conflict include the role of a treaty in international extradition and
the standard of proof in a judicial proceeding. See CARTER & TRIMBLE, supra note 2, at
814. A brief comparison of American, British, and French approaches reflects the simi-
larities and differences between the countries' procedures for extradition. See id. at 817.
The extradition treaty differs in its role in each of the three countries. See id. In the
United States, a treaty is generally required for extradition, 18 U.S.C.A. § 3181 (West
Supp. 1998), and the treaty is supplemented by the U.S. extradition statute, 18 U.S.C.A.
§ 3184 (West Supp. 1998), which governs the procedures for extradition. These proce-
dures usually vary by treaty. In the United Kingdom, the Extradition Act of 1989, ch. 33,
reprinted in 17 HALSBURY'S STATUTES OF ENGLAND AND WALES 558 (4th ed. 1993),
governs all extradition treaties and procedures uniformly. See CARTER & TRIMBLE, supra
note 2, at 817 (citing the repealed Extradition Act of 1870). French extradition procedures
are similar to those of the United States in that they are established through treaties and
supplemented by a statute, Title II of the Law of March 10, 1927. See id.

The evidentiary standards of proof differ as well. See id. While the American and Brit-
ish standards are essentially standards of probable cause, the French standard is lower.
See id. Proof under the French standard requires only evidence that there are pending
charges or a conviction against the fugitive. See id.; see also infra note 325 and accompa-
nying text (discussing the French standard of proof).

Extradition treaties often resolve most of these intersystem conflicts. Cf. BASSIOUNI,
supra note 1, at 5-6 (explaining the states' obligation to extradite based on an explicit
treaty in the absence of a recognized implicit duty to do so). Specifically, two concepts
represent the resolution of most of these disputes through extradition treaties. One com-
mon axiom is aut dedere aut judicare or the duty to extradite or prosecute a fugitive within
a state's territorial jurisdiction. See id. at 5. The United States has not recognized this
concept, instead allowing the Executive Branch to exercise discretion in extradition mat-
ters. See id. at 108. Notably, however, the U.S. Constitution recognizes customary inter-
national law as binding. See id. at 108-09; see also The Paquete Habana, 175 U.S. 677, 700
(1900) (recognizing that customary international law is binding upon American courts).
Another common principle reflected throughout most extradition treaty provisions is the
application of the law of the "Requested State." See, e.g., Extradition Treaty between
the United States and the Federal Republic of Germany, June 20, 1978, U.S.-F.R.G., art. 27,
32 U.S.T. 1485, 1510 [hereinafter U.S.-Germany Extradition Treaty]. In other words, the
country whose duty under international law is to extradite a fugitive will apply its own law
in the extradition proceedings and the requesting state has an obligation to respect that
law. See id.

4. See infra notes 13-14 and accompanying text (discussing unique applications of
U.S. law in extradition hearings).
interest is the application of probable cause\(^5\) to international extradition.\(^6\)

Defining and applying probable cause invariably has been one of the most troublesome problems in American criminal law.\(^7\) In the domestic criminal context, courts have achieved some success in clarifying the proper application of the standard.\(^8\) In the international extradition context, however, probable cause has been defined and applied inconsistently.\(^9\) This incongruity is due primarily to two reasons. First, the stat-

---

5. The source of the probable cause requirement in the United States Constitution is the Fourth Amendment, which states:

   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.

   U.S. CONST. amend. IV.

6. See Caltagirone v. Grant, 629 F.2d 739, 747-48 (2d Cir. 1980) (concluding that the language of the U.S.-Italian Extradition Treaty requires a showing of probable cause before the issuance of a provisional arrest warrant).

7. See Illinois v. Gates, 462 U.S. 213, 232 (1983) (recognizing that 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"); United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) (observing that probable cause is a "'plastic concept whose existence depends on the facts and circumstances of the particular case'") (quoting Bailey v. United States, 389 F.2d 305, 308 (D.C. Cir. 1967)).

   Also note the subtle difference between "probable cause to arrest" and "probable cause to search," a fine distinction that has confused many judges, lawyers, and even law students in the past. See 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(b), at 6 (3d ed. 1996). The distinction can be drawn by defining "probable cause to search" as showing a substantial probability that the wanted goods are in the place being searched; "probable cause to arrest," however, involves showing that an arresting officer had "reasonable grounds to believe" that a crime had been committed by the suspect before arresting him. Id. § 3.1(b), at 7-8. The focus of this Note will be on the probable cause to arrest.

   For an analysis of the history of probable cause, see generally Gerstein v. Pugh, 420 U.S. 103, 114-16 (1975); LAFAVE, supra, § 3.1 at 2-3 (quoting Henry v. United States, 361 U.S. 98 (1959), which discusses the early foundations of probable cause in American law).

8. See, e.g., Illinois v. Gates, 462 U.S. at 230-31 (emphasizing the need to weigh the "totality-of-the-circumstances" in order to determine whether probable cause is met); Brinegar v. United States, 338 U.S. 160, 175 (1949) (explaining that probable cause is based on probabilities and requires a balancing of the interests of a detained individual with those of the community and law enforcement). For a thorough discussion of the probable cause standard in U.S. domestic law, see generally LAFAVE, supra note 7, §§ 3.1-3.7, at 1-393.

9. Compare United States v. Wiebe, 733 F.2d 549, 553-54 (8th Cir. 1984) (holding that 18 U.S.C. § 3184 requires a sworn complaint and a showing that the crime is extraditable for establishment of probable cause in provisional arrest), with Parretti v. United States, 122 F.3d 758, 773 (9th Cir. 1997) (holding § 3184 unconstitutional for not requiring an adequate showing of probable cause for provisional arrest, in violation of the Fourth Amendment), op. withdrawn en banc, 143 F.3d 508 (9th Cir. 1998).
utes and treaties defining the extradition process fail to outline clearly the proper standards required to arrest and extradite a fugitive. Second, the nature of the extradition process differs from that of a regular trial, and thus requires modified applications of the law. This incoherence of definition and application has forced American courts to make many inferences as to how to determine probable cause in extradition hearings. Over time, courts have been able to apply probable cause successfully in extradition hearings by considering the special nature of the process. Courts, however, have met with less success in applying probable cause to other stages of the extradition process particularly in the provisional arrest phase.

Provisional arrest of a fugitive is the first significant step of the extradition process. This step is designed to be temporary in nature and is taken in anticipation of a formal extradition hearing. Informality and


11. There are currently extradition treaties between the United States and more than 100 other countries. See 18 U.S.C.A. § 3181 (West Supp. 1998) (listing these countries).


13. See Benson v. McMahon, 127 U.S. 457, 463 (1888) (noting that the nature of the extradition hearing is unlike that of trial, and more like that of a domestic preliminary hearing); Wiebe, 733 F.2d at 554 (discussing the effect of “bureaucratic sluggishness” on the extradition process, due to the extensive collection and translation of international documents).


15. See Benson, 127 U.S. at 463 (equating the character of an extradition hearing to that of a domestic probable cause hearing following arrest); Wiebe, 733 F.2d at 553 (describing the probable cause standard for extradition).

16. See Collins v. Loisel, 259 U.S. 309, 316 (1922) (determining that the function of the magistrate is to ascertain the competency of the evidence to hold the fugitive); Wiebe, 733 F.2d at 553 (describing the probable cause standard for extradition); Greci v. Birknes, 527 F.2d 956, 959 (1st Cir. 1976) (holding that federal domestic probable cause standard is appropriate for extradition hearings).

17. Compare In re Extradition of Russell, 805 F.2d 1215, 1217 (5th Cir. 1986) (recognizing the informal nature of the evidence presented at a provisional arrest hearing), with Caltagirone v. Grant, 629 F.2d 739, 747 (2d Cir. 1980) (inferring a higher probable cause standard than was used traditionally for provisional arrest, based on the language of the U.S.-Italian Extradition Treaty).

18. See infra Part I (describing extradition process in detail).

19. See BASSIOUNI, supra note 1, at 675 (introducing a thorough discussion of provi-
urgency are the essential characteristics of provisional arrest.20

Provisional arrest is a relatively new process in international extradition,21 and neither statute nor case law has addressed it adequately.22 Until recently the constitutionality of provisional arrest remained unchallenged, mainly because of the infrequency of such cases.23 Given the lack of judicial authority on the subject, the international legal community was concerned with the constitutionality of a fugitive’s detention when arrests were made with an insufficient or complete lack of a probable cause showing.24 At the crux of the issue is the conflict between the liberty interests of the fugitive and the international law enforcement community’s interest in ensuring an efficient and effective extradition process. This tension between interests culminated recently in the case of Parretti v. United States.25

Parretti involved the 1995 arrest by U.S. federal agents of the Italian financier Giancarlo Parretti following a provisional arrest request issued by France.26 The provisional arrest warrant issued by a U.S. Magistrate

---

20. See Russell, 805 F.2d at 1217-18 (emphasizing the informal and urgent nature of provisional arrest).

21. See BASSIOUNI, supra note 1, at 675 (stating that provisional arrest provisions became common in American extradition treaties in the 1960s); SHEARER, supra note 1, at 200-01 (noting that provisional arrest was first formulated by the French in the mid-nineteenth century).

22. See supra text accompanying notes 12, 17 (discussing the inadequacy of a definition of what constitutes a proper showing of probable cause in provisional arrest).

23. See BASSIOUNI, supra note 1, at 687 (noting the rarity of such cases and anticipating the significance of a case that would attempt to resolve the constitutionality of provisional arrest). Contributing to the dearth of cases, some courts refuse to address the important issues altogether. See Caltagirone v. Grant, 629 F.2d 739, 748 (2d Cir. 1980) (refusing to question the constitutionality of the U.S.-Italian Extradition Treaty or § 3184).

24. See Russell, 805 F.2d at 1217-18 (holding that the prosecutor established probable cause thus avoiding a ruling on the constitutionality of the Treaty’s requirements); Caltagirone, 629 F.2d at 747 (examining the showing of probable cause for provisional arrest within the context of the Treaty without having to rule on its constitutionality); see also BASSIOUNI, supra note 1, at 679, 686-88 (expressing concern about the apparent “de facto” nature of current extradition practices that allows for “unlawful detention”).

25. 122 F.3d 758 (9th Cir. 1997), op. withdrawn en banc, 143 F.3d 508 (9th Cir. 1998). The panel originally issued a decision in Parretti v. United States, 112 F.3d 1363 (9th Cir. 1997) on May 6, 1997. The opinion was then amended in August of that year to clarify a point in their decision. See Parretti, 122 F.3d 758 (9th Cir. 1997). Finally, the amended opinion was withdrawn in an en banc decision. See Parretti, 143 F.3d 508 (9th Cir. 1998) (en banc). This Note will cite to the amended decision for consistency, though the amendment to that opinion is not central to the focus of this Note. For a discussion of the amended portion of the decision, see infra note 283.

26. See Parretti, 122 F.3d at 761. France sought the arrest of Parretti for financial crimes related to his acquisition of MGM-United Artists in 1990. See id. American law
was based on a complaint sworn to by an Assistant U.S. Attorney (AUSA) that was based solely on a French arrest warrant. Following his arrest, Parretti argued that the magistrate issued the provisional arrest warrant without first finding probable cause. The district court judge, however, determined that the government’s complaint proved sufficient facts to survive a probable cause challenge.

On his appeal to a panel of the United States Court of Appeals for the Ninth Circuit, Parretti argued that the warrant issued for his arrest was invalid under the Fourth Amendment. The Ninth Circuit panel reversed the district court, holding that the magistrate issued the provisional arrest warrant without sufficiently determining probable cause. Moreover, the court held that the statutory basis for provisional arrest, 18 U.S.C. § 3184, and the governing provision of the extradition treaty between the United States and France, were unconstitutional because neither required an independent magistrate to make a determination of probable cause for provisional arrest. The court also held that the rule of judicial non-inquiry was not applicable in this case because of the enforcement agents arrested Parretti in Los Angeles while he was giving a deposition for a lawsuit in relation to the purchase. See id. at 760.

See id. at 761 & n.1.

See id. at 761-62.

See id. at 762. In his ruling, the judge further indicated that it was not necessary for the government to establish probable cause at the provisional arrest hearing, stating “[t]hat’s what they got [sic] 40 days to clear up and to make a presentation in their extradition proceedings.” Id.

30. The panel consisted of Circuit Judges Norris, Pregerson, and Reinhardt. See id. at 760.

31. See id. at 762. Specifically, Parretti argued that, first, the arrest warrant did not contain sufficient evidence to establish probable cause. See id. at 761-62. Second, he argued the arrest was invalid because the magistrate failed to make an adequate probable cause determination and, in doing so, concluded that probable cause was not required for a provisional arrest warrant. See id. at 762.

Parretti’s case also raised issues related to the denial of his bail application under the “special circumstances” doctrine, as well as a Due Process claim under the Fifth Amendment. See id. at 763-64. This Note’s focus is on probable cause for provisional arrest under the Fourth Amendment; the “special circumstances,” Due Process, and Fifth Amendment issues are beyond its scope and will not be discussed here.

32. Judge Norris wrote the panel’s opinion, see id. at 760, with Judge Reinhardt concurring, see id. at 781 (Reinhardt, J., concurring), and Judge Pregerson dissenting, see id. at 787 (Pregerson, J., dissenting).

33. See id. at 776.


35. See Parretti, 122 F.3d at 773.

36. The rule of judicial non-inquiry requires U.S. courts to refrain from inquiring into foreign judicial processes, including the means by which a foreign country obtains evidence for probable cause to extradite. See Sahagian v. United States, 864 F.2d 509, 514 (7th Cir. 1988) (applying the rule when a person claimed a violation of his constitutional
Fourth Amendment issue involved. The court ordered Parretti to be set free, whereupon he fled the country.

The Court of Appeals for the Ninth Circuit, sitting en banc, heard the government’s appeal of the panel’s decision in December 1997 and, on May 1, 1998, dismissed the appeal under the fugitive disentitlement doctrine and withdrew the panel’s opinion without addressing the constitutional issues ruled on by the panel. Despite the withdrawal, the detri-
mental impact of the panel’s decision on the future of international extradition is certain because of the important constitutional questions it raises. The withdrawn decision already has triggered new apprehen-

flight undermined the adversarial nature of the appeal. See id. at 787 (Pregerson, J., dissenting) (citing Justice Stevens’s dissent in United States v. Sharpe, 470 U.S. 675, 724 (1985) (Stevens, J., dissenting)). The majority countered his argument, however, saying that the adversarial nature of the case was not compromised when the fugitive’s counsel continued to pursue the case because of the important constitutional questions involved. See Parretti, 122 F.3d at 776-77 n.22; see also United States v. Sharpe, 470 U.S. 675, 681-82 n.2 (“This equitable principle [of the fugitive disentitlement doctrine] is wholly irrelevant when the defendant has had his conviction nullified and the government seeks review here.”).

In the ensuing en banc decision, Judge Pregerson wrote the majority opinion for the court and dismissed the appeal under the fugitive disentitlement doctrine and withdrew the panel’s decision. See Parretti, 143 F.3d at 511; see also infra note 41 and accompanying text (discussing the impact of the withdrawal of the panel’s decision on its precedential value). Judge Pregerson’s reasoning in the en banc opinion closely paralleled his dissent in the panel decision. Compare Parretti, 122 F.3d at 787 (Pregerson, J., dissenting), with Parretti, 143 F.3d at 508.

In a strenuous dissent, Judge Reinhardt, who concurred with Judge Norris to form the majority in the panel decision, argued that the disentitlement doctrine continued to be inapplicable to this appeal. See Parretti, 143 F.3d at 511-13 (Reinhardt, J., dissenting). As in the panel decision, Judge Reinhardt noted that the court had granted Parretti relief through its November 1995 order releasing him from jail, thus making the doctrine inapplicable. See id. at 512-13 (“The purpose of the doctrine is to deny to those who have fled the court’s jurisdiction any benefits of the court system. Here, Parretti received all the relief he could possibly obtain . . . .”). Moreover, it was the government, not Parretti, who sought relief from the panel’s decision in this appeal and, because the court dismissed the appeal, the government would continue to suffer from the “precedential effect” of the panel’s opinion. See id. at 513. As a result of the majority’s opinion, argued Judge Reinhardt, the law on provisional arrest in the Ninth Circuit makes no sense. See id. at 513 (“The fugitive disentitlement doctrine makes sense only when we deny the fugitive some form of relief from the court, not when we frustrate our own ability to resolve critical constitutional questions.”).

41. See Appellee’s Supplemental Brief at 1-2, Parretti (No. 95-56586) (indicating that the panel’s decision will make provisional arrest “impossible” and lead to other “grave” consequences). Though the panel’s decision in Parretti will lack precedential effect in the future, see 9TH CIR. R. 35-3 advisory committee’s note 5 (“Where an order [from a re-hearing en banc] specifies that the opinion of the panel has been withdrawn, that opinion shall not be regarded as precedent and shall not be cited in either briefs or oral argument [anywhere in the] Ninth Circuit.”), the opinion will have a strong impact on future provisional arrest cases because of the rarity of such cases and the weighty constitutional issues that were raised in it. See Parretti, 143 F.3d at 513 (Reinhardt, J., dissenting) (“Our dismissal of the case will deny Parretti nothing—it is only the government that seeks relief now, and it seeks relief not from the order we issued, but from the precedential effect of our opinion on the serious constitutional questions that arise in many extradition cases.”); see also infra note 320 (discussing another controversial extradition case, Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995), vacated on jurisdictional grounds, 82 F.3d 1081 (D.C. Cir. 1996); although vacated in the D.C. Circuit, its arguments for overturning 18 U.S.C. § 3184 on separation of powers grounds continue to resonate in the international extradition field).
sions, particularly in the federal government, about the future of the United States' role in the international extradition process should the issue re-emerge. Of particular concern to the international law enforcement community is the potential need to renegotiate the one hundred or so U.S. extradition treaties now in effect and, more significantly, the significant risk of an increased evidentiary burden during such a critically urgent stage of the extradition process as provisional arrest.

This Note examines the relationship between probable cause and provisional arrest in the context of the structure and legal history of extradition, particularly the issues brought to light in the panel decision of Parretti v. United States. First, this Note will present an overview of the extradition process in order to place provisional arrest in its proper context within extradition. Next, this Note will discuss probable cause for provisional arrest under the governing extradition statute, 18 U.S.C. § 3184, and the extradition treaties that define the requirements for a foreign country's request for provisional arrest. Exploring this context further, this Note briefly examines the relevant cases leading up to Parretti that discuss probable cause for a domestic warrant, extradition, and provisional arrest. This Note will then analyze Parretti and the likely impact it will have on future extradition cases despite the withdrawal of the panel opinion. Finally, this Note concludes that the Parretti court properly decided that probable cause is required for provisional arrest but suggests that there are major flaws in the court's analysis, including its failure to properly consider prior case law and the inherently unique nature of provisional arrest itself. In essence, this Note urges courts to consider provisional arrest precedent and its unique nature when these questions are raised again in future cases.

I. GRASPING THE BIG PICTURE: AN OVERVIEW OF THE EXTRADITION PROCESS

The extradition process generally commences when a requesting state

---

42. See Appellee's Supplemental Brief at 1-2, Parretti (No. 95-56586) (citing government fears of the impact of the panel's decision on U.S. extradition practices); Interview with Mary Jo Grotenrath, Associate Director, Department of Justice, Criminal Division, Office of International Affairs, in Washington, D.C. (Sept. 22, 1997).

43. Interview with Mary Jo Grotenrath, supra note 42.

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. An extradition treaty between the United States and the requesting state governs the procedures for provisional arrest and may vary from country to country. The U.S. Department of Justice, Criminal Division, Office of International Affairs (DOJ) in Washington, D.C. receives all provisional arrest requests either directly or through diplomatic channels from the requesting country.

Generally, a copy of the foreign arrest warrant and supporting information accompanies the provisional arrest request, however, some treaties allow for requests based on certain documents transmitted through Interpol. Interpol offers an efficient and convenient method of transmitting information concerning international fugitives between national law enforcement agencies. Interpol information, however, lacks the le-

45. See BASSIOUNI, supra note 1, at 654. In this Note, "requesting state" will refer to the foreign country who has an extradition treaty with the United States. The "requested state" in this Note will refer to the United States. The process for the United States requesting extradition of a fugitive from a foreign state is a separate, though similar, process that is outside the scope of this Note. See generally BASSIOUNI, supra note 1, at 654-776 (reviewing the extradition process and requirements).

46. See id. at 682.

47. See id. at 654. Most of these treaties contain provisions outlining provisional arrest procedures. See id. at 655 n.29. For examples of such provisions, see U.S.-Germany Extradition Treaty, supra note 3, art. 16, 32 U.S.T. at 1500-01; Extradition Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, U.S.-U.K., art. VIII, 28 U.S.T. 227, 232 [hereinafter U.S.-U.K. Extradition Treaty]; U.S.-France Extradition Treaty, supra note 12, art. IV, 37 Stat. at 1529-30. For further discussion of the status of treaties between the United States, United Kingdom, and France, see supra note 3 and accompanying text.

48. See BASSIOUNI, supra note 1, at 675-76.

49. See id. at 682-84. Interpol (the International Criminal Police Organization) serves as a liaison for national police organizations to exchange information about international fugitives from justice. See generally U.S. DEPTS. OF JUSTICE AND TREASURY, INTERPOL-U.S. NATIONAL CENTRAL BUREAU: POINT OF CONTACT FOR INTERNATIONAL LAW ENFORCEMENT, n.d. [hereinafter INTERPOL PAMPHLET] (providing an overview of Interpol's functions and processes). There are approximately 177 current member countries that take part in Interpol, including the United States. See id. Because the United States lacks a "national" police force per se, the Interpol-U.S. National Central Bureau (USNCB) serves as a communication center to relay information about fugitives to and from the various federal, state, and local police organizations in the United States. See id. USNCB's headquarters are in the Justice Department. See id.

50. See INTERPOL PAMPHLET, supra note 49. Interpol assists in international law enforcement by issuing color-coded notices that detail information about fugitives and the crimes for which they are wanted. See id. Although these notices take the form of arrest warrants in some respects, they are not arrest warrants and rarely are relied upon as a basis for a complaint in a provisional arrest or extradition hearing. Interview with Mary Jo
Gauging an Adequate Probable Cause Standard

...gal status of an arrest warrant, thus limiting its utility in provisional arrest requests. Regardless of the method, the provisional arrest request often is made on an urgent basis and the documents received by DOJ are often minimal and informal.

After receiving the provisional arrest request, DOJ reviews it to determine its sufficiency and sends it to the AUSA in the district where the fugitive is reportedly located. The AUSA then attaches the request to an affidavit, which is filed before the appropriate federal magistrate. Based on these documents, the magistrate decides whether to issue an arrest warrant for the fugitive. Upon approval of the warrant, federal officials can arrest the fugitive.

Following arrest, the fugitive is entitled to a bail hearing where he must prove "special circumstances" in order to be released on bail. If

Grotenrath, supra note 42; cf. Bassion, supra note 1, at 683. Generally, if the Interpol notice is supplemented with other relevant judicial documents, the notice may be considered by the court. See id. at 683-84. Efforts are currently underway to increase the usefulness of such notices by requiring more information and documentation about the fugitive from the requesting country. Interview with Mary Jo Grotenrath, supra note 42.

51. See Bassion, supra note 1, at 683; see also supra text accompanying note 50 (discussing the status of an Interpol notice compared to an arrest warrant).

52. See Bassion, supra note 1, at 682-83. Often, the information for a request for provisional arrest is received by fax or telex and includes identifying material (i.e., a description of the fugitive and his believed whereabouts), a statement that the request is made pursuant to and meets the requirements of the governing treaty, and a statement that the requesting state intends to issue a formal request for extradition within the required time frame. See id.

53. Interview with Mary Jo Grotenrath, supra note 42. At this stage of the process, DOJ may approve or reject the request for provisional arrest. See Bassion, supra note 1, at 682 (noting that most provisional arrest clauses are discretionary for forty to sixty days); Restatement (Third) of Foreign Relations § 478 cmt. a (1987). DOJ attorneys will attempt to establish that the request meets the requirements for arrest, particularly whether probable cause can be established. See Bassion, supra note 1, at 682-83; see also Interview with Mary Jo Grotenrath, supra note 42.

54. See Restatement (Third) of Foreign Relations § 478 cmt. a (1987). If the fugitive is known to be in or about to enter the United States, yet his specific destination or whereabouts is unknown, the AUSA may petition the United States District Court for the District of Columbia for an arrest warrant. See Bassion, supra note 1, at 681.

55. See Bassion, supra note 1, at 682-83.

56. See Restatement (Third) of Foreign Relations § 478(2)(a). If a warrant is not obtained, the government must show that such urgency existed so that there was not time to issue an issuance of a warrant. See id. § 478, reporter's note 1.

57. See Bassion, supra note 1, at 655. The federal jurisdiction of extradition was established by the first extradition statute, passed in 1848. See id. at 67 & n.162.

58. See id. at 692 (citing Wright v. Henkel, 190 U.S. 40, 63 (1903), which introduced the concept). "Special circumstances," which relate to the granting of bail in U.S. extradition hearings, are those where "the requirements of justice [warranting the granting of bail as opposed to imprisonment] are absolutely peremptory." In re Mitchell, 171 F. 289, 289 (C.C.S.D.N.Y. 1909); see also Bassion, supra note 1, at 692-93 (citing Mitchell). Re-
the fugitive fails to receive bail, authorities may detain him for a period usually ranging from thirty to sixty days under the provisional arrest warrant. During this time, the requesting government gathers the required documents for submission to the United States in a formal extradition request. If the requesting state fails to provide the material before the end of the allowed detention, the provisional arrest warrant ceases to be valid and the government must release the captive.

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. Most often these documents include a sworn complaint stating the necessary facts and history of the case, the foreign arrest warrant and/or charging document, any indictments or depositions, and any other related evidence that may suffice to satisfy probable cause for extradition. Additionally, the requesting state may supplement these documents with a conviction record. The AUSA then files the formal extradition request and supporting documentation before the appropriate federal magistrate or district court judge, who conducts the extradition hearing.

59. See BASSIOUNI, supra note 1, at 682; see also U.S.-Germany Extradition Treaty, supra note 3, art. 16, 32 U.S.T. at 1500-01 (40 days); Extradition Treaty, June 22, 1972, U.S.-Denmark, art. 12, 25 U.S.T. 1293, 1304 (30 days); U.S.-U.K. Extradition Treaty, supra note 47, art. VIII, 28 U.S.T. at 232 (45 days); U.S.-France Extradition Treaty, supra note 12, art. IV, 37 Stat. at 1529-30 (40 days).

60. See BASSIOUNI, supra note 1, at 677, 682.

61. See id. at 681, 685. If the warrant expires and the fugitive is set free, the government may presumably rearrest the fugitive under a new provisional arrest warrant. Cf. Caltagirone v. Grant, 629 F.2d 739, 747-48 (2d. Cir. 1980) (noting the concession by the government that, in effect, it could "string[] together an infinite strand of forty-five day provisional arrests, all without a judicial determination of probable cause, or a formal extradition request").

62. Interview with Mary Jo Grotenrath, supra note 42; see also BASSIOUNI, supra note 1, at 658-60, 662-64, 668 (describing the initial extradition process and the authenticated documentation required to accompany an extradition request).

63. See 18 U.S.C. § 3184 (1994) (indicating that a complaint is "made under oath, charging any person found within [the magistrate’s] jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty").

64. Interview with Mary Jo Grotenrath, supra note 42; cf. BASSIOUNI, supra note 1, at 663-64 (noting the documents that "must" be attached to the extradition hearing complaint). The probable cause standard for extradition is the same as required under domestic federal law. See supra note 16 (citing cases which compare standards for probable cause).

65. Interview with Mary Jo Grotenrath, supra note 42; cf. BASSIOUNI, supra note 1, at 663 (noting that a certified judgment of conviction may accompany the extradition hearing complaint in lieu of an authenticated arrest warrant).

At the hearing, the judge does not determine the guilt or innocence of the fugitive. Instead, the judge determines whether “evidence sufficient” to extradite the fugitive exists. The Supreme Court has equated the “sufficient evidence standard” to extradite to that of a probable cause standard. Upon determining that the fugitive can be extradited, the judge certifies that fact to the Secretary of State. The Secretary then has the discretion to extradite, depending on the circumstances of the case. For example, the Secretary will consider whether the fugitive

67. See Collins v. Loisel, 259 U.S. 309, 316 (1922) (“The function of the committing magistrate 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.”).

68. See 18 U.S.C. § 3184 (1994) (“If, on such hearing, [the magistrate] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty,” then the fugitive can be extradited.) At the hearing, the judge generally asks a series of questions in order to determine whether the “sufficient evidence standard” for extradition is met, such as whether there is an extradition treaty in force between the United States and the requesting country and whether the alleged crime is covered by the treaty. Interview with Mary Jo Grotenrath, supra note 42. The judge also may seek to determine whether the party before the court is the one charged with the crime and whether there is probable cause to believe that this person committed the crime. Id.

69. See Collins, 259 U.S. at 315-16 (explaining that the magistrate’s role is to determine the competency of the evidence to justify holding the accused and that the accused was allowed to present evidence on the issue of probable cause); United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984) (equating the probable cause standard for extradition with that required for federal law); see also Bassionni, supra note 1, at 711 (arguing that § 3184 requires a showing of probable cause for an extradition hearing).

70. See 18 U.S.C. § 3184 (1994) (requiring that after sustaining the charge that the fugitive is extraditable, the magistrate “shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State”). The decision to extradite is non-reviewable by the courts; however, a fugitive who a judge has certified to be extradited may petition for a writ of habeas corpus. See Bassionni, supra note 1, at 656 (citing 28 U.S.C. § 2241 (1988)). In fact, this option is available to a fugitive at any time during the extradition process after his provisional arrest. See id. If several writs are raised during the extradition process, each writ must be based on different legal grounds. See id. The writs generally are petitioned to either a federal district court or court of appeals. See id.

71. See Restatement (Third) of Foreign Relations, § 478 cmt. d (1987). The Secretary is not bound to follow the judicial decision. See id. A United States District Court recently held this procedure to be unconstitutional as a violation of the separation of powers. See Lobue v. Christopher, 893 F. Supp. 65, 78 (D.D.C. 1995) (holding that § 3184 is unconstitutional as a violation of the separation of powers), vacated on jurisdictional grounds, 82 F.3d 1081 (D.C. Cir. 1996); see also infra note 320 (listing other sources which discuss Lobue). Many courts have concluded otherwise, finding § 3184 to be consistent with the separation of powers. See, e.g. Lopez-Smith v. Hood, 121 F.3d 1322, 1327 (9th Cir. 1997); Lo Duca v. United States, 93 F.3d 1100, 1103-11 (2d Cir. 1996), cert. denied, — U.S. —, 117 S. Ct. 508 (1996).

Once a court issues an order for extradition, the Secretary of State must sign a separate warrant to allow the fugitive to be extradited. Interview with Mary Jo Grotenrath, supra

is likely to receive a fair trial in the requesting country, 72 or whether the alleged crime is of a political nature. 73 If no circumstances exist that mitigate against extradition, United States Marshals will place the detainee on a plane back to the requesting state or as otherwise governed by the extradition treaty. 74 If the evidence at the hearing is not sufficient to warrant extradition, the fugitive is released, 75 and the government may, at its option, deport the fugitive. 76

Unfortunately, the process of extradition does not in itself adequately explain how to properly apply probable cause at a provisional arrest hearing. The process does illustrate, however, that there is a subtle difference between the provisional arrest hearing, which is based on the need for fast, efficient arrest, 77 and the extradition hearing, which is

---

72. The Secretary or the court may bar extradition if there are misgivings about the fairness of the trial the fugitive may receive in the requesting state or for other human rights concerns. Cf. GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 79-80 (International Studies in Human Rights Vol. 17, 1991) (discussing alternatives to extradition available to courts to prevent repatriation because of human rights concerns). Generally, however, the rule of judicial non-inquiry will prevent judicial interference. See Glucksman v. Henkel, 221 U.S. 508, 512 (1911) (holding that the existence of an extradition treaty prevents judicial inquiry into the fairness of foreign trial procedures); BASSIOUNI, supra note 1, at 486-93 (discussing the rule of judicial non-inquiry); supra note 36 (defining the rule of judicial non-inquiry).

73. See Eain v. Wilkes, 641 F.2d 504, 523-24 (7th Cir. 1981) (holding that the political offense exception did not bar extradition of a PLO terrorist). The political offense exception is provided for in most extradition treaties to prevent extradition when the fugitive's alleged crime is of a political nature (i.e., the murder of a government official to further a political cause). For an in-depth discussion of the exception, see generally BASSIOUNI, supra note 1, at 502-83; cf. Miriam E. Sapiro, Note, Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception, 61 N.Y.U. L. REV. 654, 700-01 (1986) (advocating the abolishment of the exception because of its exploitation by terrorists).

74. See BASSIOUNI, supra note 1, at 657. If the fugitive is not extradited within the time specified by the treaty, the fugitive may be set free. See id. at 685.

75. See id. at 656; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 476(1)(a) (1987).

76. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 478, reporter's note 6 (1987). Generally, deportation proceedings are started before extradition proceedings, and are stayed pending the outcome of the extradition hearing. See id. Professor Bassiouni has criticized the resort to deportation proceedings following a failed attempt at extradition, calling it a “dual standard” that “flies in the face of the integrity of the legal process.” BASSIOUNI, supra note 1, at 542; see also id. at 167, 184-91 (discussing the deportation process and calling it “disguised extradition”). Although many European courts have criticized such de facto extradition, many of these courts often refuse to question a deportation order if it is valid on its face. See GILBERT, supra note 72, at 199.

77. See supra notes 48-57 and accompanying text (discussing the urgency associated with the provisional arrest stage).
slower and more deliberate. These factors, coupled with an overview of the statutory and treaty bases for provisional arrest, are key considerations for the proper application of probable cause in provisional arrest.

II. THE FOUNDATION OF PROBABLE CAUSE IN PROVISIONAL ARREST: THE STATUTE AND TREATIES

Provisional arrest has its roots in the statutes and treaties that define extradition. These sources of law, therefore, determine the scope of provisional arrest, including the parameters of an adequate evidentiary showing for probable cause. The relevant statutes and treaties, however, do not alone formulate a clear standard.

A. The Statutory Basis of Provisional Arrest: Only by Implication?

The statutory basis for international extradition is found in 18 U.S.C. §§ 3181-96. The current statutes originated in the Extradition Act of August 12, 1848. The specific source of authority to extradite international fugitives from the United States to a foreign country is § 3184. It

78. See supra notes 58-66 and accompanying text (discussing the slower pace of the extradition hearing).
79. See 18 U.S.C. §§ 3184, 3187 (1994) (governing extradition); see also BASSIOUNI, supra note 1, at 675.
80. See BASSIOUNI, supra note 1, at 72-100 (discussing statutory and treaty interpretation).
81. See BASSIOUNI, supra note 1, at 678 (noting that neither the current extradition treaties nor relevant statutes indicate the standard of proof required for provisional arrest); see also 18 U.S.C. § 3184 (1994) (lacking a clear definition of a standard of probable cause for provisional arrest); U.S.-France Extradition Treaty, supra note 12, art. IV, 37 Stat. at 1529-30 (lacking any reference to an evidentiary standard required to find probable cause for provisional arrest).
83. See BASSIOUNI, supra note 1, at 36 (offering a general discussion of the history of 18 U.S.C. §§ 3181-96). The original Extradition Act of 1848 stated that a bilateral extradition treaty was required for extradition to occur between the United States and another country, and outlined the procedures for judicial involvement in the process. See id. Congress has modified the Act several times, most recently in 1996. See 18 U.S.C.A. § 3184 (West Supp. 1998) (inserting into § 3184 portions of text referring to § 3181(b)); see also infra note 105 (reviewing the 1996 amendments). Most of these amendments were technical. See BASSIOUNI, supra note 1, at 36; cf. infra note 105 (indicating the significance of the 1996 amendments following recent terrorist incidents). Congress attempted to broadly update the statutes between 1981 and 1984 starting with the Extradition Reform Act of 1981. See id. at 36-37. The attempt failed largely because of a lack of will on behalf of Congress and the Reagan Administration following numerous attempts to pass the legislation. See id. at 47. For a thorough discussion of the attempts at reform of the U.S. extradition process during the 1980s, see BASSIOUNI, supra note 1, at 36-43.
84. Section 3184, entitled "Fugitives from foreign country to United States" describes the international extradition process:
requires an extradition treaty between the United States and the requesting country and outlines the general judicial procedure for extraditing the fugitive from the United States to the requesting country.\textsuperscript{85} There is, however, no express mention in the statute of provisional arrest as part of the international extradition process.\textsuperscript{86} Furthermore, the statute lacks an explicit requirement that the government make a showing of probable cause for either provisional arrest or extradition.\textsuperscript{87}

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.\textsuperscript{88} The Court has equated this showing to that required for a preliminary hearing in domestic arrest situa-

\begin{footnotesize}
\begin{itemize}
\item Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b) [in absence of a treaty], any justice or judge of the United States . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such [judge], to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), 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.

\item See id.
\item See id.
\item See id.
\item See id.
\item See Collins v. Loisel, 259 U.S. 309, 316 (1922) (citing Grin v. Shine, 187 U.S. 181, 197 (1902), and indicating that the "function of the committing magistrate 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"); cf. Bassionyi, supra note 1, at 711 (noting that, surprisingly, courts have not yet interpreted a showing of probable cause for extradition out of the Fourth Amendment).
\end{itemize}
\end{footnotesize}
Like preliminary hearings, extradition hearings are less formal in nature than in domestic arrest cases because, first, the use of hearsay and a limited sufficiency of the complaint are allowed and, second, there is no res judicata effect. Despite such case law development of the procedures involved in an extradition hearing, courts have made virtually no attempts to require the same determination for provisional arrests, mostly because of the rarity of such cases.

In an attempt to clarify its meaning, one extradition expert has advanced an argument that places § 3184 in the context of other extradition statutes. Using a similar analysis, by examining §§ 3183 and 3187, one can infer that an adequate probable cause showing is needed for provisional arrest under § 3184. Sections 3183 and 3187 apply to arrest and extradition within the extraterritorial jurisdiction of the United States. Specifically, § 3183 outlines the formal proofs required for extradition. Section 3187 allows for the provisional arrest and detention of a fugitive based only on a telegraphic statement of the requesting authority. This


90. The extradition hearing is “not a full fledged criminal proceeding and is not a trial on the merits.” BASSIOUNI, supra note 1, at 717.

91. See Yordi v. Nolte, 215 U.S. 227, 231-32 (1909) (citing Rice v. Ames, 180 U.S. 371, 375 (1901) and acknowledging that the information required for extradition hearings may be based on “information and belief”).

92. See Grin v. Shine, 187 U.S. 181, 185 (1902) (indicating that “technical noncompliance with some formality of criminal procedure” should not affect treaty obligations).

93. See BASSIOUNI, supra note 1, at 713 (citing Hooker v. Klein, 573 F.2d 1360 (9th Cir. 1978)).

94. But see In re Extradition of Russell, 805 F.2d 1215, 1216 (5th Cir. 1986) (approving district court's application of standard of review normally used in extradition hearings to a provisional arrest hearing).

95. See SHEARER, supra note 1, at 205 n.7. In his discussion, Dr. Shearer examines U.S. law concerning the powers of arrest without a warrant in international extradition. See id. Although his discussion does not focus specifically on the appropriate evidentiary showing required for provisional arrest, a similar analysis can be made here through an examination of the U.S. statutes on extradition. See id.

96. See id.


98. See 18 U.S.C. § 3183 (requiring a copy of an indictment or affidavit from a magistrate of the demanding jurisdiction that charges the fugitive with an offense and is certified as authentic by an authorized official).

99. See 18 U.S.C. § 3187 (allowing a provisional arrest request to be sent by telegraph
document must indicate that the formal documents for extradition are en route and that an arrest warrant has been issued for the fugitive. Based on that information, the fugitive may be detained for up to ninety days. In contrast to §§ 3183 and 3187, § 3184 contains none of this information. This comparison leads to the inference that the standards of §§ 3183 and 3187 do not apply to provisional arrest under § 3184 because of the canon of interpretation *expressio unius est exclusio alterius.*

Despite such interpretations, the absence of any mention of provisional arrest in the appropriate statute forces the examination of American extradition treaties. These treaties more clearly define the nature of probable cause in provisional arrest despite their failure to convey a complete understanding.

**B. The Treaty Basis of Provisional Arrest: Toward a Clearer Definition**

By law, a treaty is necessary in order for extradition to occur. Be-
cause extradition treaties are self-executing,\textsuperscript{106} they carry the same legal status as national legislation.\textsuperscript{107} Like statutes, treaties are subject to limitation by the Constitution.\textsuperscript{108} Therefore, in order to construe a proper application of probable cause for provisional arrest from a treaty, it must be done within the context of the Constitution, particularly the Fourth Amendment.\textsuperscript{109}

"violent" in the United States, is against an American in a foreign country, and is not of a political nature. See id. These amendments were made as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 443(a)(2), 110 Stat. 1214, 1280 (1996).

Customary international law does not provide for extradition. See United States v. Rauscher, 119 U.S. 407, 411-12 (1886) (indicating that it was not until modern times that states recognized the obligation to extradite through treaties; prior to that time, there was no such acknowledged obligation). Extradition treaties operate instead as a contract between two states. See BASSIOUNI, supra note 1, at 50-52 (discussing bilateral extradition treaties). Extradition treaties are not required to be bilateral; there are multilateral extradition treaties as well. See Pan American Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111 [hereinafter Montevideo Convention] (including the United States and other Latin American states).

106. A "self-executing" treaty is one that is effective immediately upon Senate approval, without any further implementing legislation. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 cmt. h (1987).

107. See Terlinden v. Ames, 184 U.S. 270, 288 (1902). In case of conflict between a statute and a treaty, the most recent one takes precedence. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115 cmt. a.

108. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115(3); see also Perez v. Brownell, 356 U.S. 44, 58 (1958) (holding that Congress's power over foreign affairs is limited by the Constitution); Reid v. Covert, 354 U.S. 1, 6, 17 (1957) (holding that the Constitution is supreme, and therefore limits the power of treaties).

109. U.S. CONST. amend. IV. The Constitution, including the Fourth Amendment, applies to both citizens and non-citizens found within the United States. See BASSIOUNI, supra note 1, at 678-79 (arguing that probable cause applies via the Fourth Amendment, even if not provided for by treaty or statute); see also United States v. Verdugo-Urquidez, 494 U.S. 259, 265, 271 (1990) (noting that the Constitution protects aliens who have entered the United States and have developed "substantial connections" with it, while also suggesting that, like the First, Second, Ninth, and Tenth Amendments, "the people" protected by the Fourth Amendment... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"); Plyler v. Doe, 457 U.S. 202, 212 (1982) (holding that the Fourteenth Amendment applies to all persons within the United States' territorial jurisdiction); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 & n.5 (1953) (holding that Fifth Amendment applies to all people lawfully within the borders of the United States). But see Verdugo-Urquidez, 494 U.S. at 274-75 (holding that the Fourth Amendment did not apply to search and seizure by U.S. officials of aliens and their property located abroad).

The Supreme Court has determined that treaties must be fairly interpreted so as to carry out the intentions of the parties and the purpose so intended. See Wright v. Henkel, 190 U.S. 40, 57 (1903). Courts also must construe treaties liberally, beyond what is simply required in the national legislation. See Factor v. Laubenheimer, 290 U.S. 276, 298 (1933). Generally, in matters of treaty interpretation, the courts will defer to the executive determination, see United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936), except where individual rights are concerned. See RESTATEMENT (THIRD) OF FOREIGN
Since the 1960s, provisional arrest provisions have been made part of American extradition treaties. According to most of those treaties, the provisional arrest request must be accompanied by some statement of the urgency that underlies the provisional arrest. Generally, however, the magistrate will assume that the request is made on an urgent basis, and will not require such a statement. This practice is in line with the basic premise of the request—the fear that the suspect will flee if not detained immediately.

The request also must be accompanied by sufficient information indicating that the fugitive has committed a crime and will be detained pending an extradition hearing. The sufficiency of this information has been compared to the domestic standard of probable cause necessary to effectuate an arrest. Moreover, the treaties usually list a number of documents that are required for provisional arrest, such as basic information about the fugitive and an arrest warrant. The treaty provisions on provisional arrest also include a deadline by which the fugitive must be set free; it usually ranges from thirty to sixty days. Despite these re-

RELATIONS § 326, reporters' note 2 (citing Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984)).

110. See BASSIOUNI, supra note 1, at 675. Article IV of the U.S.-France Extradition Treaty describes the provisional arrest process and requirements in some detail:

The arrest and detention of a fugitive may be applied for on information, even by telegraph, of the existence of a judgment of conviction or of a warrant of arrest.

In both countries, in case of urgency, the application for arrest and detention may be addressed directly to the competent magistrate in conformity to the statutes in force.

In both countries, the person provisionally arrested shall be released, unless within forty days from the date of arrest in France, or from the date of commitment in the United States, the formal requisition for surrender with the documentary proofs herein before prescribed be made aforesaid by the diplomatic agent of the demanding government or, in his absence, by a consular officer thereof.


111. See BASSIOUNI, supra note 1, at 677 (discussing need for urgency).

112. See id.

113. See id.

114. See id. at 677-79 (discussing the requirement for "some type" of probable cause for provisional arrest).

115. See id. at 678-79 (arguing that the Fourth Amendment probable cause standard does apply to provisional arrest).


117. See supra note 59 and accompanying text (citing several treaty provisions detailing the lengths of time for detention under provisional arrest).
quirements, none of the U.S. extradition treaties explicitly state the type of showing that is necessary for a provisional arrest warrant to be issued.\textsuperscript{118} This omission leaves the treaties subject to further interpretation as to what the requisite showing must be.\textsuperscript{119}

One potential method for determining whether some sort of standard exists is to compare the type of information required for a provisional arrest to that required for extradition within the treaty itself.\textsuperscript{120} In most extradition treaties, the information required to detain a fugitive under provisional arrest includes detailed information about the fugitive, his likely location, and the crime allegedly committed; statements or other evidence that show an arrest warrant or a conviction exists; and an intention to pursue a future extradition request.\textsuperscript{121} The treaty section on provisional arrest also requires an indication of the urgency of the case because of the potential that the fugitive may flee if not detained immediately.\textsuperscript{122} Further, most treaties permit the submission of the re-

\begin{itemize}
  \item[\textsuperscript{119}] See Vienna Convention, supra note 104, art. 31, U.N. Doc. A/CONF. 39/27, 8 I.L.M. at 691-92 (noting that treaties should be interpreted in the context of the whole document, following an examination of the text itself); Caltagirone v. Grant, 629 F.2d 739, 747 (2d Cir. 1980) (examining the U.S.-Italy Extradition Treaty in the context of its structure).
  \item[\textsuperscript{120}] See Caltagirone, 629 F.2d at 745 (applying a similar, more practical analysis of the U.S.-Italy Extradition Treaty). Alternatively, comparing the history of negotiation or the application of each and every extradition treaty to which the United States has signed would require a much more thorough analysis then the scope of this Note allows.
  \item[\textsuperscript{121}] Interview with Mary Jo Grotenrath, supra note 42. Such information generally includes the fugitive's name and any aliases, date and place of birth, citizenship, sex, race, height, weight, eye and hair color, and other physical attributes. \textit{Id.} The information may also include photographs and/or fingerprints. \textit{Id.} Other possible documents demanded from the requesting state are a copy of the fugitive's conviction, the arrest warrant, or charging document (or at least a statement that one of these documents exists). \textit{Id.}
  \item[\textsuperscript{122}] See Bassion, supra note 1, at 677 (discussing the urgent nature of provisional arrest).
\end{itemize}
quest directly between the Department and/or Ministry of Justice rather than through diplomatic channels.\textsuperscript{123}

Comparatively, the list of documents required for an extradition request is more extensive.\textsuperscript{124} It usually includes an affidavit by the prosecutor that details the facts about the fugitive and the case itself, the related provisions of law detailing the criminal offenses, related exhibits including the arrest warrant or other charging documents,\textsuperscript{125} as well as other documents that may establish more fully that the fugitive committed the crime for which the extradition is requested.\textsuperscript{126} The treaty usually requires that these documents be supplied only through diplomatic channels, thus slowing down the process by injecting the Department of State and Ministry of Foreign Affairs into it.\textsuperscript{127} Given the time needed to gather, translate, and certify the documents, as well as overcome the inherent bureaucratic sluggishness,\textsuperscript{128} the extradition process is also implicitly slower and more formal than the provisional arrest process. Because of the larger number of documents required and the slower, more deliberate nature of the extradition request, the impracticality of requiring a similar requisite showing of probable cause for a provisional arrest request is apparent.

Thus, taken together, the treaties and statutes still fail to establish clearly what constitutes a proper showing of probable cause for provisional arrest. Despite this failure,\textsuperscript{129} the statutes and treaties provide a firm foundation on which courts could develop the law appropriately.

\begin{itemize}
\item \textsuperscript{123} See id. at 655, 675-76 (citing article XIII of the 1973 U.S.-Italy Extradition Treaty).
\item \textsuperscript{124} See id. at 663-64 (listing documents required as attachments to the prosecutor's complaint for an extradition hearing).
\item \textsuperscript{125} See id. at 708-11 (identifying the requirements of a "charging" document).
\item \textsuperscript{126} Interview with Mary Jo Grotenrath, \textit{supra} note 42.
\item \textsuperscript{127} \textit{See Restatement (Third) of Foreign Relations} \S 478 cmt. a (1987) (explaining the proper method of filing a request for extradition from the United States); \textit{compare} U.S.-France Extradition Treaty, \textit{supra} note 12, art. IV, 37 Stat. at 1529-30 (allowing provisional arrest request to be made by telegraph), \textit{with id.}, art. III, 37 Stat. at 1529 (allowing extradition requests to be made only through diplomatic channels).
\item \textsuperscript{128} See \textit{BASSIOUNI, supra} note 1, at 682 (discussing reasons for bureaucratic sluggishness in international extradition).
\item \textsuperscript{129} See Parretti \textit{v.} United States, 122 F.3d 758, 772-73 (9th Cir. 1997) (examining treaty and statute and failing to find a sufficient probable cause requirement), \textit{op. withdrawn en banc}, 143 F.3d 508 (9th Cir. 1998); Caltagirone \textit{v.} Grant, 629 F.2d 739, 744-47 (2d Cir. 1980) (finding an insufficient requirement for a showing of probable cause in the extradition treaty).
\end{itemize}
III. BUILDING ON THE FOUNDATION: CASE LAW DEVELOPMENT

The development of case law concerning a probable cause standard for provisional arrest has been slow and incremental, beginning even before provisional arrest provisions appeared in extradition treaties. Prior to that time, the courts expended much effort to develop the standard of probable cause as it related to extradition. Such efforts were interspersed with comparisons to domestic standards of probable cause. Building on inferences drawn from such case law, the courts were able to develop some understanding of the new concept of provisional arrest. Coupled with these inferences was a growing recognition of human rights. As a result, the courts concentrated on ensuring that states respected the personal rights of individuals. Yet, until the panel decision in Parretti v. United States, the probable cause standard for provisional arrest had not been addressed adequately within a constitutional framework.

A. Domestic Standard Considerations

Throughout the process of developing a probable cause standard within the context of international extradition law, courts commonly made comparative references to domestic standards of probable cause to

---

131. See Collins v. Loisel, 259 U.S. 309, 316 (1922) (determining that the function of the magistrate in an extradition hearing is to ascertain the competency of the evidence to hold the fugitive); Benson v. McMahon, 127 U.S. 457, 463 (1888) (equating evidentiary standard for an extradition hearing with that required for a domestic preliminary hearing).
132. See United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984) (defining extradition in the context of the domestic evidentiary standard of probable cause).
133. See id. (citing Collins and Benson in order to establish a probable cause standard for extradition to define a probable cause standard for provisional arrest).
134. See supra note 72 and accompanying text (discussing human rights concerns in extradition).
135. See United States v. Williams, 480 F. Supp. 482, 485 (D. Mass. 1979) (discussing concerns about thirty day detention of fugitive without an adequate showing of probable cause), rev’d on other grounds, 611 F.2d 914 (1st Cir. 1979).
136. 122 F.3d 758 (9th Cir. 1997), op. withdrawn en banc, 143 F.3d 508 (9th Cir. 1998).
137. See Caltagirone v. Grant, 629 F.2d 739, 747 (2d Cir. 1980) (comparing articles within the U.S.-Italy Extradition Treaty to resolve the case without having to delve into the constitutionality of the extradition treaty under probable cause); cf. Parretti, 143 F.3d at 512 (Reinhardt, J., dissenting) (disagreeing with the majority's application of the fugitive disentitlement doctrine and the withdrawal of the panel's opinion and arguing that it was the duty of the court to decide the merits of the case).
even on the domestic front, defining such a standard is not easy. Two cases are useful to examine, however, in understanding the proper application of probable cause for provisional arrest.

The first of these cases, *Brinegar v. United States*, helped to define the interests involved in establishing a proper probable cause determination. In *Brinegar*, police arrested an interstate alcohol smuggler after he admitted to them that he had alcohol in his car. Upholding Brinegar's conviction, Justice Rutledge reasoned that probable cause must be based on probabilities and must balance the interests of the detained individual with the interests of the community in maintaining a safe environment. The Court explained that, although evidence must be sufficient enough to lead a reasonable person to believe that a crime had been committed, it also must allow for reasonable mistakes by that person. Accordingly, the Court held that the probable cause standard is "correlative to [the evidence that] must be proved."

Though it was clear from *Brinegar* that an assessment of probable cause varied with the facts of the case, a question remained as to how much evidence was required to make an adequate probable cause determination. The Court addressed this issue in *Gerstein v. Pugh*, when it held that a probable cause determination for detaining an individual, pending further proceedings, required a different and more informal application of probable cause then what was required for a full preliminary hearing. In *Gerstein*, the plaintiffs brought a class action suit on behalf of prisoners in Florida whom the state had detained without an initial

---


139. See supra note 7 and accompanying text (describing the courts' inability to specifically define probable cause).

140. 338 U.S. 160 (1949).

141. See id. at 175-77 (noting that the probable cause requirement seeks, on the one hand, "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime" and, on the other hand, "to give fair leeway for enforcing the law in the community's protection").

142. See id. at 163.

143. See id. at 175-76.

144. See id.

145. Id. at 175.

146. See id.

147. See id. at 174. Although the Court acknowledged that the evidence required to establish probable cause must be more than mere suspicion, and less than what is required to prove guilt, it did not specify what level was required. See id.


149. See id. at 119-20 (finding adversary safeguards of a full hearing unnecessary).
pretrial hearing to determine probable cause for their detention. The Court distinguished this informal hearing—to determine probable cause shortly following arrest—from a preliminary adversarial hearing. Justice Powell noted that, given the urgent nature of the initial hearing, it is more difficult to present the necessary evidence and defenses required for a full preliminary hearing. Moreover, requiring such safeguards would be burdensome on an already overwhelmed criminal justice system. The Court concluded that a magistrate may hold an informal hearing immediately after arrest, as long as he makes a determination of probable cause. The Court also confirmed that an initial hearing to determine probable cause promptly after arrest requires a lower standard of proof than is necessary at a preliminary hearing.

The findings of Brinegar and Gerstein illustrate important principles concerning probable cause to arrest. These principles include the nature of probable cause to arrest, the timing, formality, and scope of the initial detention hearing, and the importance of weighing the interests of all of those involved including the detainee, the law enforcement officers,
Translating the domestic standards for probable cause into the standards required for provisional arrest and extradition seems deceptively easy. Unfortunately, to do so would overlook the nature of the relationship between provisional arrest and extradition hearings. While the standard of proof for a domestic initial arrest hearing is clearly lower than that required for a domestic preliminary hearing, it remains debatable what level of evidence should suffice for a provisional arrest hearing versus an extradition hearing. Although Congress has not directly addressed this issue, the federal courts have played a significant role in establishing the nature of probable cause in extradition.

B. The Probable Cause Application in Extradition

Before provisional arrest existed, federal courts were forced to develop a probable cause standard for extradition. In so doing, courts not only had to take into account the relevant statutes and treaties, they also had to consider the nature of the extradition hearing and compare it to similar domestic proceedings. These early efforts resulted in principles

157. See Brinegar, 338 U.S. at 175-77 (indicating some of the important interests that must be considered in the determination of the probable cause).

158. See supra notes 49-52, 59-68, 77-78 and accompanying text (discussing some of the differences between the provisional arrest and extradition processes).

159. See Gerstein, 420 U.S. at 120.

160. See Brinegar, 338 U.S. at 175 ("The standard of proof is accordingly correlative to what must be proved.").

161. See Parretti v. United States, 122 F.3d 758, 770 (9th Cir. 1997) (considering the issue of the constitutionality of the standard of proof required for provisional arrest which, until then, was undecided), op. withdrawn en banc, 143 F.3d 508 (9th Cir. 1998).


163. See Collins v. Loisel, 259 U.S. 309, 316 (1922) (determining the proper function of the magistrate in determining probable cause for extradition purposes); United States v. Wiebe, 733 F.2d 549, 554 (8th Cir. 1984) (finding a sworn complaint issued by Spain to be sufficient to issue provisional arrest warrant); Greci v. Birknes, 527 F.2d 956, 959 (1st Cir. 1976) (discussing evidentiary standards required for extradition of a fugitive to Italy).

164. See supra note 21 and accompanying text (noting that the development of provisional arrest in the United States did not occur until the 1960s).

165. See Collins, 259 U.S. at 316 ("The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial [i.e., to determine whether there is probable cause], and not to determine whether the evidence is sufficient to justify a conviction.").

about extradition hearings, including both the informal nature of extradition hearings\(^\text{167}\) and the deference given to foreign courts and the extradition treaties themselves,\(^\text{168}\) a principle otherwise known as the rule of judicial non-inquiry.\(^\text{169}\)

In \textit{Benson v. McMahon},\(^\text{170}\) the Supreme Court drew significant parallels between probable cause as understood in the domestic and extradition contexts.\(^\text{171}\) The Court explored the sufficiency of the evidence provided to a U.S. magistrate at a Mexican fugitive's extradition hearing.\(^\text{172}\) Examining the Mexican documents at issue in the context of the statute\(^\text{173}\) and the existing U.S.-Mexico extradition treaty,\(^\text{174}\) the Court concluded that the nature of the extradition hearing was unlike that of a trial.\(^\text{175}\) Instead, the hearing had the character of a domestic preliminary hearing.\(^\text{176}\) The burden on the government to justify detaining the fugitive was therefore less than that required to establish the fugitive's guilt.\(^\text{177}\)


\(^{169}\) See \textit{supra} note 36 and accompanying text (discussing the role of judicial non-inquiry).

\(^{170}\) 127 U.S. 457 (1888).

\(^{171}\) See \textit{id.} at 463.

\(^{172}\) See \textit{id.} at 461-62. The basis for appeal was a writ of \textit{habeas corpus} applied for by the defendant before the then Circuit Court for the Southern District of New York. See \textit{id.} at 458. A writ is also applied for on appeal from an international extradition hearing. See \textit{BASSIOUNI, supra} note 1, at 737.

\(^{173}\) In this case, the court refers to "Section 5270," which reads almost verbatim to 18 U.S.C. § 3184 (1994). See \textit{Benson}, 127 U.S. at 460.


\(^{175}\) See \textit{Benson}, 127 U.S. at 463.

\(^{176}\) See \textit{id.}; see also \textit{Rosoff, supra} note 89, at 128 (discussing the Court's comparison between an extradition proceeding and a domestic preliminary hearing and the use in both hearings of the same standard of probable cause).

\(^{177}\) See \textit{Benson}, 127 U.S. at 463. Another Supreme Court case that recognized the informal nature of an extradition hearing is \textit{Yordi v. Nolte}. 215 U.S. 227 (1909). In \textit{Yordi}, Chief Justice Fuller acknowledged that, especially in cases where there is a high risk that a fugitive may flee, a fugitive may be detained and extradited upon a complaint based only upon "information and belief" of the counsel representing the extraditing country. See \textit{id.} at 230-31. The Court noted, however, that an indictment or depositions must accompany this informal basis for establishing probable cause in extradition, in accord with the applicable treaty. See \textit{id.} at 231-32 (citing \textit{Rice v. Ames}, 180 U.S. 371, 375-76 (1901)). Thus, in
The Court again focused on the informal nature of extradition hearings in *Grin v. Shine.* In *Grin,* the Court also addressed the respect afforded to the judicial systems of other countries. Justice Brown's opinion made a number of key points supporting the extradition of the defendant to Russia. First, the opinion acknowledged the importance of balancing the interests and rights of the detainee with the obligations owed to other countries under U.S. extradition treaties. Second, as for respecting foreign criminal law, the Court recognized the distinction between the U.S. and foreign charging documents, yet adhered to the notion that the documents were essentially the same in character, in accordance with the rule of judicial non-inquiry. Moreover, the Court was satisfied that the Russian arrest warrant sufficiently complied with the requirements of the Russo-American Extradition Treaty. The Court opined that, during extradition hearings conducted in good faith, a minor procedural violation by one of the parties to the treaty should not interfere with the overall fulfillment of their obligations to each other. Finally, the Court concluded that Congress implicitly allowed such informal modes of proof at an extradition hearing through its wording of the extradition statute.

These cases illustrate several important factors that guided courts in extradition cases prior to the creation of provisional arrest: an informal

---

178. *187 U.S. 181, 185, 191-92 (1902).*
179. *See id.* at 184-85.
180. *See id.* at 183-85, 190-92. The defendant, a Russian national, was wanted in Russia for embezzlement and had fled that country for San Francisco. *See id.* at 183.
181. *See id.* at 184. The Court stated that “[t]hese treaties should be faithfully observed . . . without sacrificing the legal or constitutional rights of the accused.” *Id.*
182. *See id.* at 190-91. Reinforcing this point, the Court said that it did not expect that judges should be conversant in foreign criminal law; rather, it expected them to respect authorized documents from foreign courts. *See id.* This conclusion was consistent with a Supreme Court case decided the previous year that confirmed the rule of judicial non-inquiry. *See Neely v. Henkel, 180 U.S. 109, 122-23 (1901)* (providing the foundation for the development of the rule); *see also supra* note 36 (discussing the rule of judicial non-inquiry).
184. *See id.* at 185.
185. *See id.* at 191 (stating that Congress may “declare that foreign criminals shall be surrendered upon such [informal] proofs of criminality as it may judge sufficient”).
atmosphere that governs most extradition hearings, especially in cases of urgency, and a recognition and respect of foreign criminal laws.

C. The Probable Cause Application in Provisional Arrest: Pre-Parretti

The development of provisional arrest provisions in extradition treaties starting in the late 1960s signaled a new era in U.S. extradition law. Federal courts moved slowly and incrementally through these uncharted waters and until recently had not reached the constitutionality of such provisions or the statute governing them. Using the case law dealing with extradition, the courts were able to fashion inferences as to provisional arrest. Moreover, the rise in awareness of human rights, especially since the mid-1970s, affected many of the decisions revolving around the provisional arrest and detention of international fugitives. Despite these developments, by the late 1980s, a split among the circuits had emerged as to the requirements necessary to establish probable cause for a provisional arrest. As of yet, the U.S. Supreme Court has not addressed this probable cause standard.

One of the first cases to address provisional arrest, United States v. Williams, examined the nature of the interests involved in a fugitive's

186. See Grin, 187 U.S. at 185; Benson v. McMahon, 127 U.S. 457, 463 (1888); supra notes 175-77 (discussing the informal nature of extradition hearings).
188. See Grin, 187 U.S. at 184, 190-91; supra notes 181-184 and accompanying text (indicating the deference to be given to foreign legal systems and their laws).
189. The cases discussed infra are the first to address provisional arrest and its constitutionality.
190. See Parretti v. United States, 122 F.3d 758, 773 (9th Cir. 1997) (resolving the constitutionality of the provisions), op. withdrawn en banc, 143 F.3d 508 (9th Cir. 1998); see also Caltagirone v. Grant, 629 F.2d 739, 748 (2d Cir. 1980) (noting the court’s reluctance to resolve the constitutional issue); infra text accompanying note 193 (indicating the lack of consensus about the proper standard of probable cause required for provisional arrest).
191. See In re Extradition of Russell, 805 F.2d 1215, 1216 (5th Cir. 1986) (approving, in a provisional arrest, a district court’s adoption and use of a standard of review normally used for extradition).
192. See supra notes 71-74 and accompanying text (discussing the impact of human rights and other factors on the decision of whether to extradite); see also United States v. Williams, 480 F. Supp. 482, 485 (D. Mass. 1979) (noting the judge’s concern about a thirty-day detention under provisional arrest without a proper showing of probable cause), rev’d on other grounds, 611 F.2d 914 (1st Cir. 1979).
193. Compare Caltagirone v. Grant, 629 F.2d 739, 747 (2d Cir. 1980) (stating that the evidentiary standard required for probable cause did not differ between the provisional arrest and extradition hearings), with Russell, 805 F.2d at 1217 (holding that evidence for probable cause for provisional arrest should be informal).
194. See BASSIOUNI, supra note 1, at 686.
195. 480 F. Supp. 482 (D. Mass. 1979), rev’d on other grounds, 611 F.2d 914 (1st Cir.
detention under a provisional arrest warrant. In Williams, the defendant had been arrested and detained in the United States based on a telegraphic request from Canada. The defendant questioned his detention because the Canadian arrest warrant was the only basis of the request. Moreover, the government failed to establish any reasonable grounds other than the warrant to merit his detention, which was without bail, for up to forty-five days. Although District Court Judge Keeton held that this case was appropriate to allow bail—which was later reversed—he did raise questions as to the procedures that allowed such detention without an adequate showing of probable cause under the Fourth Amendment. He further questioned the government’s position that treaty obligations outweighed an intrusion of personal liberty in this case. In his opinion, they did not.

In United States v. Wiebe, the Court of Appeals for the Eighth Circuit implicitly addressed Judge Keeton’s concerns in Williams regarding the lengthy detention of an individual under provisional arrest. In Wiebe, the defendant questioned whether the applicable U.S.-Spain extradition treaty governing his provisional arrest and detention met the requirement for a showing of probable cause under the Constitution. The court affirmed Wiebe’s extradition after making two important points.

1979).

196. See id. at 485.
197. See id. at 483. Williams was wanted in Canada for conspiracy to import narcotics. See id.
198. See id. at 485.
199. See id. at 485 & n.1.
200. See id. at 487.
201. See id. at 485.
202. See id. In this case, the United States argued that, absent “special circumstances,” the court was under a statutory mandate not to override U.S. treaty relations. See id. The court found that “special circumstances” did override the treaty concerns and released Williams on bail. See id. at 487-88.
203. See id. at 486-88 (holding that allowing Williams free on bail outweighed the government’s treaty obligations).
204. 733 F.2d 549 (8th Cir. 1984).
205. See id. at 554. Although the Eighth Circuit did not address Judge Keeton’s concerns in Williams directly, the court did discuss the reasons for the length of detention under provisional arrest. See id. (citing United States v. Clark, 470 F. Supp. 976, 979 (D. Vt. 1979)).
207. See Wiebe, 733 F.2d at 552. Although the U.S.-Spain extradition treaty allowed a person to be detained under a provisional arrest for no more than 45 days, Wiebe was held longer due to a clerical error in the exchange of the extradition documents between the two countries. See id. at 551.
208. See id. at 554.
First, the court held that a provisional arrest warrant may be issued upon two grounds. In a sworn complaint, there must be a showing by the government that an extradition treaty exists between the two countries and a showing that the fugitive committed one of the crimes set forth in that treaty. Because the government in this case met this burden, the court held that the arrest warrant was issued properly. Second, the court addressed the Williams court's concerns about the length of detention under provisional arrest. The court indicated that "bureaucratic sluggishness" in preparing and transmitting the required documents was the primary reason for the length of the detention. By raising this point and emphasizing the pragmatic distinctions between international and domestic arrests, the Wiebe court clearly differentiated the need for a long detention period under provisional arrest compared to the relatively short one allowed in domestic preliminary hearings.

While Williams and Wiebe merely probed the legality of the detention of an individual without an adequate showing of probable cause, the case of Caltagirone v. Grant was the first to address directly the issue of probable cause under a provisional arrest. In Caltagirone, the defendant argued that his provisional arrest was not based on sufficient probable cause because the government supported its warrant only by noting the existence of Italian arrest warrants for the defendant.

---

209. See id. at 553-54.
210. See id. The meaning of the court's opinion has been interpreted very differently. Compare Parretti v. United States, 122 F.3d 758, 772 (9th Cir. 1997) (explaining the U.S. government's position to be that Wiebe allowed for a provisional arrest warrant to be based on the existence of a foreign arrest warrant), op. withdrawn, 143 F.3d 508 (9th Cir. 1998) and Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc at 12, Parretti, 122 F.3d 758 (9th Cir. 1997) (No. 95-56586) (same), with Parretti, 122 F.3d at 772 (differing with the government's interpretation, stating that the Eighth Circuit required a full showing of probable cause for provisional arrest).
211. See Wiebe, 733 F.2d at 554.
212. See id.
213. See id. (citing United States v. Clark, 470 F. Supp. 976, 979 (D. Vt. 1979)).
216. 629 F.2d 739 (2d Cir. 1980).
217. See id. at 747.
218. See id. at 743. The United States Attorney for the Southern District of New York submitted to a local magistrate a sworn complaint that alleged that there were outstanding Italian arrest warrants for the defendant. See id. at 743. Based on that information, the magistrate issued a warrant for Caltagirone's arrest in New York. See id.
Reversing the district court's affirmation of the issuance of the arrest warrant, the Court of Appeals for the Second Circuit agreed with the defendant, concluding that probable cause had not been sufficiently established under the 1973 U.S.-Italy Extradition Treaty. The court said that, while deference must be paid to foreign judicial determinations, the request for provisional arrest must comply with the treaty requirements. The Second Circuit found that the U.S. Attorney failed to show probable cause for the provisional arrest as the treaty required, and concluded that the district court should not have upheld the arrest warrant.

The court in Caltagirone made several significant points about probable cause and provisional arrest. First, the court indicated that, because the language of the treaty prohibited the detention of a fugitive without a finding of probable cause, the constitutionality of treaties that permit arrests absent such a finding was not to be addressed in this case. Second, while the court acknowledged that deference to foreign judgments is normally proper, it also said that it is within the court's jurisdiction to review whether a treaty's obligations were met. In Caltagirone, they

219. See id. at 750. District court Judge Cannella stated that he was not in the position to "second-guess" the magistrate's decision, especially because there was no issue as to the validity of the Italian arrest warrants. See id. at 743.


221. See id. at 744. At the time, Article XIII of the 1973 U.S.-Italy Extradition Treaty required that the provisional arrest request be supplemented with detailed information about the fugitive and "such further information, if any" that would justify his arrest. See 1973 U.S.-Italy Extradition Treaty, supra note 220, 26 U.S.T. at 502. The Second Circuit read this phrase as a basis for a requirement of probable cause. See Caltagirone, 629 F.2d at 744.


222. See Caltagirone, 629 F.2d at 748.

223. See id. at 747. The Second Circuit also distinguished between extradition treaties that require "such further information" and those that do not. See id. at 746. The court did not delve into those treaties that lacked such a requirement. See id. This issue on the constitutionality of such non-specific treaties would finally be addressed in Parretti v. United States, 122 F.3d 758 (9th Cir. 1997), op. withdrawn en banc, 143 F.3d 508 (9th Cir. 1998).

224. See Caltagirone, 629 F.2d at 744.
were not. Third, the court attempted to clarify the differences between extradition and provisional arrest proceedings within the scope of the treaty. The court determined, however, that while the requirement for probable cause did not differ between the two processes, the sufficiency of the evidence required to show probable cause may vary. Finally, the Second Circuit reaffirmed the principle that, when construing a statute or a treaty, the Constitution always will govern.

In In re Extradition of Russell, the Court of Appeals for the Fifth Circuit echoed the Second Circuit's reasoning in Caltagirone by reaffirming the two important criteria for provisional arrest, probable cause and urgency. As to probable cause for provisional arrest, the court confirmed the informality of the information required to make such a determination. As to the urgency requirement, the court defined its im-

---

225. See id. at 745. The court failed to find that "such further information" was provided by the Italians beyond a copy of the arrest warrant. See id.; cf. Sahagian v. United States, 864 F.2d 509, 513 (7th Cir. 1988) (upholding constitutionality of the U.S.-Spain Extradition Treaty requiring "such further information" for provisional arrest and finding that the government met this burden).

226. See Caltagirone, 629 F.2d at 747. The court clarified three major differences between the two proceedings, based on the treaty. See id. First, the provisional arrest provision required "information," implying a lower standard than that of the extradition provision which required "evidence." See id. Given the urgency factor required by most provisional arrest provisions, the "information" was allowed to be informal in character, as opposed to substance. See id. Extradition's evidentiary requirement imparted more formality, requiring certified depositions, arrest warrants, and the like. See id. Second, the provisional arrest request, according to the treaty, could be made directly between the Justice ministries, as compared to requests for extradition, which must be made through "diplomatic channels." See id. Finally, the court noted that the treaty requires clear evidence for extradition, rather than mere allegations contained in an indictment relating to the identity of the fugitive, in addition to details and the law defining the crimes alleged, and other such relevant documents. See id. Such "proof" and additional information are not required for provisional arrest by the treaty. See id.

227. See id. ("The Treaty's draftsmen clearly intended to streamline the [provisional arrest] procedure in urgent cases, but not by sacrificing the protection of the probable cause requirement.").

228. See id. ("We do not find . . . that our construction of the Treaty will undercut [the provisional arrest provision's] purpose to provide a more streamlined mechanism for accommodating applications from foreign nations than full-blown extradition proceedings now require.").

229. See id. at 741.

230. 805 F.2d 1215 (5th Cir. 1986).

231. See id. at 1217-18.

232. See id. at 1217 (citing Caltagirone v. Grant, 629 F.2d 739, 747 (2d Cir. 1980), and Yordi v. Nolte, 215 U.S. 227, 232 (1909)); see also United States ex rel. Petrushansky v. Marasco, 325 F.2d 562, 564 (2d Cir. 1963) (indicating that the AUSA's complaint was sufficient based only on his information and belief for a provisional arrest hearing; his lack of knowledge of the case's facts were "irrelevant").
importance as a component of provisional arrest. The factors to consider in order to detain a fugitive quickly include his/her flight risk, the perceived threat to the public, and the government’s interest in maintaining good relations with countries with whom the United States has extradition treaties.

Although it is clear that there was some agreement among the courts as to the urgent and informal nature of provisional arrest, there remained a subtle difference of opinion as to the proper application of probable cause in provisional arrest. As of early 1997, no court had specifically addressed the constitutionality of 18 U.S.C. § 3184 or extradition treaty provisions for provisional arrest that did not contain a “further information” clause. This issue was finally addressed in Parretti v. United States, though the withdrawal of this opinion has obfuscated the point.

IV. Parretti: An Inadequate Probable Cause Showing

A. Background: Cashing in on the Constitution

Giancarlo Parretti’s extradition troubles began in 1990 when he completed a highly leveraged purchase of MGM-United Artists—a purchase that spawned a number of lawsuits both in France and the United States. In October 1995, while in Los Angeles giving a deposition for...
one of the American suits, federal agents arrested Parretti pursuant to a provisional arrest warrant issued by a United States Magistrate in Los Angeles.\(^{242}\) This warrant was based upon a complaint sworn to by an AUSA, which was in turn based on a French arrest warrant charging Parretti with numerous financial crimes.\(^{243}\) France had relayed this warrant to the U.S. State Department pursuant to the U.S.-France Extradition Treaty.\(^{244}\) The French warrant referenced numerous investigations and information, but neither identified their sources nor offered supporting affidavits or documents.\(^{245}\) Nonetheless, the AUSA stated in the complaint that France had issued a statement of intention to request extradition within forty days, as specified by the treaty.\(^{246}\)

At his bail hearing, and later at his habeas corpus hearing before the District Court for the Central District of California, Parretti argued that the warrant issued for his arrest was unconstitutional under the Fourth Amendment.\(^{247}\) One argument he made was that the magistrate had issued the provisional arrest warrant without an adequate probable cause finding, because there was insufficient evidence within the French arrest warrant to show that he had committed any crime.\(^{248}\) Second, Parretti argued that the warrant was unconstitutional because the magistrate had failed to make an adequate probable cause determination.\(^{249}\)

The district court denied Parretti’s petition for a writ of habeas corpus

---

242. See Parretti, 122 F.3d at 761.
243. See id.
244. See id.; see also U.S.-France Extradition Treaty, supra note 12, art. IV, 37 Stat. 1526, 1529-30 (outlining procedures for provisional arrest). For the text of Article IV of the Treaty, see supra note 110.
245. See Parretti, 122 F.3d at 773-74.
246. See id. at 761 n.2; see also supra note 110 (reciting the text of Article IV of the treaty).
247. See Parretti, 122 F.3d at 761.
248. See id. at 761-62.
249. See id. at 762. Parretti particularly noted that the Magistrate had acknowledged that the information in support of the arrest warrant may not be enough to support a probable cause determination at the extradition hearing, but nonetheless issued the warrant. See id.

In response to these arguments, the government asserted that, despite the informality of the complaint for provisional arrest, the information sent by the French was sufficient to meet a probable cause standard. See id. Second, the government argued that the Magistrate made a proper probable cause determination because a provisional arrest warrant may be issued on a sole showing that the fugitive had been charged with a crime, as opposed to having committed it. See id. Finally, the government argued that since the Secretary of State had determined implicitly through the decision to enforce the extradition treaty that France’s criminal charging procedures were reliable, the Court must defer to such determinations under the rule of judicial non-inquiry and accept the French warrant at face value. See id. at 762-63; see also supra note 36 (discussing judicial non-inquiry).
because it found that the government's complaint was based on sufficient facts to establish probable cause. Further, in response to Parretti's claim that the government had failed to make a full showing of probable cause, the district court said that the purpose of the provisional arrest was to allow forty days for the government to gather the proper amount of evidence to make such a showing. Based on this conclusion, the court did not address the government's arguments regarding the necessary probable cause standard for provisional arrest, nor did it address the issue of judicial non-inquiry.

A three-judge panel of the Ninth Circuit reviewed the decision and ordered the release of Parretti. The panel gave two independent grounds for its decision: Parretti's arrest violated the Fourth Amendment because the district court failed to make a determination of probable cause; and Parretti's detention without bail violated the Due Process Clause of the Fifth Amendment. The court made its determination by refusing to apply the rule of judicial non-inquiry in this case and by finding that the government failed to show probable cause.

B. The Ninth Circuit on Provisional Arrest and Probable Cause

The Ninth Circuit panel specifically addressed three issues surrounding provisional arrest and the Fourth Amendment: the role of the rule of judicial non-inquiry, the constitutionality of the statute and treaty governing Parretti's extradition absent a probable cause standard, and the proper showing of probable cause for a provisional arrest hearing. First, the court disagreed with the government's argument that the rule of judicial non-inquiry should apply to foreign warrants, which would preclude an independent judicial determination of probable cause. The court reasoned that it has an "obligation" to decide justiciable controver-

---

250. See Parretti, 122 F.3d at 762-63.
251. See id. at 762. For text of judge's comments, see supra note 29.
252. See id. at 762-63. The district court also denied Parretti's bail application, even though it did not find him to be a flight risk. See id. at 763.
253. See Parretti, 122 F.3d at 760, 763.
254. See id. at 763-64. The court's finding on the Fifth Amendment issue is beyond the scope of this Note. For a discussion of the Fifth Amendment's application to extradition, see generally BASSIOUNI, supra note 1, at 692-98 (discussing the issue of bail as it relates to extradition proceedings).
255. See Parretti, 122 F.3d at 764-67, 773-76.
256. See id. at 764-76 (Norris, J., plurality opinion) (discussing probable cause).
257. See id. at 765, 767 (declining to extend the rule of judicial non-inquiry to Fourth Amendment probable cause determinations for provisional arrest warrants).
Gauging an Adequate Probable Cause Standard

The court distinguished between fact-specific issues, where the rule may be invoked, and “policy-like determinations,” where the rule is not invoked. Here, the case required judicial involvement, because a factual question existed as to whether Parretti had committed a crime. Also, the court rejected the government’s argument—that it should respect judicial non-inquiry by deferring to foreign judicial decisions much as courts do in domestic interstate extradition under the Full Faith and Credit Clause. The court observed that, unlike domestic warrants, foreign warrants do not carry a presumption of constitutionality.

The second and most critical issue that the court addressed was whether a provisional arrest warrant may be issued without a full showing of probable cause under the Fourth Amendment. This issue was one of first impression for the court. To determine the proper application of probable cause in provisional arrest, the court looked to the sources of provisional arrest—namely § 3184 and the French treaty—and the purpose of the warrant.

As to the treaty, the court distinguished this case from Caltagirone v. Grant by emphasizing that the Second Circuit had interpreted the language of the U.S.-Italy Extradition Treaty as requiring a showing of probable cause for provisional arrest. The French treaty in this case, however, did not contain such language in either the provisional arrest article or Article I of the treaty, which governed extradition in general.

---

258. See id. at 765-66.
259. Id. The court examined the application of the rule in the context of opinions dealing with the political offense exception. See id. at 766.
260. See id. at 767.
262. See id. at 767 (“Because foreign governments are not bound by the Constitution, we decline to invoke the full faith and credit clause of the Constitution to clothe foreign arrest warrants with a presumption of compliance with the Fourth Amendment.”).
263. See id. at 767-73.
264. See id. at 767-68. In fact, no federal appellate court had addressed the issue. See id.
265. See id. at 769-71.
266. 629 F.2d 739 (2d Cir. 1980).
267. See Parretti, 122 F.3d at 768 (citing Caltagirone, 629 F.2d at 742, 747). The court also noted a similar interpretation of the U.S.-Spain Extradition Treaty in Sahagian v. United States, 864 F.2d 509, 511 (7th Cir. 1988). See Parretti, 122 F.3d at 768-69.
270. See Parretti, 122 F.3d at 769; supra note 110 (stating the French Treaty provision
The court then attempted to find a probable cause requirement in the language of § 3184. The court declined to find in § 3184 a requirement of probable cause for provisional arrest after it determined that the statute required only a complaint charging that the fugitive committed an extraditable crime.

The court also considered whether, as the government argued, the provisional arrest warrant's limited purpose also limited the evidentiary standard required for probable cause. The court stated that the Warrant Clause of the Fourth Amendment did not allow for a varying standard of probable cause. According to the court, an individual's right to freedom from government restraint was "immutable." The court also considered whether, as the government argued, the provisional arrest warrant's limited purpose also limited the evidentiary standard required for probable cause. The court stated that the Warrant Clause of the Fourth Amendment did not allow for a varying standard of probable cause. According to the court, an individual's right to freedom from government restraint was "immutable."

After concluding that the probable cause standard for provisional arrest was the same as that required for extradition, the court declared the provisional arrest provision of the U.S.-France Extradition Treaty facially unconstitutional. The court found that both the statute and the treaty failed to address that standard.

The final issue that the panel addressed was whether the government had made an adequate showing of probable cause in light of the "new" standard. The court rejected the government's argument that the French magistrate's arrest warrant should not be questioned. The panel stated that such deference was improper in this case and instead

---

relevant to provisional arrest). The court, examining Article I of the treaty, concluded that because it could not find the express requirement within the treaty for such a requirement, no probable cause requirement existed. See Parretti, 122 F.3d at 769. Although such a requirement was not explicit in the treaty, the court's opinion did not draw any inferences that such a requirement existed. See id.

271. See id. at 769-70.

272. See id. at 770. As it did when examining the U.S.-France Extradition Treaty, the court in Parretti failed to find an express requirement for a probable cause determination in United States law. See id. The court, using a strict construction of the statute, failed to draw any inferences that a probable cause determination was required for issuance of a provisional arrest warrant. See id.; cf. Reid v. Covert, 354 U.S. 1, 6, 17 (1957) (requiring the United States government to comply with the Constitution when exercising its power under an international agreement and when acting against a U.S. citizen even when he is abroad).

273. See Parretti, 122 F.3d at 771.

274. See supra note 5 (containing the text of the Fourth Amendment).

275. See Parretti, 122 F.3d at 771.

276. See id.

277. See supra note 110, art. IV, 37 Stat. at 1529-30 (stating the text of the provision).

278. See Parretti, 122 F.3d at 773.

279. See id.

280. See id. at 773-76.

281. See id. at 774.

282. The court indicated that the government's complaint, supported only by an un-
focused on whether the government had made a satisfactory probable cause determination. Substantiated French arrest warrant, was insufficient to merit a finding of probable cause. See id. at 774-75. This finding must be distinguished from whether the French arrest warrant itself met the standards of probable cause. For a discussion of the French standard of proof, see infra note 325 and accompanying text.

283. See Parretti, 122 F.3d at 774. This section of the opinion represented the amendment to the panel's original decision, made in August, 1997. The initial opinion simply discussed the insufficiency of the AUSA's complaint based on information from "unidentified" French officials. See Parretti v. United States, 112 F.3d 1363, 1378 (9th Cir.), amended and superceded by 122 F.3d 758, 774 (9th Cir. 1997). The amended section, however, included the panel's counterargument to the government's assertion that Congress intended § 3184 to render an extradition treaty partner's statement of charges as enough to "per se" satisfy probable cause to arrest the fugitive. See Parretti, 122 F.3d at 774. The court indicated that it is for the courts, not Congress, to decide when the probable cause requirement is met. See id.

284. See id. at 775. The court, however, did not completely address whether a foreign arrest warrant with substantiated charges within it would suffice to satisfy probable cause. See id. Examining Yordi v. Nolte, 215 U.S. 227 (1909) and In re Extradition of Russell, 805 F.2d 1215 (5th Cir. 1986), the court hinted that other documents were necessary to support probable cause, including depositions, and other such evidence. See Parretti, 122 F.3d at 775.

285. See Parretti, 122 F.3d at 775.

286. See id. at 781. The court held that Parretti's detention without bail violated the Due Process Clause of the Fifth Amendment, even though Parretti failed to meet the requirement for "special circumstances" that would permit him to receive bail. See id. at 780-81.

In his concurrence with Judge Norris, Judge Reinhardt agreed completely with the Fourth Amendment analysis and to a large extent with the Fifth Amendment analysis. See Parretti, 122 F.3d at 781-87 (Reinhardt, J., concurring). He noted that the Supreme Court never adopted the "special circumstances" test used by courts in extradition bail hearings, and argued that that test should not be used at all. See id. at 782-83, 786 (Reinhardt, J., concurring).

Judge Pregerson dissented, stating that because Parretti had fled the country following his release on bail, the case should be dismissed under the fugitive disentitlement doctrine because his absence threatens the functioning of the adversary process. See id. at 787 (Pregerson, J., dissenting); see also supra note 40 (discussing Judge Pregerson's dissent in the panel decision and his subsequent majority opinion in the en banc appellate decision).

Before the panel's opinion was released, the French authorities continued the extradition process for Parretti. See id. at 764 n.6. The government filed a formal request for extradition in November of 1995, and Parretti was certified to be extradited at his hearing. See id. Further certifying that Parretti was not a flight risk, the new magistrate allowed Parretti out on bail, pending the filing of a new petition for a writ of habeas corpus. See id.
C. Withdrawal of the Panel's Opinion: A Frustrating Decision

Almost a year after the panel issued its initial opinion, the Ninth Circuit, meeting en banc, withdrew both the panel and the amended decisions pursuant to the fugitive disentitlement doctrine. As Judge Reinhardt noted, this decision "frustrate[s]" the court's ability to address the important constitutional issues that Parretti raised. Setting aside the contentious question of whether the disentitlement doctrine was applied appropriately, the en banc opinion has left the panel's decision technically ineffective. The conclusions made in the panel's decision, however, remain influential. Given the rarity of cases where the constitutionality of provisional arrest is addressed, should a similar case arise in the future, a court would have to readdress the weighty questions that were left unanswered by the withdrawal of the panel's decision in Parretti. That court could look to the panel's reasoning for guidance on resolving these issues. Given this possible persuasive effect of the panel's opinion, addressing its reasoning and conclusions now is critically important in order to avoid the reemergence of the potential crisis the Parretti decision presented.

Parretti filed a new petition in July 1996, see id., then fled the country in January 1997. See id. at 787 (Pregerson, J., dissenting). That appeal was later dismissed by the district court under the fugitive disentitlement doctrine. See id. at 764 n.6; supra note 40 (discussing the disentitlement doctrine).

In the interim, the government appealed the panel's decision to the Ninth Circuit en banc. See Appellee's Petition for Rehearing with Suggestion for Rehearing en banc, Parretti (No. 95-56586); see also Appellee's Supplemental Brief, Parretti (No. 95-56586). On December 18, 1997, the Court of Appeals for the Ninth Circuit, en banc, heard arguments on the appeal. See Wiehl, supra note 39. On May 1, 1998, the court issued an opinion that dismissed the appeal under the fugitive disentitlement doctrine and withdrew the panel's opinion. See Parretti v. United States, 143 F.3d 508, 509 (9th Cir. 1998) (en banc).

287. See Parretti v. United States, 143 F.3d 508, 511 (9th Cir. 1998) (en banc). For further discussion of this opinion and the fugitive disentitlement doctrine, see supra notes 40 & 41.

288. Id. at 513 (Reinhardt, J., dissenting).

289. Compare id. at 509-11 (applying the doctrine and withdrawing the panel's opinion), with id. at 511-13 (Reinhardt, J., dissenting) (arguing that the doctrine did not apply because the fugitive had fled after receiving the remedy he sought and the government was pursuing an appeal of the panel's decision, not the fugitive); see also supra note 40 (discussing the debate over the applicability of the doctrine).

290. See supra note 41 (discussing 9TH CIR. R. 35-3).

291. See supra note 23 and accompanying text (noting the infrequency of cases concerning the constitutionality of provisional arrest).

292. See supra text accompanying notes 41-43 (indicating the potential heavy burdens that faced the United States and other international law enforcement officials had Parretti maintained its effect).
V. ROUGHING THE WATERS: THE POTENTIAL IMPACT OF PARRETTI

The potential ramifications of the panel’s decision in Parretti are dramatic. Despite the withdrawal of the panel’s opinion, 18 U.S.C. § 3184 and the extradition treaties could again face close scrutiny by the courts should a similar case emerge. Congress may have to act by rewriting the 150-year old statute\textsuperscript{293} and the United States may have to renegotiate many of its extradition treaties, a time-consuming and burdensome effort.\textsuperscript{294} Furthermore, the increased burden of proof that a higher probable cause standard would place on international law enforcement officials could make extradition impractical, for it would be more difficult for such officials to arrest and detain fugitives at an early stage in the extradition process.\textsuperscript{295}

Despite the potential havoc the Parretti decision could wreak on international law enforcement, the Ninth Circuit panel made the correct decision when it required a showing of probable cause for the purposes of

\textsuperscript{293} Notwithstanding the Parretti decision, it is evident that Congress should reform the international extradition process. See Bassion, supra note 1, at 36-44 (discussing prior legislative attempts to amend § 3184); cf. Lobue v. Christopher, 893 F. Supp. 65, 78 (D.D.C. 1995) (holding § 3184 unconstitutional for violating the separation of powers), vacated on jurisdictional grounds, 82 F.3d 1081, 1086 (D.C. Cir. 1996). A prior attempt at reform in the early 1980s failed mainly because of a lack of will on behalf of Congress and President Reagan. See supra note 83 (discussing the Extradition Reform Acts in the early 1980s). The current statute which has governed international extradition for almost 150 years is now showing its limits. See generally Parretti v. United States, 122 F.3d 758 (9th Cir. 1997) (holding § 3184 unconstitutional for not requiring probable cause for provisional arrest); Lobue, 893 F. Supp. at 78 (holding § 3184 to be unconstitutional in violation of separation of powers). Congressional reform must address these limits, particularly the statute’s failure to address either provisional arrest or the proper application of probable cause in a decisive manner.

A proper test that Congress could use in a refashioned § 3184 would be similar to the balancing test put forth in Brinegar v. United States, 338 U.S. 160 (1949), as applied in domestic arrest cases. See also Gerstein v. Pugh, 420 U.S. 103, 111-12, 120-21 (1975). The new test for probable cause for provisional arrest must be based on probabilities and balance the interests of those involved, including the liberty interests of the detainee, the interests of the international law enforcement community in doing its job efficiently and effectively, and the interests in public safety of the world community at large. See Brinegar v. United States, 338 U.S. 160, 176 (1949) (discussing some of these interests). The new test also must reflect the difference in application of probable cause to the different stages of extradition. See supra Parts I, II (noting some of the important differences between the provisional arrest and extradition hearing stages of the extradition process). As in Brinegar, the probable cause standard must be “correlative” to the evidence that must be proved. Brinegar, 338 U.S. at 175.

\textsuperscript{294} Interview with Mary Jo Grotenrath, supra note 42.

\textsuperscript{295} See Appellee’s Petition for Rehearing with Suggestion for Rehearing en banc at 17, Parretti (No. 95-56586) (describing the effect on the extradition process if the government has to establish a full evidentiary showing for provisional arrest).
provisional arrest. The applicability of the Constitution in this situation is unquestionable, given the clarity of the legal precedent. At the same time, however, there are several significant flaws in its reasoning.

First, a fair inference can be drawn from the case law that provisional arrest is informal and requires a limited application of probable cause. The Second Circuit, in Caltagirone v. Grant, was able to show this, in accordance with the governing extradition treaty, without altering the requirement that probable cause was needed for both hearings. In that opinion, the court compared the nature of the evidence required under the treaty at both the provisional arrest and extradition hearings. Noting that, although the information required for a provisional arrest warrant can be limited and informal, the Caltagirone opinion held that probable cause was required for both extradition and arrest. This probable cause standard, however, is correlative to the evidence that must be proved. The panel in Parretti failed to make that distinction between the two types of hearings. Caltagirone demonstrates that the urgent and informal nature of provisional arrest can be maintained without undermining a proper showing of probable cause.

The notion that it is possible to have different evidentiary requirements for different types of hearings is buttressed by the Supreme

296. See supra note 109 and accompanying text (indicating that treaties, like statutes, are subject to restraint by the Constitution).
297. See supra note 109 (citing cases discussing the jurisdictional reach of the Constitution).
298. See, e.g., In re Extradition of Russell, 805 F.2d 1215, 1217-18 (5th Cir. 1986) (noting the informality of information required for provisional arrest due to the urgency of the situation); United States v. Wiebe, 733 F.2d 549, 553-54 (8th Cir. 1984) (noting the limited extent of evidence required under a complaint); Caltagirone v. Grant, 629 F.2d 739, 747 (2d Cir. 1980) (comparing evidentiary proof required for provisional arrest and extradition).
299. 629 F.2d at 739.
300. See id. at 747 (“Article XI and Article XIII both require a showing of probable cause, but the proceedings they contemplate are different in several crucial respects.”); see also 1973 U.S.-Italy Extradition Treaty, supra note 220, arts. XI, XIII, 26 U.S.T. at 500-02.
301. See Caltagirone, 629 F.2d at 747; see also supra note 226 and accompanying text (discussing differences in evidentiary standards required for provisional arrest and extradition).
302. See Caltagirone, 629 F.2d at 747 (“Though the Government persuasively suggests that the provisional arrest and extradition proceedings must differ in some way, the difference does not lie in the requirement of probable cause.”)
303. See Brinegar v. United States, 338 U.S. 160, 175 (1949); see also Caltagirone, 629 F.2d at 747 (noting the differences between the evidentiary requirements for provisional arrest and extradition, without sacrificing a proper finding of probable cause).
304. See Caltagirone, 629 F.2d at 747.
Court's decision in *Gerstein v. Pugh*.\(^{305}\) In *Gerstein*, Justice Powell distinguished the nature of a domestic initial probable cause hearing following arrest from a preliminary hearing, taking special notice of the implicitly urgent and informal character of the first hearing as compared to the more formal preliminary hearing.\(^{306}\) He nonetheless cautioned against abandoning a probable cause showing at the initial hearing, stating that a probable cause standard similar to that needed for arrest was required of prosecutors.\(^{307}\) By equating the scope of this initial hearing to that of the provisional arrest hearing,\(^{308}\) a proper inference about the character of a provisional arrest hearing can be drawn, thereby limiting the scope of the information required to issue a provisional arrest warrant.\(^{309}\) By doing so, some of the harsh burdens on law enforcement resulting from the higher probable cause standard advanced by the *Parretti* decision can be mitigated.\(^{310}\)

A second facet of provisional arrest that was not adequately addressed by the *Parretti* court was the practical consideration of urgency.\(^{311}\) This failure ignores the holdings of *In re Extradition of Russell*\(^{312}\) and *United States v. Wiebe*.\(^{313}\) In *Russell*, the Fifth Circuit found urgency to be an important criterion for provisional arrest by emphasizing the significance of the fugitive's flight risk.\(^{314}\) In *Wiebe*, the Eighth Circuit indicated the importance of accounting for the bureaucratic sluggishness that is associated with international extradition.\(^{315}\) These factors are especially relevant today, given the time needed for foreign governments to gather,
translate, and transmit evidence to the United States. 316 Further, as noted by the Wiebe court, this government lethargy justifies the limited length of time allowed for detention under provisional arrest. 317 These factors together rebut the Parretti court's dismissal of the urgency requirement for provisional arrest. 318

The third flaw of the Parretti opinion was the striking down of both § 3184, a statute that has governed international extradition for 150 years, and the U.S.-France Extradition Treaty provision on provisional arrest. 319 As to the statute, the court could have inferred that a showing of probable cause was required for provisional arrest, similar to the inference made that probable cause applies to an extradition hearing. 320

---

316. In Parretti, the necessary documents that the court would have required in order to support the warrant effectively consisted of almost 2,000 pages of information, most of which would have required translation from French to English. See Appellee's Supplemental Brief at 15, Parretti v. United States, 122 F.3d 758 (9th Cir. 1997) (No. 95-56586).

317. See Wiebe, 733 F.2d at 554 (justifying the 45 day detention under the U.S.-Spain Extradition Treaty).


The court also noted that the "hurdles" required for gathering sufficient evidence to establish probable cause were the same in the domestic and international respects. See id. at 773. This conclusion, however, does not properly respect prior case law. Compare County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (requiring a probable cause hearing following arrest within 48 hours), with Wiebe, 733 F.2d at 554 (noting the necessity for a 45 day detention period due to bureaucratic sluggishness). The court failed to give proper weight to the differences in gathering and transmitting evidence in both situations. See Parretti, 122 F.3d at 773.

319. See Parretti, 122 F.3d at 773; see also supra note 83 and accompanying text (indicating the lack of major changes to the statute during its history). Although the appearance of a decision in a case that reverses years of precedent is not unusual, see INS v. Chadha, 462 U.S. 919, 959 (1983) (reversing over fifty years of precedent as to the "legislative veto"), the Ninth Circuit panel ignored the importance of subsequent practice of practicing lawyers and participating countries in international extradition under § 3184 and the Treaty. See Vienna Convention, supra note 104, art. 31(3)(b), U.N. Doc. A/CONF. 39/27, 8 I.L.M. at 692 (requiring the consideration of subsequent practice of the parties when interpreting the treaty).

320. See Wiebe, 733 F.2d at 553 (describing the accordance of probable cause under extradition with that for domestic criminal law). This point may be moot, however, because of a recent attack on the same statute alleging its inconsistency with the doctrine of separation of powers. See Lobue v. Christopher, 893 F. Supp. 65, 78 (D.D.C. 1995) (holding § 3184 unconstitutional and a violation of the separation of powers doctrine), vacated on jurisdictional grounds, 82 F.3d 1081 (D.C. Cir. 1996). But see Lo Duca v. United States, 93 F.3d 1100, 1108 (2d Cir. 1996) (holding 18 U.S.C. § 3184 as non-violative of the separation of powers). For further discussion on Lobue, see generally Benjamin N. Bedrick,
As for the treaty itself, the court could have inferred a probable cause standard into it, given the necessity to construe treaties liberally. Instead, striking down a provision such as the one in Parretti would require further treaty negotiations.

A final flaw of the Parretti decision relates to the respect given to foreign judicial determinations. Although the court properly circumvented the rule of judicial non-inquiry when it applied the Fourth Amendment to the probable cause standard for provisional arrest, the court failed to respect the French arrest warrant’s charges. Though the French have a different standard from the United States for determining the sufficiency of evidence that is required, the court’s dismissal of the French magistrate’s claims altogether was a radical step. When the Supreme Court in Grin v. Shine noted that a Russian arrest warrant essentially was of the same character as an American warrant, it affirmed the importance of respecting foreign judicial systems. At no point in its opinion did the court in Parretti offer such deference to the French judicial system.


322. See Appellee’s Supplemental Brief at 1-2, Parretti v. United States, 122 F.3d 758 (9th Cir. 1997) (No. 95-56586) (indicating the probable grave consequences the panel’s decision could have on the United States’ international stature and credibility); Wiehl, supra note 39 (discussing potential impact of the panel’s decision on U.S. extradition practices).
323. See Parretti v. United States, 122 F.3d 758, 767 (9th Cir. 1997) (refusing to observe rule of judicial non-inquiry when constitutional rights are at stake), op. withdrawn en banc, 143 F.3d 508 (9th Cir. 1998). This conclusion is in accord with prior law. See supra note 109 (noting cases that hold that the Constitution applies to all persons found within United States territory).
324. See Parretti, 122 F.3d at 773-75.
325. See SHEARER, supra note 1, at 157. The French standard of proof is lower than probable cause. See id. French law only requires charges or a prior conviction in order to arrest and does not look to the sufficiency of the evidence of criminality. See id.
326. Cf. Grin v. Shine, 187 U.S. 181, 184 (1902) (acknowledging the importance of balancing the interests and rights of the detainee with the obligations owed to other countries under U.S. treaties).
327. See id.
328. See id. at 190-91.
329. See Parretti, 122 F.3d at 773-75. The court noted that the French arrest warrant lacked a showing of credible sources underlying the allegations. See id. at 775. Even though the AUSA may have been careless in failing to provide more information to the magistrate in this situation, see id., a lack of judicial deference to foreign courts may set a dangerous precedent by assuming that the French sources and the magistrate’s decision are unreliable. Cf. Glucksman v. Henkel, 221 U.S. 508, 512 (1911) ("We are bound by the
The court's assumption that the French magistrate's determination was unreliable goes against the precedent of respecting foreign judicial systems. Such a presumption by the panel could undermine foreign judicial cooperation in future criminal matters if this deference is not acknowledged.

The flaws in the panel's decision in Parretti are attributable to its failure to recognize prior law describing the practical nature of extradition and provisional arrest. These decisions have indicated that provisional arrest is made on an urgent and informal basis. Moreover, the panel's decision to strike down § 3184 and the U.S.-France Extradition Treaty as unconstitutional ignores earlier efforts to infer constitutional requirements into these statutes and treaties. Finally, the panel's failure to give even limited deference to the French arrest warrant overlooks the stated need for such courtesy between governments. On these bases, the panel's reasoning should not be followed in future, similar cases.

VI. CONCLUSION

The role of extradition in the international legal community is critically important. The ability of fugitives from justice to travel and communicate quickly and easily is increasing, thereby making apprehension more difficult. As the world becomes smaller, adequate steps must be taken

existence of an extradition treaty to assume that the trial will be fair.

330. See Parretti, 122 F.3d at 774-75.
331. See Grin, 187 U.S. at 190-91.
332. Such deference to foreign judicial acts is based in the international law concept of comity. See Hilton v. Guyot, 159 U.S. 113, 228 (1895). Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Id. at 164.
333. See In re Extradition of Russell, 805 F.2d 1215, 1218 (5th Cir. 1986) (emphasizing the urgency requirement for provisional arrest); United States v. Wiebe, 733 F.2d 549, 554 (8th Cir. 1984) (noting the bureaucratic sluggishness inherent in the extradition process as a factor in the detainment of a fugitive); Caltagirone v. Grant, 629 F.2d 739, 747 (2d Cir. 1980) (describing the limited information required to establish probable cause for provisional arrest by comparing the nature of provisional arrest to that of extradition).
334. See Factor v. Laubenheimer, 290 U.S. 276, 298 (1933) (describing the need for courts to construe treaties liberally); Wiebe, 733 F.2d at 553 (describing the parallelism of probable cause under extradition with that for domestic criminal law).
335. See Grin, 187 U.S. at 190-91 (noting the importance of respecting foreign judicial pronouncements).
336. See supra note 41 (discussing the lack of precedential effect of the panel's decision but the likely influence its reasoning will have on future provisional arrest cases).
337. One area of particular and growing concern is the international criminal use of the Internet and the ability for law enforcement to catch such criminals. See Frank James, International Cyber-SWAT Teams Planned to Fight Computer Crimes: Industrial Powers
to update the capabilities of international law enforcement officials to do their job. These steps, however, must not be taken at the expense of the Constitution. The *Parretti* decision reflects the clash between the legitimate constitutional liberty interests of individuals and the practical and efficiency interests of the international law enforcement community. Effectively balancing these interests remains the only means to end this conflict and future courts will have an onerous responsibility in doing so.
