

Let's Try This Again: Reassessing the Right to Bail in Cases of International Extradition

JOSHUA J. FOUGERE*

Over one hundred years ago, the Supreme Court issued its lone decision on the possibility of bail in cases of foreign extradition. In Wright v. Henkel, though hesitant about the idea of bail, the Court nonetheless stated in dicta that it was unwilling to prohibit bail entirely, "whatever the special circumstances." Since that statement, courts and commentators have assumed that a right to bail exists if a fugitive can show "special circumstances." This Note argues that practical and doctrinal considerations counsel that, contrary to the accepted view, fugitives do not have and never have had a right to bail pending international extradition. Practically, the current judicial doctrine is confusing, inconsistent, and mostly incorrect. And some courts and commentators have noted that there has been a liberalizing trend favoring release for fugitives, which risks foreign relations embarrassment and violations of the government's treaty obligations to turn over the fugitives requested through extradition. What is more, the legal and doctrinal reasons for reconsidering the doctrine of bail pending extradition are equally powerful. There is no positive law allowing bail and some extradition treaties explicitly forbid it. Further, bail in the context of extraditions cannot be upheld as an inherent power. Finally, arguments rooted in the doctrine's historical entrenchment are unavailing, particularly in light of the readily available solution proposed here. The extradition laws mandate quick processing, and should be read together to require a rapid and fluid process from arrest to extradition. Then, rather

* Articles Editor, COLUM. J.L. & SOC. PROBS., 2008–2009. The author thanks the staff of the *Journal of Law and Social Problems* for all of their help seeing this Note through to publication. He also thanks Professors Nate Persily and Henry Monaghan for their valuable insights. Finally, he is grateful for the tremendous experience gained with the attorneys and staff of the Office of International Affairs at the U.S. Department of Justice. The author was a Law Clerk in the office during 2007. The views expressed herein are those of the author and do not represent the views of the U.S. Department of Justice.

than allowing bail, a fugitive's only remedy should be to challenge prolonged government delay through habeas corpus. Absent congressional action, this solution adequately balances the government's interest in detention against the risk of grave injustice and solves many of the problems identified under the current doctrine.

I. INTRODUCTION

Through judicial accident and through the acquiescence and disregard of the political branches, the law of international extradition has developed rather haphazardly.¹ Because the process happens quickly, decisions are rarely even reported. The resulting body of law has confounded commentators and courts on a number of levels. A subset of extradition law — a fugitive's² right to bail pending extradition — is no exception.

Over one hundred years ago, the Supreme Court issued its lone utterance on that topic in *Wright v. Henkel*.³ Extremely hesitant about the idea of bail pending extradition, the Court nonetheless stated, in dicta:

We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so . . .⁴

Since that statement, courts and commentators have assumed that a right to bail exists if a fugitive can show special circumstances. Consequently, a confusing and illogical body of law has developed in its wake.

Absent congressional enactment,⁵ the time has come to put an end to the "special circumstances" doctrine of *Wright*.⁶ Consider

1. See, e.g., *infra* Part II.A.

2. This Note uses the term "fugitive," rather than "defendant," in accordance with the accepted terminology used in the context of extradition.

3. 190 U.S. 40 (1903).

4. *Id.* at 63.

5. This Note proceeds on the premise that congressional action is not imminent. A statutory fix would be both welcome and clarifying. Perhaps the best solution to the en-

the recent case of Giancarlo Parretti.⁷ Mr. Parretti is an Italian citizen and resident. In 1990, his company bought MGM-United Artists for about \$1.3 billion.⁸ Due to financial troubles, the transaction gave rise to a number of lawsuits around the world. On May 3, 1995, a French magistrate issued an international arrest warrant for Parretti in one such case. France did not seek his extradition from Italy during the following five months.⁹

To answer charges in related litigations, Parretti came to the United States on October 9, 1995.¹⁰ The French government requested his provisional arrest the following day. An arrest warrant was issued,¹¹ and during a deposition on October 18, 1995 in Los Angeles, he was arrested by federal agents.¹² After Parretti petitioned for bail, the magistrate found that he was not a flight risk but, absent any special circumstances, denied bail.¹³

Parretti then appealed. In the district court, he argued that the provisional arrest warrant violated the Fourth Amendment¹⁴ and that holding him without bail absent any flight risk was unconstitutional.¹⁵ Losing on both grounds, he sought emergency review in the Ninth Circuit. Because he was not a flight risk, the Court of Appeals found that holding Parretti without bail violated

tire enterprise of extradition would be to establish an agency system like Immigration and Customs Enforcement ("ICE"). Both possibilities, however, appear unlikely at present.

6. Other commentators have recently urged that now is the time to reform extradition laws. See, e.g., John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 104, 169–71 (2002) (pointing out historical and doctrinal inaccuracies and inconsistencies and urging reform as a result).

7. For a more detailed narrative about the *Parretti* case than is given here, see Angelo M. Russo, *The Development of Foreign Extradition Takes a Wrong Turn in Light of the Fugitive Disentitlement Doctrine: Ninth Circuit Vacates the Requirement of Probable Cause for a Provisional Arrest in Parretti v. United States*, 49 DEPAUL L. REV. 1041, 1068–72 (2000) and Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 762–74 (1998).

8. *Parretti v. United States*, 122 F.3d 758, 761 (9th Cir. 1997).

9. *Parretti v. United States*, 112 F.3d 1363, 1363–67 (9th Cir. 1997).

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

11. *Id.*

12. *Id.* at 760.

13. Wiehl, *supra* note 7, at 765.

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

15. *Parretti v. United States*, 112 F.3d 1363, 1367 (9th Cir. 1997); Wiehl, *supra* note 7, at 766–67, 771.

the Due Process Clause of the Fifth Amendment.¹⁶ After thirty-three days in jail, he was ordered to be released.¹⁷

The French government filed a formal extradition request shortly thereafter. In May 1996, Parretti was found to be extraditable. Bail was reconsidered, but Parretti remained at large.¹⁸ While free, following a conviction in Delaware state court, Parretti fled the United States and returned to Italy.¹⁹ Extradition was thwarted, and despite the courts' best efforts at prediction, it turned out that Mr. Parretti was, in fact, a flight risk.²⁰

Mr. Parretti's flight is only one high-profile example. To be sure, Mr. Parretti may not be representative, and the number of fugitives released on bail who actually flee might be small.²¹ Nonetheless, his case exemplifies the dangers surrounding release on bail and is representative of the practical reasons for abandoning the current doctrine. To begin, just one flight is enough to generate the type of foreign relations embarrassment that the Supreme Court feared in *Wright*.²² Moreover, extradition requests have continued to climb in recent years. In fiscal year 1990, for example, foreign countries made 100 requests for extradition, and 56 fugitives were extradited or otherwise returned to the foreign country. By comparison, in fiscal year 2008, 249 new extradition requests were made by foreign countries, and 123 fugitives were returned.²³ With such requests come an increase in

16. *Parretti*, 122 F.3d at 763–64. For more on the Due Process argument, see *infra* Part IV.B.

17. *Id.* at 764.

18. *Id.* at 764 n.6. While release after a finding of extraditability appears to be barred explicitly by the statute, 18 U.S.C. § 3184, the court indicated that the government had stipulated its consent.

19. *Id.* at 776 n.22; *Former MGM Executive Flees Before Court Date*, N.Y. TIMES, Jan. 4, 1997, at 36.

20. Because he appeared at the extradition hearing and later fled after a Delaware conviction, the Ninth Circuit believed that his later flight had no bearing on the alleged error of the district court's previous finding. *Parretti*, 122 F.3d at 776 n.22.

21. In 1983, Roger Olsen, from the Department of Justice's Criminal Division, testified to Congress that "we have very seldom been placed in the position of being unable to deliver up a fugitive whose surrender has been ordered." *Reform of the Extradition Laws of the United States, Hearings Before the H. Comm. on the Judiciary on H.R. 2643*, 98th Cong. 36 (1983) [hereinafter *1983 Hearings*].

22. See *infra* Part III.A.3.

23. Office of International Affairs, Criminal Division, United States Department of Justice (on file with author) (data is approximate). The number of pending cases at year end is also telling. In 1990 there were 292 cases pending, while in 2008 there were 610

bail petitions, and more bail petitions occupy government resources in defending them.²⁴ Further, as some courts and commentators have noted, there has been a liberalizing trend favoring release for fugitives.²⁵ As extradition petitions continue to mount due to globalization and the war on terror,²⁶ the issue will gain significance.

Beyond such practical reasons for reconsidering the doctrine of bail pending extradition, there are also powerful legal and doctrinal reasons for doing so. Many problems have existed since 1903 and have been unrecognized, overlooked, or ignored. First, there is no positive law allowing bail. In fact, some extradition treaties explicitly forbid it.²⁷ Second, claims about inherent power to admit bail, while alluded to in *Wright*, are problematic. Because the majority view of extradition is that it falls outside the scope of Article III, arguments about an inherent *judicial* power are troublesome.²⁸ And because bail is an Article III function, requiring the judge to “switch hats” between Article III and non-Article III duties mid-case presents constitutional issues.²⁹ Additionally, the doctrine results in inconsistencies and inaccuracies when courts apply the special circumstances test, leading to some abnormal results. The government, for example, is sometimes denied the right to appeal an adverse bail ruling, even though fugitives can appeal and all presumptions in extradition should favor the government.³⁰

cases pending. *Id.* See also M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE xiv (4th ed. 2002).

24. 1983 Hearings, *supra* note 21, at 41.

25. See, e.g., *United States v. Leitner*, 784 F.2d 159, 160 (2d Cir. 1986); *In re Molnar*, 182 F. Supp. 2d 684 (N.D. Ill. 2002) (stating that “[s]ome courts, however, have followed a trend towards liberalization of bail in the provisional arrest context,” then following such a trend); *In re Heilbronn*, 773 F. Supp. 1576, 1578–79 (W.D. Mich. 1991); Jeffrey A. Hall, Note, *A Recommended Approach to Bail in International Extradition Cases*, 86 MICH. L. REV. 599, 611 (1987). The only available statistics for bail reveal a similar theme. From 1980–1982, almost thirty percent of bail applications pending extradition were successful. 1983 Hearings, *supra* note 21, at 42–43. These statistics are over twenty-five years old and may be inaccurate today. Nonetheless, a thirty percent release rate does not indicate a very strict presumption against bail.

26. See *infra* Part III.A.3.

27. See *infra* Part III.A.1.

28. See *infra* Part III.B.2.a.

29. See *infra* Part III.B.2.b.

30. Two Eleventh Circuit cases, for example, combine to create such a conundrum. In *In re Krickemeyer*, 518 F. Supp. 388 (S.D. Fla. 1981), the district court held that it did not have jurisdiction to hear an appeal from a magistrate’s grant of bail pending extradition.

In light of this landscape, this Note argues that fugitives do not have, and never have had, a right to bail pending international extradition. Rather, because the extradition laws mandate quick processing, their only remedy is to challenge prolonged government delay.³¹ The Note proceeds in three Parts. Part II details background information about extradition law and the currently problematic bail doctrine. Part III makes the case against bail. Part IV then proposes a solution, absent congressional action, that adequately balances the government's interest in detention against the risk of grave injustice. It argues that there is no right to bail but that the extradition laws and treaties require a very quick process. If the fugitive is held longer, he should be able to seek release absent any flight risk or danger to the community.

II. THE BASICS OF EXTRADITION LAW AND THE CURRENT BAIL DOCTRINE

This section outlines the background information and lays the foundation for the argument against bail. Section A describes the extradition process and its *sui generis*, anti-fugitive presumptions. Section B introduces the law on bail pending extradition and illustrates how its current "special circumstances" test is inconsistent and incorrect. Section C then surveys past commentators' proposals on the topic.

The court reasoned that because the extradition proceeding is not appealable to the district court, neither is bail. In *In re Ghandtchi*, 697 F.2d 1037 (11th Cir. 1983), *vacated as moot*, 705 F.2d 1315 (11th Cir. 1983), the circuit court reached the same result, refusing to imply an inherent power of review to the district court absent some additional authority. Because a magistrate's ruling cannot be appealed directly to the circuit court in the Eleventh Circuit, *see, e.g., United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003), this precedent leaves the government with no right to appeal. In theory, because double jeopardy does not apply to extradition, after a grant of bail, the government could reapprehend the fugitive and bring another extradition proceeding, thereby achieving an effective appeal. However, this practice is not followed and would likely cause practical and reputational problems not worth the effort. Therefore, the government is left with the future task of challenging the existing precedent to get the right to appeal an adverse bail decision from a magistrate in the Eleventh Circuit.

31. *See infra* Part IV.

A. THE EXTRADITION PROCESS

Extradition of a fugitive from the United States is governed by 18 U.S.C. §§ 3184–3196. The statute requires that there be a treaty in place,³² most of which are bilateral.³³ The process usually begins with a request from the foreign nation to the State Department for a fugitive. If the State Department finds that the request falls within the treaty, it forwards the request to the Department of Justice, which makes a similar evaluation. Once both agencies find the request proper, it is forwarded to the U.S. Attorney's Office in the district where the fugitive is located. The U.S. Attorney then files a complaint with the federal district court requesting an arrest warrant.³⁴ Most treaties also permit provisional arrest, which allows the government to obtain an arrest warrant before a formal extradition request has been made.³⁵ Such arrests are to be made in cases of urgency, which in practice is never a bar, and have a required time limit before formal filing is needed.³⁶ Arrest warrants are national in scope.³⁷

Once arrested, section 3184 dictates that the fugitive be brought before the judge or magistrate “to the end that the evidence of criminality may be heard and considered.”³⁸ The specific requirements for determining extraditability are laid out in the relevant treaty and in section 3184. The hearing is not to determine guilt or innocence. Rather, the judge asks whether the crime falls within the treaty and whether there is probable cause to believe that the fugitive committed the crime.³⁹ If both questions are answered affirmatively, the judge certifies to the Secre-

32. Very rarely, extradition has been instituted on the basis of comity and reciprocity. Such practice is not mandated and occurred more often in the nineteenth century. BASSIUNI, *supra* note 23, at 85, 90–93. *See also* United States v. Rauscher, 119 U.S. 407, 414–15 (1886).

33. This is not a restriction, however, and any treaty will qualify. BASSIUNI, *supra* note 23, at 85.

34. *Id.* at 757–58; CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 642 (2d ed. 2006).

35. *E.g.*, Extradition Treaty with Great Britain and Ireland, U.S.-U.K., art. 12, Mar. 31, 2003, S. Treaty Doc. No. 108–23 (“In an urgent situation, the Requesting State may request the provisional arrest of the person sought pending presentation of the request for extradition.”). *See also* 18 U.S.C. § 3187 (2006).

36. BASSIUNI, *supra* note 23, at 773–75.

37. Pettit v. Walshe, 194 U.S. 205 (1904).

38. 18 U.S.C. § 3184 (2006).

39. BASSIUNI, *supra* note 23, at 819–20.

tary of State that the evidence is sufficient to sustain the charge. The Secretary of State, then, has the discretion to affirm or deny the extradition.⁴⁰ Neither side has a formal right to appeal an adverse decision, but both sides may attain effective review. A fugitive is entitled to limited review by filing a writ of habeas corpus,⁴¹ and the government is not precluded from initiating subsequent proceedings.⁴²

The hearing is not always simple, and there are several possible bars to extradition. First, the crime must be within the parameters of the treaty. Generally, treaties require “dual criminality” for serious offenses. This means that the offense must be a crime in both countries, though the laws need not be identical.⁴³ Most treaties list applicable crimes, but some more recent treaties encompass all felonies.⁴⁴ Political and military offenses are not extraditable crimes.⁴⁵ Statutes of limitations may bar extradition,⁴⁶ but some treaties explicitly forbid any time bar.⁴⁷ And while other countries may not extradite their own nationals⁴⁸ or

40. BRADLEY & GOLDSMITH, *supra* note 34, at 642.

41. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) (“[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.”); BASSIOUNI, *supra* note 23, at 857; BRADLEY & GOLDSMITH, *supra* note 34, at 642.

42. Double jeopardy does not apply. *See, e.g.*, BASSIOUNI, *supra* note 23, at 759. *See also Collins v. Loisel*, 262 U.S. 426, 429 (1923); *United States v. Doherty*, 786 F.2d 499, 503 (2d Cir. 1986) (“Judge Sprizzo’s denial of a certificate was not ‘final’ since the Government may try again.”); *Hooker v. Klein*, 573 F.2d 1360, 1365 (9th Cir. 1980) (“The law of international extradition long has recognized that the government is free to pursue extradition notwithstanding initial unsuccessful efforts.”); *Caltagirone v. Grant*, 629 F.2d 739, 748 n.19 (2d Cir. 1980).

43. BASSIOUNI, *supra* note 23, at 465–503; BRADLEY & GOLDSMITH, *supra* note 34, at 645.

44. BASSIOUNI, *supra* note 23, at 481; Charles Doyle, *Extradition to and from the United States: Overview of the Law and Recent Treaties*, CRS Report for Congress, Sept. 30, 2003, at 6.

45. BRADLEY & GOLDSMITH, *supra* note 34, at 645–47; BASSIOUNI, *supra* note 23, at 594–681; Doyle, *supra* note 44, at 6–7.

46. BRADLEY & GOLDSMITH, *supra* note 34, at 647; BASSIOUNI, *supra* note 23, at 707–12.

47. *E.g.*, Extradition Treaty with Jordan, U.S.-Jordan, art. 6, Mar. 28, 1995, S. Treaty Doc. No. 104-3 (“The decision whether to grant the request for extradition shall be made without regard to provisions of the law of either Contracting State concerning lapse of time.”).

48. BRADLEY & GOLDSMITH, *supra* note 34, at 648; BASSIOUNI, *supra* note 23, at 682–89.

extradite to countries with a death penalty,⁴⁹ the U.S. has no such restrictions.⁵⁰

Beyond those potential obstacles to extradition, however, the law does not favor fugitives. During the extradition process and hearing, fugitives are accorded virtually no rights normally thought to be standard in the judicial process. Extradition is truly *sui generis*.⁵¹ As the Supreme Court explained in *Benson v. McMahon*,⁵² “the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of . . . preliminary examinations”⁵³ By holding that extradition proceedings fall outside the scope of criminal and civil law, courts have been able to place significant restrictions on the rights of fugitives.

The list of impaired rights is rather extensive. Even within the limited scope of a probable cause hearing, discovery rights are often curtailed.⁵⁴ Defenses usually available at trial are not available.⁵⁵ The Federal Rules of Criminal Procedure do not apply, nor do the Rules of Evidence.⁵⁶ As the First Circuit held, “[t]he evidence may consist of hearsay, even entirely of hearsay.”⁵⁷

49. BRADLEY & GOLDSMITH, *supra* note 34, at 648–49; BASSIOUNI, *supra* note 23, at 735–44; Doyle, *supra* note 44, at 8.

50. *E.g.*, *Charlton v. Kelly*, 229 U.S. 447, 467 (1913); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 475 (1987), reporter’s note 4.

51. *E.g.*, *In re Kirby*, 106 F.3d 855, 867 (9th Cir. 1996) (Noonan, J., dissenting) (“Extradition proceedings are not criminal proceedings . . . no guilt or innocence is determined in them. Nor are extradition proceedings civil as the term is used in our rules, so that they are not governed by the Federal Rules of Civil Procedures Extradition proceedings are *sui generis*.”) (citations omitted); *Sahagian v. United States*, 864 F.2d 509, 513 (7th Cir. 1988); *United States ex rel. Oppenheim v. Hecht*, 16 F.2d 955 (2d Cir. 1927).

52. 127 U.S. 457, 463 (1888).

53. *Id.* at 463.

54. *See, e.g.*, *First Nat. City Bank v. Aristeguieta*, 287 F.2d 219, 226 (2d Cir. 1960) (holding that discovery should only be granted if warranted by exceptional circumstances); *Jhirad v. Ferrandina*, 536 F.2d 478, 484 (2d Cir. 1976) (stating that discovery is limited and discretionary and should be ordered “as law and justice requires”); *In re Singh*, 123 F.R.D. 108, 116 (D.N.J. 1987) (finding no right to discovery). *But see* *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) (holding that prior due process requirements for discovery apply as a matter of right in extradition).

55. *E.g.*, *In re Shapiro*, 352 F. Supp. 641, 645 (S.D.N.Y. 1973) (“The defenses available to the fugitive on an extradition proceeding are sharply limited.”); Doyle, *supra* note 44, at 18 n.67.

56. FED. R. CRIM. P. 1(a)(5)(A); FED. R. EVID. 1101(d)(3).

57. *United States v. Kin-Hong*, 110 F.3d 103, 120 (1st Cir. 1997); *see also* *Collins v. Loisel*, 259 U.S. 309, 317 (1922) (allowing “unsworn statements of absent witnesses”).

Evidence from the fugitive contradicting that of the requesting country may be properly excluded.⁵⁸ Many constitutional protections do not extend to fugitives. Collecting various authorities, one district court explained that:

[T]he Sixth Amendment right to a speedy trial and the Fifth Amendment right against undue delay are inapplicable to an extradition. Likewise, the Sixth Amendment right to effective counsel does not apply to extradition proceedings. The Supreme Court has found no constitutional infirmity where those subject to extradition proceedings have been denied an opportunity to confront their accusers. Finally, the Fifth Amendment guarantee against double jeopardy and the right to a Miranda warning are inapplicable to an extradition proceeding.⁵⁹

And lastly, the non-inquiry rule bars any consideration by the judge regarding the courts of the requesting state, including their fairness.⁶⁰

B. BAIL PENDING EXTRADITION

The current doctrine of bail pending extradition exists against this backdrop. Generally, when a fugitive is arrested either provisionally or pursuant to a formal request, he will request a hearing to be released on bail.⁶¹ For many of the same reasons that fugitives have minimal rights, the current doctrine institutes a strong presumption against bail.⁶² Over one hundred years ago, however, the Supreme Court was unwilling to foreclose the possi-

58. *E.g.*, *Hooker v. Klein*, 573 F.2d 1360, 1369 (9th Cir. 1978). For more details on admissibility of evidence, see BASSIOUNI, *supra* note 23, at 832–37.

59. *In re Fulgencio Garcia*, 188 F. Supp. 2d 921, 933 (N.D. Ill. 2002) (citations omitted).

60. But the executive can always deny extradition on such grounds. *See generally* *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (“We are bound by the existence of an extradition treaty to assume that the trial will be fair.”); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991) (arguing that the rule properly entrusts such decisions to the executive not the judiciary).

61. BASSIOUNI, *supra* note 23, at 758.

62. *Beaulieu v. Hartigan*, 554 F.2d 1, 2 (1st Cir. 1977) (“Unlike the situation for domestic crimes, there is no presumption favoring bail. The reverse is rather the case.”).

bility of bail for fugitives. Instead, in *Wright v. Henkel*, the Court indicated that a district court might be able to grant bail in cases of foreign extradition where “special circumstances” exist.⁶³ Although extradition laws have been updated and procedures recodified since 1903,⁶⁴ bail has not been addressed. The notion of “special circumstances,” solely a judicial creation, is still regulated by *Wright* and its progeny a century later.

“Special circumstances” are narrowly defined. As one court explained, “[c]ourts have taken a limited view of what constitutes ‘special circumstances.’”⁶⁵ The First Circuit noted that “[s]pecial circumstances are limited to situations in which the justification [for release] is pressing as well as plain.”⁶⁶ Such circumstances must be unique and not applicable to all fugitives.⁶⁷ In an often-quoted statement issued shortly after the *Wright* decision, the Southern District of New York declared that the power should be exercised only “when the requirements of justice are absolutely peremptory.”⁶⁸

The vast majority of the decisions in this arena are from district courts or magistrate judges and thus, hold no precedential value besides illustration. However, with nothing else available, fugitives frequently invoke past decisions and circumstances previously held to be “special.” If a fugitive can convince a judge that his circumstances are sufficiently “special,” bail is granted.

Due to the inherent flexibility of this standard and the lack of guidance from the Supreme Court, lower courts have stumbled along in applying this “special circumstances” test. Implicating the ad hoc doctrine has resulted in a judicial mess. During congressional hearings in the early 1980s,⁶⁹ many commentators agreed.⁷⁰ In 1981, Professor Bassouni, an established expert of

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

64. *See* 18 U.S.C. §§ 3181–3193 (2006).

65. *In re Sutton*, 898 F. Supp. 691, 694 (E.D. Mo. 1995).

66. *United States v. Kin-Hong*, 83 F.3d 523, 524 (1st Cir. 1996) (citations omitted).

67. *In re Morales*, 906 F. Supp. 1368, 1373 (S.D. Cal. 1995).

68. *In re Mitchell*, 171 F. 289, 289 (S.D.N.Y. 1909).

69. *See infra* Part III.A.2.

70. During the 1983 Hearings, Roger Olsen, from the Department of Justice’s Criminal Division seemed to testify against this view. His statement read that “[t]he Courts have applied this special circumstances test wisely, and we have very seldom been placed in the position of being unable to deliver up a fugitive whose surrender has been ordered . . . [T]he special circumstances test has worked well in practice . . .” *1983 Hearings, supra* note 21, at 36. However, this statement should not be read as significant support

extradition law, stated that “[s]pecial circumstances have been the source of a great problem in judicial interpretations applying this standard.”⁷¹ In a letter to the Senate Judiciary Committee, the ACLU similarly noted that “courts have interpreted the special circumstances standard inconsistently over the years.”⁷² Again in 1983, Morton Halperin, testifying on behalf of the ACLU, said that “my understanding is that the courts don’t follow [the test], that in fact if you are an American citizen in the community they are going to grant you bail even if there is not a special circumstance.”⁷³

In the century since *Wright*, various special circumstances have been offered by litigants and accepted by courts. However, there is not one consistent legitimate special circumstance that warrants release on bail. Considering the more common special circumstances raised demonstrates this inconsistency.⁷⁴

One circumstance that fugitives assert is a lack of flight risk. The prevailing view is that flight risk is not a special circumstance, and is instead an independent requirement for release.⁷⁵

for the continuity of the current practice for several reasons. First, many other witnesses disagreed with this position. Second, Mr. Olsen was testifying about the 1983 House bill which sought a bail standard more liberal than the current practice and the bill proposed two years earlier in the Senate. *See infra* note 126 and accompanying text. In order to gain any clout with the House in the face of its proposed bill, he may not have been able to adopt a position any more extreme than to support to special circumstances test as it stood. Additionally, since the 1980s, the test has been applied even more liberally, *see supra* note 25, and with more reported decisions, the doctrine has spiraled into much greater disarray than existed twenty-five years ago.

71. *Extradition Act of 1981: Hearing on S. 1639 Before the S. Comm. on the Judiciary*, 97th Cong. 22 (1981) [hereinafter *1981 Hearings*].

72. *Id.* at 91.

73. *1983 Hearings*, *supra* note 21, at 56.

74. Although this analysis proceeds circumstance by circumstance, the test is not applied in this way. *See, e.g., In re Molnar*, 182 F. Supp. 2d 684, 689 (N.D. Ill., 2002) (“When looking to each of the circumstances presented by the defendant, none of them, on their own, rise to the level of ‘special circumstances’ which would merit release. [H]owever . . . we feel compelled to view his articulated ‘circumstances’ collectively rather than singularly.”); *In re Morales*, 906 F. Supp. 1368, 1373 (S.D. Cal. 1995); *In re Nacif-Borge*, 829 F. Supp. 1210, 1216 (D. Nev. 1993). Because the goal of this section is simply to show the doctrinal confusion, this does not alter the ultimate conclusion.

75. *In re Russell*, 805 F.2d 1215, 1217 (5th Cir. 1986); *United States v. Leitner*, 784 F.2d 159, 161 (2d Cir. 1986); *United States v. Williams*, 611 F.2d 914, 915 (1st Cir. 1979) (“[A]pplicant’s arguable acceptability as a tolerable bail risk [is] not [a] special circumstance.”) (citations omitted); *In re Martinov*, No. 06mj336, 2006 U.S. Dist. LEXIS 87389, at *2 (N.D. Iowa Dec. 1, 2006); *In re Santos*, 473 F. Supp. 2d 1030, 1035–36 (C.D. Cal. 2006); *In re Harrison*, No. 03 CR. MISC. 01, 2004 WL 1145831, at *9 (S.D.N.Y. May 21, 2004); *In re Sacirbegovic*, 280 F. Supp. 2d 81, 88 (S.D.N.Y. 2003); *Molnar*, 182 F. Supp. 2d at 687;

Indeed, every fugitive has fled the jurisdiction seeking his return and therefore may arguably be viewed as a flight risk by definition.⁷⁶ The two courts that have considered flight risk as an independent special circumstance, despite this overwhelming authority, were incorrect.⁷⁷

Borodin v. Ashcroft, 136 F. Supp. 2d 125, 130 (E.D.N.Y. 2001); Hababou v. Albright, 82 F. Supp. 2d 347, 352 (D.N.J. 2000); *In re Gonzalez*, 52 F. Supp. 2d 725, 735 (W.D. La. 1999); Duran v. United States, 36 F. Supp. 2d 622, 628 (S.D.N.Y. 1999); United States v. Bogue, No. CRIM.A. 98-572-M, 1998 WL 966070, at *4 (E.D. Pa. Oct. 13, 1998); *In re Ernst*, No. 97 CRIM.MISC.1PG.22, 1998 WL 51130, at *13 (S.D.N.Y. Feb. 5, 1998); *In re Rovelli*, 977 F. Supp. 566, 568 (D. Conn. 1997); *In re Mainero*, 950 F. Supp. 290, 295 (S.D. Cal. 1996); Duca v. United States, No. 95-713, 1995 WL 428636, at *16 (E.D.N.Y. July 7, 1995); *In re Rouvier*, 839 F. Supp. 537, 539 (N.D. Ill. 1993); United States v. Smyth, 795 F. Supp. 973, 976 (N.D. Cal. 1992); United States v. Hills, 765 F. Supp. 381, 386 (E.D. Mich. 1991); United States v. Taitz, 130 F.R.D. 442, 445 (S.D. Cal. 1990); *cf.* Salerno v. United States, 878 F.2d 317, 318 (9th Cir. 1989) (“[Flight risk] is not the requirement for release in an extradition case.”).

76. See, e.g., United States v. Shakur, 817 F.2d 189, 199 (2d Cir. 1987) (stating history of flight must be given careful consideration, particularly where it was to avoid the same pending charges); *In re Heilbronn*, 773 F. Supp. 1576, 1582 (W.D. Mich. 1991) (“[Extraditee had] previously jumped bail in the requesting country . . . [and thus] is customarily not afforded a second chance to violate the trust of the court [T]he fact that respondent willfully disregarded his Israel court obligations . . . establishes that he is flight-prone.”); Spatola v. United States, 741 F. Supp. 362, 366 n.14 (S.D.N.Y. 1990) (finding fugitive was a flight risk based on facts that he had “entered this country illegally” and “is a fugitive from Italy in connection with [crimes] of which he had been tried, convicted, and sentenced”), *aff’d*, 925 F.2d 615 (2d Cir. 1991).

77. In *Parretti v. United States*, 122 F.3d 758 (9th Cir. 1997), *decision withdrawn and appeal dismissed on other grounds*, 143 F.3d 508 (9th Cir.) (en banc), the Ninth Circuit held that detention pending an extradition hearing without some indicia of flight risk violates the Due Process Clause. Because the court later ruled en banc and dismissed the appeal, that panel decision has no value as precedent. *In re Kim*, No. CV 04-3886-ABC (PLA), 2004 U.S. Dist. LEXIS 12244, at *3 n.1 (C.D. Cal. July 1, 2004) (holding that *Parretti* “is not the law in th[e] [Ninth] Circuit”). Furthermore, no court in the ten years since *Parretti* has followed the panel’s decision on bail. Only four additional cases have cited the panel decision. Two cases addressed the Fourth Amendment probable-cause issue (not bail) and distinguished the panel decision. *Manta v. Chertoff*, NO. 06-CV-1568WWMC, 2007 WL 951298, at *4–5 (S.D. Cal. Mar. 12, 2007); *In re Orellana*, NO. 99CR.MISC.1 PG12KNF, 2000 WL 1036074, at *7–8 (S.D.N.Y. July 26, 2000). The two other cases citing the panel decision were decided before the en banc decision and dismissal. *In re Campillo Valles*, 36 F. Supp. 2d 1228, 1231 (S.D. Cal. 1998); *In re Powell*, 4 F. Supp. 2d 945 (S.D. Cal. 1998). Thus, to the extent that those cases are cited for the principle that later courts have relied on or followed the panel’s decision, they are irrelevant.

The second case recognizing flight risk as a special circumstance is *In re Chapman*, 459 F. Supp. 2d 1024, 1027 (D. Haw. 2006). The court held that “[w]hile this Court recognizes lack of flight risk as the initial threshold Respondents must cross, it is such a prominent aspect of this case that it rises to the level of a special circumstance in and of itself.” The case fails under its own statement, as the court even recognized, but then disregarded, that the flight risk analysis is independent from the special circumstances test.

A second commonly raised circumstance is delay or the length of detention. An actual delay of less than a year has constituted a special circumstance warranting bail in some courts,⁷⁸ and in others it has not.⁷⁹ A delay of more than a year has been a special circumstance,⁸⁰ while other courts have denied bail despite such a lengthy delay.⁸¹ Delay must be unusual⁸² and extraordinary, and that threshold has been much longer than one year for some courts.⁸³ If the length of the delay is unknown or projected, some courts have found no special circumstance warranting bail,⁸⁴ while others have.⁸⁵ Such inconsistency is typical of the special circumstances doctrine and suggests that length of delay is a hollow claim — frequently raised by fugitives and courts but not driving most of the decisions.⁸⁶

Other common “special” circumstances can be similarly rejected as simply incorrect or as inconsistently administered. In no particular order, they are: health-related claims,⁸⁷ bail rules of

78. *E.g.*, *In re Santos*, 473 F. Supp. 2d 1030 (C.D. Cal. 2006) (seven month delay plus probable future delay); *In re Morales*, 906 F. Supp. 1368 (S.D. Cal. 1995) (six month delay); *Beaulieu v. Hartigan*, 430 F. Supp. 915 (D. Mass. 1977), *vacated*, 554 F.2d 1 (1st Cir. 1977) (two month delay); *In re Gannon*, 27 F.2d 362 (E.D. Pa. 1928) (two month delay).

79. *E.g.*, *In re Heilbronn*, 773 F. Supp. 1576 (W.D. Mich. 1991) (five month delay).

80. *E.g.*, *In re Kirby*, 106 F.3d 855, 863 (9th Cir. 1996) (between two and three and a half year delay for different defendants); *Taitz*, 130 F.R.D. at 445–46 (projected delay of two years).

81. *E.g.*, *Hababou v. Albright*, 82 F. Supp. 2d 347 (D.N.J. 2000) (delay of over one year for the trial of domestic charges).

82. *Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989) (“unusual delay in the appeal process” listed as a special circumstance).

83. *E.g.*, *In re McMullen*, 989 F.2d 603, 614 n.1 (2d Cir. 1993) (en banc) (Altimari, J., concurring in part and dissenting in part) (over six years without bail); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986) (five years without bail).

84. *E.g.*, *United States v. Kin-Hong*, 83 F.3d 523, 525 (1st Cir. 1996) (holding any likelihood of delay and protracted proceedings because the litigation is complex is speculative and not a special circumstance); *United States v. Bogue*, No. CRIM.A. 98-572-M, 1998 WL 966070, at *4 (E.D. Pa. Oct. 13, 1998); *United States v. Glantz*, No. 94 CRIM. MISC. # 1, 1994 WL 168019, at *3 (S.D.N.Y. Apr. 29, 1994); *In re Klein*, 46 F.2d 85 (S.D.N.Y. 1930).

85. *E.g.*, *In re Chapman*, 459 F. Supp. 2d 1024, 1027 (D. Haw. 2006) (finding high probability of delay in the proceedings is a special circumstance); *In re Molnar*, 182 F. Supp. 2d 684 (N.D. Ill. 2002) (granting bail with possible delay as one of many special circumstances).

86. Courts generally agree that delay caused by the government may be a special circumstance. See discussion *infra* Part IV.A.2 for an in-depth analysis of this issue.

87. Although health-related claims are frequently advanced, few courts, including the Supreme Court in *Wright v. Henkel*, have accepted them as sufficiently “special.” *Wright v. Henkel*, 190 U.S. 40, 43 (1903). See also *In re Kim*, No. CV 04-3886-ABC (PLA), 2004 U.S. Dist. LEXIS 12244, at *10–18 (C.D. Cal. July 1, 2004); *Glantz*, 1994 WL 168019, at *2; *In re Rouvier*, 839 F. Supp. 537, 541 n.9 (N.D. Ill. 1993); *In re Nacif-Borge*, 829 F.

the requesting state,⁸⁸ the need to participate in litigation,⁸⁹ the complexity of the litigation,⁹⁰ the fugitive's character,⁹¹ and proba-

Supp. 1210, 1216-17 (D. Nev. 1993) (citing *United States v. Kidder*, 869 F.2d 1328, 1330-31 (9th Cir. 1989)); *In re Hamilton-Byrne*, 831 F. Supp. 287, 290 (S.D.N.Y. 1992); *In re Klein*, 46 F.2d 85 (S.D.N.Y. 1930). In light of the advanced medical facilities available in U.S. detention centers, these results make sense. Moreover, if there were no possibility of bail, as this Note argues, the government should be able to accommodate a fugitive's need for care with modern technology.

In *United States v. Taitz*, 130 F.R.D. 442, 446 (S.D. Cal. 1990), the court recognized a special circumstance where the defendant had allergic reactions to sweeteners used often at the jail and to soap used for the laundry. If bail were not available at all, however, the jail likely could have worked around the fugitive's allergies. Additionally, although the Ninth Circuit stated that "a serious deterioration of health while incarcerated" may constitute a special circumstance, *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989), such deterioration would probably take some time to occur. A writ of habeas corpus would be available for release after a fairly short time period. See *infra* Part IV.A.

88. The requesting country's bail practices have nothing to do with the United States' mandatory treaty and statutory obligations to deliver fugitives to that country. As one district court explained, if the availability of bail in the foreign country was a "special circumstance" justifying bail in the United States:

[C]ourts [would be forced] to make searching reviews of foreign law to determine whether bail is appropriate for a given defendant in a given country for a given offense That would be an undesirable practice: it might well be unworkable, and, if applied widely, it could eviscerate, at least with respect to requesting countries whose domestic practice, like our own, strongly favors bail, the doctrine set out by the Supreme Court that bail is the exception, not the rule, in international extradition cases Finally, we note that an extradition treaty between sovereign nations is essentially a contract, and the concern in an international extradition case is not to mirror the internal bail practices of the requesting country, but, rather, to deliver the extraditee to that country if the conditions precedent to extradition, as set forth in the treaty, are satisfied. To say that the extraditee would have been granted bail in the requesting country, had he been arrested there, or that he will be granted bail once returned there, thus misses the point.

In re Siegmund, 887 F. Supp. 1383, 1386-87 (D. Nev. 1995). This argument should be dispositive.

Predictably, however, not all courts agree and the circumstance is inconsistently applied. Some district courts have recognized availability of bail in the requesting country as "special." *E.g.*, *In re Morales*, 906 F. Supp. 1368, 1375-77 (S.D. Cal. 1995); *Nacif-Borge*, 829 F. Supp. at 1220-21; *Taitz*, 130 F.R.D. at 447; *In re Gannon*, 27 F.2d 362 (E.D. Pa. 1928). However, the more recent trend is to follow *Siegmund*. 887 F. Supp. at 1386-87 (rejecting *Nacif-Borge*). See, *e.g.*, *In re Martinov*, No. 06mj336, 2006 U.S. Dist. LEXIS 87389, at *3 (N.D. Iowa Dec. 1, 2006); *Kim*, 2004 U.S. Dist. LEXIS 12244, at *6-9; *In re Orozco*, 268 F. Supp. 2d 1115, 1117 (D. Ariz. 2003); *In re Sacirbegovic*, 280 F. Supp. 2d 81, 86-87 (S.D.N.Y. 2003), *on reconsideration at*, 2004 WL 1490219 (S.D.N.Y. July 2, 2004); *In re Sutton*, 898 F. Supp. 691, 695 (E.D. Mo. 1995); *Rouvier*, 839 F. Supp. at 540.

89. Technology has all but obliterated participation in litigation as a possible special circumstance. Courts have rejected the claim that the fugitive must be released in order to assist counsel in the preparation of a defense to extradition. See, *e.g.*, *In re Smyth*, 976 F.2d 1535, 1536 (9th Cir. 1992); *Matter of Extradition of Russell*, 805 F.2d 1215, 1217 (5th Cir. 1986); *In re Rovelli*, 977 F. Supp. 566, 569 (D. Conn. 1997); *Glantz*, 1994 WL 168019, at *2. The same is true of a purported need to participate in another civil suit. *E.g.*, *Rus-*

bility of success against the charge.⁹² What remains, then, is a doctrine wrought with confusion that wastes governmental and

sell, 805 F.2d at 1217; *Kim*, 2004 U.S. Dist. LEXIS 12244, at *18; *Lindstrom v. Gilkey*, No. 98 C 5191, 1999 U.S. Dist. LEXIS 7901, at *39 (N.D. Ill. May 14, 1999); *Koskotas v. Roche*, 740 F. Supp. 904, 918–19 (D. Mass. 1990), *aff'd*, 931 F.2d 169 (1st Cir. 1991); *Rovelli*, 977 F. Supp. at 569; *Glantz*, 1994 WL 168019, at *2. In *In re Mitchell*, 171 F. 289, 290 (S.D.N.Y. 1909), the fugitive was released for a few days to participate in a suit upon which his entire fortune depended. That decision, however, was one hundred years ago and today, a fugitive's virtual participation from jail should be an adequate solution. In *In re Bowey*, 147 F. Supp. 2d 1365 (N.D. Ga. 2001), the court granted bail so the extraditee could participate in divorce proceedings which directly affected the extradition case. It is rare for another suit to bear directly on extradition proceedings. More significantly, technology again could have been used in light of physical release.

90. See, e.g., *United States v. Kin-Hong*, 83 F.3d 523 (1st Cir. 1996); *Kim*, 2004 U.S. Dist. LEXIS 12244, at *18; *Hababou v. Albright*, 82 F. Supp. 2d 347, 352 (D.N.J. 2000); *United States v. Tang Yee-Chun*, 657 F. Supp. 1270, 1271–72 (S.D.N.Y. 1987); *Russell*, 805 F.2d at 1215.

91. Several courts have properly recognized that inquiring into the fugitive's character does not belong under special circumstances. E.g., *Nacif-Borge*, 829 F. Supp. at 1220 (explaining that “the character and background of a person subject to extradition are considered in regard to risk of flight and danger to the community rather than as a special circumstance”); *Sutton*, 898 F. Supp. at 696; *In re Sidali*, 868 F. Supp. 656, 658–59 (D.N.J. 1994).

The case that is almost universally cited by extraditees is *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir. 1981), which affirmed Hu's age and background as special circumstances warranting bail. That decision, however, was incorrect. After being found extraditable by a magistrate judge, Hu petitioned for habeas corpus. *Id.* at 916. The district court denied the extradition, finding no dual criminality because Hu was a juvenile when he committed the crimes and would not have been prosecuted as an adult felon in the U.S. *Id.* The circuit court then reversed, denying his writ, but found no error in the district court's grant of bail. *Id.* at 920. Because bail is statutorily forbidden after a finding of extraditability by a magistrate according to 18 U.S.C. § 3184, this case should not be followed.

92. Any assessment of extraditability is a substantive question that should be decided at the extradition hearing. Every case founded on this circumstance has generated its authority from *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989), which stated that special circumstances include “the raising of substantial claims upon which the appellant has a high probability of success.” This language was dicta. Furthermore, the court incorrectly identified this as a special circumstance in the context of international extraditions. The only relevant citation given was to *Aronson v. May*, 85 S. Ct. 3, 5 (1964). But *Aronson* concerned a domestic criminal case, where likely success on the merits is an established standard for addressing the appropriateness of granting bail. See 18 U.S.C. § 3143(a)(2)(A)(i), (b)(1)(B) (2006); accord. *Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990) (holding in a subsequent domestic case that high probability of success on the merits and extraordinary circumstances are separate requirements for bail pending habeas); *infra* note 149. By contrast, as reiterated throughout this Note, bail in international extraditions differs enormously from other areas of the U.S. criminal justice system, and neither *Wright v. Henkel* nor any other Supreme Court decision has mentioned the probability of success on the merits as a factor that would qualify as a special circumstance.

Several courts have correctly recognized the weakness of the holding in *Salerno*. One magistrate judge summarized the position as follows:

judicial resources in holding the bail hearings. Rather than continue to lead judges down this path of incorrect and confused circumstances, the current doctrine should be abandoned. Instead, judges should follow the straightforward, superior solution presented in Part IV.

C. PAST COMMENTATORS

There has been very little scholarly attention paid to the issue of bail in foreign extradition cases. One recent article set out only to summarize the current state of the law.⁹³ Commentators seeking to engage the doctrine in a more substantive review have asserted common themes. Two student notes and an article from the 1980s argue that the standard for bail in extradition should be analogous to the domestic standard. That is, the bail inquiry

[T]he court is not persuaded that strong likelihood of success is a special circumstance Aside from its possible impact on the risk of flight inquiry, there is no reason why likelihood of success should be taken into account at the detention stage of an extradition case. The fact that a person has a potentially winning defense to extradition does not make confinement any more of a hardship than it is for any other detainee. At most, it increases the probability that, at the end of the process, the accused will have prevailed, making his or her confinement that much more regrettable than it would otherwise have been. But that by no means suggests that the detention would have been in vain

In re Lui, 913 F. Supp. 50, 55 (D. Mass. 1996), *habeas corpus granted*, *Kin-Hong v. United States*, 926 F. Supp. 1180 (D. Mass. 1996), *rev'd*, 83 F.3d 523 (1st Cir. 1996); *see also Sacirbegovic*, 280 F. Supp. 2d at 88; *In re Sidali*, 868 F. Supp. 656, 658–59 (D.N.J. 1994); *Rovelli*, 977 F. Supp. at 569 n.1. The bail hearing is not the proper forum for deciding the merits of a case, and often the government does not even have all of its required documentation. Fugitives should not be allowed to turn the bail hearing into anything more by claiming probability of success on the merits as a special circumstance. In dubious cases, the proper course should be to follow *Morales*. There, faced with this claim from the fugitive, the magistrate judge wisely decided that “it would make more sense to simply move up the date of the extradition hearing rather than to hold protracted bail hearings on a dispositive issue.” *Morales*, 906 F. Supp. at 1370.

Despite these arguments, several courts have been convinced to follow *Salerno* and to find probability of success to be a special circumstance. In most cases, however, it is acknowledged as a possible special circumstance but then rejected in the given case. *E.g.*, *Kin-Hong*, 83 F.3d at 524–25; *Salerno*, 878 F.2d at 317; *In re Mironescu*, 296 F. Supp. 2d 632, 634–635 (M.D.N.C. 2003); *In re Mainero*, 950 F. Supp. 290, 294–95 (S.D. Cal. 1996); *Nacif-Borge*, 829 F. Supp. at 1216; *Rowier*, 839 F. Supp. at 542. A few district court cases have acknowledged probability of success as a valid special circumstance and gone on to find that it has been met. *E.g.*, *In re Santos*, 473 F. Supp. 2d 1030, 1038 (C.D. Cal. 2006); *In re Bowey*, 147 F. Supp. 2d 1365, 1368 (N.D. Ga. 2001). These cases were wrong for several reasons, even beyond those given above, and should not be followed.

93. Roberto Iraola, *The Federal Common Law of Bail in International Extradition Proceedings*, 17 IND. INT'L & COMP. L. REV. 29 (2007).

should focus on flight risk and danger to the community.⁹⁴ The burden of proof, however, should lie with the fugitive, and the presumption against bail should strengthen as the proceedings move closer to extradition.⁹⁵ The authors maintain that this standard properly balances national interests with individual liberty. In other words, a proper flight risk analysis adequately accounts for the national interest in treaty enforcement.

The only other commentary comes from another student note.⁹⁶ It focuses on systematically organizing the conflicting theories and legal authority surrounding bail pending extradition. The author makes some suggestions at the end, however, that are stricter than those proposed by others. He argues for combining the flight risk analysis with the special circumstances doctrine — that is, circumstances should only be considered special if they bear on flight risk, and the strong presumption against bail should survive. Like others, he suggests placing the burden on the fugitive and a tightening standard as the proceedings progress.⁹⁷

Thus, prior commentators have all advocated continuing to allow release on bail pending extradition. They seek either to make bail more readily available to fugitives or to clarify the status quo.

III. THE CASE AGAINST BAIL PENDING EXTRADITION

Rather than loosening the current standard, this Part makes the case for eliminating the right to bail pending extradition. Section A outlines the dearth of authority from the political branches, the negative authority that does exist, and the reasons to be concerned about allowing bail. Section B shows how current rationales for allowing bail conflict with proper conceptions of extradition judges and Article III judicial power. Section C then

94. Hall, *supra* note 25; John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1447–49 (1988); Carl A. Valenstein, Note, *The Right to Bail in United States Extradition Proceedings*, 1983 MICH. Y.B. INT'L LEG. STUD. 107 (1983). Hall, however, states that the standard for an acceptable flight risk would be lower than in domestic cases. Hall, *supra* note 25, at 615.

95. Hall, *supra* note 25, at 613, 616–18; Valenstein, *supra* note 94, at 115.

96. Nathaniel A. Persily, Note, *International Extradition and the Right to Bail*, 34 STAN. J. INT'L L. 407 (1998).

97. *Id.* at 437.

rebut the argument that bail is now mandated by precedent and history.

A. CONGRESSIONAL AND EXECUTIVE CONSIDERATIONS

1. *Positive Law*

Extradition, like deportation,⁹⁸ is an area where congressional and executive authority is of the highest importance.⁹⁹ The Justice and State Departments, for example, have consistently taken the position that they lack the power to extradite absent a treaty or statute.¹⁰⁰ Positive law, however, is silent on bail pending extradition. There is no statutory authority directly on point. The extradition statute makes no mention of bail¹⁰¹ and the Bail Reform Act of 1984¹⁰² does not apply in extradition proceedings.¹⁰³ Indeed, the sole statutory mandate is, upon a finding of extraditability, that the U.S. surrender the fugitive.¹⁰⁴

Similarly, extradition treaties do not authorize bail for fugitives. Not one of the government's extradition treaties with over one hundred countries grants a right to bail.¹⁰⁵ Rather, if bail is mentioned at all, it is explicitly forbidden.¹⁰⁶ And like the extradi-

98. See *Mapp v. Reno*, 241 F.3d 221, 227 (2d Cir. 2001) (“There can be no doubt that, with respect to immigration and deportation, federal judicial power is singularly constrained.”). The court continued, quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), “[t]his Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” *Id.*

99. Many courts, including the Supreme Court, have often conflated extradition and immigration or drawn analogies from immigration in making extradition law. See Parry, *supra* note 6, at 98–99 (citing cases).

100. Parry, *supra* note 6, at 116–18.

101. 18 U.S.C. § 3184 (2006).

102. 18 U.S.C. §§ 3141–3150, 3062 (2006).

103. *E.g.*, *In re Sutton*, 898 F. Supp. 691, 694 (E.D. Mo. 1995); *In re Rouvier*, 839 F. Supp. 537, 539 (N.D. Ill. 1993) (citing *Kamrin v. United States*, 725 F.2d 1225 (9th Cir. 1984)); *In re Nacif-Borge*, 829 F. Supp. 1210, 1213 (D. Nev. 1993); *United States v. Hills*, 765 F. Supp. 381, 385 n.5 (E.D. Mich. 1991).

104. The statute says that, after finding a fugitive extraditable, the government “shall issue [a] warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.” 18 U.S.C. § 3184 (2006).

105. For a list of U.S. extradition treaties, see 18 U.S.C.A. § 3181 (West 2008); U.S. Dept. of State, *Treaties in Force 2007*, <http://www.state.gov/s/l/treaty/treaties/2007/index.htm> (last visited Mar. 8, 2008).

106. *E.g.*, *United States Extradition Treaty With Costa Rica*, U.S.-Costa Rica, art. 12, Dec. 16, 1982, S. Treaty Doc. No. 98-17 (“A person detained pursuant to the Treaty shall not be released until the extradition request has been finally decided, unless such release

tion statute, all treaties contractually obligate the U.S. to deliver the fugitive once he is found to be extraditable.¹⁰⁷ Extradition treaties and statutes are binding on the government and on American courts,¹⁰⁸ and their message is either silent or against granting bail.

Some courts have suggested the power to grant bail is subsumed under the more general power, authorized by 18 U.S.C. § 3184 and local rules, to conduct extradition proceedings. In *In re Siegmund*,¹⁰⁹ for example, the district court stated that “[s]ection 3184 does not mention bail, but the power to make bail determinations is within the magistrate’s more general power to conduct proceedings in extradition matters, as the Bail Reform Act does not apply . . . and the question of bail in extradition is governed instead by voluminous precedent.”¹¹⁰ This position is incorrect. Local rules granting magistrates the power to hear extradition proceedings do so in accordance with the extradition statute. For example, one district’s typical rules grant magistrates the power to “[c]onduct extradition proceedings, in accordance with 18 U.S.C. §3184.”¹¹¹ The “proceedings” mandated by that statute do not include bail. Instead, the statute only outlines the proceedings for determining extraditability. Bail falls outside that scope. As the Ninth Circuit found, “a district judge who grants bail is not acting pursuant to Section 3184.”¹¹²

is required under the extradition law of the Requested State or unless this Treaty provides for such release.”).

107. *E.g.*, United States Extradition Treaty With Australia, U.S.-Austl., art. 1, May 14, 1976, 27 U.S.T. 957 (“Each Contracting Party agrees . . . reciprocally to deliver up persons”); United States Extradition Treaty With Canada, U.S.-Can., art. 2, ¶ 1, Dec. 3, 1971, 27 U.S.T. 983; United States Extradition Treaty With Mexico, U.S.-Mex., art. 1, ¶ 1, May 4, 1978, 31 U.S.T. 5059.

108. *See, e.g.*, *Wright v. Henkel*, 190 U.S. 40, 62 (1903) (“The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender. . . .”); *In re Siegmund*, 887 F. Supp. 1383, 1387 (D. Nev. 1995) (“[W]e note that an extradition treaty between sovereign nations is essentially a contract, and the concern in an international extradition case is . . . to deliver the extraditee to that country if the conditions precedent to extradition, as set forth in the treaty, are satisfied.”).

109. 887 F. Supp. 1383 (D. Nev. 1995).

110. *Id.* at 1384.

111. C.D. CAL. CRIM. R. 57.4(a)(3) (2007). Another example is the Southern District of New York, whose rules state that “[m]agistrate judges are hereby authorized to exercise the jurisdiction set forth in 18 U.S.C. § 3184.” S.D.N.Y. LOCAL CRIM. R. 58.1(b) (2007).

112. *In re Kirby*, 106 F.3d 855, 864 n.11 (9th Cir. 1997).

Further, the prevailing view is that jurisdictional grants do not authorize federal common law making.¹¹³ Section 3184 is a statute conferring jurisdiction over extradition matters.¹¹⁴ The body of law governing bail pending extradition is judge-made and viewed as federal common law.¹¹⁵ If jurisdictional grants do not authorize federal common law making, then section 3184 cannot be seen as the basis for a federal common law right to bail.¹¹⁶

2. *Legislative and Congressional History*

The legislative history and proposed amendments of the extradition statute further supports the idea that Congress has not acknowledged any right to bail. The extradition statute currently in place has not changed significantly since it was originally drafted in 1848.¹¹⁷ During the original floor debates, senators and representatives never addressed the idea of bail, perhaps because they did not even consider the possibility. Instead, their statements only imply an idea of continued detention.

The drafters made it clear that the statute was only meant to give effect to extradition treaties. In the Senate, the bill was presented “to carry into effect certain treaty stipulations between the United States and foreign governments.”¹¹⁸ Responding to objections and an amendment adding a jury trial, Senator William Dayton of New Jersey said that “[i]f anything of this kind is desired, the treaty ought to be amended. We are bound to carry out the treaties as they stand.”¹¹⁹ Senator George Badger of North

113. See, e.g., RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 741–42 (5th ed. 2003) (discussing the Taft Hartley Act as a possible exception to this idea).

114. E.g., *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir. 1986) (referring to 18 U.S.C. § 3184 as the jurisdictional statute); *Polo v. Horgan*, 828 F. Supp. 961, 965 (S.D. Fla. 1993) (same).

115. See *Iraola*, *supra* note 93.

116. This point is narrower than the broader idea that federal common law making may be more legitimate in foreign affairs or international law. See FALLON ET AL., *supra* note 113, at 696–97, 750–52; Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025 (1967). It only responds to the argument that section 3184 confers the authority to grant bail by pointing out that the statute is a jurisdictional grant. It does not engage the question of whether federal common law making would be legitimate under a foreign affairs rationale separately.

117. *Compare Act of Aug. 12, 1848*, ch. 167, 9 Stat. 302 § 1, with 18 U.S.C. § 3184 (1996). See also BASSIOUNI, *supra* note 23, at 77.

118. CONG. GLOBE, 30th Cong., 1st Sess. 1008 (1848).

119. *Id.*

Carolina added that “[h]is anger should have been directed against the treaty, not against the law which was necessary to carry it into operation.”¹²⁰ In the House, the same story was repeated. Representative Joseph Ingersoll of Pennsylvania introduced “a bill for giving full effect to treaties of extradition.”¹²¹ He reiterated that “it was necessary to enlarge the facilities to comply with [the government’s treaty] obligations.” Thus, the clear original intent was simply to give effect to the government’s treaties. None of those treaties mentions bail or grants any right to it. Today, some even deny it.¹²² And both houses consistently addressed the need to effectuate the treaty requirement of delivering up the fugitive¹²³ — a requirement that is threatened by release on bail.

In the early 1980s, in a highly welcomed move, Congress again revisited the extradition statutes.¹²⁴ Both drafts of the bill addressed bail, though in different ways. The 1981 Act discussed in the Senate basically codified the existing case law. The “special circumstances” test for bail would remain.¹²⁵ The House bill discussed two years later sought, more liberally, to make the bail determination largely akin to the domestic test, focusing on flight risk and danger to the community.¹²⁶ Significantly, both bills accepted, in different degrees, a possible right to bail for fugitives.

Despite the overwhelming support for a revision of the statutes, neither bill was enacted. Thus, it would be a stretch to attempt to glean any persuasive authority from the hearings and proposals of Congress. Congress may not act for a number of reasons, including procedural hurdles or political impasses.¹²⁷ As a result, discussions during a failure to pass major overhaul of extradition law do not readily imply congressional approval of one small part of that law — the current bail doctrine. Moreover, the

120. *Id.*

121. CONG. GLOBE, 30th Cong., 1st Sess. 868 (1848).

122. *See supra* note 106.

123. For example, Representative Ingersoll stated that “by treaty stipulations . . . , we were bound to deliver up fugitives who have fled from justice on the commission of a crime.” CONG. GLOBE, 30th Cong., 1st Sess. 868 (1848).

124. *See generally* 1981 Hearings, *supra* note 71; 1983 Hearings, *supra* note 21.

125. Persily, *supra* note 96, at 436.

126. *Id.*

127. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 47–82, 1061–63 (4th ed. 2007).

congressional acceptance of bail appears to have been built on acquiescence to the current judicially-created situation. The hearings took for granted the judicial authority to give bail — precisely what this Note contests.

3. *Foreign Policy*

Since the doctrine's foundation, foreign policy considerations have weighed heavily on the question of bail and extradition law. The U.S. is required to deliver fugitives found to be extraditable,¹²⁸ and there is no legislation authorizing bail pending that determination.¹²⁹ This surrender obligation has significant overtones for foreign policy. In *Wright v. Henkel*, the Court explained:

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfil [sic] if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.¹³⁰

Not too long after *Wright*, the Southern District of New York echoed this argument. In *In re Klein*, the court noted the “grave risk of frustrating the efforts of the executive branch of the government to fulfill treaty obligations.”¹³¹ Since then, courts have consistently cited potential embarrassment to the U.S. government as a basis for a strong presumption against bail.¹³²

128. 18 U.S.C. § 3184 (2006).

129. *See supra* Part III.A.1.

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

131. 46 F.2d 85 (S.D.N.Y. 1930).

132. *E.g.*, *In re Sacirbegovic*, No. 03 CRIM.MISC.01 P.19, 2004 WL 1490219, at *2 (S.D.N.Y. July 2, 2004); *In re Harrison*, No. 03 CRIM.MISC.01, 2004 WL 1145831, at *9 (S.D.N.Y. May 21, 2004); *In re Sacirbegovic*, 280 F. Supp. 2d 81, 83 (S.D.N.Y. 2003); *In re Orozco*, 268 F. Supp. 2d 1115, 1116 (D. Ariz. 2003); *In re Molnar*, 182 F. Supp. 2d 684, 687

Due to these foreign policy concerns, the current doctrine creates a presumption contrary to the presumption operating in domestic prosecutions, where pre-trial bail is the favored course. As the First Circuit put it, “[u]nlike the situation for domestic crimes, there is no presumption favoring bail. The reverse is rather the case.”¹³³ If a domestically-charged person is released and flees before trial, he thwarts the court’s ability to enforce U.S. criminal laws. That potential harm is balanced against his presumption of innocence. In an extradition case, however, the fugitive is wanted by the government of a foreign country for prosecution. Consequently, there is significantly greater potential harm if he flees before his extradition hearing can be held. The fugitive’s flight would defeat the foreign country’s ability to enforce its laws, subject the United States to embarrassment, and damage its foreign policy interests by rendering the U.S. unable to meet its treaty obligations.

Even the original drafters of the extradition statute were concerned with foreign policy and perceptions of the U.S. government abroad. Senator William King of Alabama warned that “we ought not to expect foreign governments to lend us facilities, if we do not show a disposition to reciprocate.”¹³⁴ And in his speech supporting the bill, Representative Ingersoll testified that “[the Secretary of State] had had a correspondence with the chargé of the British Government on the subject, and he desired [the bill] to pass; and by Canada and France the passage of this bill would be looked upon as a great act of propriety.”¹³⁵

The war on terror has only increased the significance of this argument. For example, some statutes now allow executive detention without impartially adjudicated probable cause. In England, the Prevention of Terrorism Act of 2005 does just that.¹³⁶

(N.D. Ill. 2002); *In re Bowey*, 147 F. Supp. 2d 1365, 1367–68 (N.D. Ga. 2001); *Hababou v. Albright*, 82 F. Supp. 2d 347, 352 (D.N.J. 2000); *In re Ernst*, No. 97 CRIM.MISC.1PG.22, 1998 WL 51130, at *13 (S.D.N.Y. Feb. 5, 1998); *In re Mainero*, 950 F. Supp. 290, 294 (S.D. Cal. 1996); *In re Sutton*, 898 F. Supp. 691, 694 (E.D. Mont. 1995); *United States v. Hills*, 765 F. Supp. 381, 385 (E.D. Mich. 1991); *In re Heilbronn*, 773 F. Supp. 1576, 1578 (W.D. Mich. 1991); *United States v. Taitz*, 130 F.R.D. 442, 444 (S.D. Cal. 1990).

133. *Beaulieu v. Hartigan*, 554 F.2d 1, 2 (1st Cir. 1977).

134. CONG. GLOBE, 30th Cong., 1st Sess. 1008 (1848).

135. CONG. GLOBE, 30th Cong., 1st Sess. 868 (1848).

136. Prevention of Terrorism Act, 2005, c. 2 § 5 (Eng.).

The same is true in the United States.¹³⁷ The greater concern for flight of fugitives and the increased use of preventative detention adds weight to the argument against allowing bail.

Any theory of release pending extradition must account for such foreign policy considerations. Although extradition courts considering bail have certainly not treated embarrassment and reciprocity concerns as dispositive, the concerns clearly counsel strongly in favor of pre-hearing detention.

B. JUDICIAL AUTHORITY, JUDICIAL POWER, AND ARTICLE III

This Section discusses bail in the context of judicial power and Article III. Part 1 analyzes *Wright* more closely, showing that the decision does not affirmatively grant a right to bail. Although courts following *Wright* interpreted the decision as granting judges the power to admit fugitives to bail pending extradition, Part 2 presents two arguments for why that must be incorrect under Article III and Supreme Court precedent.

1. *Wright v. Henkel and its Foundational Dicta*

Every discussion of bail pending extradition begins with *Wright v. Henkel*.¹³⁸ Commentators and courts, however, do not generally analyze the case. Rather, they quote its famous sentence as granting a right to bail and as the basis for the “special circumstances” doctrine. Before delving deeper into the substantive issues raised by *Wright* and its progeny — issues about Article III and inherent powers — this Section looks more closely at *Wright* itself.

The case was not commonplace procedurally. The circuit court commissioner in the Southern District of New York denied bail to Mr. Wright.¹³⁹ He then challenged detention before a circuit court judge under several theories.¹⁴⁰ The writs were dismissed, and the case was appealed to the Supreme Court on a writ of habeas corpus. Wright first challenged jurisdiction, claiming no extraditable offense was charged. He also alleged that he should have

137. *E.g.*, 10 U.S.C. § 949u (2006).

138. 190 U.S. 40 (1903).

139. *Id.*; *In re Wright*, 123 F. 463 (C.C.S.D.N.Y. 1903).

140. *Wright*, 190 U.S. at 43.

been admitted to bail.¹⁴¹ Although, as the Court noted, “the writ of habeas corpus cannot perform the office of a writ of error . . . [,]” in extradition law, habeas is the accepted form of appeal on the merits of extraditability.¹⁴² Normally, such a petition is reserved until after an initial finding of extraditability. However, because Wright presented a merits challenge to extraditability based in law, which did not depend on any evidence, the Court in *Wright* could hear the habeas petition on the merits before the initial hearing. It held that the complaint and warrant alleged extraditable offenses.¹⁴³

Bail was an ancillary issue, addressed in dicta.¹⁴⁴ The Court first canvassed many of the arguments against bail, noting that that there was no statutory right to bail,¹⁴⁵ that the domestic criminal statute did not apply,¹⁴⁶ and that treaty obligations counseled against release.¹⁴⁷ But the court was unwilling to foreclose the possibility of bail for fugitives. Instead, it stated:

We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called up to do so . . .

¹⁴⁸

141. *Id.* at 57.

142. *Id.*; see also *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); BRADLEY & GOLDSMITH, *supra* note 34, at 642.

143. *Wright*, 190 U.S. at 61.

144. Many courts and commentators have classified this section of the *Wright* opinion as dicta. See, e.g., *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955); *United States ex rel. Carapa v. Curran*, 297 F. 946, 953 (2d Cir. 1924); *Bongiovanni v. Ward*, 50 F. Supp. 3, 4 (D. Mass. 1943). Given the case’s procedural posture, this conclusion makes perfect sense. The Court heard a pre-hearing appeal on jurisdiction. This was one of the few subjects open to review on habeas in extradition. In *Fernandez*, the Court held that “habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.” *Fernandez*, 268 U.S. at 312. Bail was discussed after the jurisdictional ruling.

145. *Wright*, 190 U.S. at 62; see also *infra* Part III.A.1.

146. *Id.* at 61–62; see also *infra* Part III.A.1.

147. *Id.* at 62; see also *infra* Part III.A.3.

148. *Id.* at 63.

No right to bail was granted. The statement is negative, not affirmative and does not say that bail can be granted in extradition cases. Rather, the Court only declines to announce a categorical rule that such an award may never be proper.¹⁴⁹ Although it certainly suggests that bail may be possible, this is not a strong affirmative grant that supporters of the right to bail read into the decision.

149. Moreover, from this procedural posture, it is plausible that the Court was simply saying that in cases of foreign extradition, pending habeas review, the Court is unwilling to hold that bail is unavailable and that the same test for bail pending habeas in other contexts does not apply in extradition. The test for bail pending habeas review is extraordinary, exceptional, or unusual circumstances. *See, e.g.*, *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (citing cases).

The basis for this standard may trace back to prior versions of the Supreme Court Rules, which were in place prior to the decision in *Wright*. Currently, Rule 36 governs custody of prisoners in habeas corpus proceedings. SUP. CT. R. 36. According to Westlaw, Rules 49 and 45 were predecessors to this rule, and indeed, the language quoted in early decisions is quite similar. In *Aronson v. May*, 85 S. Ct. 3 (1964), the defendant was convicted of a domestic mail fraud scheme and sought bail pending a decision from the Court of Appeals on his appeal from a denial of a habeas petition. Citing to Rule 49(4), the Court required “special reasons” before granting bail. That rule read:

The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where *special reasons* therefor are shown to this court will it disturb that order, or make any independent order in that regard.

Id. at 4 (emphasis added). Similarly, in *In re Johnson*, 72 S. Ct. 1028, 1031 (1952), the Court cited to Rule 45(4) as requiring “special reasons.” Rule 45(4) read:

Except as elsewhere provided in this rule, the initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the court of appeals but also the further possible review in this court; and only where *special reasons* therefor are shown to the court of appeals or to this court or to a judge or justice of either court will that order be disturbed, or any independent order made in that regard.

Id. at 1030 (emphasis added). *Aronson* is often cited by courts contemplating release on bail pending habeas for the exceptional or extraordinary circumstances requirement. *See, e.g.*, *Argro v. United States*, 505 F.2d 1374, 1377–78 (2d Cir. 1974); *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974). Because the Supreme Court rules were in place prior to 1903, when *Wright* was decided, it is possible that the Court may have had this same standard in mind when it made the famous statement in dicta. Indeed, by stating that that “the final order ought not to be disturbed” in denying bail, *Wright*’s language is quite similar to the above Supreme Court rules that reference disturbing lower court detention orders. *See also In re Iasigi*, 79 F. 755 (C.C.S.D.N.Y. 1897) (holding, in an extradition case before the 1903 *Wright* decision, that under Supreme Court Rule 34, another supposed predecessor to current Rule 36, the court had no power to admit bail pending the habeas appeal because the appeal only allowed for bail on an appeal from the discharge and not the holding of a prisoner).

If this analysis is correct, then *Wright* only stated again the bail standard pending habeas review. It did not imply any new standard, to be implemented in all extraditions.

In fact, in 1909, counsel for Canada seemed to make this argument to the Southern District of New York. Pending extradition proceedings, the fugitive sought bail in order to participate in a state court trial upon which his entire fortune depended.¹⁵⁰ However, the court disagreed with Canada's reading of *Wright*, finding that:

The application [to bail] is opposed by the Canadian agent with much vigor, who contends that I have not the power to grant bail in such cases. My understanding of *Wright v. Henkel* . . . is that the existence of the power was distinctly affirmed by the Supreme Court I cannot read that opinion without recognizing that the court understood the power to exist.¹⁵¹

Because the Canadian agent contested jurisdiction to admit bail, in spite of the *Wright* decision just six years earlier, the agent probably argued that the bail discussion in *Wright* was dicta and that it did not affirmatively grant a right to bail. This argument did not convince Judge Learned Hand, however, and from that point on, the special circumstances doctrine of *Wright* and its progeny was propelled forward. Since then, courts and commentators have rarely, if ever, looked back at the *Wright* decision to ask what, if anything, the Court really held. Like Canada's counsel in 1909, this Note argues that *Wright* did not grant a right to bail and, as the following section will show, such a grant would be problematic under inherent judicial power and Article III.

2. Extradition and Article III

The constitutional nature of an extradition proceeding is a point of much debate among commentators and courts.¹⁵² The majority view is that extradition judges — either district court judges or magistrates — are not exercising Article III judicial

150. *In re Mitchell*, 171 F. 289 (C.C.S.D.N.Y. 1909).

151. *Id.*

152. For an excellent survey of the history surrounding extradition and the nature of the proceedings since the founding, see Parry, *supra* note 6. See also Persily, *supra* note 96. Taking a position on this subject merits a full article. For the purposes of this Note, however, it is sufficient to outline both sides.

power. This is the view in the Second and Ninth Circuits,¹⁵³ and this position avoids many potential problems with the law.¹⁵⁴ For example, magistrates (and previously commissioners) conduct most extradition proceedings, and there is no direct right to appeal to an Article III court. They are non-Article III officers.¹⁵⁵ Traditionally, though, magistrates are viewed as helping the court, subject to its review.¹⁵⁶ Labeling extradition as an Article III function would conflict with the unsupervised, non-Article III nature of magistrates and commissioners in extradition proceedings.¹⁵⁷ The majority view is not, however, without issues. As described in Part III.B.2.b, there is a possible violation of the separation of powers warning in *Mistretta v. United States* about wearing two hats at the same time.¹⁵⁸ And for judicial officers conducting such hearings, the Appointments Clause of Article II may be implicated.¹⁵⁹

The minority view is that an extradition proceeding falls within the scope of Article III. Some courts have taken this position.¹⁶⁰ Professor Parry's recent survey of the historical foundations of extradition law is a powerful attempt to upset the view that historically courts have always assumed the power to be outside Article III.¹⁶¹ After all, the court is enforcing a right¹⁶² — the government's right to enforce its treaty obligations — and district

153. *Lopez-Smith v. Hood*, 121 F.3d 1322 (9th Cir. 1997); *Lo Duca v. United States*, 93 F.3d 1100 (2d Cir. 1996); *In re Mackin*, 668 F.2d 122 (2d Cir. 1981).

154. *Id.*

155. Parry, *supra* note 6, at 139–41.

156. Under the Magistrate Act, without consent by the parties, magistrates rulings are subject to review in the district court. *See* 28 U.S.C. § 636 (2006).

157. The D.C. Circuit held that habeas review provided sufficient control from an Article III court. *Ward v. Rutherford*, 921 F.2d 286 (D.C. Cir. 1990). But Professor Parry has pointed out why this may still be a concern. Parry, *supra* note 6, at 165–66. The district court cannot, for example, review a grant of bail in all circuits. *See supra* note 30.

158. 488 U.S. 361, 404 (1989).

159. For a rebuttal to this issue, see *Lo Duca v. United States*, 93 F.3d 1100, 1110–11 (2d Cir. 1996).

160. *E.g.*, *DeSilva v. DiLeonardi*, 121 F.3d 1110 (7th Cir. 1997); *LoBue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995) (assuming it is an Article III proceeding and then holding the statute unconstitutional for allowing executive revision of Article III courts). For a powerful rebuttal to the *LoBue* case, see Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020 (1996) (arguing that even if extradition is an Article III proceeding, benign executive revision, which can only favor the fugitive, should be allowed, much like the pardon power).

161. Parry, *supra* note 6.

162. *Cf. Tutun v. United States*, 270 U.S. 568 (1926) (holding that when law gives a court-enforceable remedy or legal right, there arises an Article III case or controversy).

court judges who may hear extradition proceedings, at least, are appointed as Article III judges, not Article I or Article II officers. But the minority view is hard to square with the fact that such decisions have no preclusive effect. If a fugitive is found non-extraditable, the government can re-file the same suit endlessly.¹⁶³ It is hard to see what is left of Article III's case or controversy requirement if some finality is not required.¹⁶⁴ None of the cases or commentators supporting this view seem to have an answer to this concern.

Assuming the majority view of extradition proceedings, the following sections advance two arguments about why allowing bail pending extradition is incorrect. Section (a) argues that because extradition is a non-Article III function, bail cannot be an inherent *judicial* power. Section (b) contends that because bail is an Article III function, an extradition judge violates the Supreme Court's *Mistretta* warning about wearing "two hats at the same time" when considering bail.

a. Inherent Bail Powers

Before *Wright v. Henkel*, courts considering bail pending extradition universally held that they lacked the power to admit bail absent statutory authorization.¹⁶⁵ In *In re Carrier*,¹⁶⁶ a fugitive was sought for extradition to Canada under the 1842 treaty with Great Britain. When the commissioner denied bail, the fugitive filed a writ of habeas corpus in the District Court of Colorado. That court emphatically denied any right to bail. Given the unique nature of extradition proceedings, the court held that all authority must be derived explicitly from statute:

The proceeding stands upon the statute only, and it is believed that no departure can be made from the statute in any substantial matter. It is said that in matters not mentioned in the state the practice should be according to the

163. See *supra* note 42.

164. See, e.g., FALLON, ET AL., *supra* note 113, at 105.

165. This statement should be qualified. Of course, it only refers to reported cases. However, many extradition proceedings do not end up in the reporters, and thus there may have been an unreported earlier case pointing in the other direction. But given the emphatic statements in the few reported cases, this is unlikely.

166. 57 F. 578 (D. Colo. 1893).

course of our law. The matter of admitting to bail is not a question of practice. Since the time of Edward I. it has been regulated by statute; and, in our day, bail is not allowed in any case except in pursuance of some statute.¹⁶⁷

The court continued that to the extent the extradition statute did shed any light on the question, the mandatory commitment and surrender requirements counseled against bail.¹⁶⁸ Because Congress had regulated bail in the Judiciary Act of 1789 and not in the extradition statute, the court held that the subject of bail was not overlooked in 1848, but instead was not allowed.¹⁶⁹

Two other cases reached the same conclusion. The first was a case against refugees from Salvador brought in the federal district court in San Francisco.¹⁷⁰ Although there was not much detail on bail in the case, Professor Moore wrote that “[i]n the course of the proceedings before Judge Morrow, several points were decided which did not find a place in his formal opinions. He refused to admit the prisoners to bail, on the ground that there was no provision for it either in the statutes or in the treaty.”¹⁷¹ The same argument persuaded the lower court in *Wright*. The lower court pointed out that “[a]pplications to admit to bail in such cases have on several occasions (although not recently) been made to the Circuit Court in this district, and have been uniformly denied, although no opinions appear to have been written.”¹⁷² Moreover, the court continued, the circuit courts of the U.S. are creatures of statute and have only the judicial power conferred upon them by statute.¹⁷³ Thus, bail was impermissible.

Then, the Supreme Court issued its opinion in *Wright*. Drawing from its statement about the power to admit bail and “special circumstances,”¹⁷⁴ later courts considered bail in the extradition context to be an inherent power. In *In re Gannon*,¹⁷⁵ for example,

167. *Id.*

168. *Id.*

169. *Id.*

170. John Bassett Moore, *The Case of the Salvadorean Refugees*, 29 AM. L. REV. 1 (1895).

171. *Id.* at 18 n.1.

172. *In re Wright*, 123 F. 463, 464 (C.C.S.D.N.Y. 1903).

173. *Id.* (citing *Bath County v. Amy*, 80 U.S. 244, 247–48 (1871)).

174. *See supra* note 148 and accompanying text.

175. 27 F.2d 362 (E.D. Pa. 1928).

a district court in Pennsylvania thought that it had the power to grant bail pending extradition, despite no statutory authority, as part of the Article III judicial power conferred by the Constitution. The court stated that “[c]ourts cannot function without the use of process, and any tribunal which has judicial powers can enforce attendance by holding the party to bail.”¹⁷⁶ More recently, in *Mapp v. Reno*,¹⁷⁷ the Second Circuit discussed the inherent power of the federal courts to admit bail in cases properly within their jurisdiction.¹⁷⁸ The defendant was detained by the INS and sought bail pending his habeas petition challenging deportation. Acknowledging a split among courts on the issue, the Second Circuit was persuaded that the trend was toward finding bail to be an inherent power.¹⁷⁹ *Mapp* was not an extradition case but stands more broadly for the idea that bail may be an inherent power of the federal courts.

The post-*Wright* view that bail is an inherent power in extradition cases, however, is mistaken. To begin, bail is questionable as an inherent power in any context. In a classic article, Professor Van Alstyne describes what makes a power inherent.¹⁸⁰ The power must be essential to the performance of enumerated duties, not merely helpful or appropriate.¹⁸¹ The power must be “indispensable to enable a court to proceed with a given case.”¹⁸² Otherwise, Congress should decide, either by issuing a rule or by delegating limited authority.¹⁸³ Bail, especially in the extradition context, is certainly not essential to the proceeding. Therefore, under this view, the power is not inherent. Congress must provide the authority, and it has not done so.¹⁸⁴

More importantly, a claim of inherent judicial power assumes the power being exercised in extradition proceedings is judicial. This was explicitly assumed by one district court holding that the

176. *Id.* at 363.

177. 241 F.3d 221, 224–28 (2d Cir. 2001).

178. *Id.*

179. *Id.* at 225–26.

180. William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (1976).

181. *Id.* at 111.

182. *Id.* at 129.

183. *Id.* at 118.

184. *See supra* Part III.A.

power to grant bail pending extradition was inherent. After citing Article III, the court stated that “[c]ourts cannot function without the use of process, and any tribunal which has *judicial powers* can enforce attendance by holding the party to bail.”¹⁸⁵ And when the Second Circuit recently found bail to be an inherent power of federal courts, it was during habeas review, which is an Article III function.¹⁸⁶ But the majority view is that an extradition judge is not exercising Article III judicial power.¹⁸⁷ Therefore, under the majority view, there can be no inherent *judicial* powers imparted to the extradition officer, who operates outside Article III.¹⁸⁸

b. Article III, Hat-Switching, and Extradition Judges

The majority view of extradition proceedings — that it is outside the scope of Article III — presents another problem for allowing fugitives a right to bail. Bail, even in extradition, has been held to be a final order under section 1291 and an Article III judgment in the Ninth Circuit.¹⁸⁹ This forces the doctrine into the conundrum of having a final, Article III adjudication nested inside a non-Article III, non-final proceeding. Such a situation does not make sense. Beyond that, it also implicates the Supreme Court’s warning in *Mistretta* that the Constitution “forbids [judges] to wear both hats at the same time.”¹⁹⁰

In *Lo Duca v. United States*,¹⁹¹ the Second Circuit found that there was no *Mistretta* violation by holding that extradition

185. *In re Gannon*, 27 F.2d 362, 363 (E.D. Pa. 1928) (emphasis added).

186. *Mapp v. Reno*, 241 F.3d 221, 224–25 (2d Cir. 2001) (addressing “whether the *federal courts* have inherent power to grant bail in any case where they may properly assert jurisdiction”) (emphasis added).

187. *See supra* Part III.B. The minority view — that extradition proceedings are within Article III — has been described in Part III.B. For reasons given there, this view seems incorrect and presents significant constitutional problems. Therefore, this section and the following one do not analyze these issues under that view. However, the first two arguments against an inherent power to grant bail, as well as the arguments in the previous section, would all still apply under the minority view.

188. There is nothing inherently judicial about the act of adjudicating. *See Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 908–11 (1991) (Scalia, J., concurring) (distinguishing adjudicating and exercising judicial power); *United States v. Ferreira*, 54 U.S. 40, 48 (1851).

189. *In re Kirby*, 106 F.3d 855, 858–63 (9th Cir. 1997); *see also* Parry, *supra* note 6, at 145 n.280, 169.

190. *Mistretta v. United States*, 488 U.S. 361, 404 (1989).

191. 93 F.3d 1100 (2d Cir. 1996).

judges were acting outside Article III. The court found that neither of the two concerns detailed in *Mistretta* about subverting judicial integrity were implicated. The most relevant concern was that Congress might force federal judges to perform extrajudicial tasks. The Second Circuit held that federal judges are not forced into conducting extradition proceedings by Congress. Section 3184 merely authorizes them to do so.¹⁹² This analysis seems tentative at best. It is hard to imagine that a federal judge would or could refuse to hold an extradition hearing requested by the government, especially given that the government cannot extradite without such a hearing.¹⁹³ Further, the *Lo Duca* court did not address the concern addressed here — sitting in an Article III and non-Article III capacity in the same proceeding. Instead, it only addressed the broader issue of whether extradition proceedings as a whole are a permissible extrajudicial activity pursuant to *Mistretta*'s statement that “the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats.”¹⁹⁴ Allowing a right to bail under Article III powers, as the Ninth Circuit has, seems to conflict directly with the latter half of the statement in *Mistretta* that the Constitution “forbids [judges] to wear both hats at the same time.”¹⁹⁵

In *Kirby*, the Ninth Circuit disagreed. In a somewhat cursory footnote, citing to *Mistretta*, it stated that:

There is no contradiction between saying, on the one hand, that a district judge acting pursuant to Section 3184 *is not* acting as an Article III court, and our holding, on the other hand, that a district judge who grants bail in an extradition case *is* acting as an Article III court, because a district judge who grants bail is not acting pursuant to Section 3184.¹⁹⁶

If this statement is correct, and the *Mistretta* warning does not implicate hearings within the same procedure, it is unclear then what the Supreme Court meant when it warned against wearing two hats “at the same time.” Surely a judge working on a Sen-

192. *Id.* at 1110.

193. *See supra* notes 38–40 and accompanying text.

194. *Mistretta*, 488 U.S. at 404.

195. *Id.*

196. *In re Kirby*, 106 F.3d 855, 864 n.11 (9th Cir. 1997).

tencing Commission is not doing so “at the same time” as she performs her Article III duties. But here, the actions take place within the same proceeding. The majority’s footnote did not convince Judge Noonan in dissent, who concluded that he “decline[d] to enter into the reasoning by which a district judge wearing two hats at once (under Article III and under Article II) may constitutionally function as a federal court.”¹⁹⁷ Whether or not dispositive, the doubt raised by *Mistretta* in this context is another argument weighing against allowing bail in extraditions.

C. THE WEIGHT OF HISTORICAL PRECEDENT

A significant question looming in any discussion of the right to bail in extradition is how much weight should be given to that fact that the practice has gone on as it exists since *Wright v. Henkel*¹⁹⁸ — over one hundred years ago. Certainly, one might argue, the doctrine is imperfect and applied inconsistently at times. The nature of the judge’s power to admit bail even bumps up against or surpasses constitutional barriers. But while the system may appear a patchwork solution, the argument would continue, the *sui generis* nature of extradition law compels such a solution. And, on the whole, the doctrine accomplishes what it needs to accomplish. Most fugitives stay in jail and nearly all are extradited.

This argument is not without force. Indeed, one need not look far to find that the weight of historical practice has long had significance in U.S. law. In *United States v. Midwest Oil*,¹⁹⁹ for example, the Supreme Court held that in deciding the meaning of a statute or the existence of an executive power, weight is given to usage and practice. Other examples abound.²⁰⁰ And it is certainly true that there remains a strong presumption against bail.²⁰¹

Nonetheless, the argument falls short on a number of grounds. First, relying on historical practice is much more convincing if the

197. *Id.* at 867.

198. 190 U.S. 40 (1903).

199. 236 U.S. 459 (1915).

200. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (explaining the “gloss” of historical practice).

201. *See supra* notes 132–133 and accompanying text. *But see supra* notes 23–25 and accompanying text (noting a liberalizing trend).

practice works smoothly. There are significant problems, however, with the doctrine that extend beyond some inconsistent cases. Second, the world is simply different than it was at the time of the *Wright* decision. Not only have extraditions increased, but so too have the concerns surrounding releasing fugitives.²⁰² Yet, despite these concerns, courts and commentators have remarked a liberalizing trend toward release on bail.²⁰³ Justice Holmes noted the problems with relying on historical practice as the basis for a doctrine, especially when times have changed since its inception:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²⁰⁴

However, while current circumstances may solicit a greater worry about bail in extradition, the law is moving in the opposite direction, allowing more fugitives to receive bail.²⁰⁵

Finally, an argument leaning on historical practice would have significantly more force if there were no other option for the courts, absent legislative action. But as Part IV demonstrates, that is not the case here. The hands of judges in extradition cases are not tied. Instead, a solution exists that comports with current law and properly commits fugitives without bail, but provides a potential remedy against undue delay on the part of the government. Legislative action is not needed — although it is still preferred — nor is any new administrative apparatus. Accordingly, arguments tethered to historical practice do not hold up.

202. See *supra* Part III.A.3.

203. See *supra* note 25.

204. Oliver W. Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).

205. Further, the trend of the law provides yet another reason against allowing a right to bail. Domestically, since *Wright v. Henkel*, the bail standard has tightened. See Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150, 3062 (2006). In the extradition context, however, despite the much stronger presumption in favor of detention, the standard has loosened since *Wright*. Therefore, if one assumes that the reasons for tightening the domestic standard also apply to fugitives in extradition, the bail standard there should have tightened as well. Because there is not really any room for further tightening, the right to bail should be extinguished.

IV. GOVERNMENT DELAY AS THE ONLY GROUNDS FOR PROTEST

After establishing that there is not and should not be a right to bail in cases of international extradition, this Part considers an alternative proposal. Absent any action from Congress,²⁰⁶ the only vehicle for release should be statutory. In both the statutes and extradition treaties, there are strict time limits imposed on the process which bind the government. Detention surpassing these limits, if caused by the government, therefore violates them. Because habeas is available for detention contrary to federal laws, detention resulting from prolonged delay by the federal government should allow a fugitive to file for habeas relief. This Part proceeds in two Sections. Section A lays out the proposal in more detail. Section B then contends that the proposal does not violate due process.

A. HABEAS CORPUS AND ITS AVAILABILITY TO FUGITIVES PENDING EXTRADITION

Part 1 describes the strict time limits imposed in extradition proceedings and proposes a method for construing the extradition statutes and treaties such that each stage of the process is governed by quick time restraints. Part 2 then argues that prolonged government delay in conflict with these time limits should allow a fugitive to file for habeas or a court to order government action. It also suggests a revised, more cautious use of provisional arrests to avoid unnecessary jail time.

1. *Time Limits in Extradition Law are Strict*

The extradition process is filled with impositions of short time limits on proceedings. If a country seeking a fugitive in the U.S. requests a provisional arrest, extradition treaties impose a short time limit, generally between forty-five and ninety days, before which the requesting country must file a formal extradition re-

206. Of course, statutory enactment would be possible and make the current common law doctrine moot. For many of the reasons discussed throughout this Note, any new legislation should take an identical approach. However, this Note only considers a solution in light of the judicially-created doctrine in place currently.

quest.²⁰⁷ If it fails to do so, the fugitive may be released.²⁰⁸ As Professor Bassiouni states “most [treaty stipulations] require that the requisition be filed no later than two months after the relator has been arrested and confined on the extradition warrant.”²⁰⁹

Similarly, after a finding of extraditability, section 3188 of the extradition statute also mandates quick processing. It states that:

Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up . . . within two calendar months after such commitment . . . any judge . . . may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.²¹⁰

The text of the statute is fairly clear, and the Second and Sixth Circuit have both held that this two month clock begins after a finding of extraditability.²¹¹ In the Fifth Circuit, the government argued that the time limit begins only after a certificate has issued from the Secretary of State. But the court rejected this argument and held that it begins upon initial commitment of the fugitive after being found extraditable.²¹² The Supreme Court

207. *E.g.*, Extradition Treaty, U.S.-Italy, art. 12, Sept. 24, 1984, 35 U.S.T. 3023 (“Provisional arrest shall be terminated if, within a period of 45 days after the apprehension of the person sought, the Executive Authority of the Requested Party has not received a formal request for extradition and the supporting documents required by Article X.”); *see also* 18 U.S.C. § 3187 (2006).

208. *E.g.*, Extradition Treaty with Great Britain and Ireland, U.S.-U.K., art. 12(4), Mar. 31, 2003, S. Treaty Doc. No. 108-23 (“A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the documents supporting the extradition request . . .”).

209. BASSIOUNI, *supra* note 23, at 761.

210. 18 U.S.C. § 3188 (2006).

211. *Liberto v. Emery*, 724 F.2d 23 (2d Cir. 1983); *Barrett v. United States*, 590 F.2d 624, 626 (6th Cir. 1978) (“[T]he two-month time limitation began to run when the Magistrate entered an order . . . committing appellant to jail to await extradition.”).

212. *In re United States*, 713 F.2d 105, 108 n.2 (5th Cir. 1983) (“The government also argues that the two calendar month limitation runs from certification to the Secretary of State and not from the time of commitment. Such a construction of § 3188 tortures the plain wording of the statute and, at any rate lacks support in the case law.”).

found that the purpose of section 3188 was “to ensure prompt action by the extraditing government as well as by this government so that the accused would not suffer incarceration in this country or uncertainty as to his status for long periods of time through no fault of his own.”²¹³ Again, the theme is that the extradition should be processed rapidly.

The only part of the extradition process without an explicit time limit, therefore, is between the receipt of a formal extradition request and the hearing on the merits. In practice, the extradition judge will usually schedule a hearing very shortly after receiving the necessary documents, which must accompany the formal extradition request.²¹⁴ If the extradition hearing does not take place shortly after the request is made, however, a reasonable time limit should be read into the statute governing the extradition process — 18 U.S.C. § 3184.

Indeed, section 3184 can be read quite plainly to anticipate rapid processing. Upon receiving the complaint, the judge “may . . . issue his warrant for the apprehension of the person so charged, that he may be brought before the . . . judge . . . to the end that the evidence of criminality may be heard and considered.”²¹⁵ If the judge finds probable cause, “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.”²¹⁶ In other words, the statute seems to indicate a rapid and fluid process — complaint, arrest, hearing, and surrender.

The legislative history of the statute, which has not changed significantly since 1848,²¹⁷ supports this reading. The statute’s authors were concerned about fugitives located in parts of the country where a lack of officers to conduct hearings may cause delay. In the House, Representative Ingersoll introduced the bill as designed to “carry out the provisions of the treaties . . . without delay and the danger of a denial of justice.”²¹⁸

213. *Jimenez v. U.S. Dist. Ct.*, 84 S. Ct. 14, 18 (1963).

214. *See, e.g.*, Extradition Treaty with the United Mexican States, U.S.-Mex., art. 10, May 4, 1978, 31 U.S.T. 5059 (requiring that evidentiary documents accompany the extradition request).

215. 18 U.S.C. § 3184 (2006).

216. *Id.*

217. *See supra* note 117 and accompanying text.

218. CONG. GLOBE, 30th Cong., 1st Sess. 868 (1848).

The Supreme Court's holding in *Zadvydas v. Davis*²¹⁹ further supports requiring a reasonable time limit on scheduling the formal hearing under section 3184. There, plaintiffs were found deportable but had not been removed. They complained that the immigration statute should not be read to allow unlimited detention.²²⁰ If the alien is not removed during the normal ninety-day removal period and "he has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, [the statute states that he] may be detained beyond the removal period"²²¹ Petitioners were ordered deportable, but no country was willing to accept them. Given that, the government simply kept them in jail, potentially indefinitely, upon the Attorney General's determination.²²² Despite the arguably clear text of the statute, granting discretion to the Attorney General with no clear time limit on detention, the Court refused to read the statute in this manner. Instead, in part to avoid constitutional difficulties, it found an implicit reasonable time limit in the statute. After six months, the Court held, an alien may try to show, subject to rebuttal by the government, that there is no significant likelihood of removal. If he succeeds, he can be released.²²³

The broader message of *Zadvydas* applies in this context. Given the strict time limits and quick process anticipated throughout extradition statutes and treaties, section 3184, like the statute in *Zadvydas*, should be read to include an implicit, reasonable time limit on scheduling an extradition hearing. Once the documents have been submitted to the U.S. and the fugitive has been apprehended, there is no obvious reason, besides perhaps a crowded court docket,²²⁴ why the hearing should not take place immediately. In fact, the government should welcome a hearing as soon as possible. Keeping the fugitive in jail while the hearing could be taking place, only costs unnecessary tax dollars.

219. 533 U.S. 678 (2001).

220. While this is an immigration case, courts have often analogized immigration to extradition, at times even borrowing principles from one context to the other. *See supra* note 99. Therefore, the analogy is especially appropriate.

221. *Zadvydas*, 533 U.S. at 682.

222. *Id.* at 684–86.

223. *Id.* at 701.

224. Treaty and statutory obligations are binding on courts as well as the executive. Thus, asking magistrates to schedule extradition hearings quickly is appropriate.

In order to allow the extradition judge some scheduling leeway in the case of a crowded docket, thirty days seems like an appropriate time limit to read into the statute, especially in light of modern communications technology.²²⁵ Alternatively, if a court were to prefer a time limit with a firm basis in existing law, it could impose the limit for filing a formal extradition request after provisional arrest from the relevant treaty. In that case, the parties would have agreed that the time period — usually somewhere between forty-five and ninety days²²⁶ — is an appropriate limit on their actions while the fugitive is detained. A court could infer that this time limit is also reasonable for scheduling the extradition hearing.

Whatever the specific time period chosen, imposing such a restriction on the process is consistent with Supreme Court precedent and extradition more generally. Then, the entire process should work smoothly and quickly. If arrested provisionally, the government is required to file a formal request within a short time. Once the formal extradition request is received, whether or not the fugitive was apprehended on provisional arrest, the hearing should take place very shortly thereafter. After a finding of extraditability, the government would have two calendar months to deliver the fugitive to the requesting state.

2. *Government-Caused Delay is the Only Grounds for Protest*

If the government does not act within these required time restrictions, the fugitive should be able to protest.²²⁷ Indeed, it is both logical and well-established to allow fugitives to seek relief from undue government delay. Although the courts differ greatly as to the length of delay that is reasonable,²²⁸ delay by the government seems to be the only consistently recognized and legiti-

225. See Wiehl, *supra* note 7, at 796–97 (describing the current time limits as appropriate for “the days of the clipper ship” but questioning them as too lengthy in today’s world).

226. See *supra* notes 207–209 and accompanying text.

227. This is also the rule in deportation, which is often analogized to extradition. See *supra* note 99; *Carlson v. Landon*, 342 U.S. 524, 540–41 (1952) (“Congress’ intention [was] to make the Attorney General’s exercise of discretion [with respect to the detention of aliens] presumptively correct and unassailable except for abuse. We think the discretion reposed in the Attorney General . . . can only be overridden where it is clearly shown that it was without a reasonable foundation.”)

228. See *supra* notes 78–81.

mate “special circumstance” under the current doctrine.²²⁹ The undeniable appeal of this rule has been understood since the early twentieth century. As one court explained, delay may justify release only “[w]hen the examination day comes and the complainant [the government] is not ready to proceed.”²³⁰ Another court granted release pursuant to the treaty after finding no good reason for a delay in receiving necessary documents.²³¹ Similarly, even before *Wright v. Henkel*,²³² acting under the predecessor to section 3188, a circuit court in New York released a fugitive after he waived extraditability but remained in custody for more than two months with no good reason for the delayed acquisition by the requesting country.²³³

Just as logically, delay caused by the fugitive should not be, and has not been, grounds for any complaint about lengthy detention or for release. The Supreme Court found that a fugitive had no right to appeal to section 3188’s two month requirement when the delay was due to his appeals.²³⁴ Another court refused to credit the fugitive’s claim of delay when his own protracted litigation was the cause, stating that:

[The fugitive] has expressed his intention to exhaust every possible remedy at every level of the federal judiciary. The government is correct to note that it is “inappropriate for the relator to promise to generate delay through the lavish expenditure of resources, and thereby lever himself out of detention on the basis that there has been ‘too much delay.’”²³⁵

229. See, e.g., *In re Kirby*, 106 F.3d 855, 863 (9th Cir. 1997) (finding that because the defendants were not exclusively responsible for the delay, the lower court did not err in finding a special circumstance); *In re Morales*, 906 F. Supp. 1368, 1374–75 (S.D. Cal. 1995) (finding that seven months in custody plus anticipated delay due to the government’s delay and filing of a new complaint is a special circumstance). But see *In re Burt*, 737 F.2d 1477, 1486 (7th Cir. 1984) (explaining a lack of concern for government delay when it is responsive to diplomatic concerns).

230. *United States ex rel. McNamara v. Henkel*, 46 F.2d 84, 84 (S.D.N.Y. 1912).

231. *Ex parte Reed*, 158 F. 891 (D.N.J. 1908).

232. 190 U.S. 40 (1903).

233. *In re Dawson*, 101 F. 253 (C.C.D.N.Y. 1900).

234. *Jimenez v. U.S. Dist. Court*, 84 S. Ct. 14, 18–19 (1963).

235. *In re Rovelli*, 977 F. Supp. 566, 569 (D. Conn. 1997).

This position has been consistently reiterated.²³⁶ Even domestic criminal defendants are not entitled to release from pretrial custody on account of prolonged pretrial delay when the delay is attributable to their own actions.²³⁷

Ideally, unreasonable government delay will never happen. If it does, however, a fugitive's protest may come in two forms. First, he may seek release pursuant to a writ of habeas corpus. Habeas corpus is available for detention that is "in violation of the . . . laws or treaties of the United States."²³⁸ Whatever the relevant context — provisional arrest, pending the hearing, or after a finding of extraditability — if a fugitive is being held longer than the time limits laid out in the previous section, he falls within the habeas statute by its terms. In *Zadvydas*, habeas was the proper vehicle for protest,²³⁹ and it should be in this context as well.²⁴⁰

If the government and the requesting country intend to continue the extradition process despite their delays, release on habeas should not be an automated result once the time limits have run. After all, the same practical considerations and concerns that framed the argument for disallowing bail do not evaporate once the time limit passes. That said, unlawful government delay

236. See *United States v. Kin-Hong*, 83 F.3d 523, 525 (1st Cir. 1996) (rejecting bail where "[t]o the extent that there has been some delay, Lui himself is partly responsible . . ."); *In re Heilbronn*, 773 F. Supp. 1576, 1581 (W.D. Mich. 1991) (responding unsympathetically to a defendant who himself requested "several delays").

237. See *United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991) (two year delay); *United States v. Gelfuso*, 838 F.2d 358 (9th Cir. 1988) (10 month delay); *United States v. Zannino*, 798 F.2d 544 (1st Cir. 1986) (sixteen month delay); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) ("Delays . . . that the defendant caused would not raise a problem."); *United States v. Guerrero*, 756 F.2d 1342, 1349–50 (9th Cir. 1984) (20 month delay for interlocutory appeal not undue delay).

238. 28 U.S.C.A. § 2241(c)(3) (West 2008).

239. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

240. Although it seems somewhat odd to allow habeas in a pre-hearing context, where the government may ultimately continue the proceeding, the writ has been allowed pre-hearing in extradition cases. This may happen if the fugitive makes a purely legal challenge. In *Wright*, for example, the Court allowed a habeas petition pre-hearing because it challenged extraditability as a matter of law. *Wright v. Henkel*, 190 U.S. 40, 57 (1903). The writ has also been invoked by fugitives to appeal adverse bail decisions. See, e.g., *In re Siegmund*, 887 F. Supp. 1383, 1384–85 (D. Nev. 1995); *Koskotas v. Roche*, 740 F. Supp. 904, 918 (D. Mass. 1990) (acknowledging that habeas is the proper vehicle for review of pre-hearing bail determination by magistrate); *In re Russell*, 647 F. Supp. 1044, 1046–1047 (S.D. Tex. 1986) ("[B]ail determinations made by a Magistrate prior to an extradition hearing are, by inference, reviewable by habeas petition.").

certainly strips away some of the appeal and rationale for a heavily pro-government bail doctrine in extraditions.

Accordingly, if the fugitive seeks release prior to the hearing, the courts should entertain the request. A habeas court may adapt its standard of inquiry to the situation before it. In *Zadvydas*, for example, the Supreme Court gave guidance for how to decide whether or not to release the alien on habeas.²⁴¹ Here, pending extradition, a habeas court considering release after delay should be guided by the domestic standard for bail. That is, the fugitive's eligibility for release should start with an analysis of flight risk and danger to the community.²⁴² One immediate advantage to this approach is that judges know how to apply the standard because they routinely implement it. Some of the confusion in applying the current special circumstances test can be attributed to judicial unfamiliarity and a lack of precedent,²⁴³ and applying the domestic standard for bail avoids these problems. But in addition, the burden should lie with the fugitive to guarantee his appearance for the extradition hearing, be it through electronic monitoring or some other means. As such, the fugitive would have a chance to argue for release, and the government's treaty obligations should be adequately protected.

Alternatively, rather than using habeas, the fugitive may seek or the court may impose an order requiring the government to process the extradition immediately. This may be the simplest and best solution. Extradition would speed up, pursuant to the laws and time limits imposed on the process. Any risk of improvident release would not occur, while the fugitive would not have his time in jail delayed any longer.

Under either proposal, prosecutorial and governmental discretion is very important. Because a fugitive's release on habeas after government delay is not automatic, prosecutors should resist any reflexive opposition to such a motion.²⁴⁴ More importantly,

241. 533 U.S. at 701.

242. 18 U.S.C. § 3142 (2006). Other commentators have argued that the flight risk analysis should be more stringent in the extradition context, and this seems appropriate. See Hall, *supra* note 25, at 615.

243. See *supra* Part II.B.

244. This is especially true in the provisional arrest context. Some courts and commentators have shown greater concern for denying release when a fugitive is detained on a provisional arrest warrant. See, e.g., *United States v. Leitner*, 784 F.2d 159, 160 (2d Cir. 1986) ("[S]ome courts have noted a trend toward liberalization in bail, at least in the pro-

provisional arrest requests should be granted only in cases of true urgency, as is generally intended.²⁴⁵ Currently, such requests are basically granted whenever requested.²⁴⁶ If provisional arrest is reserved for cases of true urgency, many fugitives will likely avoid the bulk of their potential time in jail. As described in the previous section, after the formal extradition request has been filed and the documents received, the hearing should follow quickly. Therefore, prosecutors have an important role to play in the implementation of the proposal given here. When discussing the risk of having no double jeopardy in extradition, the Supreme Court stated that:

[p]rotection against unjustifiable vexation and harassment incident to repeated arrests for the same alleged crime must ordinarily be sought, not in constitutional limitations or treaty provisions, but in a high sense of responsibility on the part of the public officials charged with duties in this connection.²⁴⁷

Those words echo just as strongly under this proposal for the bail context.

This proposal strikes an appropriate balance. It eliminates a judicially-created right to bail and roots the doctrine in positive law, while protecting fugitives against government delay and incentivizing quick processing by the government. Furthermore, given the concern over maintaining treaty obligations, the pro-

visional arrest context.”); *In re Molnar*, 182 F. Supp. 2d 684 (N.D. Ill. 2002) (stating “[s]ome courts, however, have followed a trend towards liberalization of bail in the provisional arrest context”); BASSIOUNI, *supra* note 23, at 777–81, 795–98; Kester, *supra* note 94. That concern, however, is no reason to change the analysis here. Instead, provisional arrest should be used, as it is intended to be, for cases of urgency. It should not be automatically granted. *See supra* note 36 and accompanying text. If true urgency exists, the government’s interest in detention is bolstered. *See infra* Part IV.B.

245. *E.g.*, Treaty on Extradition Between the United States of America and Canada, U.S.-Can., art. 11(1), Mar. 22, 1976, 27 U.S.T. 983 (“In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel.”). Some older treaties do not place an urgency requirement on provisional arrests. *See e.g.*, Extradition treaty between the United States of America and Greece, U.S.-Greece, May 6, 1931, 47 Stat. 2185. But that should not alter the approach under those treaties. Given the government’s more current treaty position of allowing provisional arrest only in urgent situations, prosecutors should act consistently with that position under any treaty.

246. *See supra* notes 35–36 and accompanying text.

247. *Collins v. Loisel*, 262 US 426, 429–30 (1923).

positional safeguards the government against losing flight-prone fugitives and risking international embarrassment.

B. DENYING BAIL DOES NOT VIOLATE DUE PROCESS²⁴⁸

Detention of a fugitive without bail in an extradition case does not violate the Due Process Clause of the Fifth Amendment. The Due Process Clause balances the interests of the government with those of the fugitive.²⁴⁹ In this context, the government's interests are sufficiently weighty. Detention reflects not only the unique foreign relations and international law-enforcement imperatives identified by the Court in *Wright*,²⁵⁰ but also the reality that almost every extradition defendant is, by definition, a fugitive from justice and thus a flight risk.²⁵¹ Beyond that inherent risk, the threat of extradition creates unique incentives for flight, due to the fear of criminal prosecution in a foreign justice system that may lack many of the protections for criminal defendants guaranteed by the Constitution. In addition, improvident release would entail enormous costs in reciprocity for the United States' own extradition requests and its international relations generally.²⁵² The possibility that release conditions could ameliorate the risk of flight does not alter the constitutional balance.²⁵³ In other contexts where government interests were significant, the Court

248. This section is significantly derived from Brief for the United States in Opposition to Certiorari, *Choe v. United States*, 127 S. Ct. 2427 (2007) (No. 06-715), 2007 WL 1159581.

249. See *United States v. Salerno*, 481 U.S. 739, 750–751 (1987) (holding that an individual's "strong interest in liberty" may nevertheless "in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society").

250. See *supra* Part III.A.3.

251. See *supra* note 76.

252. See *Jiminez v. Aristiguieta*, 314 F.2d 649, 653 (5th Cir. 1963) ("No amount of money could answer the damage that would be sustained by the United States were the appellant to be released on bond, flee the jurisdiction, and be unavailable for surrender, if so determined."); *In re Klein*, 46 F.2d 85 (S.D.N.Y. 1930) (noting the "grave risk of frustrating the efforts of the executive branch of the government to fulfill treaty obligations"); *United States ex rel. McNamara v. Henkel*, 46 F.2d 84, 85 (S.D.N.Y. 1912) (asserting that presentation of forfeited bail to a foreign nation "is ridiculous, if not insulting").

253. "[T]he risk of the applicant using release on bail as the occasion to escape does not . . . exhaust the conditions that may warrant denial of bail." *Carbo v. United States*, 82 S. Ct. 662, 666 (1962) (Douglas, J.). There is always a risk of absconding.

has repeatedly allowed detention against due process challenges.²⁵⁴

In *Parretti v. United States*,²⁵⁵ the Ninth Circuit held that detention absent some indicia of flight risk violated Due Process.²⁵⁶ By summarily likening bail in domestic proceedings with extradition, the Ninth Circuit in *Parretti*, and some commentators hailing the decision entirely missed or ignored the important differences. The court declared that “the government implicitly argues that the law enforcement interest served by extradition treaties is somehow different from and greater than its interest in enforcing our domestic laws. The government fails to suggest any difference, and we can fathom none.”²⁵⁷ That is simply erroneous given, for example, significant foreign relations concerns.²⁵⁸ Moreover, detention is not indefinite, and this Part proposes a solution that bars release during a short period of time instituted by statute and by treaty. Should a delay by the government result, the fugitive may seek release. In short, as one district court announced, “a ninety-day wait while extradition proceedings are in the works would not even come close to violating [a fugitive]’s due process rights.”²⁵⁹

254. *Salerno*, 481 U.S. at 746–751 (holding that pretrial detention on basis of danger to community under Bail Reform Act of 1984 serves valid regulatory purpose); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (allowing civil detention of sex offenders who pose a serious threat of recidivism); *Schall v. Martin*, 467 U.S. 253, 263–274 (1984) (explaining that post-arrest detention of juveniles in part on the basis of danger to community serves valid regulatory purpose); *Jones v. United States*, 463 U.S. 354, 367–370 (1983) (holding that indefinite detention of insanity acquitees serves valid regulatory purpose of treatment and protection of society from potential danger); *Carlson v. Landon*, 342 U.S. 524, 537–542 (1952) (finding no due process barrier to detention of potentially dangerous resident aliens pending deportation proceedings).

255. 122 F.3d 758, 780–81 (9th Cir. 1997), *decision withdrawn and appeal dismissed on other grounds*, 143 F.3d 508 (9th Cir. 1998).

256. That case has no precedential value and has not been followed. *See supra* note 77. Nonetheless, because the argument is important and may be followed, I address it here.

257. *Parretti v. United States*, 112 F.3d 1363, 1383 (9th Cir. 1997), *opinion withdrawn by rehearing*, 143 F.3d 508 (9th Cir. 1998).

258. *See supra* Part III.A.3 and notes 75–77 and accompanying text.

259. *In re Siegmund*, 887 F. Supp. 1383, 1387 (D. Nev. 1995).

V. CONCLUSION

There is no right to bail pending international extradition nor has there ever been. Bail pending extradition presents significant problems legally, constitutionally, and practically. Perhaps the most logical solution to the problems currently plaguing the law is congressional action. A statute would be straightforward and could cure many of the defects currently in place, including the government's right to appeal. Alternatively, perhaps an agency like Immigration and Customs Enforcement could handle all extradition cases. That would eliminate many problems and the enacting legislation could address many of the issues presented here. But without action by the political branches, the judiciary should stop granting fugitives a right that they do not have. Instead, the judiciary should enforce a rapid extradition process, and a recourse to judicial hearing for possible release in the face of government inaction or delay is fair. Otherwise, detention during the process is the only lawful conclusion. After fleeing justice once, a fugitive sought for extradition should not readily be given the opportunity to do so again.