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The Provisional Arrest Clauses of Extradition Treaties: Are They Constitutional

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I. INTRODUCTION

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[1] With this statement, Justice Davis of the United States Supreme Court concluded unequivocally that constitutional protections could not be suspended during any of the exigencies of government.[2]

Currently, the problem of international crime is very much an exigency of government. Twenty-two crimes are presently classified as international crimes.[3] In fighting these crimes, international criminal justice has as its goals the prevention of harmful conduct through deterrence, the prosecution of those accused of committing criminal violations, and the punishment of the guilty.[4]

One of the most common, long-standing, and effective practices in procedural international law is extradition.[5] It is the device by which a person charged with or convicted of a crime is surrendered by one nation to another.[6] Because the United States is not obligated to extradite absent a treaty,[7] improvements in treaties are imperative to

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1. Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 120 (1866).

2. *Id.* at 121.

3. Bassiouni, *Characteristics of International Criminal Law Conventions*, in INTERNATIONAL CRIMINAL LAW: CRIMES 2 (M. Bassiouni ed. 1986). The international crimes include crimes against humanity, torture, aircraft hijacking, drug offenses, theft of nuclear materials, and bribery of foreign public officials. *Id.*

4. *Id.* at 3.

5. Bassiouni, *International Criminal Law*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 908 (S. Kadish ed. 1983).

6. *Id.*

7. Factor v. Laubenheimer, 290 U.S. 276 (1933). There are exceptions to this rule: Professor Bassiouni has defined extradition as

> the legal process based on a treaty, reciprocity, comity, or national law, whereby one state delivers to another, a person charged or convicted of a criminal offense against the laws of the requesting state or in violation of international criminal law in order to be tried or punished in the requesting state with respect to the crime stated in the request.

the prosecution of international crimes.[8]

A significant part of the Reagan administration's efforts to overcome obstacles in international law enforcement was the revision of extradition treaties. Recent treaties have clarified procedures, documentation requirements, and evidence requirements.[9] One example is the inclusion, in many new treaties, of clauses that allow for provisional arrests in cases where there is danger that the fugitive will flee.[10] Provisional arrests avoid lengthy extradition procedures, thereby allowing for jurisdiction to be obtained more quickly over fugitives who might otherwise get away. This is seen as a major improvement in international law enforcement efforts.[11]

Provisional arrest clauses allow for the fugitive to be temporarily arrested and detained. In the meantime, the requesting state has time to assemble the documentation necessary for a formal extradition request.[12] Extradition requests submitted to the United States by other countries must comply with both the applicable treaty and with federal extradition legislation.[13] Whereas both treaties[14] and federal legislation[15] seem to require some sort of probable cause for a formal extradition request to be granted, this is not so for provisional arrest requests. Conceivably, then, a provisional arrest may be effectuated

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Bassiouni, *The United States Model*, in INTERNATIONAL CRIMINAL LAW: PROCEDURE 406 (M. Bassiouni ed. 1986).

8. Comment, *Extradition Treaty Improvements to Combat Drug Trafficking*, 15 GA. J. INT'L. & COMP. L. 285, 298 (1985).

9. *See* Statement of Mark M. Richard, Deputy Assistant Attorney General Criminal Division United States Department of Justice, Concerning the Senate's Advice and Consent to the Ratification of Law Enforcement Treaties 3, (June 14, 1984) (Department of Justice Prepared Statement).

10. *See, e.g.*, Treaty on Extradition, Jan. 21, 1972, United States-Argentina, art. XII, 23 U.S.T. 3501, T.I.A.S. No. 7510; Convention Relating to Extradition, Dec. 10, 1962, United States-Israel, art. XI, 14 U.S.T. 1707, T.I.A.S. No. 5476; Supplementary Treaty on Extradition, May 29, 1970, United States-Spain, art. XI, 29 U.S.T. 2283, T.I.A.S. No. 8938 [hereinafter Treaties]. Some old treaties also allowed for provisional arrests, but fugitives still had time to flee because the requests had to be made through lengthy diplomatic channels. *See, e.g.*, Extradition Treaty, Dec. 30, 1922, United States-Siam, art. XI, para. 3, 43 Stat. 1749, T.S. No. 681. The newer treaties allow the requests to be made directly between the two nations' departments of justice. Comment, *supra* note 8, at 312-13.

11. Comment, *supra* note 8, at 313.

12. Most treaties require that formal extradition requests be presented within forty-five to sixty days of provisional arrest. *See, e.g.*, Treaties listed in *supra* note 10.

13. 18 U.S.C. §§ 3181-94 (1982). The legislation will be discussed more fully later in this Comment.

14. *See, e.g.*, Treaties listed in *supra* note 10.

15. 18 U.S.C. § 3184 (1982).

without probable cause. Provisional arrest provisions, therefore, are a more efficient, less cumbersome law enforcement mechanism.

Certainly, the goal is important and the solution effective. However, what seems to have been lost is the fourth amendment protection of the United States Constitution, which provides that "no Warrants shall issue, but upon probable cause."[16]

This Comment will address the constitutionality of the provisional arrest provisions of extradition treaties. In particular, it will examine the relationship between treaties and the Constitution vis-a-vis the supremacy clause, which seems to accord to both the status of the supreme law of the land.[17] This Comment will then look at the fourth amendment, its purposes, and the people it was designed to protect. Next, it will review cases where provisional arrests have been challenged, particularly *Caltagirone v. Grant*,[18] where the Second Circuit Court of Appeals held that probable cause was required only when so demanded by the applicable treaty. Finally, this Comment will discuss how to resolve the apparent conflict between the need to improve law enforcement and the mandate of the Supreme Court in 1866, that constitutional protections not be suspended during any of the exigencies of government.[19]

II. A Question of Supremacy

A. Treaties and the Constitution

1. History of the Conflict

The language used in the supremacy clause of the United States Constitution[20] has led to confusion over which type of law is indeed supreme. The laws of the United States clearly must be made pursuant to the Constitution.[21] This unambiguous language does not, however, apply to treaties.[22] There is no shortage of examples of the uncertainty to which this lack of clarity has led. Even before the adoption of the Bill of Rights, Patrick Henry expressed concern that abusive exercise of the treaty power might lead to the infringement of

16. U.S. Const. amend. IV.
17. U.S. Const. art. VI.
18. Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).
19. Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
20. U.S. Const. art. VI.
21. *Id.*
22. *Id.*

personal liberties.[23] Others similarly feared that treaties could nullify our Bill of Rights.[24] These fears were somewhat calmed by early Supreme Court cases which stated that a treaty could not enlarge or amend the Constitution.[25]

These judicial declarations, however, were somewhat undermined by the decision in *Missouri v. Holland*[26] in 1920. In that case, the Court, while reaffirming that the treatymaking power could not do what the Constitution forbids,[27] held that the treatymaking power was not limited by the tenth amendment.[28] In his opinion for the Court, Justice Holmes stated:

> Acts of Congress are the Supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.[29]

The Supreme Court's expression of doubt as to the existence of implied limitations on the treatymaking power in *Missouri v. Holland* seemed to become even more acute in 1952. In *Youngstown Sheet & Tube Co. v. Sawyer*[30] three dissenting justices justified the President's seizure of the country's steel mills by pointing to the importance of carrying out certain treaties.[31] The dissent's position in *Youngstown*,

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23. Patrick Henry was quoted by the Committee on the Judiciary in support of passage of the Bricker Amendment. S. REP. No. 412, 83d Cong., 2d Sess. 3 (1953).

24. *Id.*

25. *See, e.g.*, New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836) (federal jurisdiction could not be enlarged under the treatymaking power); Doe v. Braden, 57 U.S. (16 How.) 635 (1853) (the courts have no right to annul or disregard any provision of a treaty unless it violates the Constitution); The Cherokee Tobacco Case, 78 U.S. (11 Wall.) 616 (1870) (a treaty cannot change the Constitution or be held valid if it be in violation of that instrument); Geofrey v. Riggs, 133 U.S. 258 (1890) (the treaty power does not extend so far as to authorize what the Constitution forbids).

26. Missouri v. Holland, 252 U.S. 416 (1920).

27. *Id.* at 419.

28. The tenth amendment reserves all rights not expressly delegated to the United States by the Constitution to the States respectively or to the people. U.S. CONST. amend. X. For purposes of this discussion, however, the content of the tenth amendment does not matter as much as the fact that it is a constitutional provision and the treatymaking power was held not to be limited by it.

29. *Missouri*, 252 U.S. at 433. By "formal acts," Justice Holmes referred to the requirement that treaties be negotiated by the President and concurred to by two-thirds of the Senate. U.S. CONST. art. II, § 2.

30. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

31. "Our treaties represent not merely legal obligations but show congressional recognition that mutual security for the free world is the best security against the threat of aggression on a global scale." *Id.* at 669.

though not dealing directly with the treaty power, did highlight the lack of limitations on that power, giving further support to the Constitution's classification of treaties as the supreme law of the land. Concern that the Constitution did not sufficiently protect against abuse of the treaty power was further heightened after a speech given by then Secretary of State Dulles to the American Bar Association on April 12, 1952:

> Under our Constitution, treaties become the supreme law of the land. They are, indeed, more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas treaty law can override the Constitution. Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers away from the States and give them to the Federal Government or to some international body, and they can cut across the rights given to the people by their constitutional Bill of Rights.[32]

It seemed clear that there was a need to clarify the role of the treaty power.

2. The Bricker Amendment

This concern ultimately led, in 1952, to the introduction in Congress of a proposed amendment to the Constitution's treaty clause.[33] The final impetus toward the proposal of the amendment after the advent of the United Nations was the use of treaties "which seek to regulate internationally almost every conceivable facet of American life."[34] When the constitutional amendment was proposed, over 200 treaties were being prepared in the United Nations or its affiliated agencies.[35] This prompted an examination of constitutional protections and the treaty power, and led to the conclusion that "the need for additional constitutional protection is apparent."[36] The final version of the Bricker Amendment, as the proposed amendment came to be called, was reported on favorably by the Committee on the Judici-

32. S. REP. NO. 412, 83d Cong., 2d Sess. 5 (1953). It is noteworthy that opponents of the Bricker Amendment pointed out that further study had convinced Secretary of State Dulles that the treatymaking power was not unlimited. *Id.* at 40.

33. S.J. Res. 130, 82nd Cong., 2d Sess. (1952). For a chronological history of the Bricker Amendment, see C. ENGELLAND, THE BRICKER AMENDMENT 21 (1954).

34. S. REP. NO. 412, 83d Cong., 2d Sess. 5 (1953).

35. *Id.*

36. *Id.* at 6.

ary in June of 1953.[37]

For purposes of this Comment, a discussion of the Bricker Amendment will be limited to section 1 of the final version: "A provision of a treaty which conflicts with this Constitution shall not be of any force or effect."[38] Supporters of the Amendment felt that the conflicting views on the treaty power made it necessary to resolve, once and for all, that "the treaty power cannot be used for purposes in conflict with the Constitution."[39] They did not think it proper to rely on the dicta of previous Supreme Court cases[40] nor to depend on judicial review.[41] Thus, if the amendment were passed, treaties would retain their status as the supreme law of the land, as long as they were consistent with constitutional standards. The courts would be able to review treaty provisions under their article II, section 2 power.[42] Finally, conformance of treaties with the Constitution would no longer depend on the good faith of elected officials. The Committee on the Judiciary quoted in its report Thomas Jefferson's sentiment regarding the inadequacy of relying on the good will of men: "In questions of power let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."[43]

3. *Reid v. Covert*

Efforts to amend the Constitution in this regard ultimately failed. However, concern about the lack of express or implied limitations did not subside.

The Supreme Court faced the question again in the case of *Reid v. Covert*,[44] where it responded to the concerns expressed by the supporters of the Bricker Amendment. Mrs. Covert had killed her husband, who had been a sergeant in the United States Air Force, stationed at an airbase in England. She was tried by a military tribunal pursuant to a code of military justice which authorized court martial jurisdiction over civilian dependents of United States servicemen

37. *Id.* For a complete text of all four versions of the Bricker Amendment, see C. ENGELLAND, supra note 33, at 25A.

38. *Id.*

39. S. REP. No. 412, 83d Cong., 2d Sess. 7 (1953).

40. *See id.* at 3.

41. *Id.* at 7. Foreign relations questions were often considered political questions over which the jurisdiction of the court was limited.

42. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . ." U.S. CONST. art. III, § 2, cl. 1.

43. S. REP. No. 412, 83d Cong., 2d Sess. 8 (1953).

44. 354 U.S. 1 (1957).

overseas. Her appeal was based on an alleged deprivation of her rights under article III, section 2 of the Constitution,[45] as well as under both the fifth[46] and sixth[47] amendments. The Court determined that the military court's assertion of jurisdiction had violated Mrs. Covert's rights as provided in the above mentioned provisions.[48]

The Court asserted that constitutional limitations applied to the government when it acted outside the territory of the United States,[49] and stressed that the Bill of Rights and other constitutional protections could not be disregarded when they become inconvenient or when expediency seemed to so require.[50] Justice Black declared, "If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes."[51] The most pertinent portion of *Reid v. Covert* is the fact that the authority for the exercise of military jurisdiction over Mrs. Covert rested on an executive agreement in effect at the time between the United States and Great Britain. In finding that this agreement violated the Constitution, the Court resolved that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[52] Justice Black attempted to clarify the ambiguity of the supremacy clause by holding that "[t]here is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution."[53] He went on to say:

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the

45. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST. art. III, § 2, cl. 1.

46. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." U.S. CONST. amend. V.

47. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

48. Reid v. Covert, 354 U.S. 1, 7 (1957).

49. *Id.*

50. *Id.* at 8 n.7 (intent and meaning cannot be changed through extrapolation).

51. *Id.* at 14.

52. *Id.* at 16.

53. *Id.*

> Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions . . . . It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.[54]

III. THE FOURTH AMENDMENT

A. A Brief History

The fourth amendment is unique among the Bill of Rights in that it is the only procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.[55] Under early English common law, the use of search warrants was prohibited.[56] Their use became almost unlimited, however, as the Star Chamber pursued authors, printers, and publishers of allegedly seditious publications.[57] Public interest in law enforcement also contributed to the expanding use of general warrants.[58] The danger of this practice seems to have been recognized in 1685, when a justice was impeached for issuing general warrants.[59] These warrants were described as an "arbitrary exercise of government authority against which the public had a right to be safeguarded."[60] But their use did not become unlawful until 1763, when a defendant who had been convicted of treason on the basis of illegally seized papers successfully challenged the use of a general warrant.[61]

At the same time, colonial traders violated British navigation acts by trading with the island possessions of France and Spain.[62] In response, writs of assistance were issued. These writs were general warrants which allowed almost arbitrary entries into, and searches of, places suspected of hiding smuggled goods.[63] The use of these writs in

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54. *Id.* at 17-18.

55. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, ch. 1 (1966).

56. R. DAVIS, FEDERAL SEARCHES AND SEIZURES 3 (1964).

57. 1 W. LAFAVE, SEARCH AND SEIZURE 3 (1986). For a more thorough history, see F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND: 1476-1776 (1952).

58. R. DAVIS, *supra* note 56, at 4.

59. W. LAFAVE, *supra* note 57, at 4.

60. *Id.*

61. Wilkes v. Wood, 19 Howell's State Trials 1153 (1763).

62. 1 H. HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1776-1826 73 (1939).

63. *Id.* at 74.

the colonies are said to be the major impetus to the eventual adoption of the fourth amendment.[64]

The need for protection against searches was emphasized in the ratification debates during the Constitutional Convention.[65] Its inclusion in the Bill of Rights was sponsored by James Madison in response to urging by President Washington.[66]

The final version of the fourth amendment left a great deal open for later constitutional interpretation.[67] A leading authority on the fourth amendment has said that "no area of the law has more bedeviled the judiciary, from the Justices of the Supreme Court down to the magistrate . . . ."[68] One cause of the confusion raised by the amendment is the conflict between individual rights and the needs of government and society. Society as a whole benefits from law enforcement: the prosecution of crime encourages civilized society. But the fourth amendment was designed to protect personal rights through the observance of procedural safeguards. As one scholar warned, "the history of the destruction of liberty . . . has largely been the history of the relaxation of those safeguards in the face of plausible-sounding governmental claims of a need to deal with widely frightening and emotion-freighted threats to the good order of society."[69] Notwithstanding their importance, however, these "safeguards" can be frustrating, in that "[t]hey deny to government—worse yet, to democratic government—desired means, efficient means, and means that must inevitably appear from time to time . . . to be the absolutely necessary means, for government to obtain legitimate and laudable objectives."[70] In spite of this frustration, however, society is served by the

64. Famous for the fight against writs of assistance was James Otis, a merchant who first challenged the use of the writs in court. For a thorough discussion of Otis' activities and arguments, *see id.* at 74-85. John Adams even credited Otis' fight as marking the birth of American independence. H. HOCKETT, *supra* note 62, at 4; W. LAFAVE, *supra* note 57, at 4.

65. W. LAFAVE, *supra* note 57, at 4.

66. *Id.*

67. The fourth amendment reads:

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

U.S. CONST. amend. IV.

68. LaFave, *Search and Seizure: The Course of True Law Has Not Run Smooth*, 1966 U. ILL. L. F. 255 (1966).

69. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 354 (1974).

70. *Id.* at 353. The effect of this frustration on the United States' international relationships is discussed more fully elsewhere in this Comment.

fourth amendment's protections.[71] Indisputably, "the right of the people to be secure" is the paramount priority.

B. Who Is Protected?

One issue, in interpreting the fourth amendment, arises from the word "people." Citizens of the United States are, of course, covered. But what about non-citizens, in particular, a fugitive from another country who may or may not be in the United States legally?

The answer to this question is found in the amendment's language: "People" are protected. The fourth amendment, like the rest of the Constitution, is a limitation on government. "Everything American public officials do at home or abroad is governed by, measured against, and must be authorized by the United States Constitution."[72]

Case law gives many examples of non-citizens who have been protected by the Constitution. In 1931, a Soviet corporation whose property was expropriated by the United States was held to be entitled to just compensation under the fifth amendment.[73] The Court stressed that the constitutional right of the alien did not depend on whether his government rendered the same compensation to United States citizens.[74] A later Court accepted without question that aliens are entitled to the protection of the fifth amendment.[75] In *Abel v. United States*[76] a suspected Soviet spy, illegally in the United States, challenged the search of his hotel room and the subsequent seizure of his personal belongings.[77] Though the search and seizure were found not to have violated the fourth amendment, the application of its protections to the alien was unquestioned.[78] Other aspects of the fourth amendment were examined by the District of Columbia Circuit Court of Appeals in *Au Yi Lau v. United States Immigration & Naturalization Service.*[79] In that case, a Chinese alien, who was detained and questioned by immigration officials, ultimately challenged the use of

71. *Supra* note 67.

72. United States v. Tiede, Crim. Case No. 78-001A [U.S. ct. for Berlin, Mar. 14, 1979], *reprinted in* 19 I.L.M. 179, 192 (1980).

73. Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92 (1931).

74. *Id.* at 491.

75. United States v. Pink, 315 U.S. 203, 228 (1941).

76. Abel v. United States, 362 U.S. 217 (1959).

77. *Id.* at 218.

78. *Id.* at 240-41.

79. Au Yi Lau v. United States Immigration & Naturalization Service, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971).

his statements as being the product of an unconstitutional detention.[80] The court found that aliens in this country were sheltered by the fourth amendment in common with citizens.[81]

Clearly, the only limitation contained in the fourth amendment is on government action. Anyone affected by that action is entitled to raise a claim against a violation.

C. Probable Cause

The fourth amendment dictates that no warrants be issued without probable cause.[82] This phrase has never been precisely defined by the Supreme Court. It was referred to in *Illinois v. Gates*[83] as "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules."[84] At least one authority on the subject believes that both the Framers and the early Supreme Court cases shared a view of probable cause reflected by English history.[85] The early Supreme Court cases dealt not with the fourth amendment, but with congressional statutes that used "reason to suspect" and "cause to suspect" standards for validating searches.[86] Chief Justice Marshall defined probable cause as "made under circumstances which warrant suspicion."[87]

A more frequently quoted definition, however, is that of Justice Rutledge in *Brinegar v. United States.*[88] Justice Rutledge contrasted the probable cause standard with the reasonable doubt standard required to find a defendant in a criminal case guilty.[89] He recognized that probable cause implicitly meant dealing with probabilities, and conceded that it had come to mean more than just simple suspicion, as defined by Chief Justice Marshall.[90] According to Justice Rutledge, probable cause existed where " 'the facts and circumstances

80. *Id.* at 221.

81. *Id.* at 223.

82. U.S. CONST. amend. IV.

83. Illinois v. Gates, 462 U.S. 213 (1983).

84. *Id.* at 232. For a discussion of how certain justices have evaluated probable cause in varying ways, see Grano, *Probable Cause and Common Sense: A Reply To The Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465, 478 (1984).

85. For an excellent historical discussion, including English judicial opinions dealing with probable cause, *see* Grano, *supra* note 84, at 479-83.

86. *See id.* at 488-89. These cases are noteworthy because they do not indicate any difference between these standards and the fourth amendment's probable cause standard. *Id.* at 489.

87. *Id.* at 490 (quoting Locke v. United States, 11 U.S. (7 Cranch) 339 (1813)).

88. Brinegar v. United States, 338 U.S. 160 (1949).

89. *Id.* at 174.

90. *Id.* at 175.

within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[91] This is, apparently, an objective test. Indeed, the Court in *Beck v. Ohio*[92] criticized warrantless arrests as bypassing the safeguards provided by an objective predetermination of probable cause.[93] Justice Stewart warned that "if subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate . . . ."[94] The issuance of an arrest warrant is supposed to be the result of a considered review of the facts of a case by a magistrate.[95]

Generally, the probable cause standard is the same whether the issue is search or arrest.[96] However, one difference exists in that arrest cases, unlike search cases, require probable cause to believe that a crime has been committed and that the arrestee committed it.[97] In either case, adherence to the warrant process is preferred.[98] There are, however, situations where arrests and searches may take place without a warrant.[99] These situations are covered by the second half of the fourth amendment, which ensures the right of the people to be secure "against unreasonable searches and seizures."[100] Such arrests[101] and searches[102] are unconstitutional if not based on probable

91. *Id.* (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). Of particular interest for purposes of this Comment are the requirements that the facts be "within their knowledge" and "reasonably trustworthy." *Id.*

92. Beck v. Ohio, 379 U.S. 89 (1964).

93. *Id.* at 96.

94. *Id.* at 97.

95. A more detailed discussion of judicial analysis of probable cause is well beyond the scope of this Comment. For further information, *see generally* W. LAFAVE, *supra* note 57 at 539-610.

96. Spinelli v. United States, 393 U.S. 410 (1969).

97. Probable cause for search, on the other hand, requires that the items sought be seizable in that they are connected with criminal activity and that these items are in the place to be searched. Comment, *Search And Seizure In The Supreme Court: Shadows On The Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961). *See, e.g.*, United States v. McNally, 473 F.2d 934, 941 (3d Cir.) ("probable cause might well be established to suspect that illegal activity, evidence thereof or contraband, was at a given location without implicating any particular person"), *aff'd*, 491 F.2d 751 (3d Cir.), *cert. denied*, 417 U.S. 948 (1973); Commonwealth v. Kline, 234 Pa. Super. 12, 335 A.2d 361, 364 (1975) (probable cause to believe that a man has committed a crime on the street does not necessarily give rise to probable cause to search his home).

98. Beck v. Ohio, 379 U.S. 89 (1964); United States v. Ventresca, 380 U.S. 102 (1965).

99. 1 W. LAFAVE, CRIMINAL PROCEDURE §§ 3.5-3.9 (1984).

100. U.S. CONST. amend. IV.

101. Henry v. United States, 361 U.S. 98 (1959).

102. Chambers v. Maroney, 399 U.S. 42 (1970).

cause. The warrant clause reflects an understanding on the part of the Framers of the Constitution of the zealousness, on the part of law enforcement officers, that can often prevent the detached and neutral reflection embodied in the fourth amendment.[103] Nevertheless, the Supreme Court has recognized that it is not always practical to obtain a warrant and has, therefore, upheld warrantless searches and seizures where both probable cause and exigent circumstances exist.[104] In *United States v. Blasco*, exigent circumstances were found to exist where there is a danger of flight or escape, danger of harm to police officers or the public, risk of loss, destruction, removal, or concealment of evidence, and hot pursuit of a fleeing suspect.[105] These exigent circumstance exceptions to the fourth amendment apply "where the societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate."[106] The *Blasco* court warned that the exigent circumstance doctrine applied to both warrantless seizures of persons and property because both acts implicated the same privacy interests, and, therefore, were due the same level of constitutional protection.[107] The burden on the government in these situations is quite high. Because the protections of the fourth amendment are crucial to a free and viable society, the courts have required the government to obtain a warrant before an intrusion.[108] A party seeking a warrant must show probable cause.

IV. PROVISIONAL ARRESTS

A. Urgency

The rationale behind the provisional arrest clauses in extradition treaties is urgency, that is, the fear that the fugitive will flee the requested state's jurisdiction before a formal extradition request can be prepared. The requesting state sends its provisional arrest request via telex or diplomatic cable.[109] The United States will grant such re-

103. United States v. Blasco, 702 F.2d 1315, 1324 (11th Cir. 1983).

104. Warden v. Hayden, 387 U.S. 294, 298 (1967) (hot pursuit—warrantless entry and search of residence upheld where police were told that robbery suspect had entered only five minutes earlier); Carroll v. United States, 267 U.S. 132 (1925) (warrantless stop and search of vehicle upheld because of inherent mobility); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk of suspicious individual on street upheld).

105. United States v. Blasco, 702 F.2d 1315, 1325 (11th Cir. 1983).

106. *Id.* (quoting Arkansas v. Sanders, 442 U.S. 753, 759 (1979)).

107. *Id.*

108. United States v. Jeffers, 342 U.S. 48 (1951).

109. 2 M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE IX § 2-31 (1983).

quests as long as the requesting nation provides information that the fugitive will probably flee before an arrest warrant can be issued on a formal extradition request.[110] Because the provisional arrest requests are made in cases of urgency, they seldom include enough information on which to base a determination of probable cause. Therefore, in issuing an arrest warrant pursuant to the provisional arrest clause of a treaty, a magistrate must rely on the representations of a foreign government. The existence of urgency is determined according to the representations of the requesting state. One authority has postulated that the only prerequisite for a provisional arrest warrant is a statement that a warrant exists in the requesting country.[111] This is due to the fact that United States extradition agreements "do not usually specify the information that must be supplied by the requesting government to obtain provisional arrest and detention."[112]

The State Department attempted to clarify the requirements in 1975. The Australian embassy had requested information as to the United States government's policy toward provisional arrest. The State Department responded that "the policy is to arrest the fugitive only when the documentation has been received or when there is an urgent provisional arrest request, including information that the fugitive is likely to flee."[113]

The determination of urgency, like the determination of probable cause, has been reviewed by the courts.[114] The Second Circuit Court of Appeals provided a framework for the making of this determination in *United States v. Leitner.*[115] Leitner was a United States citizen who had been arrested in Israel for certain acts of violence against Arabs. After posting bail in Israel, he fled to the United States. He

110. *Id.* at IX § 2-30.

111. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 931 (Dept. of State 1968).

112. *Id.* at 930.

113. E. MCDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 175-76 (Dept. of State 1975).

114. United States v. Messina, 566 F. Supp. 740, 744 (E.D.N.Y. 1983). The government in *Messina* contended that "determinations of urgency were discretionary executive judgments which were so bound up with the foreign affairs power as to be nonjusticiable." *Id.* The court cautioned that "absent judicial review, provisional arrest may become the rule rather than the exception." *Id.* It also observed that "the broad authority of the executive in matters bearing on foreign affairs is not absolute when constitutional interests are implicated." *Id.* Ultimately, however, the *Messina* court gave a great deal of deference to the two governments' determination of urgency. The degree to which the court took its role seriously is questionable, as is illustrated by the court's language, "the court . . . accords considerable weight to the judgment of the United States, given its foreign affairs interest in the matter." *Id.* at 745.

115. United States v. Leitner, 784 F.2d 159 (2d Cir. 1986).

was provisionally arrested pursuant to the United States-Israel extradition treaty.[116] The court found that the factors bearing on the determination of urgency included an evaluation of the importance to the country seeking extradition, foreign policy concerns of the United States, the nature of the crime, and the risk of flight.[117] The court concluded that "[t]he broader interpretation of the term that takes into account the interests of the treaty parties seems the appropriate one."[118] Therefore, it appears that the immediate danger of flight is less crucial to a determination of urgency than the general importance of a case to the countries involved.

B. Caltagirone v. Grant

The courts have also struggled with the question of determining probable cause for provisional arrests. A provisional arrest warrant is an ex parte warrant.[119] The issuing magistrate, therefore, generally must rely on the representations of the requesting state as presented by the United States government.[120] Because provisional arrest clauses so provide, fugitives are often arrested only on information that the requesting state has issued a warrant for the fugitive's arrest.[121] A determination as to probable cause is not required.

The validity of this practice was challenged in *Caltagirone v. Grant*,[122] where the Second Circuit Court of Appeals held that probable cause was necessary for Caltagirone's provisional arrest because the applicable treaty so required. Caltagirone was an Italian national charged with fraudulent bankruptcy in his native country. By the time a warrant was issued for his arrest in Italy, he had already come to the United States. Pursuant to article XIII of the then-existing 1973 United States-Italy Treaty of Extradition,[123] the Italian govern-

116. *Id.* at 160. (quoting Convention Relating to Extradition, Dec. 10, 1962, United States-Israel, art. XI, 14 U.S.T. 1707, T.I.A.S. No. 5476.)

117. *Id.* at 161.

118. *Id.*

119. M. BASSIOUNI, *supra* note 109, at IX § 2-31.

120. *Id.*

121. *See, e.g.*, Petrushansky v. Marasco, 325 F.2d 562, 564 (2d Cir. 1963).

122. Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

123. Treaty of Extradition, Jan. 18, 1973, United States-Italy, 26 U.S.T. 493, T.I.A.S. No. 8052. Article XIII provided:

> 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 . . . . The application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest . . . against that person, and such

ment asked that Caltagirone be arrested and detained pending a formal extradition request. The United States Attorney for the Southern District of New York applied for a warrant for Caltagirone's arrest.[124]

A warrant was issued, and Caltagirone was arrested. He immediately moved to quash the warrant, contending that it had been issued without probable cause. The motion to quash was denied. In denying the motion, the court reasoned that the action by the federal magistrate in granting the warrant of arrest had constituted a finding that the extradition request had been in proper form.[125] The same court explained its decision when Caltagirone renewed his motions three days later. According to that court, Caltagirone's arrest in the United States was presumptively valid under Italian law because there was no dispute that warrants for his arrest had been issued by Italian magistrates.[126] Caltagirone's motions were again denied, and he appealed.

The Second Circuit ultimately found that the warrant for Caltagirone's arrest issued in the United States pursuant to the provisional arrest request was invalid. In his opinion, Judge Kaufman criticized the lower court for refusing to second-guess the Republic of Italy's determination that a warrant should issue.[127]

The Second Circuit based its opinion on an analysis of the language of the 1973 United States-Italy Extradition Treaty.[128] An examination of the requirements for an application for provisional arrest contained in article XIII led the court to conclude that probable cause for arrest was required under the Treaty. In particular, the court concentrated on the requirement under article XIII of the Treaty that such further information be provided as "would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party."[129] The court reasoned that since the United States was the requested party, then, in order for an

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> further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offence been committed . . . in the territory of the requested Party.

Id.

124. This was done by preparing a complaint under oath alleging the existence of the Italian warrants, and applying for the warrant with the United States District Court. Caltagirone v. Grant, 629 F.2d 739, 743 (2d Cir. 1980).

125. *Id.*

126. *Id.*

127. *Id.* at 744. The court cited Jhirad v. Ferrandina, 536 F.2d 478, 485 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976) as requiring that the sufficiency of the information provided to support Caltagirone's arrest be judged by American law. *Id.*

128. Treaty of Extradition, *supra* note 123.

129. *Id.*

arrest warrant to be issued, a showing of probable cause would be necessary.[130] The court noted that the provisional arrest clauses of United States treaties fell into two groups: those with the informational requirement, and those without it.[131] Because both options were available, the drafters of this particular treaty must have intended that "such further information" be presented as would be necessary to justify Caltagirone's arrest in the United States.[132] It was clear to the court that the treaty's draftsmen had not intended to sacrifice the protection of the probable cause requirement.[133] Therefore, because the treaty's probable cause requirement had not been complied with, Caltagirone's provisional arrest was found to be invalid and the judgment of the district court was reversed.[134]

The *Caltagirone* court paid lip service to the question of probable cause under the fourth amendment of the United States Constitution. It stressed that because the treaty language so clearly demanded a showing of probable cause before any warrant for provisional arrest could be issued, it was not necessary to reach the constitutional question.[135] Indeed, the court seemed relieved at not having to examine the constitutional propriety of a treaty that permitted provisional arrests without a showing of probable cause.[136] It did express doubt, however, that a sufficiently strong foreign policy interest was implicated to justify a departure from fourth amendment protections.[137]

C. The Aftermath of *Caltagirone*

Partially in response to the *Caltagirone* opinion, the United States entered into a new treaty with Italy in 1984.[138] Provisional arrest is covered in this new treaty in article XII.[139] The 1984 treaty

130. Caltagirone v. Grant, 629 F.2d 739, 744 (2d Cir. 1980) (citing Whitely v. Warden, 401 U.S. 560 (1971) and Giordenello v. United States, 357 U.S. 480 (1958)).

131. *Id.* at 746.

132. *Id.*

133. *Id.* at 747.

134. *Id.* at 750.

135. *Id.* at 748.

136. *Id.* at 747.

137. *Id.* at 748.

138. Treaty on Extradition, Oct. 13, 1983, United States-Italy, T.I.A.S. No. 10837.

139. Of particular importance is article XII, section 2, which provides:

> The application [for provisional arrest] shall contain: a description of the person sought including, if available, the person's nationality; the probable location of that person; a brief statement of the facts of the case including, if possible, the time and location of the offense and the available evidence; a statement of the existence of a warrant of arrest, with the date it was issued and the name of the issuing court; a description of the type of offenses, a citation to the sections of law violated and the

eliminated the language from the 1973 treaty which required any additional information which would be necessary to justify the issuance of an arrest warrant if the offense was committed in the requested country.[140] It seems painfully obvious that this language was left out of the new treaty in an attempt to avoid the probable cause problem which led to the finding in *Caltagirone* that the arrest was invalid. In fact, a report from the Committee on Foreign Relations submitted during the ratification hearings on this treaty specifically stated that the new United States-Italy extradition treaty "removes the impediment to provisional arrest under the present treaty, discussed in *Caltagirone v. Grant*."[141] President Reagan, in a letter to the Senate accompanying the 1984 United States-Italy Treaty on Extradition, requesting ratification, said that "[t]his Treaty will make a significant contribution to international cooperation in law enforcement."[142] By entering into this new treaty, the United States circumvented the obstacle which had blocked Caltagirone's provisional arrest. Its action was a logical result of the *Caltagirone* court having based the probable cause requirement on the contents of the treaty.

The *Caltagirone* opinion leaves the evaluation of probable cause for arrest to be done on a treaty by treaty basis. By avoiding the constitutional issue, it encouraged the use of treaties to circumvent the Constitution. The question remains, however, whether this is reconcilable with the Supreme Court's decision in *Reid v. Covert*[143]

V. Protection Against Unreasonable Seizures

The fourth amendment prohibits unreasonable seizures. A logical inference is that "unreasonable" refers to a lack of probable cause. "Seizures" refers to both seizures of physical objects and other kinds of evidence, and to arrests and detentions of a person.[144] Therefore, a look at probable cause for arrest in other contexts is illustrative. In

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maximum penalty possible upon conviction, or a statement of the existence of a judgment of conviction against that person, with the date of conviction, the name of the sentencing court and the sentence imposed, if any; and a statement that a formal request for extradition of the person sought will follow.

Id.

140. Treaty of Extradition, *supra* note 123.

141. Senate Committee on Foreign Relations report of June 20, 1984, recommending approval of the treaty: Executive Report No. 98-33, 98th Cong., 2d Sess. (1984) (report of Mr. Percy, from the Committee on Foreign Relations).

142. Letter of Transmittal from Ronald Reagan to the Senate of the United States (Apr. 18, 1984).

143. *Supra* notes 44-54 and accompanying text.

144. Giordenello v. United States, 357 U.S. 480, 486 (1957).

particular, a comparison to the area of interstate rendition and probable cause is enlightening.

A. Interstate Rendition

Interstate rendition is the practice whereby a person charged with a crime in one state, and found in another state, is delivered to the state having jurisdiction over the crime.[145] The words rendition[146] and extradition[147] are for all intents and purposes interchangeable, though some authorities insist on their being distinguished.[148] In both cases, a disinterested judicial officer is required to find probable cause to issue an arrest warrant for the alleged fugitive.[149] A magistrate evaluates probable cause based on affidavits which contain the underlying facts.[150] In rendition cases, affidavits often contain only the statutory language that defines the particular crime[151] or uncorroborated information that a crime had been committed.[152] These affidavits generally do not supply enough information on which to base a probable cause determination. The justification for this, according to one court, is that "[t]he question of whether or not the demanding state has sufficient evidence to convict an alleged fugitive from justice cannot be considered in an extradition proceeding."[153] This may be enough to satisfy the Uniform Criminal Extradition Act,[154] which requires that "the indictment, information, or affidavit made before the magistrate . . . substantially charge the person demanded with having committed a crime under the law of [the demanding] state . . . ."[155] The Uniform Criminal Extradition Act seems to basically require a

145. Michigan v. Doran, 439 U.S. 282 (1978); *See also*, U.S. CONST. art. IV, § 2, cl. 2. The Framers of the Constitution sought to enable states to bring offenders to a speedy trial from any part of the United States. By deemphasizing state boundaries and imposing concepts of comity and full faith and credit found in other clauses of article IV, they attempted to insure smooth functioning of the criminal justice system. Crumley v. Snead, 620 F.2d 481 (5th Cir. 1980).

146. The surrender of fugitives between states. Comment, *Interstate Rendition and the Fourth Amendment*, 24 RUTGERS L. REV. 551 (1970).

147. Bassiouni *supra* note 5.

148. Comment, *supra* note 146, at 551 n.1.

149. *Id.* at 569.

150. *Id.*

151. *See, e.g.*, Smith v. State, 89 Idaho 70, 403 P.2d 221 (1965), *cert. denied*, 383 U.S. 916 (1966).

152. State v. Limberg, 274 Minn. 31, 142 N.W.2d 563 (1966).

153. *Id.* at 34, 142 N.W.2d at 565.

154. UNIF. CRIM. EXTRADITION ACT. § 3, 11 U.L.A. 92 (1974).

155. *Id.*

pleading, and has been so treated by many courts.[156]

This treatment was found to be unconstitutional in *Kirkland v. Preston*[157] in 1967. In *Kirkland*, a Florida affidavit accused Kirkland with having committed arson. The affidavit was written in statutory language and did not identify any sources of information.[158] The lower court ordered extradition, explicitly refusing to examine probable cause.[159] The District of Columbia Court of Appeals held that affidavits written in statutory language and lacking any identification of sources did not show probable cause under the fourth amendment.[160] Judge Wright responded to the constitutional question by writing:

> [T]here is no reason why the Fourth Amendment, which governs arrests, should not govern extradition arrests. Under its familiar doctrine arrests must be preceded by a finding of probable cause . . . [W]hen the extradition papers rely on a mere affidavit, even where supported by a warrant of arrest, there is no assurance of probable cause unless it is spelled out in the affidavit itself. Thus the Fourth Amendment considerations require that before a person can be extradited on a Section 3182 affidavit the authorities in the asylum state must be satisfied that the affidavit shows probable cause.[161]

The court went on to recognize why the law should allow the accused in an extradition proceeding a considerable amount of procedural protection.[162] Besides noting that the accused would be transported hundreds or thousands of miles away from home, it added that the determination of probable cause before rendition was especially important because otherwise, the accused would have no probable

156. *See, e.g.*, Smith v. State, 89 Idaho 70, 403 P.2d 221, 224 (1965), *cert. denied*, 383 U.S. 916 (1966) (sufficiency of affidavit or indictment as pleading is not open to inquiry on habeas corpus to review issuance of rendition warrant); Matter of Armstrong, 49 N.C. App. 175, 270 S.E.2d 619, 621 (1980) (purpose of statute governing extradition is to assure that prisoner is indeed charged with a crime in the demanding state).

157. Kirkland v. Preston, 385 F.2d 670 (D.C. Cir. 1967).

158. *Id.* at 672-73.

159. *Id.* at 673.

160. *Id.* The court relied on United States v. Ventresca, 380 U.S. 102, 108-109 (1965), where Justice Goldberg for a majority of the Supreme Court had stated that probable cause could not be made out by affidavits which were purely conclusory. The affiant's belief that probable cause existed was insufficient, since recital of some of the underlying circumstances in the affidavit was essential if the magistrate was to perform his detached function.

161. *Kirkland*, 385 F.2d at 676. Section 3182 is the basic federal statute on interstate extradition. 18 U.S.C. § 3182 (1982).

162. *Kirkland*, 385 F.2d at 676-77.

cause hearing until after he arrived in the accusing jurisdiction.[163] The court also observed that its rule would not burden the demanding state.[164]

B. Interstate Rendition and International Extradition

Post-*Kirkland* commentary is useful when examined in the context of international extradition. One objection to *Kirkland* is that the extradition process "is designed to furnish an expeditious and summary procedure for returning a fugitive to the demanding State."[165] The response to this objection in the context of interstate rendition is that it is not unduly time-consuming for the demanding state to have to include the same information in an affidavit that it would have to include in an application for an arrest warrant in its own state any way.[166] In the international arena, however, the response is not so simple. Whereas the fourth amendment applies to every state in the United States through the fourteenth amendment,[167] the same is not true beyond the boundaries of the United States. It is very likely that an alleged fugitive would never receive a hearing as to probable cause if he did not receive it before being extradited to another country. Because of the Rule of Non-Inquiry,[168] United States courts do not inquire into the procedural or evidentiary systems to which an accused will be subject in another country.[169] This includes not inquiring into the processes by which another country secures evidence of probable cause. Therefore, by provisionally arresting an accused without probable cause, one may merely be allowing the requesting country more time to gather information which may in any case end up being insufficient under United States law. It is more protective of the accused's right against unreasonable seizures to demand the probable cause determination before he is arrested, or at least within the usual time period allowed after arrest.[170]

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163. *Id.*

164. *Id.* at 677.

165. W. LAFAVE, *supra* note 57, at 233 (quoting People *ex rel.* Kubula v. Woods, 52 Ill. 2d 48, 284 N.E.2d 286 (1972).

166. *Id.* at 233.

167. Wolf v. Colorado, 338 U.S. 25 (1949) (case overruled in 367 U.S. 655, but proposition is still valid).

168. The Rule of Non-Inquiry is one of five basic substantive requirements of extradition, recognized and accepted by contemporary international law. M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 319-20 (1987).

169. *Id.* at 372.

170. The fourth amendment requires a judicial determination of probable cause as a pre-

Kirkland has also been objected to on the grounds that an inquiry into probable cause in the asylum state is premature.[171] This argument could also be made in the context of a provisional arrest: since the accused will not ultimately be extradited without the probable cause determination, it is unnecessary to require it at the provisional arrest stage. Both arguments ignore the fact that the initial detention is a seizure, and that the accused has the constitutional right to have the reasonableness of that seizure evaluated when it occurs or soon after.[172]

Opponents of the *Kirkland* rule have also contended that an inquiry into the demanding state's criminal procedures is against public policy in that it operates against principles of comity between sister states.[173] This argument was rejected by one court,[174] which stated that a judicial determination of probable cause before rendition did not compromise principles of comity.[175] The court explained that one state could rely on the official representations of its sister state that the requisite determination had been made.[176] Obviously, two states within the United States are bound by the same fourth amendment, so a reliance on the probable cause determination is relatively trustworthy. Unfortunately, the same cannot be said in the international extradition setting.

The scope of the *Kirkland* rule was limited by the United States Supreme Court in *Michigan v. Doran.*[177] In *Doran*, the Court held that no judicial inquiry into probable cause may be had in the asylum state once that state has responded to a demanding state's determination that probable cause exists. The result of this ruling is that the fourth amendment question is triggered only when a demanding state includes neither a copy of an indictment nor a copy of an arrest warrant which asserts a judicial finding of probable cause with its extradi-

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requisite to extended restraint of liberty following arrest. Gerstein v. Pugh, 420 U.S. 103 (1974).

171. W. LAFAVE, *supra* note 57, at 232.

172. *Gerstein*, 420 U.S. at 114; W. LAFAVE, *supra* note 57, at 232.

173. W. LAFAVE, *supra* note 57, at 233.

174. *In re* Ierardi, 366 Mass. 640, 321 N.E.2d 921 (1975).

175. It is also interesting to note the *Ierardi* court's observation that "[w]e are not sending [Ierardi] for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the Federal Constitution." *Id.* (quoting Biddinger v. Commissioner of Police, 245 U.S. 128, 133 (1917)).

176. *Ierardi*, 366 Mass. at 645, 321 N.E.2d at 924.

177. Michigan v. Doran, 439 U.S. 282 (1978).

tion request.[178] Three concurring Justices in *Doran* commented on the fact that the majority seemed to ignore the presence and significance of the fourth amendment in the extradition context.[179] This neglect is even more dangerous in the context of international extradition. It is neither safe nor sufficient to assume that the probable cause finding was made in the foreign jurisdiction. In the interstate rendition case, the accused is being sent to another state, under the protection of the Federal Constitution. Assuming that an alien jurisdiction, with laws which the United States' standards might condemn, has sufficiently determined probable cause for arrest clearly violates the fourth amendment mandate that a judicial determination of probable cause take place as a prerequisite to extended restraint of liberty.[180]

VI. A BRIEF NOTE ON LEGISLATION

Current legislation on extradition is found in 18 U.S.C. §§ 3181-3195.[181] Section 3184 in particular covers fugitives from foreign countries in the United States.[182] Most important to this discussion is the fact that in order for extradition to be granted, or for a warrant therefore to be issued, a magistrate or judge must determine that the evidence presented is sufficient to sustain the charge under the provisions of the proper treaty.[183] Presumably, the same requirement ap-

178. W. LAFAVE, *supra* note 57, at 235.

179. *Michigan*, 439 U.S. at 292.

180. Gerstein v. Pugh, 429 U.S. 103, 114 (1974).

181. 18 U.S.C. §§ 3181-95 (1982). See generally M. BASSIOUNI, *supra* note 168, at 641-861, for a complete compilation of all existing and pending legislation on extradition, including both House and Senate reports.

182. Section 3184 provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

18 U.S.C. § 3184 (1984).

183. *Id.*

plies to issuing a warrant for a provisional arrest. Pending legislation on extradition allows for provisional arrest of a fugitive even where not specifically required by the applicable treaty.[184] Neither pending nor existing legislation requires probable cause in regard to the issuance of an arrest warrant before an extradition hearing.[185] Both allow for provisional arrest upon no more than an express statement that a warrant for the fugitive's arrest was issued by the jurisdiction charging the fugitive with the commission of the crime for which his extradition is sought.[186]

The absence of an explicit probable cause requirement does not affect the fact that probable cause is constitutionally required.[187] The fourth amendment includes warrants for arrest for purposes of extradition.[188] Therefore, even though the legislation does not explicitly require probable cause, extradition is subject to constitutional limitations.[189] However, it is arguable that a lesser level of probable cause should be required for provisional arrest because it is based on urgency.[190] Therefore, legislation needs to be developed that clarifies provisional arrest procedures.[191]

VII. CONCLUSION

The present state of the law on provisional arrests allows such arrests to take place absent probable clause if the applicable treaty so provides. Because treaties and federal legislation share status as the supreme law of the land, it seems necessary for legislation to explicitly require probable cause in order to overcome the constitutional viola-

184. Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L. REV. 495, 520 (1984).

185. *Id.* at 523.

186. The legislation covering provisional arrest provides that a request "shall be accompanied by an express statement that a warrant for the fugitive's arrest has been issued within the jurisdiction of the authority making such request charging the fugitive with the commission of the crime for which his extradition is sought to be obtained." 18 U.S.C. § 3187 (1984).

187. Bassiouni, *supra* note 184, at 523.

188. *Id.*

189. *Id.* When a statute is ambiguous, "construction should go in the direction of constitutional policy." *Id.* (quoting United States v. Johnson, 323 U.S. 273, 276 (1944)).

190. *Id.* at 524. Even though the rationale behind provisional arrest clauses is the prevention of flight by the fugitive, it is doubtful that telegraphic information that a warrant has been issued in a foreign country is sufficient to satisfy even minimal constitutional standards. Remarks by M. Cherif Bassiouni, Proceedings of the 74th Annual Meeting of The American Society of International Law (Apr. 17-19, 1980).

191. Remarks by M. Cherif Bassiouni, Proceedings of the 74th Annual Meeting of The American Society of International Law (Apr. 17-19, 1980).

tions that become possible under treaty language that is silent or ambiguous on probable cause in this context. This type of legislation would seem to solve the problem, especially given the fact that treaties and acts of Congress are on the same footing; either may supersede the other, usually dependent on which is later in date.[192]

However, it has been clear since 1957 that the treaty-making power is subject to constitutional limitations.[193] Hence, whether or not a treaty explicitly or implicitly requires probable cause, or even if one specifically stated that probable cause was not required, the mandate of the fourth amendment would protect the arrestee.

American society is seriously concerned about the increase in narcotics sales and usage that are adversely affecting the productivity of this nation. The Reagan administration has responded to this concern by working towards the improvement of law enforcement means. In particular, this requires improving international cooperation in the area of criminal justice. The recent changes in extradition treaties reflect this goal. However, zealousness does not excuse or justify a result that is blatantly unconstitutional. It seems obvious that, were the Supreme Court to reach the question of whether probable cause should be required for provisional arrest, its answer would have to be yes. It is difficult to think of how the Court could get around the clear mandate of the fourth amendment.[194]

The fourth amendment was created in order to ensure the security of us all in our persons and property. To erode it even for the sake of international cooperation is intolerable.

Joan Presky

192. United States v. 85.237 Acres of Land, Etc., 157 F. Supp. 150 (S.D. Tex. 1957), *aff'd*, 252 F.2d 116 (5th Cir. 1958).

193. Reid v. Covert, 354 U.S. 1 (1957); *accord*, Pierre v. Eastern Air Lines, Inc., 152 F. Supp. 486 (D. N.J. 1957) (no article or term of treaty may nullify any guarantee of right preserved by Constitution to citizens); United States v. Steinberg, 478 F. Supp. 29 (N.D. Ill. 1979) (a treaty, either by its terms or in its application, cannot run counter to the provisions of the United States Constitution).

194. One argument would be the strength of the executive's powers in the area of foreign affairs. But given the Supreme Court's requirement that treaties conform to the Constitution, it is extremely doubtful that this argument could prevail even in this context.