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## Probable Cause and Provisional Arrest Under Certain Extradition Treaties: *Caltagirone v. Grant*

Extradition<sup>1</sup> is a "form of international mutual assistance"<sup>2</sup> that enables nations to recover fugitives who have fled to foreign countries. A fugitive may be extradited from the United States only pursuant to an extradition treaty or convention between the United States and the country seeking the return of the fugitive.<sup>3</sup> Some United States treaties provide that the extradition proceedings are to be governed by the law of the state being requested to return the fugitive.<sup>4</sup> Therefore, to issue a warrant for arrest on a formal extradition request, the fourth amendment of the Constitution<sup>5</sup> as applied by the United States courts<sup>6</sup> requires that a neutral judicial officer find probable cause to believe that an extraditable crime was committed, and probable cause to believe that the person sought to be extradited committed it. In *Caltagirone v. Grant*,<sup>7</sup> the Second Circuit Court of Appeals extended this probable cause requirement to a provisional arrest, an arrest made prior to a formal extradition request. The Second Circuit held that the specific terms of the

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<sup>1</sup> "Extradition is the process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment." 6 M. Whiteman, *Digest of International Law* 727 (1968).

<sup>2</sup> Schultz, *The Classic Law of Extradition and Contemporary Needs*, in 2 A *Treatise on International Criminal Law* 309 (M. Bassiouni & V. Nanda ed. 1973).

<sup>3</sup> 18 U.S.C. § 3181 (1976) states: "[t]he provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government." If such an extradition treaty authorizes a provisional arrest, a fugitive may be arrested and detained for a limited time pending a formal extradition request. If provisional arrest is not authorized, the fugitive is arrested only when formal extradition proceedings begin.

<sup>4</sup> See, e.g., *Treaty of Extradition*, June 22, 1972, United States-Denmark, 25 U.S.T. 1293, T.I.A.S. 7864; *Treaty of Extradition*, May 14, 1974, United States-Australia, 27 U.S.T. 957, T.I.A.S. 8234. 18 U.S.C.A. § 3181 note (West Supp. 1981) provides a complete list of all such treaties currently in force.

<sup>5</sup> The fourth amendment states:

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

U.S. Const. amend. IV.

<sup>6</sup> See *Whitley v. Warden*, 401 U.S. 560 (1971); *Giordenello v. United States*, 357 U.S. 480 (1958).

<sup>7</sup> 629 F.2d 739 (2d Cir. 1980).

extradition treaty between the United States and Italy,<sup>8</sup> as read in light of the fourth amendment, required probable cause to be established prior to the issuance of a warrant for the provisional arrest<sup>9</sup> of a fugitive.

The Italian government charged Caltagirone with fraudulent bankruptcy and participation in embezzlement.<sup>10</sup> Warrants for his arrest were issued in Italy on February 8 and March 3, 1980, but Caltagirone had left Italy for the United States.<sup>11</sup> Upon learning of Caltagirone's whereabouts, the Italian government applied to the United States for his provisional arrest in accordance with Article XIII of the treaty between the two countries.<sup>12</sup> Under the treaty terms, Caltagirone could be held forty-five days on a provisional arrest, pending request for a formal extradition hearing.

On the basis of a complaint sworn to by the United States Attorney for the Southern District of New York, a warrant was issued for Caltagirone's provisional arrest. The complaint showed only that a warrant for Caltagirone's arrest was outstanding in Italy.<sup>13</sup> Immediately after the arrest, Caltagirone's attorney moved to quash the arrest warrant "on the ground, *inter alia*, that it was issued without probable cause."<sup>14</sup> The motion was denied.<sup>15</sup> Upon a later identical motion and a petition for habeas corpus, the district court held that because a warrant was outstanding in Italy, "Caltagirone's arrest in the United States was presumptively valid under Italian law,"<sup>16</sup> and again denied his motion and petition.

Caltagirone appealed the denials and moved to expedite the appeals proceedings. The motion to expedite the appeal was granted<sup>17</sup> and seventy-five days after his arrest, Caltagirone's expedited appeal was argued before the Second Circuit Court of Appeals. Italy had formally requested Caltagirone's extradition at the end of the forty-five day provi-

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<sup>8</sup> Treaty of Extradition, Jan. 18, 1973, United States-Italy, 26 U.S.T. 493, T.I.A.S. No. 8052 [hereinafter cited as 1973 Extradition Treaty].

<sup>9</sup> A provisional arrest is an arrest made prior to a formal extradition request. It is intended to prevent further flight by the fugitive while the foreign state prepares the documentation for the formal extradition request. Whiteman, *supra* note 1, at 920.

<sup>10</sup> 629 F.2d at 742.

<sup>11</sup> *Id.*

<sup>12</sup> Article XIII of the Treaty between the United States and Italy reads as follows:

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 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.

1973 Extradition Treaty, *supra* note 8, art. XIII.

<sup>13</sup> 629 F.2d at 743.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 743 n.8.

sional detention period, and a hearing on the extradition complaint was scheduled for June 5, 1980. The hearing was "adjourned indefinitely" pending the outcome of the expedited appeal.<sup>18</sup>

Focusing on specific language of the Treaty, the Second Circuit held that Article XIII of the Treaty between Italy and the United States requires that a warrant for provisional arrest be issued according to the same legal standards required for issuance of a domestic arrest warrant for the same charge.<sup>19</sup> Article XIII provides that an application for provisional arrest

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 further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party* (emphasis added).<sup>20</sup>

Therefore, under the United States law the complaint on which the warrant was based would be insufficient unless it established probable cause to believe that a crime had been committed by the person sought. The court read "such further information" to mean information necessary for the issuance of a warrant in the United States.<sup>21</sup> Under the fourth amendment of the Constitution, "no Warrant shall issue, but upon probable cause, supported by Oath or affirmation . . . ." <sup>22</sup>

The government argued that Caltagirone's case was moot because the forty-five day period had expired and because Italy had formally requested Caltagirone's extradition.<sup>23</sup> The court rejected the government's argument of mootness, as the possibility existed that Caltagirone might be released rather than extradited and that he might be once again subject to a provisional arrest on the basis of the outstanding Italian warrant.<sup>24</sup> The issue could perpetually escape review if review was possible only during the forty-five day period.<sup>25</sup> Thus the court held the case was "alive and properly before [it]."<sup>26</sup>

In general, any extradition from the United States<sup>27</sup> is begun by a request for extradition made through diplomatic channels. A person representing the foreign government files a verified complaint before a magistrate or other judicial officer,<sup>28</sup> charging the fugitive with an extra-

<sup>18</sup> Id. at 749 n.21.

<sup>19</sup> Id. at 745.

<sup>20</sup> 1973 Extradition Treaty, *supra* note 8, art. XIII.

<sup>21</sup> 629 F.2d at 742.

<sup>22</sup> U.S. Const. amend. IV.

<sup>23</sup> 629 F.2d at 749.

<sup>24</sup> Id. at 750.

<sup>25</sup> Id.

<sup>26</sup> Id. at 749.

<sup>27</sup> For a step-by-step analysis, see Bassiouni, *International Extradition in American Practice and World Public Order*, 36 Tenn. L. Rev. 1, 5-7 (1969), reprinted in 2 A *Treatise on International Criminal Law* 351-53 (M. Bassiouni & V. Nanda ed. 1973).

<sup>28</sup> 18 U.S.C. § 3184 (1976).

ditable offense. The foreign government supports the complaint with documentation or other evidence to establish that the person sought has committed the offense or that he has been convicted of an extraditable offense.<sup>29</sup> The judicial officer will issue a warrant for the apprehension of the accused fugitive. After the arrest, the judicial officer will conduct a hearing in the fugitive's presence to determine whether reasonable grounds exist to believe he committed the offense or if the person was convicted. If the judicial officer finds evidence of an extraditable crime or prior conviction that would be sufficient<sup>30</sup> to justify the "apprehension and commitment for trial if the crime had been committed in that state,"<sup>31</sup> he will order the fugitive detained. The judicial officer sends a verified transcript of the hearing to the Secretary of State. If the Secretary finds sufficient evidence in the transcript to justify extradition, he may issue a warrant of surrender upon request by the proper authorities.<sup>32</sup>

Provisional arrest is a method by which the fugitive may be apprehended and held prior to a formal extradition request. It is intended to prevent further flight of the fugitive while the foreign state is preparing documentation for a formal extradition request.<sup>33</sup> United States treaty terms for provisional arrest generally make a provisional arrest discretionary, not obligatory,<sup>34</sup> and impose a time limit on the provisional detention pending formal extradition.<sup>35</sup>

The fourth amendment requirement of probable cause has consistently been applied to the issuance of warrants under a formal extradition proceeding.<sup>36</sup> In contrast, provisional arrests have been upheld based solely upon a request made by a credible official stating that a warrant or conviction for an extraditable offense is outstanding in the requesting nation.<sup>37</sup> However, in regard to an Australian treaty article on provisional arrest,<sup>38</sup> which is identical in language to the article construed in

<sup>29</sup> See *Yordi v. Nolte*, 215 U.S. 227 (1909).

<sup>30</sup> The proof required in an extradition hearing is not proof sufficient to establish guilt beyond a reasonable doubt, but proof sufficient to establish that a crime was committed and to establish probable cause that the accused committed it. *Merino v. United States Marshal*, 326 F.2d 5 (9th Cir.), cert. denied, 377 U.S. 997 (1963).

<sup>31</sup> *Charlton v. Kelly*, 229 U.S. 447, 456 (1913). See *Collins v. Loisel*, 259 U.S. 309 (1922); *DiStefano v. Moore*, 46 F.2d 308 (E.D.N.Y.), aff'd, 46 F.2d 310 (2d Cir. 1930), cert. denied sub nom. *Stefano v. Pulver*, 283 U.S. 830 (1931).

<sup>32</sup> 18 U.S.C. § 3184 (1976).

<sup>33</sup> See *supra* note 9.

<sup>34</sup> 1977 A. Rovine, *Digest of the United States Practice in International Law* 156 (U.S. Dep't of State, Pub. No. 8960, 1979).

<sup>35</sup> S. Bedi, *Extradition in International Law and Practice* 127 (2d ed. 1968).

<sup>36</sup> See *Collins v. Loisel*, 259 U.S. 309 (1922); *Yordi v. Nolte*, 215 U.S. 227 (1909); *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972); *Ex parte Davis*, 54 F.2d 723 (9th Cir. 1931).

<sup>37</sup> See 4 G. Hackworth, *Digest of International Law* 103 (U.S. Dep't of State, Pub. No. 1756, 1942); *McNamara v. Henkel*, 46 F.2d 84 (S.D.N.Y. 1912).

<sup>38</sup> Treaty on Extradition, May 14, 1974, United States-Australia, art. XII, 27 U.S.T. 957, T.I.A.S. No. 8234 [hereinafter cited as 1974 Extradition Treaty].

the instant case, the United States State Department specified information necessary to process provisional arrest requests.<sup>39</sup> The following requirements, specified by the State Department would also be sufficient to establish probable cause:

The information requisite to justify a provisional arrest of a fugitive would be the name of the fugitive, the offense with which the fugitive is charged, including the date and place the warrant for arrest was issued, the circumstances of the crime as fully as possible, including the date and place the crime was allegedly committed, a description and identification of the accused, including date and place of birth, and the accused's whereabouts, if known.<sup>40</sup>

The State Department explanation of provisional arrest under treaties requiring "such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted in the territory of the requested State,"<sup>41</sup> directly supports the court's finding in *Callagirone* that probable cause under such language is necessary for provisional arrest as well as arrest pursuant to a formal extradition request.<sup>42</sup> *Callagirone* provides that the language of the United States-Italy treaty authorizes judicial officers to issue warrants for provisional arrest only when presented with information sufficient to establish probable cause equal to the probable cause required for issuance of a warrant on the corresponding domestic criminal charge. Because the court's decision is based on the language of the treaty itself, as read in light of the fourth amendment, and not based solely on the fourth amendment,<sup>43</sup> questions remain as to the applicability of the fourth amendment to warrants for provisional arrest under treaties without such language.

A literal reading of the fourth amendment allows no exceptions to the probable cause requirement: "*no* Warrants shall issue but upon probable cause supported by Oath or affirmation . . . (emphasis added)."<sup>44</sup> Arguably, if exclusion of language such as that in Article XIII of the treaty with Italy<sup>45</sup> amounts to a legislative attempt to authorize the issuance of warrants not based on probable cause, such an attempt would

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<sup>39</sup> 1975 A. Rovine, *Digest of the United States Practice in International Law* 175 (U.S. Dep't of State, Pub. No. 8865, 1976). The Australian Treaty provides for provisional arrest requests to contain a description of the person sought, indication of intent to seek extradition, a statement of an outstanding warrant or conviction and "such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted in the territory of the requested State." 1974 Extradition Treaty, *supra* note 38.

<sup>40</sup> A. Rovine, *supra* note 39, at 175. Also compare the Australian treaty language in note 39 with the Italian provision in note 12.

<sup>41</sup> See the language used in the United States-Australian extradition treaty found in note 39.

<sup>42</sup> 629 F.2d at 745-47.

<sup>43</sup> *Id.* at 742.

<sup>44</sup> U.S. Const. amend. IV.

<sup>45</sup> See *supra* note 12.

be in violation of the express language of the fourth amendment and therefore void.

To read the fourth amendment into the provisional arrest articles of all treaties undermines to some extent the reasoning of the *Callagiri* court, which found the variance in provisional arrest requirements as supporting the conclusion that the framers of the Italian treaty intended probable cause to be a requirement for provisional arrest.<sup>46</sup> However, it is a logical extension from applying the probable cause requirement to some provisional arrests to applying probable cause requirements to the issuance of all warrants in this country. The *Callagiri* court questioned the "constitutional propriety"<sup>47</sup> of interpreting the treaty language as permitting provisional arrests without a showing of probable cause. Further, the fifth amendment supports a probable cause requirement for all provisional arrests: "No person shall . . . be deprived of life, liberty, or property without due process of law."<sup>48</sup> The fourth amendment establishes the probable cause requirement for a warrant to issue as one element of due process. The fifth amendment prohibits deprivation of liberty without due process, *i.e.*, without a warrant based on probable cause.

The effect of *Callagiri*, whether applied to all provisional arrests or merely provisional arrests under treaty language similar to the Italian treaty, will be to protect the rights of individuals sought by foreign governments without significantly increasing the burden on the foreign government. The technology of modern communications permits rapid transmission of information to establish probable cause. Although the distinctions between provisional arrest procedure and arrests pursuant to formal extradition requests will be decreased slightly, the requirements of compiling documentation and evidence for an extradition will not be imposed on the government requesting a provisional arrest.<sup>49</sup> Hence, requiring probable cause for all provisional arrests would not defeat the main function of provisional arrest, which is to prevent flight of the fugitive while the government prepares a full case on extradition. The procedures for provisional arrest and formal extradition would roughly parallel the domestic procedures for issuance of an arrest warrant and a hearing on probable cause to bind over a defendant for trial.<sup>50</sup>

The advantages of having an extradition treaty which enables governments to recover fugitives make it unlikely that the slightly increased burden of proof needed for a provisional arrest would discourage governments from entering into extradition treaties with the United States. If the fourth amendment probable cause requirement is not held to be applicable to a provisional arrest in the absence of language such as that of

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<sup>46</sup> 629 F.2d at 746.

<sup>47</sup> *Id.* at 748.

<sup>48</sup> U.S. Const. amend. V.

<sup>49</sup> 629 F.2d at 747.

<sup>50</sup> See Fed. R. Crim. P. 4(a), 5.1(a).

the Italian treaty, countries may bargain for the omission of such treaty language. Thus, foreign countries might seek to authorize provisional arrest when sufficient evidence to establish probable cause is not yet available and the fugitive is believed likely to leave the United States before such evidence could be compiled. As extradition treaties generally apply to American citizens as well as aliens in the United States, such treaty language could arguably authorize the arrest of American citizens "upon no more than an allegation by a foreign government that a warrant for the citizens was outstanding."<sup>51</sup>

*Caltagirone* requires that probable cause be shown prior to the issuance of provisional arrest warrants under treaties with specific language. Problems of interpretation may arise when treaty language is similar to, but not identical to, the treaty language considered in *Caltagirone*. If the complainant argues successfully that the language is distinguishable, the accused faces an arrest possibly in violation of the Constitution. The accused's deprivation of liberty may, in such circumstances, be held wrongful by an appeals court, but as in *Caltagirone*, the ruling may be long after the arrest.

The question of the constitutionality of provisional arrests without probable cause under treaties which do not expressly require warrants to be issued in accordance with United States law remains unanswered. If the absence of language such as that in the United States-Italy treaty is interpreted as authorizing the issuance of a warrant without probable cause, the apparent legislative attempt to eliminate the probable cause requirements may itself violate the fourth and fifth amendments of the Constitution.

Requiring a showing of probable cause to secure a provisional arrest warrant only slightly increases the burden on foreign governments while assuring persons within the United States of constitutionally protected rights. Although the *Caltagirone* court decided the case on the basis of the treaty language read in light of the Constitution,<sup>52</sup> it is a reasonable and just step from this decision to a requirement of probable cause for all provisional arrests regardless of the treaty language, provided that provisional arrests are authorized by the treaty under which extradition is sought.

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<sup>51</sup> 629 F.2d at 748.

<sup>52</sup> *Id.* at 742.



