SECOND BITES AND INTERNATIONAL EXTRADITION

ROBERTO IRAOLA†

I. INTRODUCTION

Extradition from the United States is governed by treaty and statute (18 U.S.C. §§ 3181, 3184, 3186, 3188-3191 (2006)). There is no appeal from an order denying or certifying extradition. This means that a fugitive customarily will challenge an extradition order through a petition for a writ of habeas corpus. By contrast, if the gov-

† Senior Trial Attorney, United States Department of Justice, Office of International Affairs; J.D. 1983, Catholic University Law School. The views expressed herein are those of the author and do not necessarily represent the views of the United States Department of Justice or the United States.

1. See In re Extradition of Lehming, 951 F. Supp. 505, 508 (D. Del. 1996) ("An extradition treaty creates in a foreign government the right to demand and obtain extradition of an accused criminal."). The authorization to extradite also may be conferred by statute. See Ntakirutimana v. Reno, 184 F.3d 419, 424-27 (5th Cir. 1999). Additionally, if there is no treaty, comity allows for the return of third country nationals—persons who are not citizens, nationals, or residents of the United States—provided certain conditions are satisfied. 18 U.S.C. § 3181(b) (2006); see also Waits v. McGowan, 516 F.2d 203, 208 (3d Cir. 1975) ("International extradition is governed only by considerations of comity and treaty provisions.").

2. See In re Extradition of Lahoria, 932 F. Supp. 802, 805 (N.D. Tex. 1996) ("International extradition proceedings are governed both by statute . . . and by treaty.").

3. See Quinn v. Robinson, 783 F.2d 776, 786 n.3 (9th Cir. 1986) ("[T]here is no appeal from an extradition order by the government or by the defendant."). As the court explained in In re Extradition of Howard:

Ordinarily neither party to an extradition proceeding may challenge a decision rendered therein by direct appeal. This disability developed because the relevant statute, 18 U.S.C. § 3184, does not contemplate hearings by United States courts qua United States courts . . . but, instead, directs that extradition matters be heard by 'any justice or judge of the United States,' any authorized magistrate, or certain state judges. Therefore, an officer who presides over such a proceeding is not exercising any part of the judicial powers of the United States . . . Rather, the officer acts in a non-institutional capacity by virtue of a special authority . . . The officer's only tasks are to determine whether an individual is extraditable, and if so, to certify extraditability to the ultimate decision maker.

996 F.2d 1320, 1325 (1st Cir. 1993) (citation and internal quotation marks omitted).

4. As observed by a distinguished commentator, "[t]he term 'fugitive' as used in extradition treaties refers to any person who has left the state in which the alleged crime was committed for whatever reason and is physically within the territory and subject to the jurisdiction of the requesting state." M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 827 (5th ed. 2007) (footnote omitted). For ease of reference, at times, the term "fugitive" is used in this article.

5. See, e.g., Hoxha v. Levi, 465 F.3d 554, 560 (3d Cir. 2006) ("An individual challenging a court's extradition order may not appeal directly, because the order does not constitute a final decision under 28 U.S.C. §1291, but may petition for a writ of habeas corpus.").
ernment is not successful in its initial attempt to extradite the fugitive, the government can file a new complaint seeking the fugitive's extradition.\(^6\)

This Article examines the developing case law on the number of bites the government can take at the "extradition apple."\(^7\) By way of background, this Article first provides an overview of the foreign extradition process.\(^8\) Next, this Article discusses some of the earliest reported cases recognizing the legal principle that the government may file a new complaint seeking a fugitive's extradition if the court denied the initial extradition request. An analysis of the United States Supreme Court's ruling in *Collins v. Loisel*,\(^9\) which firmly established this rule, ensues. Lastly, this Article analyzes the developing case law on renewed requests for a fugitive's extradition.

II. OVERVIEW OF EXTRADITION

Extradition involves "the surrender by one nation of an individual accused or convicted of an offense[s]e outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender."\(^10\) The process starts when the Department of State receives a request from a foreign coun-

\(^6\) See, e.g., Ahmad v. Wigen, 910 F.2d 1063, 1065 (2d Cir. 1990) ("An extraditee's sole remedy from an adverse decision is to seek a writ of habeas corpus; the Government's sole remedy is to file a new complaint.").

\(^7\) In re Extradition of Tafoya, 572 F. Supp. 95, 98 (W.D. Tex. 1983) (discussing how, since it had no right to appeal order denying extradition, by filing new extradition complaint, "[t]he government [was merely taking a second bite at the extradition apple]."


\(^9\) 262 U.S. 426 (1923).

\(^10\) Terlinden v. Ames, 184 U.S. 270, 289 (1902); see Saroop v. Garcia, 109 F.3d 165, 167 n.3 (3d Cir. 1997). International requests for the extradition of a fugitive are triggered either by a pending charge or a conviction. See, e.g., Treaty of Extradition Between the United States of America and the United States of Brazil, U.S.-Braz., art. I, Jan. 13, 1861, 15 U.S.T. 2093 (stating that each Contracting State agrees to surrender persons found within its territory who have been charged with or convicted of crimes or offenses specified in Article II of the present treaty). When extradition is sought on the basis of a conviction, the proof necessary to support the request ordinarily will consist of a certified copy of the conviction. See, e.g., Spatola v. United States, 925 F.2d 615, 618 (2d Cir. 1991) ("A certified copy of a foreign conviction, obtained following a trial at which the defendant was present, is sufficient to sustain a judicial officer's determination that probable cause exists to extradite.").
Upon review of the request to insure that it conforms to the treaty, the Department of State will then prepare a declaration authenticating the request and send it to the Department of Justice's Office of International Affairs, which will also review it and, if sufficient, send it to the United States Attorney for the district where the person sought to be extradited is located. The United States Attorney then files a complaint in support of an arrest warrant for the fugitive in federal district court.

After the fugitive is arrested, a magistrate judge holds a hearing under 18 U.S.C. § 3184 to determine whether the evidence presented by the foreign government is "sufficient to sustain the charge under the provisions of the proper treaty or convention."
While an extradition hearing is not considered a criminal proceeding, it can be compared to a preliminary hearing in a criminal case, and the governing standard at such hearing is probable cause, meaning that the magistrate’s role is merely to determine whether there is competent evidence to justify holding the accused to await trial. The Federal Rules of Evidence, the Federal Rules of Criminal Procedure, and the Federal Rules of Civil Procedure do not apply. Under 18 U.S.C. § 3190, the demanding country is permitted to introduce properly authenticated evidence collected there, and “the court shall exclude evidence [by the fugitive] that is proffered to contradict testimony, challenge the credibility of witnesses, or estab-

16. See In re Extradition of Ortiz, 444 F. Supp. 2d 876, 883 (N.D. Ill. 2006) (“[A]n extradition proceeding is not a criminal proceeding, but rather serves an independent review function.”).

17. See Benson v. McMahon, 127 U.S. 457, 463 (1888) (noting that an extradition proceeding is “of the character of those preliminary examinations [sic] which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused”); In re Extradition of Molnar, 202 F. Supp. 2d 782, 786 (N.D. Ill. 2002) (“An extradition proceeding is not a trial, but rather is similar to a preliminary hearing to determine probable cause.”).

18. See Hoxha v. Levi, 465 F.3d 554, 561 (3d Cir. 2006) (“The probable cause standard applicable to an extradition hearing is the same as the standard used in federal preliminary hearings.”); In re Extradition of Shaftouros, 643 F. Supp. 2d 535, 542 (S.D.N.Y. 2009) (“The probable cause standard applicable to an extradition hearing is the same as the standard used in federal preliminary hearings.”).

19. Haxhiaj v. Hackman, 528 F.3d 282, 287 (4th Cir. 2008) (internal quotation marks omitted). See Lo Duca, 93 F.3d at 1104 (“The judicial officer who conducts an extradition hearing ... performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense.”) (internal quotation marks omitted).

20. See In re Requested Extradition of Kirby, 106 F.3d 855, 867 (9th Cir. 1996) (Noonan, J., dissenting) (“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 Procedure ... Extradition proceedings are sui generis ... [t]hey are essentially administrative in character.”); Fed. R. Evid. 1101(d)(3) (“The rules ... do not apply ... to [p]roceedings for extradition or rendition”); Fed. R. Crim. P. 1(a)(5) (“Proceedings not governed by these rules include ... extradition and rendition of ... fugitive[s]”).


22. 18 U.S.C. § 3190, captioned “Evidence on hearing,” states:
Depositions, warrants or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

Id. See generally United States v. Wiebe, 733 F.2d 549, 552 (8th Cir. 1984) (“The only evidence adduced by the government at this hearing was the Spanish extradition request and its supporting documents.”).
lish a defense to the crimes alleged.” Further, the evidence at the extradition hearing may consist of hearsay evidence as well as unsworn statements.

A certificate of extradition ultimately will issue if several requirements are met. First, the judge or magistrate must have jurisdiction over the subject matter and over the person sought to be extradited. Second, the offense for which extradition is sought must be an extraditable offense under a treaty in effect at the time of the request. Third, the requesting state must provide competent evidence establishing probable cause that the fugitive committed the alleged offense. Upon the issuance of a certificate of extraditability, the Secretary of State will review the case and determine whether to issue a surrender warrant for the fugitive. As noted previously, however, although a fugitive may not directly appeal a district court judge or magistrate’s extradition ruling certifying him as being extraditable, prior to the Secretary of State’s consideration of the matter, a fugitive may seek a limited review of the certification order through a petition for a writ of habeas corpus under 28 U.S.C. § 2241.

---


24. See, e.g., Haxhiaj, 528 F.3d at 292 (“[C]ourts have consistently concluded that hearsay is an acceptable basis for a probable cause determination.”); Zanazanian v. United States, 729 F.2d 624, 626 (9th Cir. 1984) (arguing that police reports summarizing witness statements competent evidence).

25. See Collins v. Loisel (Collins II), 259 U.S. 309, 317 (1922) (“[U]nsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the state on a preliminary examination.”); Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986) (“[U]nsworn hearsay statements contained in properly authenticated documents can constitute competent evidence to support a certificate of extradition.”).


27. See 18 U.S.C. § 3184 (2006) (requiring that a judicial officer “shall certify the same . . . to the Secretary of State, that a warrant may issue . . . for the surrender of such person”); 18 U.S.C. § 3186 (“The Secretary of State may order the person committed under section[ ] 3184 . . . to be delivered to any authorized agent of such foreign government”). See also Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir. 1981) (“If the case is certified to the Secretary for completion of the extradition process it is in the Secretary’s sole discretion to determine whether or not extradition should proceed further with the issuance of a warrant of surrender.”). The Secretary has a broad range of options which include, but are not limited to, “reviewing de novo the judge’s findings of fact and conclusions of law, refusing extradition on a number of discretionary grounds, including humanitarian and foreign policy considerations, granting extradition with conditions, and using diplomacy to obtain fair treatment for the fugitive.” Mironescu, 480 F.3d at 666 (citing United States v. Kin-Hong, 110 F.3d 103, 109-10 (1st Cir. 1997)).

28. See supra notes 3 & 5 and accompanying text.

29. See Alfanasjiev, 418 F.3d at 1163 (“A petition for a writ of habeas corpus is a proper method to contest an extradition order because there is no direct appeal in extradition proceedings.”); Hoxha, 465 F.3d at 560 (“An individual challenging a court’s ex-
III. EARLY BITES AT THE EXTRADITION APPLE

In re MacDonnell\(^{30}\) appears to be one of the earliest reported cases recognizing the legal principle that the government may file a new complaint seeking a fugitive’s extradition if the court denied the request based on the initial complaint.\(^{31}\) In that case, Great Britain sought petitioner’s extradition for the forgery and uttering of two bills of exchange.\(^{32}\) The commissioner had originally denied the request on the grounds that the evidence proffered failed to sustain the charge, and, in turn, the government filed a new request based on the forgery and uttering of eleven different bills of exchange.\(^{33}\)

In response to petitioner’s contention that the earlier discharge amounted to an “acquittal” and precluded the filing of a new complaint, the circuit court first observed that while the two bills of exchange involved in the first request fit the description of two of the eleven bills identified in the second request, they were not identical to those two, and the other nine bills were “plainly distinct and separate forgeries.”\(^{34}\) Furthermore, the court “purposely refrain[ed] from . . . affirming, or admitting, that, if the offence charged had been identical in both complaints, the prior discharge would have operated as a necessary legal bar to a subsequent arrest, commitment and surrender, when the demanding government was able to produce proper evidence to sustain it.”\(^{35}\)

Expounding on the principle that a second request for extradition is permissible if the first one fails based on the sufficiency of the extradition order may not appeal directly, because the order does not constitute a final decision under 28 U.S.C. § 1291, but may petition for a writ of habeas corpus.”. The review of the findings of the magistrate judge who presides over an extradition hearing “is considerably more restricted than that generally engaged in by an appellate court.” Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978). Specifically, such review is limited only to “whether the magistrate had jurisdiction, whether the offence charges [wa]s within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.” Fernandez v. Phillips, 268 U.S. 311, 312 (1925). A final order in a habeas proceeding is subject to review under 28 U.S.C. §2253 by the United States Court of Appeals for the circuit where the district court is located. See In re Extradition of Artt, 158 F.3d 462, 467-68 (9th Cir. 1998).

\(^{30}\) 16 F. Cas. 59 (C.C.S.D.N.Y 1873).
\(^{31}\) In re MacDonnel, 16 F. Cas. 59 (C.C.S.D.N.Y. 1873) (No. 8,772). Two Attorney General Opinions, one twenty years before the decision in In Re MacDonnell, the other ten years prior to it, both acknowledged the legality of initiating a second extradition request if the first one was denied on the grounds that the evidence was insufficient, or that it had not been properly authenticated. See generally Extradition of Trangott Muller, 10 Op. Att'y Gen. 501 (1863); International Extradition, 6 Op. Att'y Gen. 91 (1853). See also Muller's Case, 17 F. Cas. 975 (E.D. Pa. 1863) (No. 9,913).
\(^{32}\) MacDonnel, 16 F. Cas. at 63.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Id.
dence presented, the circuit court in *In re Kelly*\(^36\) held that this rule applied even if it was the Secretary of State who, after a judicial finding of extraditability, declined to surrender the fugitive.\(^37\) And in *Ex Parte Schorer*,\(^38\) where a third extradition complaint was filed following the dismissal of the first two on procedural and evidentiary grounds, the district court reiterated the evolving rule that a subsequent "arrest and examination is always permissible where the first discharge arose through a default, either by reason of a failure to comply with established rules of procedure, or through a failure to produce competent evidence sufficient to move the commissioner or the court to hold the accused as an offender liable to extradition."\(^39\)

**IV. SUPREME COURT PRECEDENT**

In *Collins v. Loisel*,\(^40\) the Supreme Court of the United States squarely addressed the question of successive extradition requests.\(^41\) In that case, Great Britain sought the extradition of Charles Glen Collins ("Collins") for three counts of obtaining property under false pretenses.\(^42\) On review by way of a habeas petition, the district court entered an order finding Collins extraditable as to only one of the three charges.\(^43\) While the order also remanded the case for further proceedings, with respect to the two charges for which the habeas peti-

---

36. 26 F. 852, 854 (C.C.D. Minn. 1886).
37. *In re Kelly*, 26 F. 852, 854 (C.C.D. Minn. 1886). In support of its holding, the circuit court observed:

> We do not question the fact that an extradition requires the assent of both the judicial and the executive, and that the executive is the final tribunal to determine it; and whenever it appears that the executive has said that the alleged offense does not come within the scope of the extradition treaty, or when the executive says he is satisfied that the prosecution is instituted for political reasons, or to gratify private malice, and therefore the offender shall not be extradited, that concludes all further inquiry by the court. But when it is determined by the executive, as in this case, merely that the testimony presented is insufficient, we think it leaves it as in other cases of preliminary examination, and there can be a second inquiry.

*Id.*

38. 195 F. 334 (E.D. Wis. 1912).
40. 262 U.S. 426 (1923).
42. *Collins v. Miller (Collins I)*, 252 U.S. 364, 366 (1920). The case involving Collins' extradition reached the Supreme Court on three occasions and resulted in three different opinions by Justice Brandeis. The first appeal was dismissed for lack of jurisdiction. *Collins I*, 252 U.S. at 371. In the second appeal, the Court affirmed the denial of the petition for a writ of habeas corpus challenging the single incident of obtaining property under false pretenses for which Collins had been found extraditable. See *Collins v. Loisel (Collins II)*, 259 U.S. 309 (1922). The third appeal stemmed from the denial of a habeas petition challenging a finding of extraditability as to the two other incidents involving obtaining property by false pretenses for which Collins had previously been discharged, but which the government re instituted. See *Collins III*, 262 U.S. 426 (1923).
tion had been granted, neither party took any further action, and a judgment was entered on the writ discharging Collins on those two charges. Great Britain filed a new extradition request for the two charges which had been denied (accompanied by new affidavits), and the magistrate entered an order finding him extraditable on those offenses. Collins then challenged that ruling in a petition for a writ of habeas corpus that the district court denied, leading to Collins’s third appeal before the Supreme Court.

Before the Supreme Court, Collins argued that the reinstatement of extradition proceedings for the two offenses for which he had previously been discharged violated his rights under the Fifth Amendment, as well as the extradition treaty then in effect with Great Britain. Writing for the Court, Justice Louis Brandeis first rejected the argument that the renewed request violated Collins’s right against double jeopardy under the Fifth Amendment, noting that Collins had never been tried for a crime, and that the denial of the earlier request involving the two offenses was not tantamount to an “acquittal.” As to the contention that the filing of a new request violated the treaty, Justice Brandeis found that precedent in the form of In re MacDonnell and Ex Parte Schorers established “that a fugitive from justice may be arrested in extradition proceedings a second time upon a new complaint charging the same crime, where he was discharged by the magistrate on the first complaint or the complaint was withdrawn.” Lastly, addressing the question on the limit of the government’s authority to file a new request for a fugitive’s extradition following an earlier denial of the same, Justice Brandeis observed 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.”

Collins also argued that principles of res judicata barred the second request for extradition for the two offenses for which the district
court had previously granted his petition for a writ of habeas corpus. Justice Brandeis rejected this argument, finding that the original discharge had not affected the government's right to seek Collins's extradition. This was because, as Justice Brandeis explained, the order granting Collins's habeas petition was based on the irregularity of the proceedings under which he had been held, "and the British consul general, instead of undertaking to correct them, had concluded to abandon them and to file the charges anew by another set of affidavits."

V. THE EVOLVING CASE LAW ON SUBSEQUENT BITES AT THE EXTRADITION APPLE

Following the teaching of Collins v. Loisel, the lower courts uniformly have held that there is no legal bar to a renewed request for a fugitive's extradition if the first request was denied. In so doing, the following principles have emerged when applying this rule. First, because extradition proceedings do not result in a final judgment on the merits, and because of the special considerations governing such proceedings, "it is wholly inappropriate to apply res judicata concepts to the findings resulting from extradition proceedings." Second, "where the government in good faith determines that extradition is warranted, it is not barred from pursuing multiple extradition requests irrespective of whether earlier requests were denied on the merits or on procedural grounds." Lastly, a second request for extradition

54. Id. at 430.
55. Id.
56. Id.
57. 262 U.S. 426 (1923).
58. Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978); accord In re Extradition of Massieu, 897 F. Supp. 176, 179 (D.N.J. 1995); Ahmad v. Wigen, 910 F.2d 1063, 1065 (2d Cir. 1990); Mirchandani v. United States, 836 F.2d 1223, 1226 (9th Cir. 1988); Quinn v. Robinson, 783 F.2d 776, 786 n.3 (9th Cir. 1986); United States v. Doherty, 786 F.2d 491, 501 (2d Cir. 1986); In re Extradition of Tafoya, 572 F. Supp. 95, 97 (W.D. Texas 1983). See also Desmond v. Egers, 18 F.2d 503, 506 (9th Cir. 1927); In re Extradition of Artukovic, 628 F. Supp. 1370, 1375 (C.D. Cal. 1986).
59. Hooker, 573 F.2d at 1366; accord Mirchandani, 836 F.2d at 1226; Tafoya, 572 F. Supp. at 97; cf. Ahmad v. Wigen, 726 F. Supp. 389, 397 (S.D.N.Y. 1989), aff'd 910 F.2d 1063 (2d Cir. 1990). In Hooker, the court recognized that the dismissal of the extradition order in Collins v. Loisel (Collins III), 262 U.S. 426 (1923), appeared to be grounded on procedural grounds, not on the merits. Hooker, 573 F.2d at 1366; see Sabatier v. Dabrowski, 586 F.2d 866, 869 (1st Cir. 1978) (citing Collins III and noting that in that case there had not been an adjudication on the merits regarding the first request). Nonetheless, the court reasoned in Hooker:

[T]here is no indication the [Supreme] Court intended its holding to turn on this distinction. Indeed, the Court's clearly stated preference for government fair-mindedness over judicial constraints as a curb to abusive use of multiple extradition requests indicates that the Court was formulating a broad rule applicable to the entire practice of reinstating extradition proceedings.
generally will be considered by a different magistrate or a district court judge. It also may be based solely on the record submitted in the initial request, or the original record and additional evidence.

VI. CONCLUSION

Extradition proceedings are deemed "sui generis in nature, neither civil nor criminal[,]" and "the procedural framework of international extradition gives to the demanding country advantages most uncommon to ordinary civil and criminal litigation." Since the government has no means to obtain review from the denial of an extradition request, its only recourse is to file a new request, generally heard before a different judicial officer, who will consider the request de novo. The filing of a new complaint seeking a fugitive's extradition does not violate the Double Jeopardy or Due Process Clauses of the Fifth Amendment. If this new complaint should also fail, the government may take additional bites at the extradition apple, when "in good faith [it] determines that extradition is warranted."