No. 21A854

IN THE
SUPREME COURT OF THE UNITED STATES

NIZAR TRABELSI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Respectfully Submitted,

/s/ Marc Eisenstein

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QUESTION PRESENTED

1. Whether a trial court considering a request for dismissal of an indictment based on the violation of an extradition treaty's prohibition on prior prosecution should defer to a determination of a foreign nation's Minister of Justice or make their own findings and determinations, particularly when a foreign court held that the extradition treaty was violated and issued rulings limiting the conduct for which the United States court can prosecute the defendant?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nizar Trabelsi respectfully petitions for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the District of Columbia Circuit denying the motion for reconsideration of the order denying his motion to dismiss the indictment.

DECISION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, *United States v. Trabelsi*, 28 F.4th 1291 (D.C. Cir. 2022), the Order of the District Court, filed March 13, 2020, denying the motion for reconsideration and the Order of the District Court, filed February 5, 2021, denying the motion for an indicative ruling.

JURISDICTION

The District of Columbia Circuit entered judgment in this case on [DATE]. App 56. No petition for rehearing was filed. The Court extended the time for petitioner to seek a writ of certiorari to August 1, 2022, so it is timely under Supreme Court Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

TREATY INVOLVED

At issue here is the application of the Extradition Treaty Between the United States of America and the Kingdom of Belgium ("Treaty"), Apr. 27, 1987, S. Treaty Doc. No. 104-7. The treaty is reproduced in full in the appendix to this petition. The relevant portion of the Treaty is Article 5, which provides that "[e]xtradition shall not be granted when the person sought has been found guilty, convicted or

acquitted in the Requested State for the offense for which extradition is requested."

STATEMENT OF THE CASE

Nizar Trabelsi was arrested in Brussels, Belgium the days after the September 11, 2001, terrorist attacks in the United States. He was charged with plotting and planning to take part in an attack on the Kleine Brogel Air Base by al-Qaeda. Mr. Trabelsi was convicted in Belgium and sentenced to 10 years in prison. The United States indicted Mr. Trabelsi in 2006 while he was serving his sentence in Europe for the Kleine Brogel plot. The charges in the United States included the same conduct Mr. Trabelsi was convicted of in Europe and for which he was in the process of serving a prison sentence.

The United States urged the Belgium government to extradite Mr. Trabelsi despite the overlapping conduct and known issues under the Treaty. The Treaty does not allow extradition "when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested[.]". Even though the conviction in Brussels and indictment in the United States both involved the Kleine Brogel plot, the United States was successful in causing Belgium to extradite Mr. Trabelsi. In addition to challenges by Mr. Trabelsi's counsel in Belgium, other bodies raised challenges to the extradition. The European Court of Human Rights ("ECHR") attempted to stop the extradition while claims were pending in their court.

Since arriving in the United States, Mr. Trabelsi has raised numerous challenges to his prosecution based on violations of the Treaty. His first motion to

dismiss was denied by the trial court. *United States v. Trabelsi*, 2015 U.S. Dist. LEXIS 201244 (D.D.C. 2015). The decision was upheld by the United States Court of Appeals for the District of Columbia Circuit. *United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017). Mr. Trabelsi filed a motion for reconsideration of the denial of his motion to dismiss on September 24, 2019. The motion argued that the trial court incorrectly interpreted the extradition order to include certain conduct and deferred to prior decisions of the Belgian's court's that has been changed based on subsequent court rulings and government statements and actions. Mr. Trabelsi also filed a motion for indicative ruling based on new evidence that developed after the motion for reconsideration was denied and the appeal of the ruling was pending.

The motion for reconsideration and motion for indicative ruling was based on a series of subsequent court rulings and statements and communications from the Belgian government. These included:

> **August 8, 2019 decision from Belgian Court of Appeals:** The court found that United States court incorrectly "interpret[ed] the ministerial order of extradition as authorizing the extradition without the limits set during the exequatur . . . and without being informed of the Court of Cessation's position on the interpretation of Article 5 of the [Treaty]." It further held that any rulings related to challenges to the extradition and subsequent appellate judgment are "binding on the Belgian state" and extradition would need to be "within the limits of the exequatur granted to the arrest warrant. The order also required the Belgian government to

contact the United States government and advise them that the extradition of Mr. Trabelsi does not allow them to prosecute him "for the attempt of bombing of Kleine Brogel military base." A letter was sent to the United States Department of Justice on August 9, 2019.

February 26, 2020 decision from Belgian Court of First Instance: The court found that as it related to extradition of Mr. Trabelsi, Belgian government failed in its obligation for the executive to "bring [any] limit to the attention of the Foreign State, if it grants extradition." The court required the Belgian government to notify the United States that according to rulings and analysis of Belgian law, Mr. Trabelsi cannot be prosecuted in United States for the "facts relating to the attempted attack on the Kleine-Brogel military base." The letter was sent on March 5, 2020.

May 28, 2020 decision from Belgian Court of First Instance: The court noted that a November 13, 2019 note from Belgian government "worked against the objective" which the August 8, 2019 Belgian Court of Appeals decision was meant to bring. The August 8, 2019 decision was meant to remove any ambiguity about whether Mr. Trabelsi could be prosecuted in the United States related to the Kleine Brogel plot. The Belgian government appealed the decision, stating that the November 13, 2019 letter was meant only to inform the United States that they had appealed the August 8, 2019 decision.

The Belgian government also appealed the February 26, 2020 decision from Belgian Court of First Instance. The government clarified that its prior statements were meant to convey the position that "the extradition of Mr. Trabelsi does not allow him to be prosecuted in the United States to be tried for [Kleine Brogel plot]."

July 15, 2020 decision from Belgian Court of Appeals: The court reiterated that Mr. Trabelsi's extradition "does not allow him to be prosecuted in the United States for [the Kleine Brogel plot]."

The district court denied Mr. Trabelsi's motion for reconsideration and motion for indicative ruling. The district court held that the court decisions and government actions were not "significant, new, and previously unavailable evidence that would warrant a department from the mandate rule."

Mr. Trabelsi appealed the denial of his motion for reconsideration to the Court of Appeals for the District of Columbia Circuit. The appellate court first addressed whether the interpretation of the Treaty by the Belgian court of the Belgian state controls. The court of appeals noted that the "Belgian courts have held that Trabelsi may not be prosecuted in the United States for [the Kleine Brogel plot] because they are the same as the offenses charged in Belgium. By contrast, the Belgian state has placed no limitations on his extradition or prosecution." *United States v. Trabelsi*, 28 F.4th 1291, 1298 (D.C. Cir. 2022). The court of appeals held that the view of the Belgian state

controls, noting the "emphasis on the executive authority suggests the Belgian state has the final say over the Treaty's application in an extradition order." "Under the text of the Treaty and the act of state doctrine, this Court should defer to the Belgian state's Extradition Order and its explanation of it in subsequent diplomatic notes, rather than to the Belgian courts' interpretation." With respect to the subsequent events, the court of appeals held that the developments, including the court decisions, Belgian state communications, and legal filings since 2017 "do not constitute significant new evidence that would warrant deviating from the law of the case."

REASONS FOR GRANTING THE PETITION

I. Deferring to the decision of the Belgian government on the interpretation and application of the relevant portion of the treaty was improper

In the context of extradition treaties, courts are bound "to enforce in any appropriate proceeding the rights of persons growing out of that treaty." *United States v. Rauscher*, 119 U.S. 407, 419 (1886); *Johnson v. Browne*, 205 U.S. 309, 317 (1907). Courts in the United States have "an obligation to interpret and apply treaties as the law of the land, and . . . the meaning of Article 5 [of the Extradition Treaty Between the United States of America and the Kingdom of Belgium] is fully susceptible of judicial analysis. *United States v. Trabelsi*, 845 F.3d 1181, 1194 (D.C. Cir. 2017).

"An American court must give great deference to the determination of the foreign court in an extradition proceeding." *Casey v. Dep't of State*, 980 F.2d 1472,

1477 (D.C. Cir. 1992). The circuit court cited and acknowledged this holding, but cited to *United States v. Knowles* as support for the position that it is proper to "defer[] to the executive authority over the juduciary's interpretation of [an] Extradition Order. *Trabelsi*, 28 F.4th at 1300 (citing *United States v. Knowles*, 390 F.App'x 915, 917 (11th Cir. 2010). The circumstances in *Knowles* did not involve a judicial finding by a foreign court limiting the conduct for which he could be prosecuted in the United States. Instead, it was a challenge to the extradition while a habeas application was pending. *Knowles*, 390 F.App'x at 928.

The circuit court also held that the significant developments since 2019 do not support reconsideration of the prior denial of Mr. Trabelsi's motion to dismiss. First, Mr. Trabelsi submits that the district court should have done an independent analysis instead of merely relying on the Belgian executive decisions and minimizing Belgian judicial determinations. The circuit court questioned Mr. Trabelsi's interpretation of the series of executive actions and judicicial determinations. However, the determination that the extradition was proper and no relief can be afforded by the United States court and seems to fail to recognize and appreciate the rulings, including the May 2020 ruling and government statement that "the extradition of Mr. Trabelsi does not allow him to be prosecuted in the United States to be tried for [Kleine Brogel plot]." The subsequent rulings resolve any dispute about whether Mr. Trabelsi can be prosecuted in the United States for the Kleine Brogel plot. These rulings are sufficient for reconsideration and granting the relief sought by Mr. Trabelsi

CONCLUSION

Based on the foregoing we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully Submitted,

/s/ Marc Eisenstein

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CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b) of the Supreme Court of United States, I certify that I have been appointed to represent Mr. Trabelsi in the United States District Court for the District of Columbia pursuant to the Criminal Justice Act. I further certify that on August 1, 2022, at the time of filing this petition for writ of certiorari, I served it via the Court's electronic filing system and three copies via first-class mail to the following:

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/s/ Marc Eisenstein

Marc Eisenstein

Certificate of Compliance with Type-Volume Limitation,
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I certify the following:

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/s/ Marc Eisenstein

Marc Eisenstein

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 9, 2021 Decided March 25, 2022

No. 20-3028

UNITED STATES OF AMERICA,
APPELLEE

v.

NIZAR TRABELSI, ALSO KNOWN AS NIZAR BEN ABDELAZIZ TRABELSI, ALSO KNOWN AS ABU QA'QA,
APPELLANT

Consolidated with 21-3009

Appeals from the United States District Court
for the District of Columbia
(No. 1:06-cr-00089-1)

Celia Goetzl, Assistant Federal Public Defender, argued the cause for appellant. On the briefs were *A.J. Kramer*, Federal Public Defender, and *Sandra Roland*, Assistant Federal Public Defender. *Tony Axam Jr.*, Assistant Federal Public Defender, entered an appearance.

Peter S. Smith, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Elizabeth Trosman* and *Chrisellen R. Kolb*, Assistant U.S. Attorneys.

Before: WILKINS, RAO and JACKSON*, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

Concurring opinion filed by *Circuit Judge* WILKINS.

Concurring opinion filed by *Circuit Judge* RAO.

WILKINS, *Circuit Judge*: Belgium extradited Nizar Trabelsi, a Tunisian national, to stand trial in the United States on terrorism charges in 2013. Eight years later, that trial has yet to take place. This Court has adjudicated Trabelsi's claim once before, affirming the District Court's denial of his motion to dismiss the indictment. *United States v. Trabelsi*, 845 F.3d 1181, 1184 (D.C. Cir. 2017). Then, Trabelsi argued that his extradition violated the Extradition Treaty between the United States and Belgium because the U.S. indictment charged the same offenses for which he was convicted in Belgium. Now, Trabelsi appeals the District Court's denial of his motions to reconsider dismissing the indictment in light of intervening, and conflicting, Belgian legal developments.

Trabelsi challenges the District Court's denial of his motions on three grounds. First, he contends that the Belgian court decisions and official communications constitute significant evidence that merit reconsideration of his motion to dismiss. He argues next that the District Court should have deferred to the Belgian courts' recent decisions interpreting his 2011 Extradition Order. And finally, he asserts that the District Court should have compared the offenses in the U.S. indictment to the offenses for which he was convicted in Belgium.

* Circuit Judge Jackson was a member of the panel at the time the case was argued but did not participate in this opinion.

The Belgian legal developments Trabelsi invokes do not constitute significant new evidence that would warrant disturbing this Court's 2017 decision. As a result, he has failed to meet the significantly high burden for departing from the law of the case. We therefore affirm.

I.

We assume familiarity with the facts of this case, as recounted in our prior opinion, *Trabelsi*, 845 F.3d at 1184–85, and relate them only as relevant to the present appeal. In 2001, Trabelsi was arrested, indicted, and convicted in Belgium for attempting to destroy the Kleine-Brogel military base. While serving a ten-year sentence in Belgium, a grand jury in the United States indicted Trabelsi on charges of conspiracy to kill United States nationals outside of the United States; conspiracy and attempt to use weapons of mass destruction; conspiracy to provide material support and resources to a foreign terrorist organization; and providing material support and resources to a foreign terrorist organization. On April 4, 2008, the United States issued an extradition request, pursuant to the Extradition Treaty between the U.S. and Belgium (the "Extradition Treaty" or "Treaty").

On November 19, 2008, the Court Chamber of the Court of First Instance of Nivelles issued an exequatur, or enforcement order, regarding Trabelsi's extradition, the first in a long line of Belgian court decisions. Under Article 5 of the Treaty, an individual may not be extradited if he has been found guilty, convicted, or acquitted in the Requested State for the same offense, known as the *non bis in idem* ("not twice in the same") rule. S. TREATY DOC. NO. 104-7 (1987). The Court of First Instance found that the arrest warrant was enforceable, except as to Overt Acts 23, 24, 25, and 26 as referenced in the

indictment,[1] due to their overlap with the offenses Trabelsi was convicted of in Belgium. The Brussels Court of Appeal and the Belgian Court of Cassation, that country's court of last resort, both affirmed the Court of First Instance's decision.

The Belgian Minister of Justice, who represents the Belgian government in extradition proceedings, issued the Extradition Order ("Order") on November 23, 2011. In the Order, the Minister defined an overt act as "an element (of fact or factual), an act, a conduct or a transaction which in itself cannot automatically be qualified as an offense" and concluded that the United States would not violate Article 5 of the Treaty by relying on the same "overt acts" or factual elements in prosecuting distinct offenses from those charged in Belgium. J.A. 554 ("[T]he offenses for which the person to be extradited was irrevocably sentenced . . . do not correspond to the offenses . . . that appear in the arrest warrant on which the U.S. extradition request is based."). On review of the Minister's decision, the Belgian Council of State denied Trabelsi's request

[1] The Overt Acts are the following: "(23) In or about July 2001, in Uccle, Brussels, Belgium, Nizar Trabelsi rented an apartment; (24) In or about July and August 2001, in Belgium, Nizar Trabelsi bought quantities of chemicals, including acetone, sulfur, nitrate, and glycerine, to be used in manufacturing a 1,000-kilogram bomb; (25) In or about August 2001, in Belgium, Nizar Trabelsi traveled at night with conspirators to scout the Kleine-Brogel Air Force Base—a facility used by the United States and the United States Department of the Air Force, and at which United States nationals were present—as a target for a suicide bomb attack; (26) In or about early September 2001, in the vicinity of Brussels, Belgium, Nizar Trabelsi moved, and caused to be moved, a quantity of chemicals, including acetone and sulfur, from Trabelsi's apartment to a restaurant operated by a conspirator known to the Grand Jury, after police had visited the apartment for an apparently innocuous purpose." J.A. 423.

to stay the extradition and similarly concluded that the Overt Acts were merely constitutive elements of his indictment. Belgium extradited Trabelsi to the United States on October 3, 2013.

In the United States, Trabelsi moved to dismiss the indictment, arguing that his extradition violated the Treaty. In response, the Belgian Embassy in Washington, D.C. issued a diplomatic note ("First Diplomatic Note" or "Note"), explaining that the Order "is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States" and "makes clear that Mr. Trabelsi may be tried on all of the charges set out in that indictment." J.A. 680. The Note stipulated that the prosecution was entitled to offer facts related to Overt Acts 23–26, per the Order. *Id.* The District Court agreed with the Minister of Justice over the judicial authorities, denying Trabelsi's motion because he had failed to demonstrate that he was prosecuted for the same offenses in Belgium and the United States. *United States v. Trabelsi*, No. 06-89, 2015 WL 13227797, at *1 (D.D.C. Nov. 4, 2015) ("*Trabelsi I*"). We affirmed the District Court's ruling on different grounds, *Trabelsi*, 845 F.3d at 1184. ("*Trabelsi II*"). We articulated a standard under which we "presume, absent evidence to the contrary, that the extraditing nation has complied with its obligations under the treaty and that the extradition is lawful" and found an offense-based analysis, rather than the *Blockburger* test, was the appropriate one to apply. *Id.* at 1184, 1186. Accordingly, we concluded that the Extradition Order's offense-based analysis reasonably construed the Treaty. *Id.* at 1190–92.

As his challenge to his extradition played out in the American courts, Trabelsi continued to pursue relief in Belgium. These Belgian legal proceedings—particularly four judicial decisions and various legal filings and other

communications—are what give rise to Trabelsi's current claims. First, the Court of First Instance rejected Trabelsi's requests both to halt the Belgian state from cooperating with the American authorities and to inform the American courts that the extradition proceedings violated Article 5 of the Treaty, due to their inclusion of the four Overt Acts. Trabelsi promptly appealed. On August 8, 2019, the Brussels Court of Appeal reversed, finding that the exequatur would not allow for the United States to prosecute Trabelsi for the four Overt Acts discussed and, as a practical matter, ordering the Belgian state to notify the U.S. authorities of its ruling. It stopped short of ordering Belgium to halt cooperation with the United States.

On November 13, 2019, the Belgian Embassy in Washington, D.C. issued another diplomatic note ("Second Diplomatic Note"), explaining that the Court of Appeal's August 2019 judgment was contrary to Belgium's Extradition Order and "therefore contrary to the clear wording of article 5 of the Treaty." J.A. 1405. The Second Diplomatic Note describes the Extradition Order as "the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States" and asserts "that any similarity between the United States case and the Belgian case does not give rise to any bar on his being tried on the charges in that [American] indictment." J.A. 1406. Further, the Note states that under the Treaty, "the Minister of Justice has sole authority to decide on a foreign extradition request since extradition is traditionally intergovernmental cooperation." *Id.*

Second, on February 26, 2020, the Court of First Instance ordered the Belgian state to notify the appropriate American authorities that Trabelsi could not be prosecuted for the four Overt Acts but denied his request to inform the American authorities that his prosecution violated the *non bis in idem* principle. The Belgian state appealed this judgment.

Nevertheless, on March 5, 2020, the Ministry of Justice complied with that court order, formally notifying the Department of Justice of the Court of First Instance's judgment.

Based on the August 8, 2019 Brussels Court of Appeal judgment, Trabelsi moved for the District Court to reconsider its motion to dismiss the indictment and compel compliance with his view of Article 5 of the Treaty, a view shared by Belgium's judicial authority. In March 2020, the District Court denied the motion. *United States v. Trabelsi*, No. 06-cr-89, 2020 WL 1236652, at *1 (Mar. 13, 2020) ("*Trabelsi III*"). The District Court found that the D.C. Circuit "was aware of the difference of opinions held by [the] Belgian Minister of Justice and Belgian judiciary." *Id.* at *12. Thus, "Trabelsi cannot reasonably maintain that the August 8, 2019 and February 26, 2020 decisions made available any new, and previously unavailable, line of argument." *Id.* The Court held that Trabelsi had offered no evidence to support reconsidering the Circuit's interpretation of the Extradition Order. *Id.* at *13. Trabelsi timely filed a notice of appeal on March 31, 2020.

Back in Belgium, the conflict between the Belgian executive and judicial authorities continued. The third of the intervening Belgian decisions came on May 28, 2020, when the Brussels Court of First Instance held that the Belgian state did not have authority to issue the Second Diplomatic Note. The Minister of Justice appealed that decision.

Fourth and finally, on July 15, 2020, the Brussels Court of Appeal affirmed the Court of First Instance's February 2020 judgment, denying Trabelsi's request to order the Belgian state to transmit a new diplomatic note to the United States expressing an opinion that the Extradition Order did not conform to Article 5. Significantly, the Court remarked:

> The aforementioned American decisions, and in particular that of the D.C. Circuit . . . make it clear that the American Courts are applying their own law and the law of international relations, that they have full knowledge of the dissensions between the Belgian Courts and the Belgian government, that they take into account the Belgian judicial decisions but that they consider that there is no reason, by virtue of their own law, over which this Court does not have the power to substitute its assessment, and the law of international relations . . . to give priority to these Belgian judicial decisions over the ministerial order on extradition, which these decisions do not modify or cancel and the effects of which they do not suspend.

J.A. 2021 (emphasis omitted). In the final Belgian litigation development included in the record before us, on July 31, 2020, the Belgian government filed a response to Trabelsi's new case seeking damages from the Belgian government for its failure to comply with the February 2020 decision.

Trabelsi continued his efforts in the United States. On November 3, 2020, he urged the District Court to reconsider its denial of his previous motion to reconsider, given the recent developments in his Belgian litigation, and to stay the district court proceedings pending his appeal in Belgium. Because the District Court no longer had jurisdiction over the matter, given the March 2020 notice of appeal, Trabelsi moved for an indicative ruling, pursuant to Federal Rule of Criminal Procedure 37(a). The District Court granted the stay but, in an appropriate exercise of discretion under Rule 37(a)(2), reached and denied Trabelsi's second motion to reconsider. *United States v. Trabelsi*, No. 06-cr-89, 2021 WL 430911, at *1 (Feb. 5, 2021) ("*Trabelsi IV*"). The Court once again held that the intervening Belgian decisions and pleadings did not qualify as

significant new evidence that would alter its understanding of the Extradition Order, as set forth in *Trabelsi I*, *II*, and *III*. *Id.* at *15.

II.

We review a denial of a motion to reconsider in a civil case for abuse of discretion, *Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006), and the same standard applies to a denial of a motion for reconsideration in a criminal case. *United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014). However, "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) (citing *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)). Thus, because the motion to reconsider turns on whether the District Court correctly interpreted the Extradition Treaty, and because we review the interpretation of treaties de novo, *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008), our review is effectively de novo. *See United States v. Fanfan*, 558 F.3d 105, 106–07 (1st Cir. 2009) (de novo review proper where defendant "charges the district court with misconstruing its legal authority" on motion for reconsideration).

Jurisdiction is secure over this interlocutory appeal, as it would be over a double jeopardy claim.[2] Under *Abney v. United States*, pretrial orders denying a motion to dismiss an

[2] The *non bis in idem* principle resembles double jeopardy but differs in that it "addresses the possibility of repeated prosecutions for the same conduct in different legal systems, whereas double jeopardy generally refers to repeated prosecutions for the same conduct in the same legal system." Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. OF TRANSNAT'L L. 635, 687 (2007) (internal quotation marks and citation omitted).

indictment on double jeopardy grounds constitute "final decisions" for the purposes of 28 U.S.C. § 1291. 431 U.S. 651, 662 (1977) (internal quotation marks omitted). As discussed in *Trabelsi I*, however, *Abney* is not on all fours because Trabelsi's claim arises under the Treaty, not under the Double Jeopardy Clause of the Fifth Amendment. *Trabelsi II*, 845 F.3d at 1186. Still, *Abney*'s reasoning is instructive: Article 5's *non bis in idem* provision mirrors the Constitution's prohibition of double jeopardy and Trabelsi's claim remains collateral to his conviction. Accordingly, we may appropriately exercise jurisdiction over Trabelsi's appeal.

A.

We must first address the threshold question of whether the law of the case doctrine determines the result in this subsequent appeal. The District Court and a prior appellate panel have already decided the question at the core of this case: whether Trabelsi's extradition violated Article 5 of the Treaty. The law of the case doctrine dictates that "[w]hen there are multiple appeals taken in the course of a single piece of litigation . . . decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). Put differently, "the *same* issue presented a second time in the *same* case in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). Reopening an issue is possible, however, if "extraordinary circumstances" demand it. *Id.* That may include an intervening change in the law, a finding that the original decision was clearly erroneous, or if "significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light." *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (internal quotation marks and citation omitted); *see LaShawn A.*, 87 F.3d at 1393.

Trabelsi relies on the third exception to argue that the intervening Belgian court decisions, Belgian government communications, and legal filings constitute "significant new evidence" that warrant revisiting the propriety of his extradition under Article 5. This "new evidence" could not have been obtained earlier, given the timing of the Belgian litigation. We may therefore evaluate Trabelsi's claim to determine whether these developments qualify as significant new evidence, such that they require breaking from the law of the case.

B.

Even before we reach the question of whether the Belgian legal developments constitute significant new evidence, we must examine whether the Belgian state's or its courts' interpretation of the Treaty controls. The Belgian courts have held that Trabelsi may not be prosecuted in the United States for Overt Acts 23–26 because they are the same as the offenses charged in Belgium. By contrast, the Belgian state has placed no limitations on his extradition or prosecution. Whether this Court owes deference to the Belgian courts may impact our ability to view the Belgian judgments as "significant new evidence."

At the outset, the Extradition Treaty governs these proceedings. *See Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933). Like statutory interpretation, the interpretation of a treaty begins with the text itself. *See Medellin v. Texas*, 552 U.S. 491, 506 (2008). The Treaty does not vest final authority over its interpretation to either the Belgian state or the Belgian courts, but it does intimate whose interpretation controls. Throughout, the Treaty refers to the power of the "executive authority" in extradition proceedings. S. TREATY DOC. NO.

104-7. It is the executive authority who can refuse to extradite an individual for offenses that are not illegal under ordinary criminal law and who can choose the state of extradition if there are competing requests. *Id.* at arts. 4(4), 13. Significantly, it is also the executive authority who "consents to the person's detention, trial, or punishment" prior to the extradited person being detained, tried, or punished abroad. *Id.* at art. 15(1). Nowhere does the Treaty refer to the Belgian courts' role in extradition proceedings. Its emphasis on the executive authority suggests the Belgian state has the final say over the Treaty's application in an extradition order.

Despite the Treaty's focus on the executive, it is true that American courts have urged deference to foreign courts' holdings in extradition proceedings. In *Johnson v. Browne*, the Supreme Court held that whether a crime was an extraditable offense under the relevant treaty was a matter for the Canadian judicial authorities (the extraditing country) to decide. 205 U.S. 309, 316 (1907). This Court later interpreted *Johnson* to mean that "an American court must give great deference to the determination of the foreign court in an extradition proceeding." *Casey v. Dep't of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1992). It further held that the foreign court's holding on "what that country's criminal law provides should not lightly be second-guessed by an American court." *Id. But see Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869 (2018) (holding that a federal court should respectfully consider a foreign government's statements "but is not bound to accord conclusive effect to" them).

Yet, these cases did not concern a conflicting legal interpretation between a country's executive and its judicial authorities. And under the act of state doctrine, American courts are prohibited from questioning the validity of a foreign sovereign power's public acts committed within its own

territory. *World Wide Mins., Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002). The doctrine applies if "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within" its territory. *Id.* (quoting *W.S. Kirkpatrick & Co., Inc. v. Env't Tectonics Corp.*, 493 U.S. 400, 405 (1990) (alteration in original and internal quotation marks omitted)).

In the context of extradition proceedings, courts have refrained from finding extradition orders issued by the state executive invalid under the act of state doctrine. Take, for example, *United States v. Knowles*, in which the defendant challenged his extradition as unenforceable because the Supreme Court of the Bahamas had withdrawn its approval of the extradition until it deemed all legal processes in his case complete. 390 F. App'x 915, 917 (11th Cir. 2010) (per curiam). The court dismissed the relevance of the Bahamian court's order under the act of state doctrine because the Bahamian Ministry of Foreign Affairs had consented to the appellant's extradition. *Id.* at 928. It thus deferred to the executive authority over the judiciary's interpretation of the Extradition Order. *Id.*; *see also Reyes-Vasquez v. U.S. Att'y Gen.*, 304 F. App'x 33, 36 (3d Cir. 2008) (per curiam) (abstaining from declaring the President of the Dominican Republic's extradition decree invalid because it was an act of state). A court will thus "presume that if the extraditing country does not indicate that an offense specified in the request is excluded from the extradition grant, the extraditing country considers the offense to be a crime for which extradition is permissible." *United States v. Campbell*, 300 F.3d 202, 209 (2d Cir. 2002).

This approach accords with the opinion of one of Trabelsi's experts, a Belgian professor of law, who explained

that "the final decision in terms of extradition is taken solely by the Government; this is a sovereign act, a political action taken by an administrative authority." Expert Op. at 2, D. Ct. Dkt. 345-4. It also aligns with the goal of maintaining cordial international relations and international comity in extradition proceedings. *Trabelsi II*, 845 F.3d at 1192–93. Even Trabelsi conceded in the briefing that the decision to extradite an individual is a political act controlled by the executive, not by the judiciary. Appellant Br. 8 ("the Minister of Justice makes the political decision whether to extradite pursuant to the exequatur"). Under the text of the Treaty and the act of state doctrine, this Court should defer to the Belgian state's Extradition Order and its explanations of it in subsequent diplomatic notes, rather than to the Belgian courts' interpretation.

C.

Turning to the legal developments themselves, the Belgian court decisions, official state communications, and legal filings in the time since *Trabelsi II* do not constitute significant new evidence that would warrant deviating from the law of the case. Indeed, the disagreement between the Belgian state and its courts was plain at the time of *Trabelsi II* but did not impact our conclusion that Trabelsi's extradition comported with Article 5 of the Treaty.

First, the Brussels Court of Appeal's August 8, 2019 decision adds nothing new to the analysis and merely reiterates the Belgian court's view that the exequatur prohibits the prosecution of the four Overt Acts. To be sure, as Trabelsi notes, this decision is the first time a Belgian court heard his case since the issuance of the 2011 Extradition Order. But that does not bear on the Court of Appeal's analysis. Indeed, the Brussels Court of Appeal states that the Extradition Order

"could only validly grant the extradition requested by the United States within the limits of the exequatur . . . but not for the 'Overt Acts'" mentioned. J.A. 1320 (emphasis removed). But it does not assert that the Minister of Justice excluded those Acts nor that he was compelled to follow the exequatur.

Further, the Court of Appeal's decision supports this Court's assertion in *Trabelsi II* that the Minister of Justice abstained from excluding the four Overt Acts. Specifically, the Court remarked that the Belgian courts interpret Article 5 to imply a "review of the identity of the fact and not of its qualification" in determining whether an individual is being extradited for a previously charged offense. J.A. 1317 (emphasis removed). That review is what led the Court of First Instance to exclude the four Overt Acts from the exequatur. *Id.* But the Court of Appeal went on to remark that "[o]nly the ministerial extradition order of November 23, 2011 departs from this consistent interpretation of Article 5 of the Extradition Convention, arguing that the provision requires an identity of qualifications." J.A. 1319. Put differently, the Court of Appeal recognized the conflicting interpretation of Article 5 set forth by the Minister of Justice in the Extradition Order. The Minister of Justice's interpretation, in turn, is what this Court relied on in finding that Belgium did not place any limits on Trabelsi's extradition. The Belgian government confirmed that interpretation in its Second Diplomatic Note, sent on November 13, 2019, which characterized the August 2019 Court of Appeal judgment as contrary to its Extradition Order and reiterated that there was no bar on Trabelsi's extradition. At bottom, the decision does not reflect a change in the Belgian courts' or government's position from those originally considered in *Trabelsi II*.

Second, in its February 26, 2020, decision, the Court of First Instance simply confirmed the Court of Appeal's

judgment and ordered the Belgian government to send a copy of its decision to the appropriate U.S. authorities. On March 5, 2020, the Belgian Ministry of Justice sent a one-page letter to the Department of Justice, including the specific language the Belgian court requested, specifying that Trabelsi's extradition did not allow him to be prosecuted for facts set out in the four Overt Acts. Trabelsi latches on to the March 5 letter, arguing that it was an act of state because it expressed Belgium's official position that the Extradition Order precluded Trabelsi's prosecution as to the four Overt Acts. Appellant Br. 22, 40. That argument strains credulity. The letter does not purport to stake out Belgium's official position on the scope of Trabelsi's extradition. To the contrary, it opens with the stipulation that the Court of First Instance "has ordered the Belgian Government to formally notify its judgment, including the following wording" before including the relevant excerpt from the opinion. J.A. 1816. The letter's language explicitly states that the Ministry only transmitted the judgment because it was obligated to do so, not because it represented the Belgian state's position. As a result, the letter does not constitute an act of state, nor does it represent significant new evidence.

Third, as for the May 28, 2020, decision, the Court of First Instance admonished the Belgian government for sending the Second Diplomatic Note and challenging the court's ruling that Trabelsi's extradition was limited. But in the fourth relevant Belgian judicial decision, which Trabelsi avoids wrestling with in his briefs, the Brussels Court of Appeal on July 15, 2020 refused Trabelsi's request to order the Belgian state to send a new diplomatic note conforming its position to the Court's rulings. At the end of the day, the Court of Appeal acknowledged that we were aware that the Belgian courts and executive had conflicting views on how to interpret the Treaty, but the Court of Appeal impliedly conceded that it could not force the American courts to prioritize its interpretation. It

further conceded that the Belgian courts' decisions do not modify, cancel, or suspend the Extradition Order. Neither of these decisions support Trabelsi's proposition that the Belgian courts or government have altered their positions so drastically such that they qualify as new evidence sufficient to justify reconsideration of this Court's last opinion. If anything, the July 2020 decision forcefully supports that the Extradition Order controls.

As such, the two July 2020 pleadings filed by the Belgian state do not aid Trabelsi's claims. He argues that these pleadings diminish the significance of the Second Diplomatic Note, which, as described above, characterized the August 2019 Court of Appeal judgment as contrary to the Extradition Order and reiterated the Belgian state's view that there was no bar on Trabelsi's extradition. Trabelsi points to the language in the Ministry of Justice's July 15 pleading stating that the Second Diplomatic Note "was only intended to inform the U.S. judicial authorities that the [Belgian State] had filed an appeal," not to state its official position. J.A. 1968. In doing so, he takes this sentence out of context and ignores the one that follows, which stipulates that the diplomatic note "summarizes the position of the [Belgian State] . . . as well as its point of view regarding the concept of *non bis in idem*." *Id.* Further, Trabelsi seizes upon the Minister's language in the July 31 pleading that the March 2020 notification to the American authorities "does not mean that the [Belgian State] would have distanced itself once again from what was decided by" the February 2020 ruling. J.A. 2072 (internal quotation marks and emphasis omitted). Here, the Belgian government simply explained that it was ordered to transmit the March 2020 notice of the Court's order to the proper U.S. authorities. Remarking that it would not distance itself from the Belgian court's ruling is not the same as adopting the Belgian court's position on the Extradition Order as its own.

Trabelsi has selectively picked and chosen phrases from these documents to argue that this Court must defer to the Belgian courts' interpretation of Article 5 and revisit its decision in *Trabelsi II*. But none of the intervening decisions, communications, or pleadings present significant new evidence or detract from the deference this Court owes to the Belgian state. As a result, this Court will not depart from the law of the case and reopen the question of whether the indictment charges the same offenses as in the Belgian prosecution. The District Court's orders denying Trabelsi's motions to reconsider the motion to dismiss the indictment are affirmed.

So ordered.

WILKINS, *Circuit Judge*, concurring: My concurring colleague raises the question of whether, in the previous appeal, *see United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017), we should have "first addressed the threshold question of whether the Treaty conferred a *non bis* right that Trabelsi could invoke in the United States after his extradition." Rao Concurring Op. at 1. I write separately only to note that the Government did not make my concurring colleague's argument in the prior appeal; instead, it contended that we lacked jurisdiction to review the extradition determination of Belgium. Therefore, we did not reach, and the Government forfeited, any argument that the text of the Treaty does not confer upon Trabelsi any enforceable *non bis* rights. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356–57 (2006) (holding that even where a claim arises from an international treaty, "[t]he consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim"); *Breard v. Greene*, 523 U.S. 371, 375–76 (1998) (failure to raise Vienna Convention claim in state court resulted in procedural default in subsequent habeas proceeding because procedural rules of the forum State govern). I express no opinion on the merits of my colleague's interpretation of the Treaty's text.

RAO, *Circuit Judge*, concurring: Nizar Trabelsi has failed to show we should depart from the law of the case, and therefore I join the panel opinion in full. *See United States v. Trabelsi* ("*Trabelsi II*"), 845 F.3d 1181 (D.C. Cir. 2017). Since his extradition from Belgium in 2013, Trabelsi has challenged his U.S. indictment for terrorism crimes on the grounds of *non bis in idem*, the international law prohibition against being tried twice for the same offense. On its face, the U.S.-Belgian Extradition Treaty does not impose a *non bis* obligation on the United States after extradition has occurred. Nonetheless, in *Trabelsi II* the court simply determined Trabelsi was not being tried twice for the same offense. While the court reached the right result, in light of the important separation of powers considerations at stake, I would have first addressed the threshold question of whether the Treaty conferred a *non bis* right that Trabelsi could invoke in the United States after his extradition.

* * *

Trabelsi has doggedly challenged his indictment for various crimes of terrorism on the grounds that it violates the maxim *non bis in idem* ("not twice in the same matter"). He claims the United States is prosecuting him for the same acts he was criminally punished for in Belgium. Trabelsi maintains that Article 5 of the U.S.-Belgian Extradition Treaty incorporates the *non bis* principle. *See* Extradition Treaty between the United States of America and the Kingdom of Belgium, art. 5, Apr. 27, 1987, S. TREATY DOC. NO. 104-7. *Non bis* is analogous to the Fifth Amendment's prohibition against double jeopardy. U.S. CONST. amend. V. It is blackletter law, however, that the Double Jeopardy Clause does not bar successive prosecutions by separate sovereigns. *See Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019); *Trabelsi II*, 845 F.3d at 1186. Trabelsi's argument that he may not be tried twice thus turns solely on the rights afforded by the Treaty.

Trabelsi's challenge to his U.S. indictment requires us to look first to the text of the Treaty to determine whether there is an enforceable right to bar a U.S. prosecution after extradition to the United States. *See Medellin v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."). On this threshold question, Trabelsi argues Article 5 of the Treaty incorporates the principle of *non bis* and therefore that if Belgium violated Article 5 when it extradited him, his U.S. indictment must be dismissed.

Article 5 states: "Extradition shall not be granted when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested." Treaty, *supra*, art. 5(1). Article 5 concerns the effect of a first prosecution on a subsequent *extradition* and does not mention any successive "prosecution" or "trial" in the requesting country.[1] Rather, Article 5 places responsibility for implementing the *non bis* principle squarely on the extraditing

[1] By contrast, Article 15 provides: "A person extradited under this Treaty may not be *detained, tried, or punished* in the Requesting State" for offenses for which extradition was not granted. Treaty, *supra*, art. 15 (emphasis added). Article 15 deals with "specialty," which is "[t]he principle, included as a provision in most extradition treaties, under which a person who is extradited to a country to stand trial for certain criminal offenses may be tried only for those offenses and not for any other pre-extradition offenses." *Doctrine of Specialty*, BLACK'S LAW DICTIONARY (11th ed. 2019). Trabelsi's *non bis* claim cannot hinge on Article 15 because *Trabelsi II* specifically explained that Article 15 was not at issue in the appeal, 845 F.3d at 1185 n.1, and because this court has now twice held that Trabelsi's prosecution accords with both countries' understanding of the extradition order.

state (the "Requested State").[2] In other words, the Treaty required Belgium to refuse extradition if it had already prosecuted Trabelsi for the offenses underlying the U.S. indictment. But on its face, Article 5 says nothing about whether, *after* extradition has occurred, the United States may prosecute him for the same offense he was convicted of in Belgium.[3]

This litigation might have been resolved years ago if Article 5 of the Treaty had been given its plain meaning, which places no bar on a U.S. prosecution after extradition by Belgium. Instead, the district court skipped over the initial question of whether Article 5 provided a ground for Trabelsi to challenge his U.S. prosecution. That court assumed Article 5 could bar Trabelsi's U.S. prosecution because both parties were

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[2] Extradition treaties typically frame the *non bis* principle as a constraint on the extraditing state and not on the requesting state. *See, e.g.*, Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, art. 5, Mar. 31, 2003, S. TREATY DOC. NO. 108-23; MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES § 6-2(18) (2007). As a practical matter, it makes sense to resolve issues regarding the scope of extradition before extradition occurs. On the other hand, the doctrine of specialty must usually be enforced in the requesting country to ensure that the prosecution is limited to those offenses for which extradition was granted.

[3] I do not address the separate question of whether, under the Treaty, a person in the United States could challenge extradition to Belgium on *non bis* grounds. Our courts often adjudicate treaty based *non bis* claims. *See, e.g.*, *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) (Friendly, J.) (considering and rejecting a *non bis* defense to extradition from the United States based on a U.S.-Italian extradition treaty). Trabelsi, for instance, has brought numerous Article 5 claims against his extradition in Belgian courts.

"equal partners" under the Treaty. *United States v. Trabelsi*, 2015 WL 13227797, at *4 (D.D.C. Nov. 4, 2015) (noting without analysis of the Treaty text that "the United States and Belgium may be on equal footing to consider a defendant's Article 5 claims"). The Treaty of course creates an agreement binding on both parties; however, each country's obligations are determined by the specific articles of the Treaty, not the mere fact of the Treaty.

Trabelsi II also did not address the question of whether Article 5 gave Trabelsi grounds for challenging his U.S. indictment and instead analyzed the substantive question of whether his extradition from Belgium was consistent with the Treaty. In answering that question, we properly explained that "the scope of Article 5 [is] a matter for Belgium" because "[i]t was for Belgium, as the requested party, to determine whether to grant extradition." 845 F.3d at 1188. We rejected Trabelsi's claims because Belgium had reasonably construed the Treaty to allow for his extradition for the crimes specified in the U.S. extradition request. In other words, we deferred to Belgium's conclusion that Trabelsi's extradition was not for the same offenses for which he was prosecuted in Belgium. Deference to Belgium's decision, however, does not address the prior question of whether Trabelsi could invoke Article 5 against his U.S. prosecution at all.

My point is simply that we should have analyzed the text of the Treaty first. A ruling based on the Treaty's text could have clarified that Article 5 would not provide a basis for Trabelsi to challenge his U.S. prosecution. This would have allowed the court to reject Trabelsi's motion to dismiss his indictment without passing on whether Belgium's extradition decision violated the Treaty.

* * *

Furthermore, whether the Treaty confers an enforceable *non bis in idem* right should have been decided at the outset because Trabelsi's challenge to his U.S. prosecution implicates the Constitution's separation of powers.

First, courts must respect the commitment of the treaty making power to the President and the Senate. *See* U.S. CONST. art. II, § 2; *id.* art. VI (treaties are part of the supreme law of the land). Therefore, "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.).

International law principles like *non bis* have no free-floating status in domestic law. *Cf. Medellin*, 552 U.S. at 504 ("[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts."); *Al-Bihani v. Obama*, 619 F.3d 1, 10 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("[I]nternational-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms."). Instead, the text of a treaty determines whether a given provision or principle is a "directive to domestic courts" that may be enforced by litigants. *Medellin*, 552 U.S. at 508. Respect for the President's control over foreign affairs requires courts to take a text-first approach to treaty interpretation. *See id.* at 506; Majority Op. at 11.

Second, extradition is traditionally an executive act, and the Treaty's obligations will be implemented by the U.S. and Belgian executives. *See* Majority Op. at 12 (discussing the Treaty's "emphasis on the executive authority"). Assuming the

Treaty includes a right to enforce *non bis in idem* against a U.S. prosecution after extradition risks improper judicial interference with delicate foreign affairs, the conduct of which has been primarily committed to the President. U.S. CONST. art. II; *cf. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (noting that the "President has unique responsibility" for "foreign and military affairs").

In this case, Trabelsi was convicted in Belgium of conspiring and attempting to destroy U.S.-Belgian military facilities. The diplomatic negotiations between U.S. and Belgian law enforcement centered on the scope of the extradition and the crimes for which Trabelsi would be extradited. The negotiations also included other conditions, such as a guarantee that Trabelsi would not be sent back to Tunisia, his country of origin. Absent a firm legal basis, courts should not second guess such sensitive negotiations. The Executive Branch should be able to secure extradition against a clear background of treaty rights, interpreted fairly based on a treaty's text, not general principles of international law read into the treaty. Moreover, extradition links up with the Executive Branch's "clear and indisputable right to control the initiation and dismissal of prosecutions." *In re Flynn*, 973 F.3d 74, 94 (D.C. Cir. 2020) (en banc) (Rao, J., dissenting). Courts should not second guess an otherwise valid criminal indictment through the application of international law norms such as *non bis* unless a treaty clearly demands it.

Finally, as the government argued in earlier stages of this litigation, unless there is some other legal basis, treaty violations during the process of bringing Trabelsi to the United States cannot suffice to dismiss an indictment. Instead, the "broad rule" in the extradition context follows the longstanding *Ker-Frisbie* doctrine, under which alleged misconduct in bringing someone into the United States' criminal jurisdiction,

including even "shocking" "abductions," does not render the subsequent prosecution unlawful. *United States v. Alvarez-Machain*, 504 U.S. 655, 660–61, 669 (1992) (citing *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952)); *see also United States v. Riviere*, 924 F.2d 1289, 1301 (3d Cir. 1991) ("*Ker* teaches that the mere existence of a treaty does not create individual rights" for everyone within a contracting country). The Supreme Court has consistently deferred to the Executive Branch to address the international implications of prosecuting someone already within U.S. jurisdiction. *Alvarez-Machain*, 504 U.S. at 669–70. In light of these background principles, unless a treaty (or other domestic law) specifically binds the U.S. government, courts cannot impose international law barriers to U.S. prosecutions.

* * *

Before entertaining a treaty based challenge to a U.S. indictment, courts should ensure that the treaty protects an individual right against the U.S. government. This inquiry safeguards the separation of powers and mitigates the danger that loose treaty interpretation will undermine international cooperation in the enforcement of U.S. criminal laws. Although the court skipped this analysis in earlier stages of the litigation, *Trabelsi II* reached the right result and is law of the case barring Trabelsi's appeal. Examining the Treaty's text at the outset, however, might have prevented the nearly decade-long delay of Trabelsi's trial through successive and meritless efforts to undo his extradition on *non bis* grounds.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b) of the Supreme Court of United States, I certify that I have been appointed to represent Mr. Trabelsi in the United States District Court for the District of Columbia pursuant to the Criminal Justice Act. I further certify that on August 1, 2022, at the time of filing this petition for writ of certiorari, I served it via the Court's electronic filing system and three copies via first-class mail to the following:

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/s/ Marc Eisenstein

Marc Eisenstein

Certificate of Compliance with Type-Volume Limitation,
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I certify the following:

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   This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Century Schoolbook, 12 point.

/s/ Marc Eisenstein

Marc Eisenstein

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, v. NIZAR TRABELSI, *Defendant.*	No. 06-cr-89 (RDM)

MEMORANDUM OPINION AND ORDER

Defendant Nizar Trabelsi was extradited from the Kingdom of Belgium to the United States after serving a 10-year term of imprisonment in Belgium for, among other things, attempting to bomb the Kleine-Brogel Air Base ("Kleine-Brogel") in 2001. In September 2014, Trabelsi (1) moved to dismiss the U.S. indictment on the ground that his extradition violated the *non bis in idem* (or "not twice") principle contained in the extradition treaty between the United States and Belgium, which prohibits extradition for an "offense" for which the person sought has been convicted or acquitted in the state from which extradition has been requested, and, in the alternative, (2) moved to preclude the government from relying on four of the overt acts set forth in the U.S. indictment based on the doctrine of specialty, which prohibits prosecution for a crime other than the crime for which the defendant was extradited. Dkt. 70. This Court denied both motions, Dkt. 124 (Roberts, C.J.), and because Trabelsi's *non bis* challenge was analogous to a double-jeopardy challenge, he was allowed to take an interlocutory appeal of the Court's order declining to dismiss the indictment. On appeal, the D.C. Circuit rejected Trabelsi's *non bis* challenge and affirmed this Court's order. *United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017).

Two related motions are now before the Court. First, Trabelsi asks the Court to reconsider its decision—since affirmed by the D.C. Circuit—declining to dismiss the indictment on the ground that his extradition violated the *non bis* principle. Dkt. 345. In Trabelsi's view, an August 8, 2019 decision from the Brussels Court of Appeal constitutes "new evidence" that warrants reconsideration and reversal of that decision. *Id*. at 1. Second, he once again moves to compel compliance with the treaty doctrine of speciality (1) by excluding evidence related to a conspiracy or attempt to bomb Kleine-Brogel or, in the alternative, (2) by instructing the jury that it cannot convict him based solely on evidence of the alleged Kleine-Brogel conspiracy. Dkt. 210; Dkt. 262.

For the following reasons, the Court will **DENY** both motions.

I. BACKGROUND

A. Trabelsi's Arrest, Belgian Prosecution, and Extradition

On September 13, 2001, Trabelsi was arrested by the Belgian police. *Trabelsi*, 845 F.3d at 1184. He was charged with and convicted of, among other things, the following offenses under Belgian law:

> [First,] at an unknown date between July 3, 2001 and September 14, 2001, [Trabelsi] attempted to destroy, with the effects of an explosion, a building, bridge, dam, road, train rail, locks, store, yard, shed, ship, boat, car, train, aircraft, work of art, construction, motor vehicle, specifically in the present case, the military base of Kleine-Brogel belonging to the Belgian State, represented by the Minister of National Defense, the perpetrators having had to assume that one or more people were present at the time of the explosion, with the resolution to commit the crime having been demonstrated by outside acts that form a beginning of performance of that crime and that were only suspended or only failed to achieve their aim due to circumstances outside the will of the perpetrators[;]
>
> * * *
>
> [Second,] between May 1, 2001 and October 3, 2001, [Trabelsi was] the instigator of a conspiracy created for the purpose of carrying out attacks on people or property through the commission of crimes which carry a sentence from twenty to thirty

> years, from fifteen to twenty years, or from ten to fifteen years (specifically in the present case, a conspiracy of individuals who, in one way or the other, promoted an enterprise for the purpose of carrying out a terrorist attack);
>
> * * *
>
> [Third,] at an unknown date between May 3, 2001 and October 1, 2001, in violation of Articles 1 and 2 of the Law of July 29, 1934, prohibiting private militias, [Trabelsi] created, assisted or joined a private militia or any other organization of individuals whose purpose was to use force[.]

Dkt. 367-3 at 24, 27, 31 (*The Federal Prosecutor v. Mohamed Fethi, et al.*)[1]. On September 30, 2003, Trabelsi was sentenced to ten years of incarceration in Belgium. *Trabelsi*, 845 F.3d at 1184.

On April 7, 2006, while he was serving his sentence in Belgium, a grand jury in the United States indicted Trabelsi on charges of Conspiring to Kill U.S. Nationals Outside the United States, in violation of 18 U.S.C. §§ 1111(a) and 2332(b)(2); Conspiring and Attempting to Use Weapons of Mass Destruction, in violation of 18 U.S.C. §§ 2 and 2332a; Conspiring to Provide Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; and Providing Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. §§ 2 and 2339B. Dkt. 3. Over a year later, on November 16, 2007, a grand jury returned a superseding indictment, charging Trabelsi with the same statutory violations, but revising the charged overt acts.[2] *See* Dkt. 6. On April 4, 2008, the United States requested that Belgium extradite Trabelsi to the United States and provided the

[1] All documents from the Belgian proceedings have been translated from the original French into English. *See* Dkt. 367. The original French-language versions, along with their English translations, are available on the docket. *See* Dkt. 367 and attachments.

[2] On the U.S. government's motion and with the consent of Trabelsi, Counts 3 and 4—which concerned the provision to material support to a terrorist organization—were subsequently dismissed with prejudice. *See* Dkt. 231; Minute Order (June 10, 2019).

Belgian government with an affidavit describing the above charges and the governing U.S. law as well as a copy of the superseding indictment. Dkt. 367-7.

On November 19, 2008, the Court Chamber of the Court of First Instance of Nivelles ("Court of First Instance") issued the first of several Belgian-court decisions concerning Trabelsi's extradition. Dkt. 367-9. The only portion of that decision relevant to the pending motion addressed the *non bis* provision of the Extradition Treaty between the United States and the Kingdom of Belgium. Article 5 of the Treaty provides in pertinent part that "[e]xtradition shall not be granted when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is granted." Article 5, Extradition Treaty Between the United States of America and the Kingdom of Belgium (the "Extradition Treaty" or "Treaty"), Apr. 27, 1987, S. Treaty Doc. No. 104-7. The Court of First Instance construed the term "offense," as used in Article 5, to mean "facts . . . or acts . . . falling under the scope of criminal law of one of the two States." Dkt. 367-9 at 7. From this premise, it reasoned that four overt acts included in the superseding indictment—numbers 23, 24, 25 and 26—"very precisely correspond to the offenses, committed on Belgian soil" on which Trabelsi's Belgian conviction was based.[3] *Id.* The court, accordingly, concluded that Trabelsi's extradition was permitted under Article 5 of the Extradition Treaty, except with respect to those overt acts. *Id.* at 8. That decision was affirmed by the Brussels Court of Appeal and, in turn, by the Belgian Court of Cassation. Dkt. 367-11; Dkt. 367-13; *see also Trabelsi*, 845 F.3d at 1184.

On November 23, 2011, the Belgian Minister of Justice issued a decision granting the request of the United States to extradite Trabelsi. Dkt. 367-17 at 14. With respect to the four

[3] Although the Court of First Instance omits reference to overt act 25 in its discussion, this was apparently an oversight; in the operative paragraph of the court's decision, it refers to all four of the overt acts at issue. Dkt. 367-9 at 8.

overt acts in question, the Minister of Justice explained that under the Extradition Treaty "it is *not the facts*, but their qualification, *the offenses*, that have to be identical." *Id.* at 11 (emphasis added). He further explained that the offenses of which Trabelsi was convicted in Belgium "do not correspond to the offenses listed under the counts . . . that appear in the arrest warrant on which the U.S. extradition request is based." *Id.* at 12. In the operative portion of his order, the Minister declared that "[t]he extradition of Nizar Trabelsi is granted to the United States government for the offenses for which it is requested" upon completion of Trabelsi's term of imprisonment in Belgium. *Id.* at 14. Trabelsi appealed that decision to the Council of State, an administrative court that reviews actions of the Belgian executive branch, which rejected Trabelsi's challenge to the order of extradition. *See* Dkt. 367-21.

On October 3, 2013, Belgium extradited Trabelsi to the United States. *Trabelsi*, 845 F.3d at 1185.

B. 2014 Motion to Dismiss and Related Interlocutory Appeal

About a year after he was brought to the United States, Trabelsi moved to dismiss the indictment on the ground that his extradition violated Article 5 of the Extradition Treaty. Dkt. 70. He argued that the Minister of Justice "incorrectly concluded 'that the constitutive elements of the American and Belgian offenses respectively, their significance, and the place(s) and time(s) at which they were committed do not match.'" *Id.* at 14 (quoting Minister of Justice's Extradition Order (Dkt. 367-17 at 11)). The United States, in Trabelsi's view, charged a broader conspiracy than the plot to bomb the Kleine-Brogel Air Base merely "for the purpose of securing [his] appearance before this Court in violation of the [Extradition] Treaty." *Id.* at 15. He posited that, notwithstanding the breadth of the charges in the indictment, "the [U.S.] government will present at trial only the narrow evidence of the plot to bomb Kleine-Brogel and thereby

circumvent Article 5 of the treaty." *Id.* at 16. In other words, Trabelsi argued, the U.S. government seeks to do precisely what the *non bis* principle precludes—it seeks to try him in the United States for the same conspiracy for which he was previously tried and convicted in Belgium.

In the same filing, Trabelsi also argued that Belgium denied the U.S. request for his extradition with respect to those allegations "set forth in [o]vert [a]cts 23, 24, 25, and 26" and that, as a result, permitting the government to "continue[] to prosecute the Indictment based on th[o]se allegations" would violate the doctrine of speciality. Dkt. 70 at 19-26. That doctrine, which is incorporated in Article 15 of the Extradition Treaty, precludes the requesting country from trying or punishing a person for any offense, other than "the offense for which extradition has been granted." *Id.* at 20 (quoting Article 15, Extradition Treaty). "By continuing to pursue the[] allegation for which extradition was not authorized," Trabelsi argued, "the United States is in violation of . . . Article 15 and the doctrine of speciality." *Id.* at 26.

The United States opposed Trabelsi's motion and attached to its opposition brief a diplomatic note from the Kingdom of Belgium. Dkt. 80-1. That note reads, in relevant part: "the [Extradition] Order . . . makes clear that Mr. Trabelsi may be tried on all of the charges set out in [the superseding] indictment, and that any similarity between the United States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment." *Id.* at 1. The note goes on to state that "[t]he [Extradition] Order is also clear that the prosecution may offer facts relating to overt acts 23 through 26 in prosecuting Mr. Trabelsi on the charges in the indictment" and that "[n]either Mr. Trabelsi's trial on the charges set out in the indictment[] nor the prosecution's offering proof as to any of the overt acts recited in the indictment[] is

inconsistent with the Order." *Id.* Finally, the note asserts that neither "trial" on those charges nor the "offering of proof" as to those overt acts would "violate the rule of speciality." *Id*.

This Court (Roberts, C.J.) denied Trabelsi's motion to dismiss the indictment, relying on a D.C. Circuit opinion counseling U.S. courts to accord deference to a foreign government's decision to extradite a defendant and applying the double-jeopardy test from *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Dkt. 124 at 8, 14–16 (discussing *Casey v. Dep't of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1982)). The Court then determined that the Belgian and U.S. offenses were different offenses under *Blockburger* and that proceeding to trial on the indictment, accordingly, would not violate Article 5 of the Extradition Treaty. *Id.* at 16–26. With respect to the doctrine of speciality, the Court held that because "Belgium has repeatedly consented to Trabelsi's prosecution under the superseding indictment," and because the Extradition Treaty confers the right to enforce Article 15 upon the signatory-nations, Trabelsi lacked standing to "challenge his extradition as a violation of Article 15." *Id*. at 29. Finally, the Court held that, "even if Trabelsi did have standing to raise a challenge under the doctrine of speciality," the challenge would fail in light of Belgium's repeated consent to the prosecution. *Id.* at 30.

Trabelsi filed an interlocutory appeal of the portion of the Court's order denying his motion to dismiss the indictment on *non bis* grounds. He argued that this Court erred in according deference to the decision of the Belgium state, erred in assuming that the Belgian authorities understood the conspiracy charged in the United States, and erred in applying "a strict *Blockburger* test" in comparing offenses from different nations. *United States v. Trabelsi*, No.

15-3075 (D.C. Cir. 2017), Appellant's Br. at 15, 23[4] (internal quotation omitted). Instead of applying the strict *Blockberger* test, in his view, "[c]ourts must look beyond the elements of the offenses and apply a modified and more flexible test of whether the same conduct or transaction underlies the criminal charges in both transactions." *Id*. at 33. Applying that test—or even the *Blockberger* test—Trabelsi maintained that the Belgian and U.S. charges were the same. *See id.* at 33–65. In his opening brief, Trabelsi further argued that the Minister of Justice's authority to grant the extradition request was limited by the decisions of the Belgian courts excluding overt acts 23, 24, 25, and 26, *id.* at 7-8, and, in his reply brief, he added that the Minister of Justice's extradition order must have, "as required under Belgian law, incorporated the exclusion of the Kleine-Brogel overt acts (23 through 26)," *United States v. Trabelsi*, No. 15-3075 (D.C. Cir. 2017), Appellant's Reply Br. at 33. According to Trabelsi, it was only after "recognizing the Belgian court-required exclusion of overt acts 23 through 26" that "the Minister made the conclusory statement" that "'[t]he essential elements of the respective U.S. and Belgian offenses . . . do not correspond.'" *Id.* at 34 (quoting Dkt. 367-17 at 12).

The D.C. Circuit affirmed this Court's order denying Trabelsi's motion to dismiss the indictment. The Court of Appeals described the relevant background as follows:

> On November 19, 2008, the Court [] Chamber of the Court of First Instance[] of Nivelles held that the United States arrest warrant was enforceable, except as to the overt acts labeled number[s] 23, 24, 25, and 26 in the indictment. The Court of Appeals of Brussels affirmed this decision on February 19, 2009. On June 24, 2009, the Belgian Court of Cassation affirmed the Court of Appeals.
>
> The Belgian Minister of Justice, who has final authority over extradition requests, granted the United States' request on November 23, 2011. The Minister rejected the position that the *non bis in idem* principle is implicated by Article 5, concluding instead that the narrower offense-based "double jeopardy" principle applies. *The Minister further rejected the limitation on overt acts,*

[4] Page numbers refer to the file-stamped page of the PDF, not the internal pagination of the document.

> *explaining that they were "not the offense for which an extradition [was] requested" because "an overt act is an element (of fact, or factual), an act, a conduct or transaction which itself cannot automatically be qualified as an offense*." . . . Trabelsi appealed the Minister's decision to the Belgian Counsel of State, which also concluded that the United States offenses are different and that "'overt acts' constitute elements . . . to determine whether [Trabelsi] is guilty or not guilty," and rejected his application on September 23, 2013."

Trabelsi, 845 F.3d 1184–85 (emphasis added). The Court of Appeals went on to hold that that the Minister of Justice had "determined that Trabelsi's extradition would not violate the Treaty" and explained that, absent good cause, it would "not 'second-guess'" his decision to grant the U.S. request for extradition. *Id.* at 1189 (citing *United States v. Campbell*, 300 F.3d 202, 209 (2d Cir. 2002)).

Because the Minster's "grant" of the U.S. request "did not exclude any of the offenses included in the request for extradition," the D.C. Circuit "presume[d] that Belgium [had] determined that none of the offenses in the indictment violate[d] Article 5 of the Treaty." *Id.* (citing *Casey v. Dep't of State*, 980 F.2d 1472, 1475 (D.C. Cir. 1992)). The court recognized that this "presumption" might be rebutted by evidence of "misconduct on the part of the United States in procuring an extradition" or by evidence that the requested party did not review the extradition request. *Id.* But, here, "Trabelsi . . . offer[ed] no such evidence." *Id.* To the contrary, the "United States sought Trabelsi's extradition," and Belgium granted that request—"without limitation"—"[a]fter comparing the offenses in the U.S. indictment with those of which Trabelsi was convicted in Belgium." *Id.* As the D.C. Circuit further noted, "the Minister adequately explained his decision, including his basis for rejecting the overt-acts exclusion." *Id*.

Finally, the D.C. Circuit held that the presumption of compliance with the *non bis* principle might "also be rebutted by a showing that the requested state or party did not apply the correct legal standard adopted in the Treaty," *id.* at 1189, but concluded that the Belgian Minister

of Justice reasonably construed the Treaty and reasonably concluded that "'the offenses for which [Trabelsi] was irrevocably sentenced . . . do to correspond to the offenses listed [in the indictment] that appear in the arrest warrant on which the U.S. extradition [was] based.'" *Id*. at 1190 (first two bracketed inserts in D.C. Circuit opinion) (quoting Dkt. 367-17 at 12). Having held that the Minister reasonably construed the Treaty to require an "offense-based analysis" and that Trabelsi had failed to offer anything "of merit to rebut the presumption" that Belgium had correctly construed the Treaty, the D.C. Circuit rejected Trabelsi's challenge without needing to "decide whether the charges in the U.S. indictment and the crimes for which Belgium convicted Trabelsi are identical under *Blockburger*." *Id.*

C. Recent Developments

After the D.C. Circuit affirmed this Court's denial of Trabelsi's motion to dismiss, this Court set a trial date of Sept. 9, 2019. Minute Entry (Apr. 16, 2018). Among numerous other pretrial motions, Trabelsi filed a motion to compel compliance with the Treaty and the doctrine of specialty. Dkt. 210. That motion renewed Trabelsi's argument that his extradition was conditioned on, and thus included, the exclusion of the four overt acts related to the plot to bomb the Kleine-Brogel Air Base. Trabelsi further argued that, because he could not be convicted based on those four overt acts, evidence of those acts should be excluded from the trial as bad-acts evidence under Federal Rule of Evidence 404(b). Dkt. 210 at 15–16. The government opposed that motion, arguing, as it had before the D.C. Circuit, that Trabelsi was extradited without the exclusion of the Kleine-Brogel overt acts. Dkt. 228.

On August 8, 2019, while that motion was pending and about a month before trial was scheduled to begin, the Brussels Court of Appeal issued a new decision concerning Trabelsi's extradition. *See* Dkt. 312-2. That decision concerned an "interim" challenge he brought seeking

to preclude Belgian officials from aiding in his upcoming U.S. trial on the ground that his extradition violated his treaty rights. *Id.* In the course of its analysis, the Belgian court construed Article 5 of the Extradition Treaty to require "a review of the identity of the *fact* and *not* of its *qualification*." *Id.* at 23 (emphasis added). It explained that Belgian courts had consistently construed the Extradition Treaty in this way but that "the ministerial extradition order of November 23, 2011 departs from this consistent interpretation . . . , arguing [instead] that the provision requires an identity of *qualifications*." *Id.* at 25 (emphasis added). As a result, the court held, "the Ministerial order on Extradition . . . could only validly grant the extradition by the United States within the limits of the exequatur granted to the arrest warrant, that is to say for the four counts mentioned in the arrest warrant, but not for the "[o]vert [a]cts" [numbered] 23, 24, 25, and 26, set out in paragraph 10 of Count 1 and supposed to be repeated in support of the other three counts." *Id.* at 26. The court concluded: "the extradition . . . does not allow" Trabelsi "to be tried for the 'overt acts' . . . [numbered] 23, 24, 25, and 26 . . . , namely the facts relating to the attempt of bombing the Kleine-Brogel military base." *Id.*

In light of this decision, both Trabelsi and the United States requested that this Court vacate the September trial date to provide time to brief the effect, if any, of the August 8, 2019 Belgian court decision on the proceedings before this Court. Aug. 15, 2019 Hrg. Tr. (Rough at 4, 7–8). This Court agreed to do so, *id.* (Rough at 9), and set a briefing schedule for Trabelsi's motion for reconsideration of his motion to dismiss, Minute Order (Sept. 5, 2019). On September 24, 2019, Trabelsi moved for reconsideration of this Court's prior denial of his motion to dismiss the indictment, arguing that the August 8, 2019 decision from the Brussels Court of Appeal constituted new evidence not previously available to the defense. Dkt. 345. He contends, in particular, that the August 8, 2019 decision shows that the Minister of Justice did

not reject and could not have rejected the Belgian courts' exclusion of overt acts 23, 24, 25, and 26, and that this Court and the D.C. Circuit mistakenly deferred to an interpretation of the Treaty that Belgium had rejected, and still rejects. *Id.* Because the U.S. case is dependent, in Trabelsi's view, on the excluded overt acts, he maintains that the only remedy for the Treaty violation is dismissal of the charges against him. *See id.*

The United States opposes this motion and, along with its opposition brief, has provided the Court with a second diplomatic note from the Kingdom of Belgium, this one dated November 13, 2019. *See* Dkt. 355; Dkt. 355-1. That note asserts that the August 8, 2019 Belgian court decision is "contrary to the Extradition order of 23 November 2011 and in our view, therefore contrary to the clear wording of article 5 of the [Extradition] Treaty." *Id.* at 1. For that reason, the note explains, the Belgian state has "appealed the [August 8, 2019] judgment before the Supreme Court." *Id.* The note further reaffirms the contents of its October 29, 2014 diplomatic note and explains that the Minister of Justice's 2011 extradition order "is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States," and it "makes clear that Mr. Trabelsi may be tried on all of the charges set out in [the] indictment[], and that any similarity between the United States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment." *Id.* at 2. Finally, the note asserts that the 2011 extradition order was also "clear that the prosecution may offer facts relating to all 28 overt acts in prosecuting Mr. Trabelsi on the charges in the indictment." *Id.*

The Court originally scheduled a hearing on the motion for December 5, 2019 and, if needed, December 6, 2019. Minute Entry (Sept. 5, 2019). However, after both sides sought extensions of time, the Court rescheduled the hearing for January 8, 2020. Minute Order (Nov. 20, 2020). Upon filing his reply brief, Trabelsi also moved to continue the hearing "until the

appeals process in Belgium is complete"—effectively seeking to stay the proceedings indefinitely. Dkt. 360 at 2. The Court denied that motion, concluding that such an indefinite stay was unwarranted. Minute Order (Dec. 20, 2020).

On January 8, 2020, the Court heard testimony regarding Belgian extradition law from Professor Adrien Masset and argument from the parties. During argument, counsel for Trabelsi explained that Trabelsi's Belgian counsel sought, through members of the Belgian Parliament, to ask questions of the Belgian Minister of Justice regarding the extradition order and that those questions would be asked and answered in the coming weeks. Jan. 8, 2020 Hrg. Tr. (Rough at 19). The Court indicated that it would not issue its decision before the end of January and that Trabelsi could submit the results of that questioning in a supplemental filing. *Id.* (Rough at 37). The defense has not filed any evidence related to such questioning in support the pending motion.

On March 4, 2020, Trabelsi filed a translated version of a February 26, 2020 decision of the Francophone Court of First Instance of Brussels concerning Trabelsi's legal challenges in that country to his extradition and Belgium's continued cooperation with the United States in the U.S. prosecution. Dkt. 373; Dkt. 373-1. That decision ordered the Belgian state to provide a copy of the decision to U.S. officials and to "specify[] in the accompanying letter" the following:

> According to the analysis prevailing in Belgian law, the extradition of Mr. TRABELSI does not allow him to be prosecuted in the United States to be tried there for the facts set out in the "Overt Acts" Nos. 23, 24, 25 and 26 set out in paragraph 10 of the first count and which are supposed to be repeated in support of the other counts [*of the American arrest warrant which is the basis for the extradition (indictment of the Grand Jury of November 3, 2006, filed on November 16, 2007 at the Registry of the US District Court of the District of Columbia*], namely, the facts relating to the attempted attack on the Kleine-Brogel military base.

Dkt. 373-1 at 72 (brackets and emphasis in original). On March 6, 2020, the United States filed the February 26, 2020 decision and accompanying letter that it received from the Belgian State,

which informed the United States that the Court of First Instance of Brussels had ordered the Belgian government to provide the U.S. with the decision and notice containing the language quoted above. Dkt. 375-1.

II. ANALYSIS

The pending motions turn on the scope of Belgium's grant of extradition and, in particular, the breadth and effect of the Minister of Justice's extradition order. *See* Dkt. 210; Dkt. 345. Both this Court and the D.C. Circuit have previously addressed that question. *See* Dkt. 124; *Trabelsi*, 845 F.3d at 1190. Thus, before considering Trabelsi's arguments, the Court must consider when, if ever, a district court may reconsider a question of law or fact, not only previously decided by the district court, but also decided by an appellate panel in the very case now back before the district court.

The general rule is easily stated: "courts involved in later phases of a lawsuit should" typically refrain from "re-open[ing] questions decided." *United States v. Philip Morris USA Inc.*, 801 F.3d 250, 257 (D.C. Cir. 2015) (quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995)). At times, that rule is not binding but simply a principle of sound judicial practice, designed to promote respect for the rule of law, judicial efficiency, and the orderly conduct of litigation. In civil litigation, for example, district courts are generally free to reconsider their own interlocutory orders and decision, as appropriate, prior to the entry of final judgment. *See Keepseagle v. Perdue*, 856 F.3d 1039, 1048 (D.C. Cir. 2017). Although nothing in the Federal Rules of Criminal Procedure speaks to the question, it is also well understood that district courts may—and, at times, should—do the same in criminal cases. *See*, *e.g.*, *United States v. Cabrera*, 699 F. Supp. 2d 35, 40 (D.D.C. 2010); *United States v. Sunia*, 643 F. Supp. 2d

51, 60 (D.D.C. 2009); *United States v. Booker*, 613 F. Supp. 2d 32, 34 (D.D.C. 2009). Even in that context, however, reconsideration should be reserved for "extraordinary circumstances" and should not be used to bring to the Court's attention "arguments that could have been advanced earlier." *Cabrera*, 699 F. Supp. 2d at 41. Ultimately, the decision whether to entertain a motion for reconsideration of an interlocutory order typically lies in the sound discretion of the district court.

Once the Court of Appeals has decided a question, whether in a final appeal leading to a new trial or on interlocutory appeal, however, the district court is bound by the appellate decision. Under the law-of-the-case doctrine, "the *same* issue presented a second time in the *same* court should lead to the *same* result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). This means that, "[w]hen there are multiple appeals taken in the course of a single piece of litigation, . . . decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker*, 49 F.3d at 739. The law-of-the-case doctrine applies to all "issues that were decided either explicitly or by necessary implication." *United States v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1041 (D.C. Cir. 1997). Although the law-of-the-case doctrine "is a prudential rule," *Crocker*, 49 F.3d at 739–40, "an even more powerful version of the doctrine—sometimes called the 'mandate rule'—*requires* a lower court to honor the decisions of a superior court in the same judicial system," *LaShawn A.*, 87 F.3d at 1393 n.3 (citations omitted) (emphasis added). Simply put, "'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'" *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 596-97 (D.C. Cir. 2001) (quoting *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948)); *see also Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939) (it is "indisputable" that district courts are "bound to carry the mandate of the upper court into execution and [may] not consider the

questions which the mandate laid to rest"); *Role Models of Am., Inc. v. Geren*, 514 F.3d 1308, 1311 (D.C. Cir. 2008).

Although the D.C. Circuit has not had an opportunity to address the question, decisions from this Court and from other circuits recognize that a district court may, nonetheless, permit re-litigation of a question previously resolved in an appellate decision, but only in "extraordinary circumstances." *United States v. Carta*, 690 F.3d 1, 5 (1st Cir. 2012) (citation omitted); *see also United States ex rel. Oliver v. Philip Morris USA, Inc.*, 101 F. Supp. 3d 111, 120 n.5 (D.D.C. 2015); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 262 (D.D.C. 2002); *cf. Naples v. United States*, 359 F.2d 276, 277–78 (D.C. Cir. 1966) (per curiam) (law-of-the-case doctrine does "not operate to bar consideration of the admissibility of these confessions based upon material facts not heretofore adduced"). As the test is framed in at least two circuits, "[a] district court may depart from an appellate court's mandate" in response to "'(1) a dramatic change in controlling legal authority; (2) significant new evidence that was not earlier obtainable through due diligence but has since come to light; or (3) [if] blatant error from the prior . . . decision would result in serious injustice if uncorrected.'" *United States v. Webb*, 98 F.3d 585, 587 (10th Cir. 1996) (citation omitted); *see also United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (applying essentially the same test); *cf. United States v. Pineiro*, 470 F.3d 200, 205–06 (5th Cir. 2006) (applying a similar test, but permitting deviation from a mandate where evidence to be offered at "a subsequent trial" is "substantially different"). It bears emphasis, however, that respect for the proper roles of trial and appellate courts and the importance of judicial economy and order demand that district courts apply these exceptions "only in 'very special situations,'" *Carta*, 690 F.3d at 5, and that district courts avoid reopening

issues once decided or second-guessing the conclusions—express or implicit—of appellate courts.

Here, Trabelsi relies on the exception for newly discovered evidence. Because he seeks reconsideration of a question already decided by the D.C. Circuit, this means that he bears the heavy burden of demonstrating that the evidence is new, and not merely cumulative; that it would lead to a different result; and that the evidence could not have been previously adduced through reasonable diligence.

A. Motion for Reconsideration of the Denial of the Motion to Dismiss

With these principles in mind, the Court turns first to Trabelsi's motion for reconsideration. That motion hinges on Trabelsi's claim that the August 8, 2019 decision from the Brussels Court of Appeal constitutes significant new evidence at odds with the factual foundation of the D.C. Circuit's decision. According to Trabelsi, the D.C. Circuit's "decision rested on the inaccurate premise that the Minister of Justice had the authority to, and did in fact, reject the overt act exclusion imposed by the Belgian court . . . ." Dkt. 345 at 23. In his view, the D.C. Circuit's belief that the Minister of Justice authorized Trabelsi's extradition—without limitation—led that court, like this one, to defer to an extradition decision that the Belgian state never made. Without that unwarranted deference, Trabelsi continues, the D.C. Circuit would have been required to interpret the Treaty on its own, and it would have been required to conduct its own comparison of the U.S. and Belgian offenses. Dkt. 345 at 2. Had it done so, Trabelsi contends, the court would have concluded that the Belgian and U.S. offenses overlap and that Trabelsi was not subject to extradition to the United States on charges, like those in the pending indictment, that included a conspiracy or attempt to bomb the Kleine-Brogel Air Base. *Id.*

At the time he filed his motion for reconsideration, the only new evidence that Trabelsi cited in support of this contention was the August 8, 2019 decision from the Brussels Court of Appeal. *See* Jan. 8, 2020 Hr. Tr. (Rough at 13). That evidence is new and significant, according to Trabelsi, both because it "clarifie[s] that the Belgian Minister of Justice did not have the authority to 'reject' the exclusion imposed by the Belgian court," and, more importantly, because it shows that he did not in fact do so. Dkt. 345 at 23. This "clarifi[cation]," Trabelsi argues, can be found in the Belgian court's conclusion that the Minister of Justice's interpretation of the Treaty was at odds with the prior, binding Belgian court decisions. *Id.* at 23–24. The Belgian court concluded, for example, that the ministerial order on extradition "*could only* validly grant the extradition requested by the United States within the limits of the" prior Belgian court decisions—in other words, only with the exclusion of the four overt acts. Dkt. 345-1 at 26. By arguing that the Minister of Justice "did not have the authority to 'reject' the exclusion imposed by the Belgian court, nor did he," Dkt. 345 at 23, Trabelsi raises two distinct contentions about the Minister of Justice's decision. Neither warrants reconsideration of this Court's or the D.C. Circuit's decision.

Trabelsi first, and most significantly, contends that the August 8, 2019 decision clarifies that the Minister of Justice did not, in fact, order Trabelsi's extradition without limitation—that is, he was bound by the decisions of the Belgian courts, and his extradition order must therefore be read to exclude overt acts 23, 24, 25, and 26. The August 8, 2019 decision does not purport to amend the Minister's extradition order, nor does Trabelsi contend that the decision had any such operative effect. Instead, the August 8, 2019 decision is relevant to Trabelsi's motion for reconsideration only if it offers significant, new evidence about the meaning of the Minister's 2011 extradition order. In other words, reconsideration is unwarranted unless the August 8, 2019

decision presents previously unavailable evidence that controverts the D.C. Circuit's reading of the extradition order.

The starting point for resolving that question is, of course, the text of the extradition order itself. There is no doubt the Minister of Justice was aware of the decisions of the Belgian courts excluding the four overt acts; the extradition order discussed those decisions in detail and acknowledged that the Court of First Instance "rendered enforceable the arrest warrant issued on 7 April, 2006 by the Federal Court of the District of Columbia, 'except with respect to "overt acts" no. 23, 24, 25 and 26.'" Dkt. 367-17 at 3. Nor is there any doubt that the Minister carefully considered, on his own accord, whether the *non bis* principle required exclusion of the four overt acts; the extradition order discussed Article 5 of the Extradition Treaty and the *non bis*—or, in the Minister's nomenclature, the double jeopardy—principle at length, concluded that the Treaty embodies an offense-based approach, and the order determined that the "overt acts" are "elements in support of the charges" and that "[t]he 'double jeopardy' principle does not exclude the possibility to use these elements of fact or not." *Id*. at 10–13. The extradition order further stressed that "[t]he overt acts listed in the . . . indictment . . . are not the offenses for which an extradition [was] requested" but, rather, were "element[s]" of "fact" that do not "automatically qualify as an offense." *Id.* at 12. Overt act 23, for example, which alleges that Trabelsi "rented an apartment" in Brussels, Dkt. 6 at 8, "should obviously not be qualified as an offense," Dkt. 367-17 at 13. Accordingly, in the Minister's view, the overt acts did "not represent in any way the offenses for which an extradition was requested." *Id.* He, therefore, concluded that "the conditions and formalities for extradition" had "been met" and—without mention of any limitation or condition— he "granted" the request of the United States for extradition. *Id*. at 14.

With the text of the extradition order and the preceding decisions of the Belgian courts before it, the D.C. Circuit read the Minister of Justice's extradition order to grant extradition, without limitation. The D.C. Circuit observed, in relevant respects: "The Minister . . . rejected the limitation on overt acts, explaining that they are 'not offenses for which an extradition [was] requested' because 'an overt act is an element (of fact, or factual), an act, a conduct or a transaction which in itself cannot automatically qualify as an offense.'" *Trabelsi*, 845 F.3d at 1184–85 (quoting Dkt. 367-17 at 12). And, with this understanding in mind, the D.C. Circuit held that the Minister of Justice compared "the offenses in the U.S. indictment with those of which Trabelsi was convicted in Belgium;" "adequately explained his decision, including *the basis for rejecting the overt-acts exclusion*;" and "granted the extradition request *without limitation*." *Id.* at 1189 (emphasis added).

The question for this Court to decide is whether the August 8, 2019 decision offers significant new evidence that was previously unavailable and that shows that this Court and the D.C. Circuit mistakenly believed that the Minister had "reject[ed] the over-acts exclusion" and had "granted the extradition request without limitation." *See Webb*, 98 F.3d at 587; *see also LaShawn A.*, 87 F.3d at 1393 (requiring "extraordinary circumstances"). The August 8, 2019 decision does not come close to meeting that high bar. To the contrary, read correctly, the opinion addresses only whether the Minister of Justice acted lawfully, in the view of that court, when he ordered Trabelsi's extradition without excluding those overt acts. *See* Dkt. 345-1 at 23–26.

Trabelsi focuses on the following passage from the Belgian court's August 8, 2019 opinion in an effort to show that the D.C. Circuit's interpretation of the Minister's 2011 order was incorrect:

As a result of the foregoing, under Belgian law:

> Article 5 of the Extradition Convention refers to the identity of the fact and not the identity of the qualification;
>
> For this reason, the Belgian courts—order of the Nivelles Chamber of the Council of November 19, 2008, confirmed by the ruling of the Grand Jury of the Brussels Court of Appeal of February 19, 2009—have limited the exequatur given to the U.S. arrest warrant by granting it "*except in so far as it refers to the 'overt acts' n°23, 24, 25, and 26 set out in paragraph 10 of Count 1 and deemed to be repeated in support of the other three counts*;"
>
> These decisions of the Belgian courts have acquired the force of res judicata and are binding on the Belgian State;
>
> Similarly, the Ministerial Order on Extradition of November 23, 2011 could only validly grant the extradition requested by the United States within the limits of the exequatur granted to the arrest warrant, that is to say for the four counts mentioned in the arrest warrant, ***but not for the "Overt Acts" n° 23, 24, 25 and 26, set out in paragraph 10 of Count 1 and supposed to be repeated in support of the other three counts;***
>
> Accordingly, as a result of the foregoing, according to the analysis which prevails in Belgian law, the extradition of the appellant does not allow to prosecute him in the United States in order to be tried for the "overt acts" ("Overt Acts") n° 23, 24, 25 and 26, set out in paragraph 10 of Count 1 and supposed to be repeated in support of the other three counts, namely the facts relating to the attempt of bombing the Kleine-Brogel military base.

Dkt. 345-1 at 26 (bold, italics, and underline in original).

In Trabelsi's view, the Belgian court's observation that "the Ministerial Order . . . could only validly grant the extradition . . . within the limits of" the "exequatur" of the Court of First Instance, Dkt. 345-1 at 26, which excluded the four overt acts, provides new evidence that the Minister, in fact, limited the extradition order in conformity with that order. *See* Dkt. 345 at 23. But that is not what the August 8, 2019 decision says; rather, consistent with the judicial decisions that preceded the Minister's decision—all of which were before the D.C. Circuit—the August 8, 2019 decision simply reaffirms the view of the Belgian judiciary regarding the meaning and application of Article 5 of the Extradition Treaty. Even if read to say that the Minister of Justice was, in the view of Brussels Court of Appeal, bound by those judicial

decisions and *should have excluded* the overt acts, that does not demonstrate that he *did exclude* them—or even that he agreed that he was bound by the "exequatur."

Far from presenting significant new evidence, a different portion of the August 8, 2019 decision shows that the Brussels Court of Appeal concurred with the D.C. Circuit understanding that the Minister of Justice, in fact, declined to exclude the four overt acts. The decision describes the view of the Court of First Instance that Article 5 of the Treaty "implies a review of the identity of the fact and not its qualification" and notes that, "on the basis of such review—a comparison of the facts for which the appellant was convicted in Belgium with the 'Overt acts' supporting the American changes"—the Court of First Instance granted "the exequatur to the U.S. arrest warrant "except in so far as it related to the 'overt acts' N° 23, 24, 25 and 26." Dkt. 345-1 at 23 (underline in original). The August 8, 2019 decision further notes that "[t]his order . . . was confirmed by the ruling of . . . the Brussels Court of Appeal" and that the appeal of the order "by the Belgian State was rejected by the Court of Cassation." *Id.* at 24. And it then observes that "[o]nly the ministerial extradition order of November 23, 2011 depart[ed] from this consistent interpretation of Article 5 of the Extradition [Treaty], arguing that the provision requires an identity of qualifications." *Id.* at 25. In other words, the Minister of Justice disagreed with the Belgian courts on the central premise of their decisions—that is, that "Article 5 of the [Treaty] refers to the identity of the fact and not the identity of the qualification" and that, "[f]or this reason," the exequatur given to the U.S. arrest warrant" was limited to exclude overt acts 23, 24, 25, and 26. *Id.* at 26. Thus, if anything, the August 8, 2019 opinion adds further support for—and certainly does not controvert—the D.C. Circuit's conclusion that the Minister of Justice granted extradition without limitation.

The February 26, 2020 decision from the Court of First Instance in Brussels, which was issued after briefing was completed on the pending motions, is not to the contrary. That decision, like the August 8, 2019 decision, interpreted Article 5 of the Treaty to require a fact-based rather than offense-based comparison of the U.S. and Belgian charges. *See* Dkt. 373-1 at 55. The Court of First Instance goes on to explain that, in its view, the Minister of Justice incorrectly based the grant of extradition on an offense-based, rather than fact-based, analysis, *id.* at 62–63, and that the extradition order "d[id] not specify that, as a result of the [overt act exclusion], Mr. Trabelsi cannot be sentenced in the United States for these acts," *id.* at 65. That action, according to the Court of First Instance, "constitute[d] an excess of power" because the Minister of Justice exceeded the limits on extradition set by the courts. *Id.* at 65. This Court need not—and, indeed, should not—engage with the question whether the Belgian Minister of Justice exceeded his authority under Belgian law by declining to conform his order to the "exequatur" granted by the Court of First Instance or to other pronouncements of the Belgian courts. *See infra* at 28–29. All that matters for current purposes is that the February 26, 2020 decision *confirms* the D.C. Circuit's understanding that the Minister of Justice did, in fact, order Trabelsi's extradition to the United States without excluding the four overt acts.

That conclusion is further confirmed by another piece of new evidence (albeit cumulative)—the most recent diplomatic note, which speaks directly to the Minister's intent. *See* Dkt. 355-1. That note offers the official position of the Belgian state and explains that the Minister of Justice's 2011 extradition order "is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States." Dkt. 355-1 at 2. More importantly, according to the diplomatic note, the extradition order "makes clear that Mr. Trabelsi may be tried [in the United States] on all of the charges set out in [the] indictment, and

that *any* similarity between the United States case and the Belgian case does not give rise to *any* bar to his being tried on the charges in that indictment." *Id.* (emphasis added). And, most importantly, the diplomatic note explains that the 2011 extradition order "is also clear that the prosecution may offer facts relating to all 28 overt acts in prosecuting Mr. Trabelsi on the charges in the indictment." *Id.* That assertion is consistent with the plain language of the 2011 order, the Belgian state's prior diplomatic note (which was before the D.C. Circuit), and with the D.C. Circuit's opinion.

Trabelsi claims that a recent communication from the Belgian state to the U.S. government concerning the February 26, 2020 decision constitutes "the unequivocal, official position of the State of Belgium in this matter" and argues that that communication "plainly states that Mr. Trabelsi cannot be prosecuted in the United States for the planned attack on Kleine Brogel." Dkt. 377 at 2 (discussing Dkt. 375-1 at 1). The Court is unpersuaded. The communication does not adopt the conclusion of the Court of First Instance as its own position, but, rather, merely apprises the U.S. government that the Court of First Instance "has ordered the Belgian Government to formally notify its judgment" and then recites the language that the Court of First Instance required the Belgian state convey to the United States. Dkt. 375-1 at 1. The Belgian state, in that communication, also explains that the February 26, 2020 opinion reached its conclusion "for the reasons set out in" the attached translated decision. *Id.* Those reasons, however, as already explained, do nothing to cast doubt on the D.C. Circuit's conclusion that the extradition order that was issued in 2011 did, in fact, extradite Trabelsi without excluding the four Kleine-Brogel overt acts. Accordingly, Trabelsi offers no evidence—much less significant, new evidence that was not previously available—that calls the D.C. Circuit's understanding of the extradition order into question.

Trabelsi also relies on the August 8, 2019 and February 26, 2020 decisions to support a second contention—that regardless of what the Minister of Justice may have intended, he was precluded as a matter of Belgian law from granting the extradition request without excluding the four overt acts because he was bound by the Belgian courts' decisions excluding those overt acts. That contention is easier to square with what the August 8, 2019 and February 26, 2020 decisions actually say, but it does not advance his motion for reconsideration for two reasons.

First, the D.C. Circuit's reasoning did not turn on whether the Minister of Justice was acting with lawful authority under Belgian law or in conformity with Belgian judicial decisions. Rather, the D.C. Circuit deferred to the decision of the Belgian state to grant the U.S. request for extradition. In considering whether to defer, the D.C. Circuit relied in substantial part on *United States v. Campbell*, 300 F.3d 202 (2d Cir. 2002), a Second Circuit case in which the U.S. court deferred to the foreign state's decision whether the offense for which extradition was sought fell within the scope of the extradition treaty. *Trabelsi*, 845 F.3d at 1188–89. In *Campbell*, the Second Circuit explained that "the question of whether an extradition treaty allows prosecution for a particular crime that is specified in the extradition request is a matter for the extraditing country to determine." *Campbell*, 300 F.3d at 209. At least for purposes of the doctrine of specialty, that determination is one that "courts cannot second-guess." *Id.* In other words, according to *Campbell*, courts must "presume that if the extraditing country does not indicate that an offense specified is excluded from the extradition grant, the extraditing country considers the offense to be a crime for which the extradition is permissible." *Id.* Noting that the *non bis* challenge raised in the interlocutory appeal was distinct from the doctrine of specialty challenge at issue in *Campbell*, the D.C. Circuit nevertheless found "its approach . . . useful here." *Trabelsi*, 845 F.3d at 1188.

That *Campbell*'s reasoning undergirds the D.C. Circuit's deference to Belgium's decision to extradite Trabelsi to the United States shows that it is the decision of the foreign state, acting in the realm of international relations, to which deference is owed. The passage from *Campbell* that the D.C. Circuit relies upon is preceded by the following justification for that deference:

> Whether or not express terms in a treaty make the extraditing country's decision final as to whether an offense is extraditable, *deference to that country's decision seems essential to the maintenance of cordial international relations*. It could hardly promote harmony to request a grant of extradition and then, after extradition is granted, have the requesting nation take the stance that the extraditing nation was wrong to grant the request.

Campbell, 300 F.3d at 209 (emphasis added); *see also Trabelsi*, 845 F.3d at 1187 ("Because the extradition implicates 'the sovereignty of a nation to control its borders and to enforce its treaties," judicial review of such a decision could implicate concerns of international comity." (citations omitted)). The interest protected by the deference regime, accordingly, focuses on the decision made by one party to a treaty to extradite a defendant to the other party to the treaty—that is, the state-to-state decision of the Minister of Justice to grant the request of the United States government to extradite Trabelsi.

The D.C. Circuit, moreover, was aware of the difference of opinions held by Belgian Minister of Justice and the Belgian judiciary at the time it deferred to the Belgian state's decision to extradite. Both Trabelsi and the United States recited the Belgian procedural history in their briefs to the D.C. Circuit, each careful to point out this difference of views. *See Trabelsi*, No. 15-3075, Appellant's Br. at 14–16; *Id.*, Appellee's Br. 14–16. Even more to the point, the D.C. Circuit noted that split in reciting the history of the case:

> On November 19, 2008, the Court Chamber of the Court of First Instance of Nivelles held that the United States arrest warrant was enforceable, except as to the overt acts labeled numbers 23, 24, 25, and 26 in the indictment. The Court of Appeals of Brussels affirmed this decision on February 19, 2009. On June 24, 2009, the Belgian Court of Cassation affirmed the Court of Appeals. . . . The Minister . . . rejected the limitation on overt acts, explaining that they were

> "not the offenses for which an extradition [was] requested" because "an overt act is an element (of fact, or factual), an act, a conduct or a transaction which in itself cannot automatically be qualified as an offense."

Trabelsi, 845 F.3d at 1184–85. The D.C. Circuit was thus aware of the decisions rendered by the Belgian courts, and it was aware that the Minister of Justice "rejected the limitation on overt acts" set forth in the decisions. With this background in mind, Trabelsi cannot reasonably maintain that the August 8, 2019 and February 26, 2020 decisions made available any new, and previously unavailable, line of argument. To the contrary, he previously made—and the D.C. Circuit considered—the same argument he is now making. *Compare* Dkt. 345 at 24 ("[T]he Belgian Minister of Justice did not have the authority to reject this exclusion, nor did he in fact reject it.") *with Trabelsi*, No. 15-3075, Appellant's Reply Br. at 30 ("The Minister [of Justice] could not and did not ignore this exclusion.").

To be sure, the D.C. Circuit's opinion does at times suggest that the "Belgian courts" and the Minister of Justice were in agreement as to the interpretation of the Extradition Treaty and its application to Trabelsi's case. Most notably, the D.C. Circuit "defer[red] to th[e] decision of the Belgian courts and Minister of Justice that, based on an offense-based analysis, Trabelsi's extradition comports with Article 5 of the Treaty." *Trabelsi*, 845 F.3d at 1190. That sentence, however, is best understood to refer to the decision by the Council of State—an administrative court in Belgium that exercises jurisdiction over the review of administrative acts, *see* Council of State of Belgium, The Institution, Legal Powers, http://www.raadvst-consetat.be/?page=about_competent&lang=en (last accessed Mar. 13, 2020)—which rejected Trabelsi's appeal of the Minister of Justice's extradition order on the ground that it violated

Article 5 of the treaty, *see* Dkt. 367-21 at 28–29.[5] The D.C. Circuit, like the Minister of Justice, interpreted the Treaty to require an offense-based analysis. And, the Council of State's opinion does not contravene that view. *See* Dkt. 367-21 at 28–29. The fact that other Belgian courts construed the Treaty to apply an identity-of-the-facts analysis does not undercut the deference U.S. courts owe to the decision of the Belgian state to grant the U.S. request for extradition, without limitation. In the words of the *Campbell* decision, "[i]t could hardly promote harmony" for the United States, having successfully extradited Trabelsi to the United States, to "take the stance that the extraditing nation was wrong to grant the request." *Campbell*, 300 F.3d at 209

Second, to the extent Trabelsi's argument would require this Court to declare that the Belgian Minister of Justice violated Belgian law by ignoring a domestic judicial decree, the act-of-state doctrine bars the Court from doing so. The act-of-state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). It applies when "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within" its boundaries. *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 405, (1990). It serves as "a rule of decision for the courts of this

[5] Trabelsi separately argues that the decision of the Council of State further demonstrates that the Minister of Justice excluded the four overt acts from his grant of extradition. Dkt. 345 at 8–9. That argument fails because (1) it is far from clear that the Council of State's decision, which simply refers to the remaining twenty-four overt acts a "among . . . those for which the extradition is granted," Dkt. 367-21 at 26–27, can carry that weight; (2) the Council of State decision was available at the time the D.C. Circuit decided the interlocutory appeal and, indeed, the D.C. Circuit cited to that decision, 845 F.3d at 1185; and (3) despite that decision, the D.C. Circuit held that the Minister of Justice "rejected the limitation on overt acts," *id.*

country," *id.* at 405 (quoting *Ricaud v. Am. Metal Co.,* 246 U.S. 304, 310 (1918)), requiring that, "in the process of deciding [a case], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid," *id.* at 409. The doctrine is "a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Id.* at 404 (quoting *Sabbatino,* 376 U.S. at 423). The act-of-state doctrine advances "international comity, respect for the sovereignty of foreign nations in their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *Id.* at 408. Federal courts must tread lightly when they wade into disputes between the two other branches of the U.S. government. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). They should proceed with even greater trepidation when asked to wade into a dispute between two branches of a foreign government.

For all of these reasons, Trabelsi has failed to offer any significant, new, and previously unavailable evidence that would warrant departure from the mandate rule. The Court will, accordingly, deny Trabelsi's motion for reconsideration, Dkt. 345.

B. Motion to Compel Compliance With Doctrine of Specialty and to Exclude Rule 404(b) Evidence

Trabelsi also moves "to compel compliance with" the doctrine of specialty and to exclude evidence of the Kleine-Brogel plot as inadmissible under Federal Rule of Evidence 404(b). Dkt. 210. The doctrine of specialty provides that, "once extradited, a person can be prosecuted only for those charges on which he was extradited." *United States v. Sensi*, 879 F.2d 888, 892 (D.C. Cir. 1989). The extradition treaty between the United States and Belgium incorporates this principle. Extradition Treaty, Art. 15 ("A person extradited under this Treaty may not be

detained, tried, or punished in the Requesting State except for . . . the offense for which extradition has been granted . . . .").

Trabelsi previously moved to dismiss the indictment on the ground that it violated the doctrine of specialty, enshrined in Article 15 of the Treaty. *See* Dkt. 70 at 20–26. This Court (C.J. Roberts) denied that motion on two independent grounds. First, while recognizing that it was an open question in this circuit whether a defendant may challenge his extradition on specialty grounds, the Court held that "it appears that Trabelsi cannot challenge his extradition as a violation of Article 15" because he lacked standing to do so. Dkt. 124 at 28–29. Second, the Court explained that, even if Trabelsi did have standing to assert a defense under the doctrine of specialty, the operative test is "whether the requested state has objected or would object to prosecution." *Id.* at 30 (quoting Restatement (Third) of Foreign Relations Law § 477 cmt. b (1987)). The Court then concluded that, because Belgium "ha[d] repeatedly consented to prosecution under the superseding indictment as a whole, Trabelsi's [specialty] challenge must fail." *Id.*

Trabelsi now argues that because overt acts 23, 24, 25, and 26 were "excluded" from the Minister of Justice's extradition order, he cannot be prosecuted for those acts. Dkt. 210 at 12–16. Even beyond the charges he can face, moreover, Trabelsi argues that all evidence of the four overt acts—and, more generally, evidence relating to the Kleine-Brogel plot—must be excluded as inadmissible bad-acts evidence under Federal Rule of Evidence 404(b). *Id.* at 16. Finally, and in the in alternative, he requests a jury instruction about the limited purpose for which any such evidence might be considered. *Id*. at 19–21.

Trabelsi's motion fails because it turns on the scope of Belgium's grant of extradition. As already explained, the D.C. Circuit has already concluded that the Minister of Justice rejected

the Belgian courts' overt act exclusion and that Belgium extradited Trabelsi without that exclusion. *See Trabelsi*, 845 F.3d at 1184–85. Thus, with respect to that issue, the Court is bound, barring "extraordinary circumstances." *See Cabrera*, 699 F. Supp. 2d at 41; *LaShawn A.*, 87 F.3d at 1393, 1393 n.3. And, as already explained, the facts relating to the extradition decision have not changed since the D.C. Circuit reached that conclusion. Because Trabelsi's invocation of the doctrine of specialty and Rule 404(b) rests entirely on this rejected premise, the Court denies that motion as well.

Nor has Trabelsi offered anything in his motion that would warrant reconsideration of this Court's prior holding that "the standard for adjudicating a [specialty motion] in the United States is whether the requested state has objected or would object to prosecution," and that, under that standard, the motion fails. Dkt. 124 at 30. That approach is consistent with the approach taken by the Second Circuit in *Campbell*, where the court relied not only on the extraditing state's decision to extradite but also on "the record of communications between the two nations," including post-extradition clarifications provided by the extraditing state, in order to reject the defendant's motion to dismiss on the basis of the doctrine of specialty. *Campbell*, 300 F.3d 211–12. Trabelsi has not offered any evidence that suggests that "the record of communications" demonstrates a violation of the terms of the 2011 extradition. Rather, in response to this newest round of briefing, the Belgian state submitted a diplomatic note, again consenting to Trabelsi's prosecution without the exclusion of any overt acts, notwithstanding the continued conflicting position of the courts of Belgium. *See* Dkt. 355-2. Moreover, as already explained, the most recent communication—which merely provided, without adopting, the conclusion of the February 26, 2020 judicial decision to the U.S. government—does not evidence a change in the Belgian state's views. *See* Dkt. 375-1.

Accordingly, the Court once again rejects the premise at the core of Trabelsi's motion. It follows that Trabelsi's trial on the superseding indictment—without any limitation on the enumerated overt acts—would not violate the doctrine of specialty enshrined in Article 15 of the Treaty, and that Trabelsi's motion is, therefore, unavailing.

CONCLUSION

For the foregoing reasons, Defendant's motion to compel compliance with the treaty, Dkt. 210, and motion for reconsideration, Dkt. 345, are hereby **DENIED**.

SO ORDERED.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: March 13, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, v. NIZAR TRABELSI, *Defendant.*	No. 06-cr-89 (RDM)

MEMORANDUM OPINION AND ORDER

Defendant Nizar Trabelsi was convicted in Belgium of several crimes, including attempting to bomb the Kleine-Brogel Air Base ("Kleine-Brogel") in 2001. After serving his sentence in Belgium, Trabelsi was extradited to the United States to face various conspiracy and terrorism charges. Since 2008—both before and after his extradition—he has filed an ever-expanding array of cases and motions in Belgium, the European Union, and the United States challenging the lawfulness of his extradition. Much of that litigation has focused on the question of whether his extradition violated the *non bis in idem*—or, simply, *non bis*—provision of the Extradition Treaty between Belgium and the United States, which prohibits extradition "when the person sought has been found guilty, convicted[,] or acquitted in the Requested State for the office for which extradition is" sought. *See* Extradition Treaty Between the United States of America and the Kingdom of Belgium, art. 5, Apr. 27, 1987, S. Treaty Doc. No. 104-7 ("Extradition Treaty" or "Treaty").

In November 2015, this Court determined that Trabelsi's extradition did not violate the *non bis* provision of the Treaty and thus rejected Trabelsi's motion to dismiss his U.S. indictment, *United States v. Trabelsi*, No. 06-cr-89, 2015 WL 13227797 (D.D.C. Nov. 4, 2015)

("*Trabelsi I*"), and, in January 2017, the D.C. Circuit affirmed that decision, *United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017) ("*Trabelsi II*"). Then, on the eve of trial, Trabelsi moved for reconsideration of the ruling from the court of appeals in light of an intervening decision from a Belgian court. At the parties' request, the Court adjourned the trial date to permit briefing on whether developments in the Belgian courts shed new light on Trabelsi's *non bis* claim. After considering the parties' arguments, however, the Court concluded that none of the intervening events that Trabelsi proffered as a basis for reconsideration called into question the prior decisions of this Court and the D.C. Circuit. *United States v. Trabelsi*, 2020 WL 1236652 (D.D.C. March 13, 2020) ("*Trabelsi III*"), and Trabelsi has appealed that decision, *see United States v. Trabelsi*, No. 20-3028 (D.C. Cir.) (appeal docketed Mar. 31, 2020).

Now before the Court are two motions related to the pending appeal. In one, Trabelsi asks the Court to stay further proceedings in the district court while his appeal is pending. Dkt. 402. In the other, he invokes yet further developments in the long-running Belgian litigation to seek an indicative ruling from the Court reconsidering its prior order denying reconsideration of this Court's (and the D.C. Circuit's) rejection of his *non bis* argument. Dkt. 401. In the meantime, the D.C. Circuit has held Trabelsi's appeal in abeyance pending resolution of his motion for an indicative ruling. *See* Order, *United States v. Trabelsi*, No. 20-3028 (D.C. Cir. Dec. 1, 2020).

For the following reasons, the Court will **GRANT** Trabelsi's motion to stay the district court proceedings pending resolution of his appeal but will **DENY** his motion for reconsideration, as permitted by Federal Rule of Criminal Procedure 37.

I. BACKGROUND

A. Trabelsi's Belgian Prosecution and Extradition

The factual background of this case is set forth in greater detail in several prior opinions. *See Trabelsi I*, 2015 WL 13227797, at *1; *Trabelsi II*, 845 F.3d at 1184–85; *Trabelsi III*, 2020 WL 1236652, at *1–7. Here, the Court focuses on the procedural history of the case, as relevant to resolving the pending motions.

The Belgian police arrested Trabelsi on September 13, 2001, *Trabelsi II*, 845 F.3d at 1184, and he was charged with and ultimately convicted of several offenses under Belgian law, including charges of conspiring and attempting to bomb Kleine-Brogel. *See Trabelsi III*, 2020 WL 1236652, at *1–2 (citing Dkt. 367-3 at 24, 27, 31). On September 30, 2003, Trabelsi was sentenced to ten years of incarceration in Belgium. *Trabelsi II*, 845 F.3d at 1184. On April 7, 2006, while Trabelsi was serving his sentence in Belgium, a U.S. grand jury indicted him for Conspiring to Kill U.S. Nationals Outside the United States, in violation of 18 U.S.C. §§ 1111(a) and 2332(b)(2); Conspiring and Attempting to Use Weapons of Mass Destruction, in violation of 18 U.S.C. §§ 2 and 2332a; Conspiring to Provide Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; and Providing Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. §§ 2 and 2339B. *Trabelsi III*, 2020 WL 1236652, at *2 (citing Dkt. 3). On November 16, 2007, a grand jury returned a superseding indictment, which charged Trabelsi with the same statutory violations but revised the charged overt acts.[1] *Id.* (citing Dkt. 6). And on April 4, 2008, the United States asked Belgium to extradite Trabelsi to the United States "and provided the Belgian government

[1] Many years later, the United States dropped the material support counts. *See* Minute Order (June 10, 2019); Dkt. 231.

with an affidavit describing the above charges and the governing U.S. law as well as a copy of the superseding indictment." *Id.* (citing Dkt. 367-7).

The extradition request set off what has become a long-running dispute between the Belgian state and the Belgian courts as to the proper interpretation of the Extradition Treaty and the permissible scope of Trabelsi's extradition under the Treaty. The disagreement pertains to a provision of the Treaty dictating that "[e]xtradition shall not be granted when the person sought has been found guilty, convicted[,] or acquitted in the Requested State for the offense for which extradition is granted." Extradition Treaty, art. 5. This provision embodies a principle of international law known as *non bis in idem* (meaning "not twice"), akin to the double jeopardy rule in American law.[2]

On November 19, 2008, the Court Chamber of the Court of First Instance of Nivelles issued a decision addressing, inter alia, the application of the *non bis* principle to Trabelsi's

[2] Whether the Treaty in fact incorporates the *non bis* principle is itself a matter of some dispute in this case. At least as interpreted in many European courts, the *non bis* principle provides protection against double prosecutions based on not only the same offenses, but also based on any of the same underlying facts, even if those facts are used in support of different charges. *See* John A.E. Vervaele, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, 9(4) Ultrect L. Rev. 211 (2003) (discussing this "*idem factum* approach"). In extraditing Trabelsi, the Belgian state thus referred to the operative portion of the Treaty as embodying a "double jeopardy principle," rather than "a *non bis* principle," given the Treaty's use of the term "offense." Dkt. 367-17 at 12. But the *non bis* principle can also have a more generic meaning, encompassing either fact-based or offense-based prohibitions on double prosecutions. *See* Jennifer E. Costa, *Double Jeopardy and Non Bis in Idem: Principles of Fairness*, 4 U.C. Davis J. Int'l L. & Pol'y 181 (1998). When used in this more generic way, *non bis* can refer to a rule, like the one in the Treaty, that prohibits separate sovereigns from bringing subsequent prosecutions for the same crimes, whereas "double jeopardy" refers to a rule against subsequent prosecutions within a single sovereign. *Id.* at 183. The Court uses the term *non bis* to refer to the relevant Treaty provision for the sake of clarity and consistency and to avoid confusion with the American law of double jeopardy. But the Court's use of the term is not intended to convey support for a fact-based understanding of the Treaty provision. On the contrary, the Court finds persuasive the Belgian state's arguments for why the Treaty incorporates an offense-based approach.

proposed extradition. Dkt. 367-9. The court read the word "offense" in Article 5 to mean "facts . . . or acts . . . falling under the scope of criminal law of one of the two States." Dkt. 367-9 at 7. Based on that interpretation, the court reasoned that the overt acts numbered 23, 24, 25, and 26 in the superseding indictment—specifically, those acts related to the attempted bombing of Kleine-Brogel—"very precisely correspond to the offenses[] committed on Belgian soil" for which Trabelsi had already been convicted. *Id.* The Belgian court thus held that the Extradition Treaty permitted Trabelsi's extradition, except as to those four overt acts. *Id.* at 8. The Brussels Court of Appeal, Dkt 367-11, and the Belgian Court of Cassation, the country's highest court, Dkt. 367-13, affirmed the decision from the Court of First Instance.

The Belgian state, however, took a different position. On November 23, 2011, the Belgian Minister of Justice granted the request from the United States to extradite Trabelsi. Dkt. 367-17 at 14. The Minister's order included substantial legal analysis, including of the *non bis* principle embodied in Article 5 of the Extradition Treaty and the possible exclusion of overt acts 23, 24, 25, and 26. *Id.* at 10–14. Looking to the text of the Treaty, the Minister explained that "Belgium and the United States have mutually committed to reject an extradition under this treaty if the person to be extradited was acquitted in the Requested State or was sentenced there for the same offense as the one for which the extradition is requested." *Id.* at 11. But because the treaty uses the word "offense," the Minister reasoned that "it is not the facts, but their qualification, the offenses, that have to be identical" for the *non bis* provision to apply. *Id.* That is, "the 'double jeopardy' principle mentioned in Article 5 of the Extradition Treaty is limited to the same offenses or to offenses that are substantially the same." *Id.* at 12. Overt acts, the Minister reasoned, are not "offenses," but instead "operate as elements in support of the charges." *Id.* Unless all the elements constituting an offense are the same under both U.S. and

Belgian law, "[t]he 'double jeopardy' principle does not exclude the possibility to use these elements." *Id.*

Applying this understanding of the Extradition Treaty to Trabelsi's case, the Minister concluded that the offenses of which Trabelsi was convicted in Belgium "do not correspond to the offenses listed under the counts . . . that appear in the arrest warrant on which the U.S. extradition request is based." *Id*. The Minister thus ordered that "[t]he extradition of Nizar Trabelsi is granted to the United States government for the offenses for which it is requested," without any mention of exclusions for the four disputed overt acts. *Id.* at 14.

Trabelsi appealed the Minister's extradition order to the Council of State, an administrative court that reviews decisions of the Belgian executive. On September 23, 2013, the Council of State affirmed the extradition order and concluded that overt acts 23, 24, 25, and 26 did not constitute "offenses" within the meaning of the Treaty. Dkt. 367-21. The Council reasoned that the overt acts in the superseding indictment were not themselves offenses, but rather "'overt acts' constitute elements that shall serve the U.S. judicial authorities to determine whether the applicant is guilty or not guilty of the four charges brought against him." *Id.* at 29. On October 3, 2013, Belgium extradited Trabelsi to the United States. *Trabelsi II*, 845 F.3d at 1185.

B. *Trabelsi I*

Nearly a year after his extradition, on September 15, 2014, Trabelsi moved to dismiss the superseding indictment on two grounds. Dkt. 70. First, he argued that his extradition violated the *non bis* provision of the Extradition Treaty because the Minister of Justice "incorrectly concluded that '[t]he constitutive elements of the American and Belgian offenses respectively, their significance, and the place[](s) and time(s) at which they were committed do not match.'"

Id. at 14 (quoting Minister of Justice's Extradition Order (Dkt. 367-17 at 12)). Although the United States had charged a broader conspiracy than had been alleged in Belgium, Trabelsi argued that "the [U.S.] government will present at trial only the narrow evidence of the plot to bomb Kleine-Brogel and thereby circumvent Article 5 of the Treaty." *Id.* at 16. "In other words, Trabelsi argued, the U.S. government seeks to do precisely what the *non bis* principle precludes—it seeks to try him in the United States for the same conspiracy for which he was previously tried and convicted in Belgium." *Trabelsi III*, 2020 WL 1236652, at *3. Alternatively, Trabelsi argued that Belgium had, in fact, denied his extradition with respect to the allegations set forth in overt acts 23, 24, 25, and 26, and that his prosecution based on those acts would therefore violate the doctrine of "speciality." Dkt. 70 at 19–26. That doctrine[3] is embodied in Article 15 of the Treaty, which permits the requesting country to try or to punish a person for only "'the offense for which extradition has been granted.'" *Id.* at 20 (quoting Extradition Treaty, art. 15). Trabelsi argued that, "[b]y continuing to pursue the[] allegation for which extradition was not authorized, the United States is in violation of . . . Article 15 and the doctrine of speciality." *Id.* at 26.

Along with its opposition to that motion, the United States filed a diplomatic note from the Belgian state. Dkt. 80-1. The note, dated October 29, 2014, explained that the Extradition Order, "which is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States, makes clear that Mr. Trabelsi may be tried on all of the charges set out in [the superseding] indictment, and that any similarity between the United

[3] In the United States, the name of this doctrine is usually spelled "specialty," but the Extradition Treaty uses the British spelling, "speciality." *See Trabelsi I*, 2015 WL 13227797, at *10 n.9. The prior opinions in this case have used the two spellings interchangeably. In this opinion, the Court uses the American spelling, "specialty," unless quoting from the Treaty or a pleading that uses the British spelling.

States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment." *Id.* at 1. Specifically with respect to overt acts 23, 24, 25, and 26, the note explained that "[t]he order is also clear that the prosecution may offer facts relating" to those acts, and "[n]either Mr. Trabelsi's trial on the charges set out in the [superseding] indictment[] nor the prosecution's offering proof as to any of the overt acts recited in the indictment[] is inconsistent with the Order." *Id.* The note added that neither "trial" nor "offering of proof" based on those acts would "violate the rule of specialty." *Id.*

The Court (Roberts, C.J.) denied Trabelsi's motion to dismiss. *Trabelsi I*, 2015 WL 13227797, at *11. As a threshold matter, the Court explained that "'an American court must give great deference'" to a foreign government's decision to extradite a defendant, as a matter of international comity. *Id.* at *4 (quoting *Casey v. Dep't of State*, 980 F.2d 1472, 1476–77 (D.C. Cir. 1992)). Next, in the absence of a clear legal test for applying the *non bis* provision of the Extradition Treaty, the Court fell back on the double-jeopardy test from *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Id.* at *5–6. Based on a comparison of the elements, as required by *Blockburger*, the Court determined that the Belgian offenses were different than those charged in the superseding indictment. *Id.* at *6–9. The Court thus concluded that Trabelsi could be tried on all of the U.S. charges without violating the *non bis* provision of the Extradition Treaty. *Id.* Turning to the doctrine of specialty, the Court held that Trabelsi did not have standing to bring a claim under Article 15 of the Treaty because "Belgium has repeatedly consented to Trabelsi's prosecution under the superseding indictment." *Id.* at *10.

C. *Trabelsi II*

Trabelsi took an interlocutory appeal of the Court's order denying his *non bis* motion,[4] and the D.C. Circuit affirmed. *Trabelsi II*, 845 F.3d at 1193. Relying on *United States v. Campbell*, 300 F.3d 202 (2d Cir. 2002), the D.C. Circuit took a "deferential approach." *Id.* at 1189. Interpreting "the scope of Article 5 [was] a matter for Belgium," and the court of appeals declined to "'second-guess [Belgium's] grant of extradition.'" *Id.* at 1188–89 (quoting *Campbell*, 300 F.3d at 209) (alteration in original). Because "[t]he extradition grant did not exclude any of the offenses included in the request for extradition," the court thus "presume[d] that Belgium has determined that none of the offenses in the indictment violate Article 5 of the Treaty." *Id.* at 1189.

The court of appeals explained, however, that this presumption could be rebutted with evidence of (1) "misconduct on the part of the United States in procuring an extradition;" (2) "the absence of review of the extradition request by the requested party;" or (3) "a showing that the requested state or party did not apply the correct legal standard adopted in the Treaty." *Id.* Trabelsi had presented no evidence of either misconduct on the part of the United States or a lack of review on the part of Belgium. *Id.* As to whether Belgium had applied the correct legal standard, the D.C. Circuit concluded that the Belgian state interpreted the Treaty reasonably, especially in light the Treaty's use of the term "offense" in Article 5, rather than "acts." *Id.*

[4] Because double-jeopardy decisions are subject to immediate interlocutory appeal, and because Trabelsi's *non bis* argument was akin to a double-jeopardy challenge, Trabelsi was permitted to take an immediate appeal of the Court's order declining to dismiss the indictment.

Based on the deference that it accorded to Belgium's interpretation of the Extradition Treaty, the D.C. Circuit declined to consult the *Blockburger* test that the district court had employed.[5] *Id.*

C. *Trabelsi III*

After the D.C. Circuit's affirmance, the Court set a trial date of September 16, 2019. Minute Order (April 18, 2019). Trabelsi then filed a motion to compel compliance with the Treaty and the doctrine of specialty, renewing his argument that his extradition had excluded the four overt acts related to the plot to bomb Kleine-Brogel. Dkt. 210. He also argued that evidence of those acts should be excluded under Federal Rule of Evidence 404(b). *Id.*

While that motion was pending, the Belgian courts weighed in again. On August 8, 2019, roughly a month before the trial was scheduled to begin, the Brussels Court of Appeal issued a new decision regarding Trabelsi's extradition. Dkt. 312-2. In considering a claim from Trabelsi that Belgian officials should be precluded from aiding the U.S. prosecution because his Treaty rights had been violated, the Belgian court again disagreed with the Minister of Justice's interpretation of the Extradition Treaty. The Belgian court construed the *non bis* provision as

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[5] In at least one place in its opinion, the D.C. Circuit appeared to elide the disagreement between the Belgian courts and the Belgian state, stating that it was "defer[ring] to th[e] decision of the Belgian courts and Minister of Justice that, based on an offense-based analysis, Trabelsi's extradition comports with Article 5 of the Treaty." *Trabelsi II*, 300 F.3d at 1190. Elsewhere in the opinion, however, the D.C. Circuit explained in detail the procedural history of the case, including the back-and-forth between the Belgian courts and the Belgian state. *See id.* at 1184–85. Although not entirely clear, it may be that at this point in its opinion, the court of appeals was referring to the Belgian Council of State, which is an administrative court that concurred in the Minister's extradition order. *See Trabelsi III*, 2020 WL 1236652, at *13. But, in any event, this Court has little doubt that the D.C. Circuit (1) understood that the Belgian courts—and, particular, the Court of First Instance in Nivelles, the Brussels Court of Appeal, and the Belgian Court of Cassation—had concluded that the four overt acts should be excluded from the extradition order; (2) understood that the Belgian Minister of Justice "rejected the limitation on overt acts, explaining that they were 'not the offices for which an extradition [was] requested' because 'an overt act is an element . . . which in itself cannot automatically be qualified as an offense;'" and (3) understood that the Minister spoke on behalf of the Belgian state on matters affecting international relations. *Trabelsi II*, 300 F.3d at 1184–85.

requiring "a review of the identity of the fact and not of its qualification." *Id.* at 23 (emphasis in original). As the court explained, the Belgian courts had unanimously interpreted the Extradition Treaty as requiring a fact-based analysis, and only the Minister's "extradition order of November 23, 2011 departs from this consistent interpretation." *Id.* at 25. The Belgian court further explained that "the Ministerial order on Extradition . . . could only validly grant the extradition by the United States within the limits of the exequatur granted to the arrest warrant, that is to say for the four counts mentioned in the arrest warrant, *but not for the '[o]vert [a]cts' 23, 24, 25, and 26*." *Id.* at 26 (emphasis in original). The court thus concluded, "according to the analysis which prevails in Belgian law." that "the extradition . . . does not allow" Trabelsi "to be tried for the 'overt acts'" in dispute, "namely the facts relating to the attempt of bombing the Kleine-Brogel military base." *Id.* (emphasis in original).

Following this decision, both Trabelsi and the government asked the Court to postpone the trial. Aug. 15, 2019 Hrg. Tr. (Rough at 4, 7–8). Trabelsi moved for reconsideration of this Court's and the D.C. Circuit's decisions rejecting his *non bis* argument and declining to dismiss the indictment on that ground. Dkt. 345. In Trabelsi's view, "the August 8, 2019 decision [of the Belgian court] show[ed] that the Minister of Justice did not reject and could not have rejected the Belgian courts' exclusion of overt acts 23, 24, 25, and 26, and that this Court and the D.C. Circuit mistakenly deferred to an interpretation of the Treaty that Belgium had rejected, and still rejects." *Trabelsi III*, 2020 WL 1236652, at *6.

The government opposed the motion and provided the Court with a second diplomatic note from the Kingdom of Belgium, this one dated November 13, 2019. Dkt. 355-1. This note asserted that the August 8, 2019 decision of the Brussels Court of Appeal was "contrary to the Extradition order of 23 November 2011 and in our view, therefore contrary to the clear wording

of article 5 of the Treaty." *Id.* at 1. The note further explained that, based on this disagreement, the Belgian government had appealed the decision to the Belgian Court of Cassation. *Id.* The note went on to reaffirm that the Minister of Justice's 2011 extradition order "is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States." *Id.* at 2. The note sought to "make[] clear that Mr. Trabelsi may be tried on all of the charges set out in [the] indictment, and that any similarity between the United States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment." *Id.* Finally, the note asserted that the 2011 extradition order was "clear that the prosecution may offer facts relating to all 28 overt acts in prosecuting Mr. Trabelsi on the charges in the indictment." *Id.*

Before the Court ruled on Trabelsi's motions, another Belgian court issued a decision addressing Trabelsi's ongoing challenge to his extradition. On February 26, 2020, the Francophone Court of First Instance of Brussels ordered the Belgian state to provide a copy of this decision to U.S. officials and to "specify[ ] in the accompanying letter" the following:

> According to the analysis prevailing in Belgian law, the extradition of Mr. TRABELSI does not allow him to be prosecuted in the United States to be tried there for the facts set out in the "Overt Acts" Nos. 23, 24, 25 and 26 set out in paragraph 10 of the first count and which are supposed to be repeated in support of the other counts [*of the American arrest warrant which is the basis for the extradition (indictment of the Grand Jury of November 3, 2006, filed on November 16, 2007 at the Registry of the US District Court of the District of Columbia*], namely, the facts relating to the attempted attack on the Kleine-Brogel military base.

Dkt. 373-1 at 72 (brackets and emphasis in original).

In *Trabelsi III*, this Court rejected Trabelsi's motion for reconsideration. As an initial matter, the Court explained the "heavy burden" that Trabelsi faced in seeking reconsideration from a district court of a decision from the court of appeals. *Trabelsi III*, 2020 WL 1236652, at *8. Although a district court may reconsider a question previously resolved in an appellate

decision in "extraordinary circumstances," including where significant new evidence has come to light, the Court emphasized "that respect for the proper roles of trial and appellate courts and the importance of judicial economy and order demand that district courts apply these exceptions only in very special situations." *Id.* (internal quotation marks and citations omitted). Because Trabelsi sought reconsideration of a question already decided by the D.C. Circuit, he bore "the heavy burden of demonstrating that the evidence is new, and not merely cumulative; that it would lead to a different result; and that the evidence could not have been previously adduced through reasonable diligence." *Id.*

Next, the Court clarified that, in reconsidering the earlier decisions, its inquiry was limited to the proper interpretation of the original 2011 extradition order. That is, the subsequent judicial decisions from the Belgium court were relevant only if they provided "significant, new evidence about the meaning of the Minister's 2011 extradition order." *Id.* at *9. The text of the extradition order itself, however, weighed heavily against reconsideration. The extradition order directly addressed the Belgian court decisions excluding the four overt acts, and the Minister of Justice expressly rejected those courts' reasoning in a lengthy legal analysis. *See* Dkt. 367-17 at 10–14. The Minister concluded that the overt acts did "not represent in any way the offenses for which an extradition [was] requested." *Id.* at 13. Based on this text, "the D.C. Circuit read the Minister of Justice's extradition order to grant extradition, without limitation." *Trabelsi III*, 2020 WL 1236652, at *9.

With those considerations in mind, the Court held that the subsequent decisions from the Belgian courts did "not come close to meeting th[e] high bar" of showing that the D.C. Circuit's interpretation was mistaken. *Id.* at *10. On the contrary, when read carefully, these decisions

confirmed that the Minister of Justice had ordered Trabelsi's extradition without exclusion, although, in the view of the Belgian courts, he had done so without legal authority.

Starting with the August 8, 2019 decision of the Brussels Court of Appeal, the Court explained that the opinion "addresses only whether the Minister of Justice acted lawfully, in the view of that court, when he ordered Trabelsi's extradition without excluding those overt acts." *Id.* This Court rejected Trabelsi's argument that the August 8, 2019 decision demonstrated that "the Minister, in fact, limited the extradition order in conformity with" the prior decisions of the Belgian courts. *Id.* As the Court explained, "Even if read to say that the Minister of Justice was, in the view of Brussels Court of Appeal, bound by those judicial decisions and *should have excluded* the overt acts, that does not demonstrate that he *did exclude* them." *Id.* (emphasis in original). Other portions of the August 8, 2019 decision, moreover, showed that the Brussels Court of Appeal agreed with the D.C. Circuit's reading of the extradition order. *Id.* The Belgian court observed that "[o]nly the ministerial extradition order of November 23, 2011 depart[ed] from [the Belgian courts'] consistent interpretation of Article 5 of the Extradition [Treaty]." Dkt. 345-1 at 25. This Court, accordingly, concluded that, "if anything, the August 8, 2019 opinion adds further support for—and certainly does not controvert—the D.C. Circuit's conclusion that the Minister of Justice granted extradition without limitation." *Trabelsi III*, 2020 WL 1236652, at *10.

The Court then turned to the February 26, 2020 decision from the Court of First Instance in Brussels. That decision again held that "the Minister of Justice incorrectly based the grant of extradition on an offense-based, rather than fact-based, analysis," in contravention of the prior decisions of the Belgian courts. *Id.* at *11 (citing Dkt. 373-1 at 62–65). The Court of First Instance held that the Minister's extradition order thus "'constitute[d] an excess of power'

because the Minister of Justice exceeded the limits on extradition set by the courts." *Id.* (quoting Dkt. 373-1 at 65). But this Court explained that it "need not—and, indeed, should not—engage with the question whether the Belgian Minister of Justice exceeded his authority under Belgian law by declining to conform his order to the 'exequatur' granted by the Court of First Instance or to other pronouncements of the Belgian courts." *Id.* Rather, all that mattered for the Court's purposes was "that the February 26, 2020 decision *confirms* the D.C. Circuit's understanding that the Minister of Justice did, in fact, order Trabelsi's extradition to the United States without excluding the four overt acts." *Id.* (emphasis in original).

The Court found further support for its conclusion in the November 13, 2019 diplomatic note. *Id.* As the Court observed, this diplomatic note "offer[ed] the official position of the Belgian state and explains that the Minister of Justice's 2011 extradition order 'is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States.'" *Id.* (quoting Dkt. 355-1 at 2). The diplomatic note did not equivocate as to the meaning of the original extradition order, explaining that the order "is also clear that the prosecution may offer facts relating to all 28 overt acts in prosecuting Mr. Trabelsi on the charges in the indictment." *Id.* "That assertion," the Court concluded, "is consistent with the plain language of the 2011 order, the Belgian state's prior diplomatic note (which was before the D.C. Circuit), and with the D.C. Circuit's opinion." *Id.*

The Court placed relatively little weight, however, on a communication from the Belgian state to the United States government concerning the February 26, 2020 decision from the Court of First Instance in Brussels. "The communication does not adopt the conclusion of the Court of First Instance as [the Belgian state's] own position, but, rather, merely apprises the U.S. government that the Court of First Instance 'has ordered the Belgian Government to formally

notify its judgment' and then recites the language that the Court of First Instance required the Belgian state convey to the United States." *Id.* (quoting Dkt. 375-1 at 1). In essence, the Belgian state merely acted as a messenger for the Belgian courts, and the communication, accordingly, did not cast doubt on the D.C. Circuit's understanding of the Minister's original extradition order. Pulling these various strands together, the Court concluded that "Trabelsi [had] offer[ed] no evidence—much less significant, new evidence that was not previously available—that calls the D.C. Circuit's understanding of the extradition order into question." *Id.*

The Court then considered Trabelsi's related contention "that regardless of what the Minister of Justice may have intended, he was precluded as a matter of Belgian law from granting the extradition request without excluding the four overt acts because he was bound by the Belgian courts' decisions excluding those overt acts." *Id.* The Court rejected that argument for two reasons. First, "the D.C. Circuit's reasoning did not turn on whether the Minister of Justice was acting with lawful authority under Belgian law or in conformity with Belgian judicial decisions." *Id.* at 12. Second, "to the extent Trabelsi's argument would require this Court to declare that the Belgian Minister of Justice violated Belgian law by ignoring a domestic judicial decree, the act-of-state doctrine bars the Court from doing so." *Id.* at *13. That doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). Most fundamentally, whether framed under the act-of-state doctrine or otherwise, interests of international comity and respect for the sovereignty of foreign nations counseled against "wad[ing] into a dispute between two branches of a foreign government." *Trabelsi III*, 2020 WL 1236652, at *13.

Finally, the Court rejected Trabelsi's separate motion to compel compliance with the doctrine of specialty and to exclude Rule 404(b) evidence. *Id.* at *14. That motion was premised on interpreting the extradition order as excluding overt acts 23, 24, 25, and 26. *Id.* But the Court had already rejected that interpretation and, like the D.C. Circuit, concluded that "Belgium extradited Trabelsi without that exclusion." *Id.*

The Court's decision in *Trabelsi III* is now on appeal to the D.C. Circuit. See *United States v. Trabelsi*, No. 20-3028 (D.C. Cir.) (appeal docketed Mar. 31, 2020). In one of the two pending motions addressed in this opinion, Trabelsi moves to stay the district court proceedings until his interlocutory appeal is resolved. Dkt. 402. Meanwhile, the D.C. Circuit has held Trabelsi's appeal in abeyance pending this Court's resolution of his motion for indicative ruling, Dkt. 401. *See* Order, *United States v. Trabelsi*, No. 20-3028 (D.C. Cir. Dec. 1, 2020).

D. Further Developments in Belgian Courts and Motion for Indicative Ruling

In arguing that intervening events have cast further doubt on the lawfulness of his extradition, Trabelsi focuses on two decisions from Belgian courts and two court pleadings filed by the Belgian executive.

1. *May 28, 2020 Decision*

On May 28, 2020, the Francophone Court of First Instance in Brussels issued a decision in the ongoing litigation over the legality of Trabelsi's extradition. Dkt. 401-1. Trabelsi had sued the Minister of Justice for approximately € 50,000 on a claim that the Minister's November 13, 2019 diplomatic note, discussed above, violated the Brussels Court of Appeal's judgment of August 8, 2019. *Id.* at 11. In that August 8, 2019 judgment, the Brussels Court of Appeal ordered the Belgian state "to officially notify the US authorities" with " a copy of this ruling, inviting the US authorities to acquaint themselves with the legal analysis" in the opinion,

specifically its conclusion that extradition was improper as to the four overt acts, "under a penalty of € 5,000 per day of delay, with a maximum of € 50,000." *Id.* at 12. Trabelsi argued in his recent suit that the Belgian state had violated that injunction by maintaining its position that Trabelsi could be prosecuted based on those overt acts in its November 13, 2019 diplomatic note. *Id.* at 11.

The Court of First Instance explained that the "disputed injunction" from the Brussels Court of Appeal was "aimed at and was sufficient to [] protect, on the one hand, Mr. TRABELSI's right not to be tried in the United States for acts which had already led to his conviction in Belgium (*non bis in idem*), and on the other hand, his right not to be tried there for acts foreign to those for which his extradition had been granted (principle of specialty)." *Id.* at 13. Such an injunction had been necessary, the Belgian court posited, "due to the fact that the Belgian State's position on the possibility of [Trabelsi] being tried in the United States for the acts linked to the attempted attack on the Kleine Brogel military base was somewhat opaque and therefore a source of confusion on the part of the American authorities." *Id.* at 14. Once this Court was made aware of the August 8, 2019 decision, however, "the confusion was cleared up and the threat, in all logic, removed." *Id.* But "confusion" was reintroduced, the Court of First Instance reasoned, when the Belgian state, in its November 13, 2019 note, reaffirmed its position that Trabelsi's extradition included no limitation with respect to the four disputed overt acts. *Id.* That diplomatic note "sought to destroy the effect which the Brussels Court of Appeal's injunction should normally have had, namely to remove any ambiguity" as to the interpretation of the Extradition Treaty prevailing in Belgian law, and the note had thus "revived the threat to Mr. TRABELSI's rights." *Id.* at 14–15. The Court of First Instance held that the Belgian state

had acted without authority in issuing that note, because it gave the impression that "irrevocably settled" questions of law "would still be open to discussion." *Id.* at 15.

In discussing the harm that the Belgian state had caused, the Court of First Instance observed that, "in the international legal order, a declaration by a Minister of Justice is likely to be legally binding on the State on behalf of whom he is acting vis-à-vis the State to which it is addressed." *Id.* As the Belgian court explained, the Minister of Justice's actions are binding on Belgium where "the Minister of Justice expresses himself in a matter within his jurisdiction, provided, on the one hand, that the declaration in question demonstrates a willingness to commit himself and, on the other hand, that its purpose is sufficiently clear and precise,[] *which was the case here*." *Id.* at 16 (emphasis added). As such, "the Belgian State has therefore not only revived the threat to Mr. TRABELSI's rights, it has also aggravated it." *Id.*

2. *July 8, 2020 Pleading*

The Minister of Justice appealed the May 28, 2020 decision of the Court of Instance holding that the Belgian state had violated the August 8, 2019 injunction. On July 8, 2020, the Minister filed a brief arguing why the state had complied with the injunction. Dkt. 401-3. The Minister's primary argument was that he had complied with the literal text of the injunction because, on August 9, 2019, he had officially sent U.S. authorities a copy of the August 8, 2019 opinion "inviting the US authorities to acquaint themselves with the legal analysis." *Id.* at 7. According to the Minister, nothing more was required. *Id.* As for the November 13, 2019 diplomatic note, the Minister wrote that the note "was only intended to inform the U.S. judicial authorities that the BELGIAN STATE had filed an appeal in cassation." *Id.* at 11. But with that said, in the very next sentence of his brief, the Minister acknowledged that the note not only "explain[ed] the reasons for the appeal" but also reiterated the Belgian state's "point of view

regarding the concept of *non bis in idem*." *Id.* Given the ongoing appeal, the Minister argued, the applicability of the *non bis* principle to Trabelsi's extradition was "not definitely decided." *Id.* In any event, however, the Minister argued that the November 13, 2019 diplomatic note did not revive any threats to Trabelsi's rights, given that his March 5, 2020 communication had "again notified the American authorities of the content of a new ruling [the February 26, 2020 decision] served in Belgium and which confirmed the content of the ruling of the Brussels Court of Appeal." *Id.* at 13. Even more to the point, the Minister stressed that the November 13, 2019 note was not dispositive because the U.S. courts were well aware of the various decisions from the Belgian courts and had nevertheless rejected Trabelsi's *non bis* argument. *Id.* (discussing *Trabelsi III*).

3. *July 15, 2020 Decision*

In response to this Court's decision in *Trabelsi III*, Trabelsi returned to the Brussels Court of Appeal seeking an additional injunction requiring the Belgian state to notify this Court that he could not be prosecuted for offenses related to the four disputed overt acts. Dkt. 401 at 13. Specifically, he sought an order requiring the Belgian state to cease any cooperation in his prosecution in the United States and "to confirm again to the US authorities, within two days of the serving of the upcoming ruling, that the proceedings against Mr. TRABELSI cannot refer to the 'reported acts' 23 to 26, nor to any event taking place on the territory of the Kingdom, including the 'attempted attack' on the military base of Kleine Brogel." Dkt. 401-7 at 24. Curiously, Trabelsi also requested "that the Belgian State, in the interests of effectiveness of the measures prescribed by the judgment to come, be prohibited from mentioning, express or implied, that its actions are carried out following a conviction by the judiciary." *Id.* He even went so far as to ask the court to "[p]rohibit the Belgian State from mentioning the fact that the

said diplomatic note is issued as a result of a new judicial conviction, neither by making explicit reference to it, nor by using quotation marks or any other procedure likely to suggest that the executive would divest itself of the position thus expressed" and to "[p]rohibit the Belgian State from sending communications to the United States authorities other than that to which it is obliged by the judgment to be served, concerning the litigating issue." *Id.* at 26.

The Brussels Court of Appeal denied his request. Dkt. 401-7. It held that Trabelsi had not established "the need to have a new diplomatic note sent out," given that the Belgian state had already notified U.S. authorities of the August 8, 2019 decision. *Id.* at 32. The Belgian court questioned the utility of a further note, because the "American decisions," especially the D.C. Circuit's in *Trabelsi II*,

> make it clear that the American Courts are applying their own law and the law of international relations, that they have full knowledge of the dissensions between the Belgian Courts and the Belgian government, that they take into account the Belgian judicial decisions but that they consider that there is no reason, **by virtue of their own law**, over which this Court does not have the power to substitute its assessment, **and the law of international relations**, . . . to give priority to these Belgian judicial decisions over the ministerial order on extradition, which these decisions do not modify or cancel and the effects of which they do not suspend.

Id. at 34 (bold in original).

Unsurprisingly, the Belgian court also concluded that Trabelsi's request that the court order the Belgian state to withhold certain information from this Court (and potentially to mislead the Court) would be inappropriate and ineffective. In the view of the Belgian court,

> it would, at the very least, be contrary to procedural loyalty and the principle of separation of powers, to instruct the BELGIAN STATE to issue a diplomatic note in terms which would be dictated by the Court and to hide from the American Courts that the issuance of this diplomatic note would be ordered by a Court decision, in an *attempt* to make these jurisdictions believe that the government is issuing a personal and new interpretation of the Ministerial extradition order.

Id. (emphasis in original).

4. *July 31, 2020 Pleading*

In a separate action in Belgian court, Trabelsi against sought damages from the Belgian state, this time alleging that the Belgian state had not complied with the February 26, 2020 decision from the Court of First Instance in Brussels, discussed above, and the accompanying injunction. In responding to Trabelsi's argument, the Belgian state argued that

> the fact that the notification made by the Belgian State specified that it is carried out on court order, *including the details it contains, does not mean that the Belgian State would have* []*distanced itself once again from what was decided by the ruling of February 26, 2020, nor that the Belgian State has, again, not executed the ruling of the Court of First Instance of Brussels of February 26, 2020*.

Dkt. 401-9 at 7 (emphasis in original).

Based on these additional Belgian court materials, Trabelsi asks the Court to reconsider, yet again, its denial of his motion to dismiss the superseding indictment based on an alleged violation of Article 5 of the Treaty.

II. ANALYSIS

A. Motion to Stay

Although Trabelsi filed his motion to stay proceedings in the District Court, Dkt. 402, after his motion for indicative ruling, Dkt. 401, the Court will address the motion to stay first, because the motion for indicative ruling is premised on the assumption that the Court does not have jurisdiction during the pendency of the appeal.

Trabelsi's argument in support of his motion to stay is straightforward. He contends that the filing of his currently pending interlocutory appeal conferred jurisdiction on the D.C. Circuit and divested this Court of jurisdiction. Dkt. 402 at 1 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam) and *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (per curiam)). The government acknowledges that an interlocutory appeal of a

double jeopardy claim typically divests the district court of jurisdiction. Dkt. 424 at 14 (citing *Abney v. United States*, 431 U.S. 651, 657, 659–62 (1977)). But the government contends, relying on out-of-circuit precedent, that "a district court may continue to exercise jurisdiction over a case if the district court finds that the basis for the interlocutory appeal is frivolous or dilatory. *Id.* (citing *United States v. Farmer*, 923 F.2d 1557, 1565 (11th Cir. 1991) and *United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir. 1980) (en banc)). Although the D.C. Circuit has not—to date—explicitly adopted a similar limitation on the default rule that an appeal divests the district court of jurisdiction, it has observed that other courts "have carved out a few narrow exceptions to [the general] rule, such as where the defendant frivolously appeals . . . or takes an interlocutory appeal from a non-appealable order . . . ." *DeFries*, 129 F.3d at 1302–03 (internal citations omitted); *see also United States v. Black*, 759 F.2d 71, 73 (D.C. Cir. 1985).

This Court agrees with the government and that out-of-circuit precedent that there must be some limit on the ability of a defendant to cause delay through the filing of serial interlocutory appeals. As the Tenth Circuit has observed, the rule that an appeal divests the trial court of jurisdiction "should not leave the trial court powerless to prevent intentional dilatory tactics by enabling a defendant unilaterally to obtain a continuance at any time prior to trial by merely filing a motion, however frivolous, and appealing the trial court's denial thereof." *United States v. Hines*, 689 F.2d 934, 936–37 (10th Cir. 1982). At a January 8, 2020 hearing, this Court expressed a similar concern, noting that Trabelsi had already appealed once on the same double-jeopardy issue. Dkt. 370 at 116. The Court asked whether Trabelsi "could . . . come back the next week and do it again" and expressed skepticism of that proposition, observing that "it can't be that you get to keep doing that." *Id.* at 117.

More generally, the Court continues to share the government's concern about the potential for dilatory conduct in this case. Trabelsi should not be permitted to delay his trial indefinitely by bringing an unending stream of litigation in Belgium and then asking this Court to respond to each successive development in a foreign court. As time goes on, each new Belgian court decision is further and further removed from the Belgian state's extradition order and thus provides diminishing insight for interpreting that order. This case has been pending for many years, and further delays could result in the loss of key evidence or the deterioration of the memories of key witnesses. The Court will therefore move this case to trial as expediently as possible, consistent with Trabelsi's legal rights.

With all of that said, wherever the line lies between a legitimate appeal and a frivolous or dilatory one, the Court cannot agree with the government that Trabelsi's current appeal crosses that line. The August 8, 2019 decision from the Brussels Court of Appeal was (at least arguably) a significant development, which the government acknowledged when it joined Trabelsi in requesting that the Court postpone his trial to provide time to consider the implications of that Belgian court decision for Trabelsi's *non bis* claim. Although the Court ultimately denied Trabelsi's motion for reconsideration in *Trabelsi III*, his motion presented the substantial legal question of how to resolve the ongoing conflict between the Belgian courts and the Belgian executive—a question that the D.C. Circuit did not fully address in *Trabelsi II*. Trabelsi's appeal is not frivolous.

As for whether Trabelsi has prosecuted his appeal in a dilatory manner, it appears from the appellate docket that he filed several motions to extend his briefing deadlines, before asking the court of appeals to hold the case in abeyance pending this Court's resolution of his motion for indicative ruling. *See United States v. Trabelsi*, No. 20-3028 (D.C. Cir.). And although the

government did not oppose any of those motions, the government may not have recognized the need to expedite the appeal because Trabelsi only recently asserted that the pendency of the appeal precludes this Court from addressing substantive motions; indeed, the parties participated in scheduling hearings before this Court at which Trabelsi's counsel never suggested that his second interlocutory appeal had divested the Court of jurisdiction. In addition, Trabelsi could have asked this Court for an indicative ruling and could have asked the D.C. Circuit to hold the appeal in abeyance months earlier than he did. Even so, there is no evidence that Trabelsi's extension requests before the D.C. Circuit were made in bad faith or merely for the purpose of delay or that he intentionally dragged his feet in seeking an indicative ruling.

The Court agrees that it is imperative that all work together to move this case along as promptly as possible, both before this Court and the D.C. Circuit. To the extent the government seeks expedition before the court of appeals, however, it must raise its request in that forum.

The Court will therefore stay this case pending the resolution of Trabelsi's appeal. Trabelsi argues that the stay should apply to "all non-ministerial proceedings." Dkt. 402 at 4. In *Abney*, the Supreme Court held that a trial court's rejection of a double jeopardy claim is subject to immediate interlocutory appeal under the collateral order doctrine. *See Abney*, 431 U.S. at 662. Generally, when a party appeals a discrete collateral issue, the district court would retain jurisdiction over the remainder of the case. But the Double Jeopardy Clause protects against not only double convictions but also against even the "risk" or "potential" of a second conviction for the same crime. *Id.* at 661. It is thus generally understood that "an interlocutory appeal from an order refusing to dismiss on double jeopardy . . . grounds relates to the entire action and, therefore, it divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant." *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990) (emphasis in

original). The Court will therefore stay the case with respect to any substantive matters to preserve Trabelsi's double-jeopardy-like rights pending appeal. The Court need not decide at this juncture whether, given the collateral nature of the interlocutory appeal, the Court retains jurisdiction to address procedural or ministerial matters and, if so, which matters properly remain before the Court.

B. Motion for Indicative Ruling

Although the case will be stayed, the Court may still resolve Trabelsi's motion for an indicative ruling. Rule 37 of the Federal Rules of Criminal Procedure provides a mechanism for a district court that lacks jurisdiction over a pending motion for relief because of a pending appeal nevertheless to indicate how it would rule on the motion if it were to have jurisdiction. Fed. R. Crim. P. 37(a). A district court presented with a motion for relief while an appeal is pending has three options. It may "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." *Id.* The third of these options is called an indicative ruling. Here, Trabelsi requests that the Court indicate how it would rule on a motion for reconsideration of its decision in *Trabelsi III*, based on additional Belgian court filings and decisions. Dkt. 401. That is, he asks the Court whether, if it had jurisdiction, it would reconsider its earlier decision in *Trabelsi III* declining to reconsider its decision in *Trabelsi I* and the D.C. Circuit's decision in *Trabelsi II*.

As in *Trabelsi III*, Trabelsi faces a heavy burden. He asks the Court to reconsider three prior decisions declining to dismiss the charges against him, including one from the D.C. Circuit. As the Court explained in *Trabelsi III*, the "mandate rule," which is "an even more powerful version" of the law-of-the-case doctrine, "*requires* a lower court to honor the decisions of a

superior court in the same judicial system." *Trabelsi III*, 2020 WL 1236652, at *8 (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996)) (emphasis in original). In asking the Court to reconsider not only its own prior decisions but also the earlier decision of the D.C. Circuit, Trabelsi "bears the heavy burden of demonstrating that the evidence is new, and not merely cumulative; that it would lead to a different result; and that the evidence could not have been previously adduced through reasonable diligence." *Id.*

As before, moreover, the Court's focus is on "the breadth and effect of the Minister of Justice's extradition order" of November 23, 2011. *Id.* at *7. For Trabelsi to succeed, then, he must present new evidence that would alter the Court's interpretation of that order, which issued almost a decade ago. It would not be enough, for example, for Trabelsi to call into question the Court's prior interpretation of the November 13, 2019 diplomatic note, unless the new evidence about the meaning of the note also undermined the Court's reading of the extradition order itself.

The Court will address in turn each of the recent Belgian court decisions and filings upon which Trabelsi relies. Although Trabelsi picks out the passages from each document most favorable to his position, the Court sees nothing in these recent Belgian judicial records that undermines the understanding of the extradition order relied upon in *Trabelsi I*, *II*, and *III*.

1. *May 28, 2020 Decision*

Trabelsi first contends that the May 28, 2020 decision from the Court of First Instance in Brussels demonstrates that this Court's interpretations of the November 23, 2011 extradition order, the August 8, 2019 decision from the Brussels Court of Appeal, and the November 13, 2019 diplomatic note, as well as the D.C. Circuit's reading of the extradition order, were all incorrect. Trabelsi suggests that "[a]ccording to the representations of the Minister in a court of law, the August 8, 2019 decision made clear that overt acts 23–26 were excluded from the

extradition, and he officially conveyed that exclusion in the August 9, 2019 communication." Dkt. 401 at 10. He also argues that "the May 28, 2020 decision held that the 2011 extradition order had *not* been clear that Mr. Trabelsi could be prosecuted in the U.S. on overt acts 23–26" and, instead, was "'opaque'" and "'a source of confusion.'" *Id.* (quoting Dkt. 401-1 at 14) (emphasis in original). And even beyond that, Trabelsi contends that the Minister acknowledged in the Belgian litigation that the November 13, 2019 diplomatic note's "sole purpose was merely to apprise the U.S. authorities that the Belgian state had appealed the August 8, 2019 decision and of the 'point of view' that it would press in the appeal." *Id.* at 9.

When read in its entirety, the May 28, 2020 decision of the Court of First Instance does not support Trabelsi's arguments. That decision addressed a claim from Trabelsi seeking € 50,000 from the Minister of Justice on the ground that the Minister's November 13, 2019 diplomatic note had violated an earlier injunction. The court held that the Minister had violated the injunction because the November 13, 2019 note "revived the threat" that Trabelsi would face prosecution in the United States. Dkt. 401-1 at 15. In considering Trabelsi's claim, the court thus rejected the interpretation that Trabelsi advances here that the November 13, 2019 diplomatic note functioned merely to notify the United States of the Belgian state's litigating position on appeal.

It is true that the Court of First Instance observed that "the Belgian State's position on the possibility of [Trabelsi] being tried in the United States for the acts linked to the attempted attack on the Kleine Brogel military base was somewhat opaque and therefore a source of confusion on the part of the American authorities." Dkt. 401-1 at 14. But that characterization is difficult to square with the text of the extradition order itself, which stated plainly that "it is not the facts, but their qualification, the offenses, that have to be identical" for Article V of the Treaty to apply and

that the overt acts did "not represent in any way the offenses for which an extradition [was] requested." Dkt. 367-17 at 11, 13. And the court's statement is likewise difficult to square with the following language from the August 8, 2019 decision, which the Court of First Instance itself quotes: "Only the ministerial extradition order of November 23, 2011 deviates from [the Belgian courts'] constant interpretation of Article 5 of the Extradition Convention, arguing that the provision required an identity of qualifications." Dkt. 401-1 at 8.

Moreover, although the May 28, 2020 decision suggested that the August 8, 2019 decision, "in all logic," should have ended the "threat" of Trabelsi's prosecution in the United States, *id.* at 14, it concluded that, instead, the November 13, 2019 diplomatic note resolved the ambiguity in favor of Trabelsi's trial under the superseding indictment without limitation. That is, contrary to Trabelsi's arguments here, the Court of First Instance read the November 13, 2019 diplomatic note as taking a clear position on the scope of Trabelsi's extradition. Far from simply stating a litigating position, the November 13, 2019 diplomatic note, according to the May 28, 2020 decision, "sought to destroy the effect which the Brussels Court of Appeal's injunction should normally have had, namely to remove any ambiguity" as to the interpretation of the Extradition Treaty prevailing in Belgian law and thus "revived the threat to Trabelsi's rights." *Id.* at 14–15. The views of the Belgian state carried unique importance, in the view of the Court of First Instance, because it is the position of the Belgian state, rather than the position of the Belgian courts, that is likely to receive deference in the U.S. courts. As the May 28, 2020 decision explained, "in the international legal order, a declaration by a Minister of Justice is likely to be legally binding on the State on behalf of whom he is acting vis-à-vis the State to which it is addressed." *Id.* at 15.

In sum, the May 28, 2020 decision offered no reason to question or to reconsider this Court's understanding that the Minister's November 23, 2011 extradition order declined to exclude the four overt acts. Beyond that, it affirmed the Court's view that the November 13, 2019 diplomatic note reiterated the position of the Belgian state that the *non bis* provision of the Extradition Treaty does not apply in this case. As the Belgian court explained, the diplomatic note "not only revived the threat to Mr. TRABELSI's rights, it has also aggravated it." *Id.* at 16.

2. *July 8, 2020 Pleading*

Trabelsi next contends that the Minister of Justice's July 8, 2020 pleading on appeal of the May 28, 2020 decision undermines this Court's decision in *Trabelsi III*. But Trabelsi misreads certain portions of the pleading and takes others out of context. Trabelsi first relies on the Minister's statement that the November 13, 2019 diplomatic note "was only intended to inform the U.S. judicial authorities that the BELGIAN STATE had filed an appeal in cassation." Dkt. 401-3 at 11. He concludes from this statement that "the August 8 decision and the August 9 diplomatic note conveying that decision put the U.S. authorities on notice from the Belgian state that Mr. Trabelsi could not be prosecuted in the U.S. for overt acts 23–26, and the November 13 note informed those authorities that the official position of the Belgian state could change if it is successful in its pending appeal." Dkt. 401 at 11–12. Trabelsi's reading, however, ignores the very next sentence of the pleading, which says that the November 13, 2019 diplomatic note not only apprised the Court of the Belgian state's litigating position on appeal but also explained the Belgian state's "point of view regarding the concept of *non bis in idem*." Dkt. 401-3 at 11. Regardless, contrary to Trabelsi's contention, nothing in the July 8, 2020 pleading suggests that the Belgian state had adopted the August 8, 2020 decision from the Brussels Court of Appeal as its own official position. Instead, the Minister's primary argument in his pleading was that he

had complied with the literal terms of the injunction because, on August 9, 2019, he sent U.S. authorities a copy of the August 8, 2019 opinion "*inviting the US authorities to acquaint themselves with the legal analysis*," which was all the injunction required. *Id.* at 7 (emphasis in original).

Trabelsi also contends that the Minister's July 8, 2020 pleading acknowledged that his March 5, 2020 communication, which conveyed the February 26, 2020 decision, "'confirmed the content of the ruling'" that Trabelsi could not be tried on the four overt acts. Dkt. 401 at 12 (quoting Dkt. 401-3 at 13). Here, Trabelsi appears to misread the pleading. The entire phrase from which Trabelsi pulled that snippet asserted:

> it is difficult to claim, in this context, that the diplomatic note of November 13, 2019 would have "revived" threats on the rights of Mr. TRABELSI in the United States, or even "aggravated" them . . . [because,] since the sending of this note, the Belgian State has again notified the American authorities of the content of a new ruling served in Belgium and *which confirmed the content of the ruling* of the Brussels Court of Appeal . . . .

Dkt. 401-3 at 13 (emphasis added). The most natural reading of this sentence is that it was the "new ruling" of February 26, 2020, rather than the communication from the Minister, that "confirmed the content of the [August 8, 2019] ruling." *Id.* As the government points out, the March 5, 2020 communication explicitly "informed the United States that the Court of First Instance of Brussels had ordered the Belgian government to provide the U.S. with the decision" and did not adopt the Belgian court's holding as the Belgian state's own position. *Trabelsi III*, 2020 WL 1236652, at *7.

3. *July 15, 2020 Decision*

Trabelsi does not rely on the Brussels Court of Appeal's July 15, 2020 decision but, rather, seeks to minimize it. He argues that the "court threw up its hands" and "held that since this Court seems to have required unequivocal proof that the August 9, 2019 and March 5, 2020

diplomatic note[s] reflect the 'personal' view of the Minister, there would be no point in requiring that person to issue a new note that was court-ordered." Dkt. 401 at 13–14. But Trabelsi elides the most important aspects of the July 15, 2020 decision. Far from simply throwing up its hands, the Belgian court recognized that the "American decisions," especially the D.C. Circuit's in *Trabelsi II*,

> make it clear that the American Courts are applying their own law and the law of international relations, that *they have full knowledge of the dissensions between the Belgian Courts and the Belgian government*, that they take into account the Belgian judicial decisions but that *they consider that there is no reason*, by virtue of their own law, over which this Court does not have the power to substitute its assessment, and the law of international relations, . . . *to give priority to these Belgian judicial decisions over the ministerial order on extradition*, which these decisions do not modify or cancel and the effects of which they do not suspend.

Dkt. 401-7 at 34 (emphasis added and bold removed). Significantly, then, the Brussels Court of Appeal recognized that (1) the Belgian state and judiciary disagreed about the meaning of the *non bis* provision; (2) the U.S. courts understood this "dissension[;]" (3) the U.S. courts saw "no reason" to defer to the decisions of the Belgian judiciary, as opposed to the Belgian state; and (4) the decisions of the Belgian judiciary did not have the effect of modifying or canceling the November 23, 2011 extradition order. *Id.* These conclusions are fatal to Trabelsi's claim that new evidence now demonstrates that this Court and the D.C. Circuit misread the extradition order. The question before this Court is the proper interpretation of that order, and the Belgian courts themselves acknowledge that the Belgian state and Belgian judiciary are of two minds about the meaning of the Extradition Treaty and that the relevant judicial decisions have not altered (and cannot alter) the meaning of the extradition order.

4. *July 31, 2020 Pleading*

Finally, Trabelsi argues that an assertion from the Belgian state in a July 31, 2020 pleading confirms that the Belgian state has adopted the position of the Belgian courts as its own. In responding to an argument from Trabelsi concerning the March 5, 2020 diplomatic note, the Belgian state argued that

> the fact that the notification made by the BELGIAN STATE specified that it is carried out on court order, *including the details it contains, does not mean that the BELGIAN STATE would have* []*distanced itself once again from what was decided by the ruling of February 26, 2020, nor that the Belgian State has, again, not executed the ruling of the Court of First Instance of Brussels of February 26, 2020*.

Dkt. 401-9 at 7 (emphasis in original). As the government contends, the Belgian state was simply explaining that it had complied with the Court's order to transmit its decision to the U.S. authorities. Dkt. 405 at 19. The Belgian state's assertion that it did not "distance[] itself" from the Belgian court's decision is a far cry from the Belgian state adopting the court's position as its own.

The Court does not doubt that the Belgian state is in a delicate position when litigating these issues in Belgian courts. The Belgian state and Belgian judiciary are not in agreement (at least to date) on an important issue, and the Belgian state has faced multiple lawsuits alleging that it has failed to comply with various Belgian judicial decrees. But as the Court explained in *Trabelsi III*, "[t]his Court need not—and, indeed, should not—engage with the question whether the Belgian Minister of Justice exceeded his authority under Belgian law." *Trabelsi III*, 2020 WL 1236652, at *11. Under principles of international comity and separation of powers, this Court has no role to play in a dispute between coordinate branches of a foreign state. Instead, "[a]ll that matters for current purposes is that the [recent Belgian court pleadings and decisions] *confirm*[] the D.C. Circuit's understanding that the Minister of Justice did, in fact, order

Trabelsi's extradition to the United States without excluding the four overt acts." *Id.* (emphasis in original).

Because the Court would deny Trabelsi's motion for reconsideration if not for his pending appeal, Rule 37 permits the Court to reach the merits of the motion. *See* Fed. R. Crim. P. 37(a)(2). The Court will therefore reach the merits and will deny the motion in accordance with Rule 37 and in the interest of judicial economy. *Cf. United States v. Martin*, No. 18-cr-834-7, 2020 WL 1819961, at *2 (S.D.N.Y. Apr. 10, 2020).

CONCLUSION

For the foregoing reasons, Trabelsi's motion to stay proceedings in the district court pending the resolution of his appeal, Dkt. 402, is hereby **GRANTED**. Trabelsi's motion for an indicative ruling and for reconsideration, Dkt. 401, is hereby **DENIED**. In order to avoid further delay in these proceedings, the parties shall promptly convey this Memorandum Opinion and Order to the D.C. Circuit.

SO ORDERED.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: February 5, 2021

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-3028 **September Term, 2021**

FILED ON: MARCH 25, 2022

UNITED STATES OF AMERICA,
APPELLEE

v.

NIZAR TRABELSI, ALSO KNOWN AS NIZAR BEN ABDELAZIZ TRABELSI, ALSO KNOWN AS ABU QA'QA,
APPELLANT

Consolidated with 21-3009

Appeals from the United States District Court
for the District of Columbia
(No. 1:06-cr-00089-1)

Before: WILKINS, RAO and JACKSON*, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the District Court's orders denying Trabelsi's motions to reconsider the motion to dismiss the indictment be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: March 25, 2022

Opinion for the court filed by Circuit Judge Wilkins.
Concurring opinion filed by Circuit Judge Wilkins.
Concurring opinion filed by Circuit Judge Rao.

* Circuit Judge Jackson was a member of the panel at the time the case was argued but did not participate in the disposition of this matter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 9, 2021 Decided March 25, 2022

No. 20-3028

UNITED STATES OF AMERICA,
APPELLEE

v.

NIZAR TRABELSI, ALSO KNOWN AS NIZAR BEN ABDELAZIZ TRABELSI, ALSO KNOWN AS ABU QA'QA,
APPELLANT

Consolidated with 21-3009

Appeals from the United States District Court
for the District of Columbia
(No. 1:06-cr-00089-1)

Celia Goetzl, Assistant Federal Public Defender, argued the cause for appellant. On the briefs were *A.J. Kramer*, Federal Public Defender, and *Sandra Roland*, Assistant Federal Public Defender. *Tony Axam Jr.*, Assistant Federal Public Defender, entered an appearance.

Peter S. Smith, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Elizabeth Trosman* and *Chrisellen R. Kolb*, Assistant U.S. Attorneys.

Before: WILKINS, RAO and JACKSON*, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

Concurring opinion filed by *Circuit Judge* WILKINS.

Concurring opinion filed by *Circuit Judge* RAO.

WILKINS, *Circuit Judge*: Belgium extradited Nizar Trabelsi, a Tunisian national, to stand trial in the United States on terrorism charges in 2013. Eight years later, that trial has yet to take place. This Court has adjudicated Trabelsi's claim once before, affirming the District Court's denial of his motion to dismiss the indictment. *United States v. Trabelsi*, 845 F.3d 1181, 1184 (D.C. Cir. 2017). Then, Trabelsi argued that his extradition violated the Extradition Treaty between the United States and Belgium because the U.S. indictment charged the same offenses for which he was convicted in Belgium. Now, Trabelsi appeals the District Court's denial of his motions to reconsider dismissing the indictment in light of intervening, and conflicting, Belgian legal developments.

Trabelsi challenges the District Court's denial of his motions on three grounds. First, he contends that the Belgian court decisions and official communications constitute significant evidence that merit reconsideration of his motion to dismiss. He argues next that the District Court should have deferred to the Belgian courts' recent decisions interpreting his 2011 Extradition Order. And finally, he asserts that the District Court should have compared the offenses in the U.S. indictment to the offenses for which he was convicted in Belgium.

* Circuit Judge Jackson was a member of the panel at the time the case was argued but did not participate in this opinion.

The Belgian legal developments Trabelsi invokes do not constitute significant new evidence that would warrant disturbing this Court's 2017 decision. As a result, he has failed to meet the significantly high burden for departing from the law of the case. We therefore affirm.

I.

We assume familiarity with the facts of this case, as recounted in our prior opinion, *Trabelsi*, 845 F.3d at 1184–85, and relate them only as relevant to the present appeal. In 2001, Trabelsi was arrested, indicted, and convicted in Belgium for attempting to destroy the Kleine-Brogel military base. While serving a ten-year sentence in Belgium, a grand jury in the United States indicted Trabelsi on charges of conspiracy to kill United States nationals outside of the United States; conspiracy and attempt to use weapons of mass destruction; conspiracy to provide material support and resources to a foreign terrorist organization; and providing material support and resources to a foreign terrorist organization. On April 4, 2008, the United States issued an extradition request, pursuant to the Extradition Treaty between the U.S. and Belgium (the "Extradition Treaty" or "Treaty").

On November 19, 2008, the Court Chamber of the Court of First Instance of Nivelles issued an exequatur, or enforcement order, regarding Trabelsi's extradition, the first in a long line of Belgian court decisions. Under Article 5 of the Treaty, an individual may not be extradited if he has been found guilty, convicted, or acquitted in the Requested State for the same offense, known as the *non bis in idem* ("not twice in the same") rule. S. TREATY DOC. NO. 104-7 (1987). The Court of First Instance found that the arrest warrant was enforceable, except as to Overt Acts 23, 24, 25, and 26 as referenced in the

indictment,[1] due to their overlap with the offenses Trabelsi was convicted of in Belgium. The Brussels Court of Appeal and the Belgian Court of Cassation, that country's court of last resort, both affirmed the Court of First Instance's decision.

The Belgian Minister of Justice, who represents the Belgian government in extradition proceedings, issued the Extradition Order ("Order") on November 23, 2011. In the Order, the Minister defined an overt act as "an element (of fact or factual), an act, a conduct or a transaction which in itself cannot automatically be qualified as an offense" and concluded that the United States would not violate Article 5 of the Treaty by relying on the same "overt acts" or factual elements in prosecuting distinct offenses from those charged in Belgium. J.A. 554 ("[T]he offenses for which the person to be extradited was irrevocably sentenced . . . do not correspond to the offenses . . . that appear in the arrest warrant on which the U.S. extradition request is based."). On review of the Minister's decision, the Belgian Council of State denied Trabelsi's request

[1] The Overt Acts are the following: "(23) In or about July 2001, in Uccle, Brussels, Belgium, Nizar Trabelsi rented an apartment; (24) In or about July and August 2001, in Belgium, Nizar Trabelsi bought quantities of chemicals, including acetone, sulfur, nitrate, and glycerine, to be used in manufacturing a 1,000-kilogram bomb; (25) In or about August 2001, in Belgium, Nizar Trabelsi traveled at night with conspirators to scout the Kleine-Brogel Air Force Base—a facility used by the United States and the United States Department of the Air Force, and at which United States nationals were present—as a target for a suicide bomb attack; (26) In or about early September 2001, in the vicinity of Brussels, Belgium, Nizar Trabelsi moved, and caused to be moved, a quantity of chemicals, including acetone and sulfur, from Trabelsi's apartment to a restaurant operated by a conspirator known to the Grand Jury, after police had visited the apartment for an apparently innocuous purpose." J.A. 423.

to stay the extradition and similarly concluded that the Overt Acts were merely constitutive elements of his indictment. Belgium extradited Trabelsi to the United States on October 3, 2013.

In the United States, Trabelsi moved to dismiss the indictment, arguing that his extradition violated the Treaty. In response, the Belgian Embassy in Washington, D.C. issued a diplomatic note ("First Diplomatic Note" or "Note"), explaining that the Order "is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States" and "makes clear that Mr. Trabelsi may be tried on all of the charges set out in that indictment." J.A. 680. The Note stipulated that the prosecution was entitled to offer facts related to Overt Acts 23–26, per the Order. *Id.* The District Court agreed with the Minister of Justice over the judicial authorities, denying Trabelsi's motion because he had failed to demonstrate that he was prosecuted for the same offenses in Belgium and the United States. *United States v. Trabelsi*, No. 06-89, 2015 WL 13227797, at *1 (D.D.C. Nov. 4, 2015) ("*Trabelsi I*"). We affirmed the District Court's ruling on different grounds, *Trabelsi*, 845 F.3d at 1184. ("*Trabelsi II*"). We articulated a standard under which we "presume, absent evidence to the contrary, that the extraditing nation has complied with its obligations under the treaty and that the extradition is lawful" and found an offense-based analysis, rather than the *Blockburger* test, was the appropriate one to apply. *Id.* at 1184, 1186. Accordingly, we concluded that the Extradition Order's offense-based analysis reasonably construed the Treaty. *Id.* at 1190–92.

As his challenge to his extradition played out in the American courts, Trabelsi continued to pursue relief in Belgium. These Belgian legal proceedings—particularly four judicial decisions and various legal filings and other

communications—are what give rise to Trabelsi's current claims. First, the Court of First Instance rejected Trabelsi's requests both to halt the Belgian state from cooperating with the American authorities and to inform the American courts that the extradition proceedings violated Article 5 of the Treaty, due to their inclusion of the four Overt Acts. Trabelsi promptly appealed. On August 8, 2019, the Brussels Court of Appeal reversed, finding that the exequatur would not allow for the United States to prosecute Trabelsi for the four Overt Acts discussed and, as a practical matter, ordering the Belgian state to notify the U.S. authorities of its ruling. It stopped short of ordering Belgium to halt cooperation with the United States.

On November 13, 2019, the Belgian Embassy in Washington, D.C. issued another diplomatic note ("Second Diplomatic Note"), explaining that the Court of Appeal's August 2019 judgment was contrary to Belgium's Extradition Order and "therefore contrary to the clear wording of article 5 of the Treaty." J.A. 1405. The Second Diplomatic Note describes the Extradition Order as "the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States" and asserts "that any similarity between the United States case and the Belgian case does not give rise to any bar on his being tried on the charges in that [American] indictment." J.A. 1406. Further, the Note states that under the Treaty, "the Minister of Justice has sole authority to decide on a foreign extradition request since extradition is traditionally intergovernmental cooperation." *Id.*

Second, on February 26, 2020, the Court of First Instance ordered the Belgian state to notify the appropriate American authorities that Trabelsi could not be prosecuted for the four Overt Acts but denied his request to inform the American authorities that his prosecution violated the *non bis in idem* principle. The Belgian state appealed this judgment.

Nevertheless, on March 5, 2020, the Ministry of Justice complied with that court order, formally notifying the Department of Justice of the Court of First Instance's judgment.

Based on the August 8, 2019 Brussels Court of Appeal judgment, Trabelsi moved for the District Court to reconsider its motion to dismiss the indictment and compel compliance with his view of Article 5 of the Treaty, a view shared by Belgium's judicial authority. In March 2020, the District Court denied the motion. *United States v. Trabelsi*, No. 06-cr-89, 2020 WL 1236652, at *1 (Mar. 13, 2020) ("*Trabelsi III*"). The District Court found that the D.C. Circuit "was aware of the difference of opinions held by [the] Belgian Minister of Justice and Belgian judiciary." *Id.* at *12. Thus, "Trabelsi cannot reasonably maintain that the August 8, 2019 and February 26, 2020 decisions made available any new, and previously unavailable, line of argument." *Id.* The Court held that Trabelsi had offered no evidence to support reconsidering the Circuit's interpretation of the Extradition Order. *Id.* at *13. Trabelsi timely filed a notice of appeal on March 31, 2020.

Back in Belgium, the conflict between the Belgian executive and judicial authorities continued. The third of the intervening Belgian decisions came on May 28, 2020, when the Brussels Court of First Instance held that the Belgian state did not have authority to issue the Second Diplomatic Note. The Minister of Justice appealed that decision.

Fourth and finally, on July 15, 2020, the Brussels Court of Appeal affirmed the Court of First Instance's February 2020 judgment, denying Trabelsi's request to order the Belgian state to transmit a new diplomatic note to the United States expressing an opinion that the Extradition Order did not conform to Article 5. Significantly, the Court remarked:

> The aforementioned American decisions, and in particular that of the D.C. Circuit . . . make it clear that the American Courts are applying their own law and the law of international relations, that they have full knowledge of the dissensions between the Belgian Courts and the Belgian government, that they take into account the Belgian judicial decisions but that they consider that there is no reason, by virtue of their own law, over which this Court does not have the power to substitute its assessment, and the law of international relations . . . to give priority to these Belgian judicial decisions over the ministerial order on extradition, which these decisions do not modify or cancel and the effects of which they do not suspend.

J.A. 2021 (emphasis omitted). In the final Belgian litigation development included in the record before us, on July 31, 2020, the Belgian government filed a response to Trabelsi's new case seeking damages from the Belgian government for its failure to comply with the February 2020 decision.

Trabelsi continued his efforts in the United States. On November 3, 2020, he urged the District Court to reconsider its denial of his previous motion to reconsider, given the recent developments in his Belgian litigation, and to stay the district court proceedings pending his appeal in Belgium. Because the District Court no longer had jurisdiction over the matter, given the March 2020 notice of appeal, Trabelsi moved for an indicative ruling, pursuant to Federal Rule of Criminal Procedure 37(a). The District Court granted the stay but, in an appropriate exercise of discretion under Rule 37(a)(2), reached and denied Trabelsi's second motion to reconsider. *United States v. Trabelsi*, No. 06-cr-89, 2021 WL 430911, at *1 (Feb. 5, 2021) ("*Trabelsi IV*"). The Court once again held that the intervening Belgian decisions and pleadings did not qualify as

significant new evidence that would alter its understanding of the Extradition Order, as set forth in *Trabelsi I*, *II*, and *III*. *Id.* at *15.

II.

We review a denial of a motion to reconsider in a civil case for abuse of discretion, *Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006), and the same standard applies to a denial of a motion for reconsideration in a criminal case. *United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014). However, "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) (citing *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)). Thus, because the motion to reconsider turns on whether the District Court correctly interpreted the Extradition Treaty, and because we review the interpretation of treaties de novo, *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008), our review is effectively de novo. *See United States v. Fanfan*, 558 F.3d 105, 106–07 (1st Cir. 2009) (de novo review proper where defendant "charges the district court with misconstruing its legal authority" on motion for reconsideration).

Jurisdiction is secure over this interlocutory appeal, as it would be over a double jeopardy claim.[2] Under *Abney v. United States*, pretrial orders denying a motion to dismiss an

[2] The *non bis in idem* principle resembles double jeopardy but differs in that it "addresses the possibility of repeated prosecutions for the same conduct in different legal systems, whereas double jeopardy generally refers to repeated prosecutions for the same conduct in the same legal system." Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. OF TRANSNAT'L L. 635, 687 (2007) (internal quotation marks and citation omitted).

indictment on double jeopardy grounds constitute "final decisions" for the purposes of 28 U.S.C. § 1291. 431 U.S. 651, 662 (1977) (internal quotation marks omitted). As discussed in *Trabelsi I*, however, *Abney* is not on all fours because Trabelsi's claim arises under the Treaty, not under the Double Jeopardy Clause of the Fifth Amendment. *Trabelsi II*, 845 F.3d at 1186. Still, *Abney*'s reasoning is instructive: Article 5's *non bis in idem* provision mirrors the Constitution's prohibition of double jeopardy and Trabelsi's claim remains collateral to his conviction. Accordingly, we may appropriately exercise jurisdiction over Trabelsi's appeal.

A.

We must first address the threshold question of whether the law of the case doctrine determines the result in this subsequent appeal. The District Court and a prior appellate panel have already decided the question at the core of this case: whether Trabelsi's extradition violated Article 5 of the Treaty. The law of the case doctrine dictates that "[w]hen there are multiple appeals taken in the course of a single piece of litigation . . . decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). Put differently, "the *same* issue presented a second time in the *same* case in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). Reopening an issue is possible, however, if "extraordinary circumstances" demand it. *Id.* That may include an intervening change in the law, a finding that the original decision was clearly erroneous, or if "significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light." *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (internal quotation marks and citation omitted); *see LaShawn A.*, 87 F.3d at 1393.

Trabelsi relies on the third exception to argue that the intervening Belgian court decisions, Belgian government communications, and legal filings constitute "significant new evidence" that warrant revisiting the propriety of his extradition under Article 5. This "new evidence" could not have been obtained earlier, given the timing of the Belgian litigation. We may therefore evaluate Trabelsi's claim to determine whether these developments qualify as significant new evidence, such that they require breaking from the law of the case.

B.

Even before we reach the question of whether the Belgian legal developments constitute significant new evidence, we must examine whether the Belgian state's or its courts' interpretation of the Treaty controls. The Belgian courts have held that Trabelsi may not be prosecuted in the United States for Overt Acts 23–26 because they are the same as the offenses charged in Belgium. By contrast, the Belgian state has placed no limitations on his extradition or prosecution. Whether this Court owes deference to the Belgian courts may impact our ability to view the Belgian judgments as "significant new evidence."

At the outset, the Extradition Treaty governs these proceedings. *See Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933). Like statutory interpretation, the interpretation of a treaty begins with the text itself. *See Medellin v. Texas*, 552 U.S. 491, 506 (2008). The Treaty does not vest final authority over its interpretation to either the Belgian state or the Belgian courts, but it does intimate whose interpretation controls. Throughout, the Treaty refers to the power of the "executive authority" in extradition proceedings. S. TREATY DOC. NO.

104-7. It is the executive authority who can refuse to extradite an individual for offenses that are not illegal under ordinary criminal law and who can choose the state of extradition if there are competing requests. *Id.* at arts. 4(4), 13. Significantly, it is also the executive authority who "consents to the person's detention, trial, or punishment" prior to the extradited person being detained, tried, or punished abroad. *Id.* at art. 15(1). Nowhere does the Treaty refer to the Belgian courts' role in extradition proceedings. Its emphasis on the executive authority suggests the Belgian state has the final say over the Treaty's application in an extradition order.

Despite the Treaty's focus on the executive, it is true that American courts have urged deference to foreign courts' holdings in extradition proceedings. In *Johnson v. Browne*, the Supreme Court held that whether a crime was an extraditable offense under the relevant treaty was a matter for the Canadian judicial authorities (the extraditing country) to decide. 205 U.S. 309, 316 (1907). This Court later interpreted *Johnson* to mean that "an American court must give great deference to the determination of the foreign court in an extradition proceeding." *Casey v. Dep't of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1992). It further held that the foreign court's holding on "what that country's criminal law provides should not lightly be second-guessed by an American court." *Id. But see Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869 (2018) (holding that a federal court should respectfully consider a foreign government's statements "but is not bound to accord conclusive effect to" them).

Yet, these cases did not concern a conflicting legal interpretation between a country's executive and its judicial authorities. And under the act of state doctrine, American courts are prohibited from questioning the validity of a foreign sovereign power's public acts committed within its own

territory. *World Wide Mins., Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002). The doctrine applies if "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within" its territory. *Id.* (quoting *W.S. Kirkpatrick & Co., Inc. v. Env't Tectonics Corp.*, 493 U.S. 400, 405 (1990) (alteration in original and internal quotation marks omitted)).

In the context of extradition proceedings, courts have refrained from finding extradition orders issued by the state executive invalid under the act of state doctrine. Take, for example, *United States v. Knowles*, in which the defendant challenged his extradition as unenforceable because the Supreme Court of the Bahamas had withdrawn its approval of the extradition until it deemed all legal processes in his case complete. 390 F. App'x 915, 917 (11th Cir. 2010) (per curiam). The court dismissed the relevance of the Bahamian court's order under the act of state doctrine because the Bahamian Ministry of Foreign Affairs had consented to the appellant's extradition. *Id.* at 928. It thus deferred to the executive authority over the judiciary's interpretation of the Extradition Order. *Id.*; *see also Reyes-Vasquez v. U.S. Att'y Gen.*, 304 F. App'x 33, 36 (3d Cir. 2008) (per curiam) (abstaining from declaring the President of the Dominican Republic's extradition decree invalid because it was an act of state). A court will thus "presume that if the extraditing country does not indicate that an offense specified in the request is excluded from the extradition grant, the extraditing country considers the offense to be a crime for which extradition is permissible." *United States v. Campbell*, 300 F.3d 202, 209 (2d Cir. 2002).

This approach accords with the opinion of one of Trabelsi's experts, a Belgian professor of law, who explained

that "the final decision in terms of extradition is taken solely by the Government; this is a sovereign act, a political action taken by an administrative authority." Expert Op. at 2, D. Ct. Dkt. 345-4. It also aligns with the goal of maintaining cordial international relations and international comity in extradition proceedings. *Trabelsi II*, 845 F.3d at 1192–93. Even Trabelsi conceded in the briefing that the decision to extradite an individual is a political act controlled by the executive, not by the judiciary. Appellant Br. 8 ("the Minister of Justice makes the political decision whether to extradite pursuant to the exequatur"). Under the text of the Treaty and the act of state doctrine, this Court should defer to the Belgian state's Extradition Order and its explanations of it in subsequent diplomatic notes, rather than to the Belgian courts' interpretation.

C.

Turning to the legal developments themselves, the Belgian court decisions, official state communications, and legal filings in the time since *Trabelsi II* do not constitute significant new evidence that would warrant deviating from the law of the case. Indeed, the disagreement between the Belgian state and its courts was plain at the time of *Trabelsi II* but did not impact our conclusion that Trabelsi's extradition comported with Article 5 of the Treaty.

First, the Brussels Court of Appeal's August 8, 2019 decision adds nothing new to the analysis and merely reiterates the Belgian court's view that the exequatur prohibits the prosecution of the four Overt Acts. To be sure, as Trabelsi notes, this decision is the first time a Belgian court heard his case since the issuance of the 2011 Extradition Order. But that does not bear on the Court of Appeal's analysis. Indeed, the Brussels Court of Appeal states that the Extradition Order

"could only validly grant the extradition requested by the United States within the limits of the exequatur . . . but not for the 'Overt Acts'" mentioned. J.A. 1320 (emphasis removed). But it does not assert that the Minister of Justice excluded those Acts nor that he was compelled to follow the exequatur.

Further, the Court of Appeal's decision supports this Court's assertion in *Trabelsi II* that the Minister of Justice abstained from excluding the four Overt Acts. Specifically, the Court remarked that the Belgian courts interpret Article 5 to imply a "review of the identity of the fact and not of its qualification" in determining whether an individual is being extradited for a previously charged offense. J.A. 1317 (emphasis removed). That review is what led the Court of First Instance to exclude the four Overt Acts from the exequatur. *Id.* But the Court of Appeal went on to remark that "[o]nly the ministerial extradition order of November 23, 2011 departs from this consistent interpretation of Article 5 of the Extradition Convention, arguing that the provision requires an identity of qualifications." J.A. 1319. Put differently, the Court of Appeal recognized the conflicting interpretation of Article 5 set forth by the Minister of Justice in the Extradition Order. The Minister of Justice's interpretation, in turn, is what this Court relied on in finding that Belgium did not place any limits on Trabelsi's extradition. The Belgian government confirmed that interpretation in its Second Diplomatic Note, sent on November 13, 2019, which characterized the August 2019 Court of Appeal judgment as contrary to its Extradition Order and reiterated that there was no bar on Trabelsi's extradition. At bottom, the decision does not reflect a change in the Belgian courts' or government's position from those originally considered in *Trabelsi II*.

Second, in its February 26, 2020, decision, the Court of First Instance simply confirmed the Court of Appeal's

judgment and ordered the Belgian government to send a copy of its decision to the appropriate U.S. authorities. On March 5, 2020, the Belgian Ministry of Justice sent a one-page letter to the Department of Justice, including the specific language the Belgian court requested, specifying that Trabelsi's extradition did not allow him to be prosecuted for facts set out in the four Overt Acts. Trabelsi latches on to the March 5 letter, arguing that it was an act of state because it expressed Belgium's official position that the Extradition Order precluded Trabelsi's prosecution as to the four Overt Acts. Appellant Br. 22, 40. That argument strains credulity. The letter does not purport to stake out Belgium's official position on the scope of Trabelsi's extradition. To the contrary, it opens with the stipulation that the Court of First Instance "has ordered the Belgian Government to formally notify its judgment, including the following wording" before including the relevant excerpt from the opinion. J.A. 1816. The letter's language explicitly states that the Ministry only transmitted the judgment because it was obligated to do so, not because it represented the Belgian state's position. As a result, the letter does not constitute an act of state, nor does it represent significant new evidence.

Third, as for the May 28, 2020, decision, the Court of First Instance admonished the Belgian government for sending the Second Diplomatic Note and challenging the court's ruling that Trabelsi's extradition was limited. But in the fourth relevant Belgian judicial decision, which Trabelsi avoids wrestling with in his briefs, the Brussels Court of Appeal on July 15, 2020 refused Trabelsi's request to order the Belgian state to send a new diplomatic note conforming its position to the Court's rulings. At the end of the day, the Court of Appeal acknowledged that we were aware that the Belgian courts and executive had conflicting views on how to interpret the Treaty, but the Court of Appeal impliedly conceded that it could not force the American courts to prioritize its interpretation. It

further conceded that the Belgian courts' decisions do not modify, cancel, or suspend the Extradition Order. Neither of these decisions support Trabelsi's proposition that the Belgian courts or government have altered their positions so drastically such that they qualify as new evidence sufficient to justify reconsideration of this Court's last opinion. If anything, the July 2020 decision forcefully supports that the Extradition Order controls.

As such, the two July 2020 pleadings filed by the Belgian state do not aid Trabelsi's claims. He argues that these pleadings diminish the significance of the Second Diplomatic Note, which, as described above, characterized the August 2019 Court of Appeal judgment as contrary to the Extradition Order and reiterated the Belgian state's view that there was no bar on Trabelsi's extradition. Trabelsi points to the language in the Ministry of Justice's July 15 pleading stating that the Second Diplomatic Note "was only intended to inform the U.S. judicial authorities that the [Belgian State] had filed an appeal," not to state its official position. J.A. 1968. In doing so, he takes this sentence out of context and ignores the one that follows, which stipulates that the diplomatic note "summarizes the position of the [Belgian State] . . . as well as its point of view regarding the concept of *non bis in idem*." *Id.* Further, Trabelsi seizes upon the Minister's language in the July 31 pleading that the March 2020 notification to the American authorities "does not mean that the [Belgian State] would have distanced itself once again from what was decided by" the February 2020 ruling. J.A. 2072 (internal quotation marks and emphasis omitted). Here, the Belgian government simply explained that it was ordered to transmit the March 2020 notice of the Court's order to the proper U.S. authorities. Remarking that it would not distance itself from the Belgian court's ruling is not the same as adopting the Belgian court's position on the Extradition Order as its own.

Trabelsi has selectively picked and chosen phrases from these documents to argue that this Court must defer to the Belgian courts' interpretation of Article 5 and revisit its decision in *Trabelsi II*. But none of the intervening decisions, communications, or pleadings present significant new evidence or detract from the deference this Court owes to the Belgian state. As a result, this Court will not depart from the law of the case and reopen the question of whether the indictment charges the same offenses as in the Belgian prosecution. The District Court's orders denying Trabelsi's motions to reconsider the motion to dismiss the indictment are affirmed.

So ordered.

WILKINS, *Circuit Judge*, concurring: My concurring colleague raises the question of whether, in the previous appeal, *see United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017), we should have "first addressed the threshold question of whether the Treaty conferred a *non bis* right that Trabelsi could invoke in the United States after his extradition." Rao Concurring Op. at 1. I write separately only to note that the Government did not make my concurring colleague's argument in the prior appeal; instead, it contended that we lacked jurisdiction to review the extradition determination of Belgium. Therefore, we did not reach, and the Government forfeited, any argument that the text of the Treaty does not confer upon Trabelsi any enforceable *non bis* rights. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356–57 (2006) (holding that even where a claim arises from an international treaty, "[t]he consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim"); *Breard v. Greene*, 523 U.S. 371, 375–76 (1998) (failure to raise Vienna Convention claim in state court resulted in procedural default in subsequent habeas proceeding because procedural rules of the forum State govern). I express no opinion on the merits of my colleague's interpretation of the Treaty's text.

RAO, *Circuit Judge*, concurring: Nizar Trabelsi has failed to show we should depart from the law of the case, and therefore I join the panel opinion in full. *See United States v. Trabelsi* ("*Trabelsi II*"), 845 F.3d 1181 (D.C. Cir. 2017). Since his extradition from Belgium in 2013, Trabelsi has challenged his U.S. indictment for terrorism crimes on the grounds of *non bis in idem*, the international law prohibition against being tried twice for the same offense. On its face, the U.S.-Belgian Extradition Treaty does not impose a *non bis* obligation on the United States after extradition has occurred. Nonetheless, in *Trabelsi II* the court simply determined Trabelsi was not being tried twice for the same offense. While the court reached the right result, in light of the important separation of powers considerations at stake, I would have first addressed the threshold question of whether the Treaty conferred a *non bis* right that Trabelsi could invoke in the United States after his extradition.

* * *

Trabelsi has doggedly challenged his indictment for various crimes of terrorism on the grounds that it violates the maxim *non bis in idem* ("not twice in the same matter"). He claims the United States is prosecuting him for the same acts he was criminally punished for in Belgium. Trabelsi maintains that Article 5 of the U.S.-Belgian Extradition Treaty incorporates the *non bis* principle. *See* Extradition Treaty between the United States of America and the Kingdom of Belgium, art. 5, Apr. 27, 1987, S. TREATY DOC. NO. 104-7. *Non bis* is analogous to the Fifth Amendment's prohibition against double jeopardy. U.S. CONST. amend. V. It is blackletter law, however, that the Double Jeopardy Clause does not bar successive prosecutions by separate sovereigns. *See Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019); *Trabelsi II*, 845 F.3d at 1186. Trabelsi's argument that he may not be tried twice thus turns solely on the rights afforded by the Treaty.

Trabelsi's challenge to his U.S. indictment requires us to look first to the text of the Treaty to determine whether there is an enforceable right to bar a U.S. prosecution after extradition to the United States. *See Medellin v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."). On this threshold question, Trabelsi argues Article 5 of the Treaty incorporates the principle of *non bis* and therefore that if Belgium violated Article 5 when it extradited him, his U.S. indictment must be dismissed.

Article 5 states: "Extradition shall not be granted when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested." Treaty, *supra*, art. 5(1). Article 5 concerns the effect of a first prosecution on a subsequent *extradition* and does not mention any successive "prosecution" or "trial" in the requesting country.[1] Rather, Article 5 places responsibility for implementing the *non bis* principle squarely on the extraditing

[1] By contrast, Article 15 provides: "A person extradited under this Treaty may not be *detained, tried, or punished* in the Requesting State" for offenses for which extradition was not granted. Treaty, *supra*, art. 15 (emphasis added). Article 15 deals with "specialty," which is "[t]he principle, included as a provision in most extradition treaties, under which a person who is extradited to a country to stand trial for certain criminal offenses may be tried only for those offenses and not for any other pre-extradition offenses." *Doctrine of Specialty*, BLACK'S LAW DICTIONARY (11th ed. 2019). Trabelsi's *non bis* claim cannot hinge on Article 15 because *Trabelsi II* specifically explained that Article 15 was not at issue in the appeal, 845 F.3d at 1185 n.1, and because this court has now twice held that Trabelsi's prosecution accords with both countries' understanding of the extradition order.

state (the "Requested State").[2] In other words, the Treaty required Belgium to refuse extradition if it had already prosecuted Trabelsi for the offenses underlying the U.S. indictment. But on its face, Article 5 says nothing about whether, *after* extradition has occurred, the United States may prosecute him for the same offense he was convicted of in Belgium.[3]

This litigation might have been resolved years ago if Article 5 of the Treaty had been given its plain meaning, which places no bar on a U.S. prosecution after extradition by Belgium. Instead, the district court skipped over the initial question of whether Article 5 provided a ground for Trabelsi to challenge his U.S. prosecution. That court assumed Article 5 could bar Trabelsi's U.S. prosecution because both parties were

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[2] Extradition treaties typically frame the *non bis* principle as a constraint on the extraditing state and not on the requesting state. *See, e.g.*, Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, art. 5, Mar. 31, 2003, S. TREATY DOC. NO. 108-23; MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES § 6-2(18) (2007). As a practical matter, it makes sense to resolve issues regarding the scope of extradition before extradition occurs. On the other hand, the doctrine of specialty must usually be enforced in the requesting country to ensure that the prosecution is limited to those offenses for which extradition was granted.

[3] I do not address the separate question of whether, under the Treaty, a person in the United States could challenge extradition to Belgium on *non bis* grounds. Our courts often adjudicate treaty based *non bis* claims. *See, e.g.*, *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) (Friendly, J.) (considering and rejecting a *non bis* defense to extradition from the United States based on a U.S.-Italian extradition treaty). Trabelsi, for instance, has brought numerous Article 5 claims against his extradition in Belgian courts.

"equal partners" under the Treaty. *United States v. Trabelsi*, 2015 WL 13227797, at *4 (D.D.C. Nov. 4, 2015) (noting without analysis of the Treaty text that "the United States and Belgium may be on equal footing to consider a defendant's Article 5 claims"). The Treaty of course creates an agreement binding on both parties; however, each country's obligations are determined by the specific articles of the Treaty, not the mere fact of the Treaty.

Trabelsi II also did not address the question of whether Article 5 gave Trabelsi grounds for challenging his U.S. indictment and instead analyzed the substantive question of whether his extradition from Belgium was consistent with the Treaty. In answering that question, we properly explained that "the scope of Article 5 [is] a matter for Belgium" because "[i]t was for Belgium, as the requested party, to determine whether to grant extradition." 845 F.3d at 1188. We rejected Trabelsi's claims because Belgium had reasonably construed the Treaty to allow for his extradition for the crimes specified in the U.S. extradition request. In other words, we deferred to Belgium's conclusion that Trabelsi's extradition was not for the same offenses for which he was prosecuted in Belgium. Deference to Belgium's decision, however, does not address the prior question of whether Trabelsi could invoke Article 5 against his U.S. prosecution at all.

My point is simply that we should have analyzed the text of the Treaty first. A ruling based on the Treaty's text could have clarified that Article 5 would not provide a basis for Trabelsi to challenge his U.S. prosecution. This would have allowed the court to reject Trabelsi's motion to dismiss his indictment without passing on whether Belgium's extradition decision violated the Treaty.

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* * *

Furthermore, whether the Treaty confers an enforceable *non bis in idem* right should have been decided at the outset because Trabelsi's challenge to his U.S. prosecution implicates the Constitution's separation of powers.

First, courts must respect the commitment of the treaty making power to the President and the Senate. *See* U.S. CONST. art. II, § 2; *id.* art. VI (treaties are part of the supreme law of the land). Therefore, "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.).

International law principles like *non bis* have no free-floating status in domestic law. *Cf. Medellin*, 552 U.S. at 504 ("[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts."); *Al-Bihani v. Obama*, 619 F.3d 1, 10 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("[I]nternational-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms."). Instead, the text of a treaty determines whether a given provision or principle is a "directive to domestic courts" that may be enforced by litigants. *Medellin*, 552 U.S. at 508. Respect for the President's control over foreign affairs requires courts to take a text-first approach to treaty interpretation. *See id.* at 506; Majority Op. at 11.

Second, extradition is traditionally an executive act, and the Treaty's obligations will be implemented by the U.S. and Belgian executives. *See* Majority Op. at 12 (discussing the Treaty's "emphasis on the executive authority"). Assuming the

Treaty includes a right to enforce *non bis in idem* against a U.S. prosecution after extradition risks improper judicial interference with delicate foreign affairs, the conduct of which has been primarily committed to the President. U.S. CONST. art. II; *cf. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (noting that the "President has unique responsibility" for "foreign and military affairs").

In this case, Trabelsi was convicted in Belgium of conspiring and attempting to destroy U.S.-Belgian military facilities. The diplomatic negotiations between U.S. and Belgian law enforcement centered on the scope of the extradition and the crimes for which Trabelsi would be extradited. The negotiations also included other conditions, such as a guarantee that Trabelsi would not be sent back to Tunisia, his country of origin. Absent a firm legal basis, courts should not second guess such sensitive negotiations. The Executive Branch should be able to secure extradition against a clear background of treaty rights, interpreted fairly based on a treaty's text, not general principles of international law read into the treaty. Moreover, extradition links up with the Executive Branch's "clear and indisputable right to control the initiation and dismissal of prosecutions." *In re Flynn*, 973 F.3d 74, 94 (D.C. Cir. 2020) (en banc) (Rao, J., dissenting). Courts should not second guess an otherwise valid criminal indictment through the application of international law norms such as *non bis* unless a treaty clearly demands it.

Finally, as the government argued in earlier stages of this litigation, unless there is some other legal basis, treaty violations during the process of bringing Trabelsi to the United States cannot suffice to dismiss an indictment. Instead, the "broad rule" in the extradition context follows the longstanding *Ker-Frisbie* doctrine, under which alleged misconduct in bringing someone into the United States' criminal jurisdiction,

including even "shocking" "abductions," does not render the subsequent prosecution unlawful. *United States v. Alvarez-Machain*, 504 U.S. 655, 660–61, 669 (1992) (citing *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952)); *see also United States v. Riviere*, 924 F.2d 1289, 1301 (3d Cir. 1991) ("*Ker* teaches that the mere existence of a treaty does not create individual rights" for everyone within a contracting country). The Supreme Court has consistently deferred to the Executive Branch to address the international implications of prosecuting someone already within U.S. jurisdiction. *Alvarez-Machain*, 504 U.S. at 669–70. In light of these background principles, unless a treaty (or other domestic law) specifically binds the U.S. government, courts cannot impose international law barriers to U.S. prosecutions.

* * *

Before entertaining a treaty based challenge to a U.S. indictment, courts should ensure that the treaty protects an individual right against the U.S. government. This inquiry safeguards the separation of powers and mitigates the danger that loose treaty interpretation will undermine international cooperation in the enforcement of U.S. criminal laws. Although the court skipped this analysis in earlier stages of the litigation, *Trabelsi II* reached the right result and is law of the case barring Trabelsi's appeal. Examining the Treaty's text at the outset, however, might have prevented the nearly decade-long delay of Trabelsi's trial through successive and meritless efforts to undo his extradition on *non bis* grounds.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, v. NIZAR TRABELSI, *Defendant.*	No. 06-cr-89 (RDM)

MEMORANDUM OPINION AND ORDER

Defendant Nizar Trabelsi was extradited from the Kingdom of Belgium to the United States after serving a 10-year term of imprisonment in Belgium for, among other things, attempting to bomb the Kleine-Brogel Air Base ("Kleine-Brogel") in 2001. In September 2014, Trabelsi (1) moved to dismiss the U.S. indictment on the ground that his extradition violated the *non bis in idem* (or "not twice") principle contained in the extradition treaty between the United States and Belgium, which prohibits extradition for an "offense" for which the person sought has been convicted or acquitted in the state from which extradition has been requested, and, in the alternative, (2) moved to preclude the government from relying on four of the overt acts set forth in the U.S. indictment based on the doctrine of specialty, which prohibits prosecution for a crime other than the crime for which the defendant was extradited. Dkt. 70. This Court denied both motions, Dkt. 124 (Roberts, C.J.), and because Trabelsi's *non bis* challenge was analogous to a double-jeopardy challenge, he was allowed to take an interlocutory appeal of the Court's order declining to dismiss the indictment. On appeal, the D.C. Circuit rejected Trabelsi's *non bis* challenge and affirmed this Court's order. *United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017).

Two related motions are now before the Court. First, Trabelsi asks the Court to reconsider its decision—since affirmed by the D.C. Circuit—declining to dismiss the indictment on the ground that his extradition violated the *non bis* principle. Dkt. 345. In Trabelsi's view, an August 8, 2019 decision from the Brussels Court of Appeal constitutes "new evidence" that warrants reconsideration and reversal of that decision. *Id*. at 1. Second, he once again moves to compel compliance with the treaty doctrine of speciality (1) by excluding evidence related to a conspiracy or attempt to bomb Kleine-Brogel or, in the alternative, (2) by instructing the jury that it cannot convict him based solely on evidence of the alleged Kleine-Brogel conspiracy. Dkt. 210; Dkt. 262.

For the following reasons, the Court will **DENY** both motions.

I. BACKGROUND

A. Trabelsi's Arrest, Belgian Prosecution, and Extradition

On September 13, 2001, Trabelsi was arrested by the Belgian police. *Trabelsi*, 845 F.3d at 1184. He was charged with and convicted of, among other things, the following offenses under Belgian law:

> [First,] at an unknown date between July 3, 2001 and September 14, 2001, [Trabelsi] attempted to destroy, with the effects of an explosion, a building, bridge, dam, road, train rail, locks, store, yard, shed, ship, boat, car, train, aircraft, work of art, construction, motor vehicle, specifically in the present case, the military base of Kleine-Brogel belonging to the Belgian State, represented by the Minister of National Defense, the perpetrators having had to assume that one or more people were present at the time of the explosion, with the resolution to commit the crime having been demonstrated by outside acts that form a beginning of performance of that crime and that were only suspended or only failed to achieve their aim due to circumstances outside the will of the perpetrators[;]
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> * * *
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> [Second,] between May 1, 2001 and October 3, 2001, [Trabelsi was] the instigator of a conspiracy created for the purpose of carrying out attacks on people or property through the commission of crimes which carry a sentence from twenty to thirty

> years, from fifteen to twenty years, or from ten to fifteen years (specifically in the present case, a conspiracy of individuals who, in one way or the other, promoted an enterprise for the purpose of carrying out a terrorist attack);
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> * * *
>
> [Third,] at an unknown date between May 3, 2001 and October 1, 2001, in violation of Articles 1 and 2 of the Law of July 29, 1934, prohibiting private militias, [Trabelsi] created, assisted or joined a private militia or any other organization of individuals whose purpose was to use force[.]

Dkt. 367-3 at 24, 27, 31 (*The Federal Prosecutor v. Mohamed Fethi, et al.*)[1]. On September 30, 2003, Trabelsi was sentenced to ten years of incarceration in Belgium. *Trabelsi*, 845 F.3d at 1184.

On April 7, 2006, while he was serving his sentence in Belgium, a grand jury in the United States indicted Trabelsi on charges of Conspiring to Kill U.S. Nationals Outside the United States, in violation of 18 U.S.C. §§ 1111(a) and 2332(b)(2); Conspiring and Attempting to Use Weapons of Mass Destruction, in violation of 18 U.S.C. §§ 2 and 2332a; Conspiring to Provide Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; and Providing Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. §§ 2 and 2339B. Dkt. 3. Over a year later, on November 16, 2007, a grand jury returned a superseding indictment, charging Trabelsi with the same statutory violations, but revising the charged overt acts.[2] *See* Dkt. 6. On April 4, 2008, the United States requested that Belgium extradite Trabelsi to the United States and provided the

[1] All documents from the Belgian proceedings have been translated from the original French into English. *See* Dkt. 367. The original French-language versions, along with their English translations, are available on the docket. *See* Dkt. 367 and attachments.

[2] On the U.S. government's motion and with the consent of Trabelsi, Counts 3 and 4—which concerned the provision to material support to a terrorist organization—were subsequently dismissed with prejudice. *See* Dkt. 231; Minute Order (June 10, 2019).

Belgian government with an affidavit describing the above charges and the governing U.S. law as well as a copy of the superseding indictment. Dkt. 367-7.

On November 19, 2008, the Court Chamber of the Court of First Instance of Nivelles ("Court of First Instance") issued the first of several Belgian-court decisions concerning Trabelsi's extradition. Dkt. 367-9. The only portion of that decision relevant to the pending motion addressed the *non bis* provision of the Extradition Treaty between the United States and the Kingdom of Belgium. Article 5 of the Treaty provides in pertinent part that "[e]xtradition shall not be granted when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is granted." Article 5, Extradition Treaty Between the United States of America and the Kingdom of Belgium (the "Extradition Treaty" or "Treaty"), Apr. 27, 1987, S. Treaty Doc. No. 104-7. The Court of First Instance construed the term "offense," as used in Article 5, to mean "facts . . . or acts . . . falling under the scope of criminal law of one of the two States." Dkt. 367-9 at 7. From this premise, it reasoned that four overt acts included in the superseding indictment—numbers 23, 24, 25 and 26—"very precisely correspond to the offenses, committed on Belgian soil" on which Trabelsi's Belgian conviction was based.[3] *Id.* The court, accordingly, concluded that Trabelsi's extradition was permitted under Article 5 of the Extradition Treaty, except with respect to those overt acts. *Id.* at 8. That decision was affirmed by the Brussels Court of Appeal and, in turn, by the Belgian Court of Cassation. Dkt. 367-11; Dkt. 367-13; *see also Trabelsi*, 845 F.3d at 1184.

On November 23, 2011, the Belgian Minister of Justice issued a decision granting the request of the United States to extradite Trabelsi. Dkt. 367-17 at 14. With respect to the four

[3] Although the Court of First Instance omits reference to overt act 25 in its discussion, this was apparently an oversight; in the operative paragraph of the court's decision, it refers to all four of the overt acts at issue. Dkt. 367-9 at 8.

overt acts in question, the Minister of Justice explained that under the Extradition Treaty "it is *not the facts*, but their qualification, *the offenses*, that have to be identical." *Id.* at 11 (emphasis added). He further explained that the offenses of which Trabelsi was convicted in Belgium "do not correspond to the offenses listed under the counts . . . that appear in the arrest warrant on which the U.S. extradition request is based." *Id.* at 12. In the operative portion of his order, the Minister declared that "[t]he extradition of Nizar Trabelsi is granted to the United States government for the offenses for which it is requested" upon completion of Trabelsi's term of imprisonment in Belgium. *Id.* at 14. Trabelsi appealed that decision to the Council of State, an administrative court that reviews actions of the Belgian executive branch, which rejected Trabelsi's challenge to the order of extradition. *See* Dkt. 367-21.

On October 3, 2013, Belgium extradited Trabelsi to the United States. *Trabelsi*, 845 F.3d at 1185.

B. 2014 Motion to Dismiss and Related Interlocutory Appeal

About a year after he was brought to the United States, Trabelsi moved to dismiss the indictment on the ground that his extradition violated Article 5 of the Extradition Treaty. Dkt. 70. He argued that the Minister of Justice "incorrectly concluded 'that the constitutive elements of the American and Belgian offenses respectively, their significance, and the place(s) and time(s) at which they were committed do not match.'" *Id.* at 14 (quoting Minister of Justice's Extradition Order (Dkt. 367-17 at 11)). The United States, in Trabelsi's view, charged a broader conspiracy than the plot to bomb the Kleine-Brogel Air Base merely "for the purpose of securing [his] appearance before this Court in violation of the [Extradition] Treaty." *Id.* at 15. He posited that, notwithstanding the breadth of the charges in the indictment, "the [U.S.] government will present at trial only the narrow evidence of the plot to bomb Kleine-Brogel and thereby

circumvent Article 5 of the treaty." *Id.* at 16. In other words, Trabelsi argued, the U.S. government seeks to do precisely what the *non bis* principle precludes—it seeks to try him in the United States for the same conspiracy for which he was previously tried and convicted in Belgium.

In the same filing, Trabelsi also argued that Belgium denied the U.S. request for his extradition with respect to those allegations "set forth in [o]vert [a]cts 23, 24, 25, and 26" and that, as a result, permitting the government to "continue[] to prosecute the Indictment based on th[o]se allegations" would violate the doctrine of speciality. Dkt. 70 at 19-26. That doctrine, which is incorporated in Article 15 of the Extradition Treaty, precludes the requesting country from trying or punishing a person for any offense, other than "the offense for which extradition has been granted." *Id.* at 20 (quoting Article 15, Extradition Treaty). "By continuing to pursue the[] allegation for which extradition was not authorized," Trabelsi argued, "the United States is in violation of . . . Article 15 and the doctrine of speciality." *Id.* at 26.

The United States opposed Trabelsi's motion and attached to its opposition brief a diplomatic note from the Kingdom of Belgium. Dkt. 80-1. That note reads, in relevant part: "the [Extradition] Order . . . makes clear that Mr. Trabelsi may be tried on all of the charges set out in [the superseding] indictment, and that any similarity between the United States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment." *Id.* at 1. The note goes on to state that "[t]he [Extradition] Order is also clear that the prosecution may offer facts relating to overt acts 23 through 26 in prosecuting Mr. Trabelsi on the charges in the indictment" and that "[n]either Mr. Trabelsi's trial on the charges set out in the indictment[] nor the prosecution's offering proof as to any of the overt acts recited in the indictment[] is

inconsistent with the Order." *Id.* Finally, the note asserts that neither "trial" on those charges nor the "offering of proof" as to those overt acts would "violate the rule of speciality." *Id*.

This Court (Roberts, C.J.) denied Trabelsi's motion to dismiss the indictment, relying on a D.C. Circuit opinion counseling U.S. courts to accord deference to a foreign government's decision to extradite a defendant and applying the double-jeopardy test from *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Dkt. 124 at 8, 14–16 (discussing *Casey v. Dep't of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1982)). The Court then determined that the Belgian and U.S. offenses were different offenses under *Blockburger* and that proceeding to trial on the indictment, accordingly, would not violate Article 5 of the Extradition Treaty. *Id.* at 16–26. With respect to the doctrine of speciality, the Court held that because "Belgium has repeatedly consented to Trabelsi's prosecution under the superseding indictment," and because the Extradition Treaty confers the right to enforce Article 15 upon the signatory-nations, Trabelsi lacked standing to "challenge his extradition as a violation of Article 15." *Id*. at 29. Finally, the Court held that, "even if Trabelsi did have standing to raise a challenge under the doctrine of speciality," the challenge would fail in light of Belgium's repeated consent to the prosecution. *Id.* at 30.

Trabelsi filed an interlocutory appeal of the portion of the Court's order denying his motion to dismiss the indictment on *non bis* grounds. He argued that this Court erred in according deference to the decision of the Belgium state, erred in assuming that the Belgian authorities understood the conspiracy charged in the United States, and erred in applying "a strict *Blockburger* test" in comparing offenses from different nations. *United States v. Trabelsi*, No.

15-3075 (D.C. Cir. 2017), Appellant's Br. at 15, 23[4] (internal quotation omitted). Instead of applying the strict *Blockberger* test, in his view, "[c]ourts must look beyond the elements of the offenses and apply a modified and more flexible test of whether the same conduct or transaction underlies the criminal charges in both transactions." *Id*. at 33. Applying that test—or even the *Blockberger* test—Trabelsi maintained that the Belgian and U.S. charges were the same. *See id.* at 33–65. In his opening brief, Trabelsi further argued that the Minister of Justice's authority to grant the extradition request was limited by the decisions of the Belgian courts excluding overt acts 23, 24, 25, and 26, *id.* at 7-8, and, in his reply brief, he added that the Minister of Justice's extradition order must have, "as required under Belgian law, incorporated the exclusion of the Kleine-Brogel overt acts (23 through 26)," *United States v. Trabelsi*, No. 15-3075 (D.C. Cir. 2017), Appellant's Reply Br. at 33. According to Trabelsi, it was only after "recognizing the Belgian court-required exclusion of overt acts 23 through 26" that "the Minister made the conclusory statement" that "'[t]he essential elements of the respective U.S. and Belgian offenses . . . do not correspond.'" *Id.* at 34 (quoting Dkt. 367-17 at 12).

The D.C. Circuit affirmed this Court's order denying Trabelsi's motion to dismiss the indictment. The Court of Appeals described the relevant background as follows:

> On November 19, 2008, the Court [] Chamber of the Court of First Instance[] of Nivelles held that the United States arrest warrant was enforceable, except as to the overt acts labeled number[s] 23, 24, 25, and 26 in the indictment. The Court of Appeals of Brussels affirmed this decision on February 19, 2009. On June 24, 2009, the Belgian Court of Cassation affirmed the Court of Appeals.
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> The Belgian Minister of Justice, who has final authority over extradition requests, granted the United States' request on November 23, 2011. The Minister rejected the position that the *non bis in idem* principle is implicated by Article 5, concluding instead that the narrower offense-based "double jeopardy" principle applies. *The Minister further rejected the limitation on overt acts,*

[4] Page numbers refer to the file-stamped page of the PDF, not the internal pagination of the document.

> *explaining that they were "not the offense for which an extradition [was] requested" because "an overt act is an element (of fact, or factual), an act, a conduct or transaction which itself cannot automatically be qualified as an offense*." . . . Trabelsi appealed the Minister's decision to the Belgian Counsel of State, which also concluded that the United States offenses are different and that "'overt acts' constitute elements . . . to determine whether [Trabelsi] is guilty or not guilty," and rejected his application on September 23, 2013."

Trabelsi, 845 F.3d 1184–85 (emphasis added). The Court of Appeals went on to hold that that the Minister of Justice had "determined that Trabelsi's extradition would not violate the Treaty" and explained that, absent good cause, it would "not 'second-guess'" his decision to grant the U.S. request for extradition. *Id.* at 1189 (citing *United States v. Campbell*, 300 F.3d 202, 209 (2d Cir. 2002)).

Because the Minster's "grant" of the U.S. request "did not exclude any of the offenses included in the request for extradition," the D.C. Circuit "presume[d] that Belgium [had] determined that none of the offenses in the indictment violate[d] Article 5 of the Treaty." *Id.* (citing *Casey v. Dep't of State*, 980 F.2d 1472, 1475 (D.C. Cir. 1992)). The court recognized that this "presumption" might be rebutted by evidence of "misconduct on the part of the United States in procuring an extradition" or by evidence that the requested party did not review the extradition request. *Id.* But, here, "Trabelsi . . . offer[ed] no such evidence." *Id.* To the contrary, the "United States sought Trabelsi's extradition," and Belgium granted that request—"without limitation"—"[a]fter comparing the offenses in the U.S. indictment with those of which Trabelsi was convicted in Belgium." *Id.* As the D.C. Circuit further noted, "the Minister adequately explained his decision, including his basis for rejecting the overt-acts exclusion." *Id*.

Finally, the D.C. Circuit held that the presumption of compliance with the *non bis* principle might "also be rebutted by a showing that the requested state or party did not apply the correct legal standard adopted in the Treaty," *id.* at 1189, but concluded that the Belgian Minister

of Justice reasonably construed the Treaty and reasonably concluded that "'the offenses for which [Trabelsi] was irrevocably sentenced . . . do to correspond to the offenses listed [in the indictment] that appear in the arrest warrant on which the U.S. extradition [was] based.'" *Id*. at 1190 (first two bracketed inserts in D.C. Circuit opinion) (quoting Dkt. 367-17 at 12). Having held that the Minister reasonably construed the Treaty to require an "offense-based analysis" and that Trabelsi had failed to offer anything "of merit to rebut the presumption" that Belgium had correctly construed the Treaty, the D.C. Circuit rejected Trabelsi's challenge without needing to "decide whether the charges in the U.S. indictment and the crimes for which Belgium convicted Trabelsi are identical under *Blockburger*." *Id.*

C. Recent Developments

After the D.C. Circuit affirmed this Court's denial of Trabelsi's motion to dismiss, this Court set a trial date of Sept. 9, 2019. Minute Entry (Apr. 16, 2018). Among numerous other pretrial motions, Trabelsi filed a motion to compel compliance with the Treaty and the doctrine of specialty. Dkt. 210. That motion renewed Trabelsi's argument that his extradition was conditioned on, and thus included, the exclusion of the four overt acts related to the plot to bomb the Kleine-Brogel Air Base. Trabelsi further argued that, because he could not be convicted based on those four overt acts, evidence of those acts should be excluded from the trial as bad-acts evidence under Federal Rule of Evidence 404(b). Dkt. 210 at 15–16. The government opposed that motion, arguing, as it had before the D.C. Circuit, that Trabelsi was extradited without the exclusion of the Kleine-Brogel overt acts. Dkt. 228.

On August 8, 2019, while that motion was pending and about a month before trial was scheduled to begin, the Brussels Court of Appeal issued a new decision concerning Trabelsi's extradition. *See* Dkt. 312-2. That decision concerned an "interim" challenge he brought seeking

to preclude Belgian officials from aiding in his upcoming U.S. trial on the ground that his extradition violated his treaty rights. *Id.* In the course of its analysis, the Belgian court construed Article 5 of the Extradition Treaty to require "a review of the identity of the *fact* and *not* of its *qualification*." *Id.* at 23 (emphasis added). It explained that Belgian courts had consistently construed the Extradition Treaty in this way but that "the ministerial extradition order of November 23, 2011 departs from this consistent interpretation . . . , arguing [instead] that the provision requires an identity of *qualifications*." *Id.* at 25 (emphasis added). As a result, the court held, "the Ministerial order on Extradition . . . could only validly grant the extradition by the United States within the limits of the exequatur granted to the arrest warrant, that is to say for the four counts mentioned in the arrest warrant, but not for the "[o]vert [a]cts" [numbered] 23, 24, 25, and 26, set out in paragraph 10 of Count 1 and supposed to be repeated in support of the other three counts." *Id.* at 26. The court concluded: "the extradition . . . does not allow" Trabelsi "to be tried for the 'overt acts' . . . [numbered] 23, 24, 25, and 26 . . . , namely the facts relating to the attempt of bombing the Kleine-Brogel military base." *Id.*

In light of this decision, both Trabelsi and the United States requested that this Court vacate the September trial date to provide time to brief the effect, if any, of the August 8, 2019 Belgian court decision on the proceedings before this Court. Aug. 15, 2019 Hrg. Tr. (Rough at 4, 7–8). This Court agreed to do so, *id.* (Rough at 9), and set a briefing schedule for Trabelsi's motion for reconsideration of his motion to dismiss, Minute Order (Sept. 5, 2019). On September 24, 2019, Trabelsi moved for reconsideration of this Court's prior denial of his motion to dismiss the indictment, arguing that the August 8, 2019 decision from the Brussels Court of Appeal constituted new evidence not previously available to the defense. Dkt. 345. He contends, in particular, that the August 8, 2019 decision shows that the Minister of Justice did

not reject and could not have rejected the Belgian courts' exclusion of overt acts 23, 24, 25, and 26, and that this Court and the D.C. Circuit mistakenly deferred to an interpretation of the Treaty that Belgium had rejected, and still rejects. *Id.* Because the U.S. case is dependent, in Trabelsi's view, on the excluded overt acts, he maintains that the only remedy for the Treaty violation is dismissal of the charges against him. *See id.*

The United States opposes this motion and, along with its opposition brief, has provided the Court with a second diplomatic note from the Kingdom of Belgium, this one dated November 13, 2019. *See* Dkt. 355; Dkt. 355-1. That note asserts that the August 8, 2019 Belgian court decision is "contrary to the Extradition order of 23 November 2011 and in our view, therefore contrary to the clear wording of article 5 of the [Extradition] Treaty." *Id.* at 1. For that reason, the note explains, the Belgian state has "appealed the [August 8, 2019] judgment before the Supreme Court." *Id.* The note further reaffirms the contents of its October 29, 2014 diplomatic note and explains that the Minister of Justice's 2011 extradition order "is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States," and it "makes clear that Mr. Trabelsi may be tried on all of the charges set out in [the] indictment[], and that any similarity between the United States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment." *Id.* at 2. Finally, the note asserts that the 2011 extradition order was also "clear that the prosecution may offer facts relating to all 28 overt acts in prosecuting Mr. Trabelsi on the charges in the indictment." *Id.*

The Court originally scheduled a hearing on the motion for December 5, 2019 and, if needed, December 6, 2019. Minute Entry (Sept. 5, 2019). However, after both sides sought extensions of time, the Court rescheduled the hearing for January 8, 2020. Minute Order (Nov. 20, 2020). Upon filing his reply brief, Trabelsi also moved to continue the hearing "until the

appeals process in Belgium is complete"—effectively seeking to stay the proceedings indefinitely. Dkt. 360 at 2. The Court denied that motion, concluding that such an indefinite stay was unwarranted. Minute Order (Dec. 20, 2020).

On January 8, 2020, the Court heard testimony regarding Belgian extradition law from Professor Adrien Masset and argument from the parties. During argument, counsel for Trabelsi explained that Trabelsi's Belgian counsel sought, through members of the Belgian Parliament, to ask questions of the Belgian Minister of Justice regarding the extradition order and that those questions would be asked and answered in the coming weeks. Jan. 8, 2020 Hrg. Tr. (Rough at 19). The Court indicated that it would not issue its decision before the end of January and that Trabelsi could submit the results of that questioning in a supplemental filing. *Id.* (Rough at 37). The defense has not filed any evidence related to such questioning in support the pending motion.

On March 4, 2020, Trabelsi filed a translated version of a February 26, 2020 decision of the Francophone Court of First Instance of Brussels concerning Trabelsi's legal challenges in that country to his extradition and Belgium's continued cooperation with the United States in the U.S. prosecution. Dkt. 373; Dkt. 373-1. That decision ordered the Belgian state to provide a copy of the decision to U.S. officials and to "specify[] in the accompanying letter" the following:

> According to the analysis prevailing in Belgian law, the extradition of Mr. TRABELSI does not allow him to be prosecuted in the United States to be tried there for the facts set out in the "Overt Acts" Nos. 23, 24, 25 and 26 set out in paragraph 10 of the first count and which are supposed to be repeated in support of the other counts [*of the American arrest warrant which is the basis for the extradition (indictment of the Grand Jury of November 3, 2006, filed on November 16, 2007 at the Registry of the US District Court of the District of Columbia*], namely, the facts relating to the attempted attack on the Kleine-Brogel military base.

Dkt. 373-1 at 72 (brackets and emphasis in original). On March 6, 2020, the United States filed the February 26, 2020 decision and accompanying letter that it received from the Belgian State,

which informed the United States that the Court of First Instance of Brussels had ordered the Belgian government to provide the U.S. with the decision and notice containing the language quoted above. Dkt. 375-1.

II. ANALYSIS

The pending motions turn on the scope of Belgium's grant of extradition and, in particular, the breadth and effect of the Minister of Justice's extradition order. *See* Dkt. 210; Dkt. 345. Both this Court and the D.C. Circuit have previously addressed that question. *See* Dkt. 124; *Trabelsi*, 845 F.3d at 1190. Thus, before considering Trabelsi's arguments, the Court must consider when, if ever, a district court may reconsider a question of law or fact, not only previously decided by the district court, but also decided by an appellate panel in the very case now back before the district court.

The general rule is easily stated: "courts involved in later phases of a lawsuit should" typically refrain from "re-open[ing] questions decided." *United States v. Philip Morris USA Inc.*, 801 F.3d 250, 257 (D.C. Cir. 2015) (quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995)). At times, that rule is not binding but simply a principle of sound judicial practice, designed to promote respect for the rule of law, judicial efficiency, and the orderly conduct of litigation. In civil litigation, for example, district courts are generally free to reconsider their own interlocutory orders and decision, as appropriate, prior to the entry of final judgment. *See Keepseagle v. Perdue*, 856 F.3d 1039, 1048 (D.C. Cir. 2017). Although nothing in the Federal Rules of Criminal Procedure speaks to the question, it is also well understood that district courts may—and, at times, should—do the same in criminal cases. *See*, *e.g.*, *United States v. Cabrera*, 699 F. Supp. 2d 35, 40 (D.D.C. 2010); *United States v. Sunia*, 643 F. Supp. 2d

51, 60 (D.D.C. 2009); *United States v. Booker*, 613 F. Supp. 2d 32, 34 (D.D.C. 2009). Even in that context, however, reconsideration should be reserved for "extraordinary circumstances" and should not be used to bring to the Court's attention "arguments that could have been advanced earlier." *Cabrera*, 699 F. Supp. 2d at 41. Ultimately, the decision whether to entertain a motion for reconsideration of an interlocutory order typically lies in the sound discretion of the district court.

Once the Court of Appeals has decided a question, whether in a final appeal leading to a new trial or on interlocutory appeal, however, the district court is bound by the appellate decision. Under the law-of-the-case doctrine, "the *same* issue presented a second time in the *same* court should lead to the *same* result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). This means that, "[w]hen there are multiple appeals taken in the course of a single piece of litigation, . . . decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker*, 49 F.3d at 739. The law-of-the-case doctrine applies to all "issues that were decided either explicitly or by necessary implication." *United States v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1041 (D.C. Cir. 1997). Although the law-of-the-case doctrine "is a prudential rule," *Crocker*, 49 F.3d at 739–40, "an even more powerful version of the doctrine—sometimes called the 'mandate rule'—*requires* a lower court to honor the decisions of a superior court in the same judicial system," *LaShawn A.*, 87 F.3d at 1393 n.3 (citations omitted) (emphasis added). Simply put, "'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'" *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 596-97 (D.C. Cir. 2001) (quoting *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948)); *see also Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939) (it is "indisputable" that district courts are "bound to carry the mandate of the upper court into execution and [may] not consider the

questions which the mandate laid to rest"); *Role Models of Am., Inc. v. Geren*, 514 F.3d 1308, 1311 (D.C. Cir. 2008).

Although the D.C. Circuit has not had an opportunity to address the question, decisions from this Court and from other circuits recognize that a district court may, nonetheless, permit re-litigation of a question previously resolved in an appellate decision, but only in "extraordinary circumstances." *United States v. Carta*, 690 F.3d 1, 5 (1st Cir. 2012) (citation omitted); *see also United States ex rel. Oliver v. Philip Morris USA, Inc.*, 101 F. Supp. 3d 111, 120 n.5 (D.D.C. 2015); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 262 (D.D.C. 2002); *cf. Naples v. United States*, 359 F.2d 276, 277–78 (D.C. Cir. 1966) (per curiam) (law-of-the-case doctrine does "not operate to bar consideration of the admissibility of these confessions based upon material facts not heretofore adduced"). As the test is framed in at least two circuits, "[a] district court may depart from an appellate court's mandate" in response to "'(1) a dramatic change in controlling legal authority; (2) significant new evidence that was not earlier obtainable through due diligence but has since come to light; or (3) [if] blatant error from the prior . . . decision would result in serious injustice if uncorrected.'" *United States v. Webb*, 98 F.3d 585, 587 (10th Cir. 1996) (citation omitted); *see also United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (applying essentially the same test); *cf. United States v. Pineiro*, 470 F.3d 200, 205–06 (5th Cir. 2006) (applying a similar test, but permitting deviation from a mandate where evidence to be offered at "a subsequent trial" is "substantially different"). It bears emphasis, however, that respect for the proper roles of trial and appellate courts and the importance of judicial economy and order demand that district courts apply these exceptions "only in 'very special situations,'" *Carta*, 690 F.3d at 5, and that district courts avoid reopening

issues once decided or second-guessing the conclusions—express or implicit—of appellate courts.

Here, Trabelsi relies on the exception for newly discovered evidence. Because he seeks reconsideration of a question already decided by the D.C. Circuit, this means that he bears the heavy burden of demonstrating that the evidence is new, and not merely cumulative; that it would lead to a different result; and that the evidence could not have been previously adduced through reasonable diligence.

A. Motion for Reconsideration of the Denial of the Motion to Dismiss

With these principles in mind, the Court turns first to Trabelsi's motion for reconsideration. That motion hinges on Trabelsi's claim that the August 8, 2019 decision from the Brussels Court of Appeal constitutes significant new evidence at odds with the factual foundation of the D.C. Circuit's decision. According to Trabelsi, the D.C. Circuit's "decision rested on the inaccurate premise that the Minister of Justice had the authority to, and did in fact, reject the overt act exclusion imposed by the Belgian court . . . ." Dkt. 345 at 23. In his view, the D.C. Circuit's belief that the Minister of Justice authorized Trabelsi's extradition—without limitation—led that court, like this one, to defer to an extradition decision that the Belgian state never made. Without that unwarranted deference, Trabelsi continues, the D.C. Circuit would have been required to interpret the Treaty on its own, and it would have been required to conduct its own comparison of the U.S. and Belgian offenses. Dkt. 345 at 2. Had it done so, Trabelsi contends, the court would have concluded that the Belgian and U.S. offenses overlap and that Trabelsi was not subject to extradition to the United States on charges, like those in the pending indictment, that included a conspiracy or attempt to bomb the Kleine-Brogel Air Base. *Id.*

At the time he filed his motion for reconsideration, the only new evidence that Trabelsi cited in support of this contention was the August 8, 2019 decision from the Brussels Court of Appeal. *See* Jan. 8, 2020 Hr. Tr. (Rough at 13). That evidence is new and significant, according to Trabelsi, both because it "clarifie[s] that the Belgian Minister of Justice did not have the authority to 'reject' the exclusion imposed by the Belgian court," and, more importantly, because it shows that he did not in fact do so. Dkt. 345 at 23. This "clarifi[cation]," Trabelsi argues, can be found in the Belgian court's conclusion that the Minister of Justice's interpretation of the Treaty was at odds with the prior, binding Belgian court decisions. *Id.* at 23–24. The Belgian court concluded, for example, that the ministerial order on extradition "*could only* validly grant the extradition requested by the United States within the limits of the" prior Belgian court decisions—in other words, only with the exclusion of the four overt acts. Dkt. 345-1 at 26. By arguing that the Minister of Justice "did not have the authority to 'reject' the exclusion imposed by the Belgian court, nor did he," Dkt. 345 at 23, Trabelsi raises two distinct contentions about the Minister of Justice's decision. Neither warrants reconsideration of this Court's or the D.C. Circuit's decision.

Trabelsi first, and most significantly, contends that the August 8, 2019 decision clarifies that the Minister of Justice did not, in fact, order Trabelsi's extradition without limitation—that is, he was bound by the decisions of the Belgian courts, and his extradition order must therefore be read to exclude overt acts 23, 24, 25, and 26. The August 8, 2019 decision does not purport to amend the Minister's extradition order, nor does Trabelsi contend that the decision had any such operative effect. Instead, the August 8, 2019 decision is relevant to Trabelsi's motion for reconsideration only if it offers significant, new evidence about the meaning of the Minister's 2011 extradition order. In other words, reconsideration is unwarranted unless the August 8, 2019

decision presents previously unavailable evidence that controverts the D.C. Circuit's reading of the extradition order.

The starting point for resolving that question is, of course, the text of the extradition order itself. There is no doubt the Minister of Justice was aware of the decisions of the Belgian courts excluding the four overt acts; the extradition order discussed those decisions in detail and acknowledged that the Court of First Instance "rendered enforceable the arrest warrant issued on 7 April, 2006 by the Federal Court of the District of Columbia, 'except with respect to "overt acts" no. 23, 24, 25 and 26.'" Dkt. 367-17 at 3. Nor is there any doubt that the Minister carefully considered, on his own accord, whether the *non bis* principle required exclusion of the four overt acts; the extradition order discussed Article 5 of the Extradition Treaty and the *non bis*—or, in the Minister's nomenclature, the double jeopardy—principle at length, concluded that the Treaty embodies an offense-based approach, and the order determined that the "overt acts" are "elements in support of the charges" and that "[t]he 'double jeopardy' principle does not exclude the possibility to use these elements of fact or not." *Id*. at 10–13. The extradition order further stressed that "[t]he overt acts listed in the . . . indictment . . . are not the offenses for which an extradition [was] requested" but, rather, were "element[s]" of "fact" that do not "automatically qualify as an offense." *Id.* at 12. Overt act 23, for example, which alleges that Trabelsi "rented an apartment" in Brussels, Dkt. 6 at 8, "should obviously not be qualified as an offense," Dkt. 367-17 at 13. Accordingly, in the Minister's view, the overt acts did "not represent in any way the offenses for which an extradition was requested." *Id.* He, therefore, concluded that "the conditions and formalities for extradition" had "been met" and—without mention of any limitation or condition— he "granted" the request of the United States for extradition. *Id*. at 14.

With the text of the extradition order and the preceding decisions of the Belgian courts before it, the D.C. Circuit read the Minister of Justice's extradition order to grant extradition, without limitation. The D.C. Circuit observed, in relevant respects: "The Minister . . . rejected the limitation on overt acts, explaining that they are 'not offenses for which an extradition [was] requested' because 'an overt act is an element (of fact, or factual), an act, a conduct or a transaction which in itself cannot automatically qualify as an offense.'" *Trabelsi*, 845 F.3d at 1184–85 (quoting Dkt. 367-17 at 12). And, with this understanding in mind, the D.C. Circuit held that the Minister of Justice compared "the offenses in the U.S. indictment with those of which Trabelsi was convicted in Belgium;" "adequately explained his decision, including *the basis for rejecting the overt-acts exclusion*;" and "granted the extradition request *without limitation*." *Id.* at 1189 (emphasis added).

The question for this Court to decide is whether the August 8, 2019 decision offers significant new evidence that was previously unavailable and that shows that this Court and the D.C. Circuit mistakenly believed that the Minister had "reject[ed] the over-acts exclusion" and had "granted the extradition request without limitation." *See Webb*, 98 F.3d at 587; *see also LaShawn A.*, 87 F.3d at 1393 (requiring "extraordinary circumstances"). The August 8, 2019 decision does not come close to meeting that high bar. To the contrary, read correctly, the opinion addresses only whether the Minister of Justice acted lawfully, in the view of that court, when he ordered Trabelsi's extradition without excluding those overt acts. *See* Dkt. 345-1 at 23–26.

Trabelsi focuses on the following passage from the Belgian court's August 8, 2019 opinion in an effort to show that the D.C. Circuit's interpretation of the Minister's 2011 order was incorrect:

As a result of the foregoing, under Belgian law:

> Article 5 of the Extradition Convention refers to the identity of the fact and not the identity of the qualification;
>
> For this reason, the Belgian courts—order of the Nivelles Chamber of the Council of November 19, 2008, confirmed by the ruling of the Grand Jury of the Brussels Court of Appeal of February 19, 2009—have limited the exequatur given to the U.S. arrest warrant by granting it "*except in so far as it refers to the 'overt acts' n°23, 24, 25, and 26 set out in paragraph 10 of Count 1 and deemed to be repeated in support of the other three counts*;"
>
> These decisions of the Belgian courts have acquired the force of res judicata and are binding on the Belgian State;
>
> Similarly, the Ministerial Order on Extradition of November 23, 2011 could only validly grant the extradition requested by the United States within the limits of the exequatur granted to the arrest warrant, that is to say for the four counts mentioned in the arrest warrant, ***but not for the "Overt Acts" n° 23, 24, 25 and 26, set out in paragraph 10 of Count 1 and supposed to be repeated in support of the other three counts;***
>
> Accordingly, as a result of the foregoing, according to the analysis which prevails in Belgian law, the extradition of the appellant does not allow to prosecute him in the United States in order to be tried for the "overt acts" ("Overt Acts") n° 23, 24, 25 and 26, set out in paragraph 10 of Count 1 and supposed to be repeated in support of the other three counts, namely the facts relating to the attempt of bombing the Kleine-Brogel military base.

Dkt. 345-1 at 26 (bold, italics, and underline in original).

In Trabelsi's view, the Belgian court's observation that "the Ministerial Order . . . could only validly grant the extradition . . . within the limits of" the "exequatur" of the Court of First Instance, Dkt. 345-1 at 26, which excluded the four overt acts, provides new evidence that the Minister, in fact, limited the extradition order in conformity with that order. *See* Dkt. 345 at 23. But that is not what the August 8, 2019 decision says; rather, consistent with the judicial decisions that preceded the Minister's decision—all of which were before the D.C. Circuit—the August 8, 2019 decision simply reaffirms the view of the Belgian judiciary regarding the meaning and application of Article 5 of the Extradition Treaty. Even if read to say that the Minister of Justice was, in the view of Brussels Court of Appeal, bound by those judicial

decisions and *should have excluded* the overt acts, that does not demonstrate that he *did exclude* them—or even that he agreed that he was bound by the "exequatur."

Far from presenting significant new evidence, a different portion of the August 8, 2019 decision shows that the Brussels Court of Appeal concurred with the D.C. Circuit understanding that the Minister of Justice, in fact, declined to exclude the four overt acts. The decision describes the view of the Court of First Instance that Article 5 of the Treaty "implies a review of the identity of the fact and not its qualification" and notes that, "on the basis of such review—a comparison of the facts for which the appellant was convicted in Belgium with the 'Overt acts' supporting the American changes"—the Court of First Instance granted "the exequatur to the U.S. arrest warrant "except in so far as it related to the 'overt acts' N° 23, 24, 25 and 26." Dkt. 345-1 at 23 (underline in original). The August 8, 2019 decision further notes that "[t]his order . . . was confirmed by the ruling of . . . the Brussels Court of Appeal" and that the appeal of the order "by the Belgian State was rejected by the Court of Cassation." *Id.* at 24. And it then observes that "[o]nly the ministerial extradition order of November 23, 2011 depart[ed] from this consistent interpretation of Article 5 of the Extradition [Treaty], arguing that the provision requires an identity of qualifications." *Id.* at 25. In other words, the Minister of Justice disagreed with the Belgian courts on the central premise of their decisions—that is, that "Article 5 of the [Treaty] refers to the identity of the fact and not the identity of the qualification" and that, "[f]or this reason," the exequatur given to the U.S. arrest warrant" was limited to exclude overt acts 23, 24, 25, and 26. *Id.* at 26. Thus, if anything, the August 8, 2019 opinion adds further support for—and certainly does not controvert—the D.C. Circuit's conclusion that the Minister of Justice granted extradition without limitation.

The February 26, 2020 decision from the Court of First Instance in Brussels, which was issued after briefing was completed on the pending motions, is not to the contrary. That decision, like the August 8, 2019 decision, interpreted Article 5 of the Treaty to require a fact-based rather than offense-based comparison of the U.S. and Belgian charges. *See* Dkt. 373-1 at 55. The Court of First Instance goes on to explain that, in its view, the Minister of Justice incorrectly based the grant of extradition on an offense-based, rather than fact-based, analysis, *id.* at 62–63, and that the extradition order "d[id] not specify that, as a result of the [overt act exclusion], Mr. Trabelsi cannot be sentenced in the United States for these acts," *id.* at 65. That action, according to the Court of First Instance, "constitute[d] an excess of power" because the Minister of Justice exceeded the limits on extradition set by the courts. *Id.* at 65. This Court need not—and, indeed, should not—engage with the question whether the Belgian Minister of Justice exceeded his authority under Belgian law by declining to conform his order to the "exequatur" granted by the Court of First Instance or to other pronouncements of the Belgian courts. *See infra* at 28–29. All that matters for current purposes is that the February 26, 2020 decision *confirms* the D.C. Circuit's understanding that the Minister of Justice did, in fact, order Trabelsi's extradition to the United States without excluding the four overt acts.

That conclusion is further confirmed by another piece of new evidence (albeit cumulative)—the most recent diplomatic note, which speaks directly to the Minister's intent. *See* Dkt. 355-1. That note offers the official position of the Belgian state and explains that the Minister of Justice's 2011 extradition order "is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States." Dkt. 355-1 at 2. More importantly, according to the diplomatic note, the extradition order "makes clear that Mr. Trabelsi may be tried [in the United States] on all of the charges set out in [the] indictment, and

that *any* similarity between the United States case and the Belgian case does not give rise to *any* bar to his being tried on the charges in that indictment." *Id.* (emphasis added). And, most importantly, the diplomatic note explains that the 2011 extradition order "is also clear that the prosecution may offer facts relating to all 28 overt acts in prosecuting Mr. Trabelsi on the charges in the indictment." *Id.* That assertion is consistent with the plain language of the 2011 order, the Belgian state's prior diplomatic note (which was before the D.C. Circuit), and with the D.C. Circuit's opinion.

Trabelsi claims that a recent communication from the Belgian state to the U.S. government concerning the February 26, 2020 decision constitutes "the unequivocal, official position of the State of Belgium in this matter" and argues that that communication "plainly states that Mr. Trabelsi cannot be prosecuted in the United States for the planned attack on Kleine Brogel." Dkt. 377 at 2 (discussing Dkt. 375-1 at 1). The Court is unpersuaded. The communication does not adopt the conclusion of the Court of First Instance as its own position, but, rather, merely apprises the U.S. government that the Court of First Instance "has ordered the Belgian Government to formally notify its judgment" and then recites the language that the Court of First Instance required the Belgian state convey to the United States. Dkt. 375-1 at 1. The Belgian state, in that communication, also explains that the February 26, 2020 opinion reached its conclusion "for the reasons set out in" the attached translated decision. *Id.* Those reasons, however, as already explained, do nothing to cast doubt on the D.C. Circuit's conclusion that the extradition order that was issued in 2011 did, in fact, extradite Trabelsi without excluding the four Kleine-Brogel overt acts. Accordingly, Trabelsi offers no evidence—much less significant, new evidence that was not previously available—that calls the D.C. Circuit's understanding of the extradition order into question.

Trabelsi also relies on the August 8, 2019 and February 26, 2020 decisions to support a second contention—that regardless of what the Minister of Justice may have intended, he was precluded as a matter of Belgian law from granting the extradition request without excluding the four overt acts because he was bound by the Belgian courts' decisions excluding those overt acts. That contention is easier to square with what the August 8, 2019 and February 26, 2020 decisions actually say, but it does not advance his motion for reconsideration for two reasons.

First, the D.C. Circuit's reasoning did not turn on whether the Minister of Justice was acting with lawful authority under Belgian law or in conformity with Belgian judicial decisions. Rather, the D.C. Circuit deferred to the decision of the Belgian state to grant the U.S. request for extradition. In considering whether to defer, the D.C. Circuit relied in substantial part on *United States v. Campbell*, 300 F.3d 202 (2d Cir. 2002), a Second Circuit case in which the U.S. court deferred to the foreign state's decision whether the offense for which extradition was sought fell within the scope of the extradition treaty. *Trabelsi*, 845 F.3d at 1188–89. In *Campbell*, the Second Circuit explained that "the question of whether an extradition treaty allows prosecution for a particular crime that is specified in the extradition request is a matter for the extraditing country to determine." *Campbell*, 300 F.3d at 209. At least for purposes of the doctrine of specialty, that determination is one that "courts cannot second-guess." *Id.* In other words, according to *Campbell*, courts must "presume that if the extraditing country does not indicate that an offense specified is excluded from the extradition grant, the extraditing country considers the offense to be a crime for which the extradition is permissible." *Id.* Noting that the *non bis* challenge raised in the interlocutory appeal was distinct from the doctrine of specialty challenge at issue in *Campbell*, the D.C. Circuit nevertheless found "its approach . . . useful here." *Trabelsi*, 845 F.3d at 1188.

That *Campbell*'s reasoning undergirds the D.C. Circuit's deference to Belgium's decision to extradite Trabelsi to the United States shows that it is the decision of the foreign state, acting in the realm of international relations, to which deference is owed. The passage from *Campbell* that the D.C. Circuit relies upon is preceded by the following justification for that deference:

> Whether or not express terms in a treaty make the extraditing country's decision final as to whether an offense is extraditable, *deference to that country's decision seems essential to the maintenance of cordial international relations*. It could hardly promote harmony to request a grant of extradition and then, after extradition is granted, have the requesting nation take the stance that the extraditing nation was wrong to grant the request.

Campbell, 300 F.3d at 209 (emphasis added); *see also Trabelsi*, 845 F.3d at 1187 ("Because the extradition implicates 'the sovereignty of a nation to control its borders and to enforce its treaties," judicial review of such a decision could implicate concerns of international comity." (citations omitted)). The interest protected by the deference regime, accordingly, focuses on the decision made by one party to a treaty to extradite a defendant to the other party to the treaty—that is, the state-to-state decision of the Minister of Justice to grant the request of the United States government to extradite Trabelsi.

The D.C. Circuit, moreover, was aware of the difference of opinions held by Belgian Minister of Justice and the Belgian judiciary at the time it deferred to the Belgian state's decision to extradite. Both Trabelsi and the United States recited the Belgian procedural history in their briefs to the D.C. Circuit, each careful to point out this difference of views. *See Trabelsi*, No. 15-3075, Appellant's Br. at 14–16; *Id.*, Appellee's Br. 14–16. Even more to the point, the D.C. Circuit noted that split in reciting the history of the case:

> On November 19, 2008, the Court Chamber of the Court of First Instance of Nivelles held that the United States arrest warrant was enforceable, except as to the overt acts labeled numbers 23, 24, 25, and 26 in the indictment. The Court of Appeals of Brussels affirmed this decision on February 19, 2009. On June 24, 2009, the Belgian Court of Cassation affirmed the Court of Appeals. . . . The Minister . . . rejected the limitation on overt acts, explaining that they were

> "not the offenses for which an extradition [was] requested" because "an overt act is an element (of fact, or factual), an act, a conduct or a transaction which in itself cannot automatically be qualified as an offense."

Trabelsi, 845 F.3d at 1184–85. The D.C. Circuit was thus aware of the decisions rendered by the Belgian courts, and it was aware that the Minister of Justice "rejected the limitation on overt acts" set forth in the decisions. With this background in mind, Trabelsi cannot reasonably maintain that the August 8, 2019 and February 26, 2020 decisions made available any new, and previously unavailable, line of argument. To the contrary, he previously made—and the D.C. Circuit considered—the same argument he is now making. *Compare* Dkt. 345 at 24 ("[T]he Belgian Minister of Justice did not have the authority to reject this exclusion, nor did he in fact reject it.") *with Trabelsi*, No. 15-3075, Appellant's Reply Br. at 30 ("The Minister [of Justice] could not and did not ignore this exclusion.").

To be sure, the D.C. Circuit's opinion does at times suggest that the "Belgian courts" and the Minister of Justice were in agreement as to the interpretation of the Extradition Treaty and its application to Trabelsi's case. Most notably, the D.C. Circuit "defer[red] to th[e] decision of the Belgian courts and Minister of Justice that, based on an offense-based analysis, Trabelsi's extradition comports with Article 5 of the Treaty." *Trabelsi*, 845 F.3d at 1190. That sentence, however, is best understood to refer to the decision by the Council of State—an administrative court in Belgium that exercises jurisdiction over the review of administrative acts, *see* Council of State of Belgium, The Institution, Legal Powers, http://www.raadvst-consetat.be/?page=about_competent&lang=en (last accessed Mar. 13, 2020)—which rejected Trabelsi's appeal of the Minister of Justice's extradition order on the ground that it violated

Article 5 of the treaty, *see* Dkt. 367-21 at 28–29.[5] The D.C. Circuit, like the Minister of Justice, interpreted the Treaty to require an offense-based analysis. And, the Council of State's opinion does not contravene that view. *See* Dkt. 367-21 at 28–29. The fact that other Belgian courts construed the Treaty to apply an identity-of-the-facts analysis does not undercut the deference U.S. courts owe to the decision of the Belgian state to grant the U.S. request for extradition, without limitation. In the words of the *Campbell* decision, "[i]t could hardly promote harmony" for the United States, having successfully extradited Trabelsi to the United States, to "take the stance that the extraditing nation was wrong to grant the request." *Campbell*, 300 F.3d at 209

Second, to the extent Trabelsi's argument would require this Court to declare that the Belgian Minister of Justice violated Belgian law by ignoring a domestic judicial decree, the act-of-state doctrine bars the Court from doing so. The act-of-state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). It applies when "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within" its boundaries. *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 405, (1990). It serves as "a rule of decision for the courts of this

[5] Trabelsi separately argues that the decision of the Council of State further demonstrates that the Minister of Justice excluded the four overt acts from his grant of extradition. Dkt. 345 at 8–9. That argument fails because (1) it is far from clear that the Council of State's decision, which simply refers to the remaining twenty-four overt acts a "among . . . those for which the extradition is granted," Dkt. 367-21 at 26–27, can carry that weight; (2) the Council of State decision was available at the time the D.C. Circuit decided the interlocutory appeal and, indeed, the D.C. Circuit cited to that decision, 845 F.3d at 1185; and (3) despite that decision, the D.C. Circuit held that the Minister of Justice "rejected the limitation on overt acts," *id.*

country," *id.* at 405 (quoting *Ricaud v. Am. Metal Co.,* 246 U.S. 304, 310 (1918)), requiring that, "in the process of deciding [a case], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid," *id.* at 409. The doctrine is "a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Id.* at 404 (quoting *Sabbatino,* 376 U.S. at 423). The act-of-state doctrine advances "international comity, respect for the sovereignty of foreign nations in their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *Id.* at 408. Federal courts must tread lightly when they wade into disputes between the two other branches of the U.S. government. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). They should proceed with even greater trepidation when asked to wade into a dispute between two branches of a foreign government.

For all of these reasons, Trabelsi has failed to offer any significant, new, and previously unavailable evidence that would warrant departure from the mandate rule. The Court will, accordingly, deny Trabelsi's motion for reconsideration, Dkt. 345.

B. Motion to Compel Compliance With Doctrine of Specialty and to Exclude Rule 404(b) Evidence

Trabelsi also moves "to compel compliance with" the doctrine of specialty and to exclude evidence of the Kleine-Brogel plot as inadmissible under Federal Rule of Evidence 404(b). Dkt. 210. The doctrine of specialty provides that, "once extradited, a person can be prosecuted only for those charges on which he was extradited." *United States v. Sensi*, 879 F.2d 888, 892 (D.C. Cir. 1989). The extradition treaty between the United States and Belgium incorporates this principle. Extradition Treaty, Art. 15 ("A person extradited under this Treaty may not be

detained, tried, or punished in the Requesting State except for . . . the offense for which extradition has been granted . . . .").

Trabelsi previously moved to dismiss the indictment on the ground that it violated the doctrine of specialty, enshrined in Article 15 of the Treaty. *See* Dkt. 70 at 20–26. This Court (C.J. Roberts) denied that motion on two independent grounds. First, while recognizing that it was an open question in this circuit whether a defendant may challenge his extradition on specialty grounds, the Court held that "it appears that Trabelsi cannot challenge his extradition as a violation of Article 15" because he lacked standing to do so. Dkt. 124 at 28–29. Second, the Court explained that, even if Trabelsi did have standing to assert a defense under the doctrine of specialty, the operative test is "whether the requested state has objected or would object to prosecution." *Id.* at 30 (quoting Restatement (Third) of Foreign Relations Law § 477 cmt. b (1987)). The Court then concluded that, because Belgium "ha[d] repeatedly consented to prosecution under the superseding indictment as a whole, Trabelsi's [specialty] challenge must fail." *Id.*

Trabelsi now argues that because overt acts 23, 24, 25, and 26 were "excluded" from the Minister of Justice's extradition order, he cannot be prosecuted for those acts. Dkt. 210 at 12–16. Even beyond the charges he can face, moreover, Trabelsi argues that all evidence of the four overt acts—and, more generally, evidence relating to the Kleine-Brogel plot—must be excluded as inadmissible bad-acts evidence under Federal Rule of Evidence 404(b). *Id.* at 16. Finally, and in the in alternative, he requests a jury instruction about the limited purpose for which any such evidence might be considered. *Id*. at 19–21.

Trabelsi's motion fails because it turns on the scope of Belgium's grant of extradition. As already explained, the D.C. Circuit has already concluded that the Minister of Justice rejected

the Belgian courts' overt act exclusion and that Belgium extradited Trabelsi without that exclusion. *See Trabelsi*, 845 F.3d at 1184–85. Thus, with respect to that issue, the Court is bound, barring "extraordinary circumstances." *See Cabrera*, 699 F. Supp. 2d at 41; *LaShawn A.*, 87 F.3d at 1393, 1393 n.3. And, as already explained, the facts relating to the extradition decision have not changed since the D.C. Circuit reached that conclusion. Because Trabelsi's invocation of the doctrine of specialty and Rule 404(b) rests entirely on this rejected premise, the Court denies that motion as well.

Nor has Trabelsi offered anything in his motion that would warrant reconsideration of this Court's prior holding that "the standard for adjudicating a [specialty motion] in the United States is whether the requested state has objected or would object to prosecution," and that, under that standard, the motion fails. Dkt. 124 at 30. That approach is consistent with the approach taken by the Second Circuit in *Campbell*, where the court relied not only on the extraditing state's decision to extradite but also on "the record of communications between the two nations," including post-extradition clarifications provided by the extraditing state, in order to reject the defendant's motion to dismiss on the basis of the doctrine of specialty. *Campbell*, 300 F.3d 211–12. Trabelsi has not offered any evidence that suggests that "the record of communications" demonstrates a violation of the terms of the 2011 extradition. Rather, in response to this newest round of briefing, the Belgian state submitted a diplomatic note, again consenting to Trabelsi's prosecution without the exclusion of any overt acts, notwithstanding the continued conflicting position of the courts of Belgium. *See* Dkt. 355-2. Moreover, as already explained, the most recent communication—which merely provided, without adopting, the conclusion of the February 26, 2020 judicial decision to the U.S. government—does not evidence a change in the Belgian state's views. *See* Dkt. 375-1.

Accordingly, the Court once again rejects the premise at the core of Trabelsi's motion. It follows that Trabelsi's trial on the superseding indictment—without any limitation on the enumerated overt acts—would not violate the doctrine of specialty enshrined in Article 15 of the Treaty, and that Trabelsi's motion is, therefore, unavailing.

CONCLUSION

For the foregoing reasons, Defendant's motion to compel compliance with the treaty, Dkt. 210, and motion for reconsideration, Dkt. 345, are hereby **DENIED**.

SO ORDERED.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: March 13, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, v. NIZAR TRABELSI, *Defendant.*	No. 06-cr-89 (RDM)

MEMORANDUM OPINION AND ORDER

Defendant Nizar Trabelsi was convicted in Belgium of several crimes, including attempting to bomb the Kleine-Brogel Air Base ("Kleine-Brogel") in 2001. After serving his sentence in Belgium, Trabelsi was extradited to the United States to face various conspiracy and terrorism charges. Since 2008—both before and after his extradition—he has filed an ever-expanding array of cases and motions in Belgium, the European Union, and the United States challenging the lawfulness of his extradition. Much of that litigation has focused on the question of whether his extradition violated the *non bis in idem*—or, simply, *non bis*—provision of the Extradition Treaty between Belgium and the United States, which prohibits extradition "when the person sought has been found guilty, convicted[,] or acquitted in the Requested State for the office for which extradition is" sought. *See* Extradition Treaty Between the United States of America and the Kingdom of Belgium, art. 5, Apr. 27, 1987, S. Treaty Doc. No. 104-7 ("Extradition Treaty" or "Treaty").

In November 2015, this Court determined that Trabelsi's extradition did not violate the *non bis* provision of the Treaty and thus rejected Trabelsi's motion to dismiss his U.S. indictment, *United States v. Trabelsi*, No. 06-cr-89, 2015 WL 13227797 (D.D.C. Nov. 4, 2015)

("*Trabelsi I*"), and, in January 2017, the D.C. Circuit affirmed that decision, *United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017) ("*Trabelsi II*"). Then, on the eve of trial, Trabelsi moved for reconsideration of the ruling from the court of appeals in light of an intervening decision from a Belgian court. At the parties' request, the Court adjourned the trial date to permit briefing on whether developments in the Belgian courts shed new light on Trabelsi's *non bis* claim. After considering the parties' arguments, however, the Court concluded that none of the intervening events that Trabelsi proffered as a basis for reconsideration called into question the prior decisions of this Court and the D.C. Circuit. *United States v. Trabelsi*, 2020 WL 1236652 (D.D.C. March 13, 2020) ("*Trabelsi III*"), and Trabelsi has appealed that decision, *see United States v. Trabelsi*, No. 20-3028 (D.C. Cir.) (appeal docketed Mar. 31, 2020).

Now before the Court are two motions related to the pending appeal. In one, Trabelsi asks the Court to stay further proceedings in the district court while his appeal is pending. Dkt. 402. In the other, he invokes yet further developments in the long-running Belgian litigation to seek an indicative ruling from the Court reconsidering its prior order denying reconsideration of this Court's (and the D.C. Circuit's) rejection of his *non bis* argument. Dkt. 401. In the meantime, the D.C. Circuit has held Trabelsi's appeal in abeyance pending resolution of his motion for an indicative ruling. *See* Order, *United States v. Trabelsi*, No. 20-3028 (D.C. Cir. Dec. 1, 2020).

For the following reasons, the Court will **GRANT** Trabelsi's motion to stay the district court proceedings pending resolution of his appeal but will **DENY** his motion for reconsideration, as permitted by Federal Rule of Criminal Procedure 37.

I. BACKGROUND

A. Trabelsi's Belgian Prosecution and Extradition

The factual background of this case is set forth in greater detail in several prior opinions. *See Trabelsi I*, 2015 WL 13227797, at *1; *Trabelsi II*, 845 F.3d at 1184–85; *Trabelsi III*, 2020 WL 1236652, at *1–7. Here, the Court focuses on the procedural history of the case, as relevant to resolving the pending motions.

The Belgian police arrested Trabelsi on September 13, 2001, *Trabelsi II*, 845 F.3d at 1184, and he was charged with and ultimately convicted of several offenses under Belgian law, including charges of conspiring and attempting to bomb Kleine-Brogel. *See Trabelsi III*, 2020 WL 1236652, at *1–2 (citing Dkt. 367-3 at 24, 27, 31). On September 30, 2003, Trabelsi was sentenced to ten years of incarceration in Belgium. *Trabelsi II*, 845 F.3d at 1184. On April 7, 2006, while Trabelsi was serving his sentence in Belgium, a U.S. grand jury indicted him for Conspiring to Kill U.S. Nationals Outside the United States, in violation of 18 U.S.C. §§ 1111(a) and 2332(b)(2); Conspiring and Attempting to Use Weapons of Mass Destruction, in violation of 18 U.S.C. §§ 2 and 2332a; Conspiring to Provide Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; and Providing Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. §§ 2 and 2339B. *Trabelsi III*, 2020 WL 1236652, at *2 (citing Dkt. 3). On November 16, 2007, a grand jury returned a superseding indictment, which charged Trabelsi with the same statutory violations but revised the charged overt acts.[1] *Id.* (citing Dkt. 6). And on April 4, 2008, the United States asked Belgium to extradite Trabelsi to the United States "and provided the Belgian government

[1] Many years later, the United States dropped the material support counts. *See* Minute Order (June 10, 2019); Dkt. 231.

with an affidavit describing the above charges and the governing U.S. law as well as a copy of the superseding indictment." *Id.* (citing Dkt. 367-7).

The extradition request set off what has become a long-running dispute between the Belgian state and the Belgian courts as to the proper interpretation of the Extradition Treaty and the permissible scope of Trabelsi's extradition under the Treaty. The disagreement pertains to a provision of the Treaty dictating that "[e]xtradition shall not be granted when the person sought has been found guilty, convicted[,] or acquitted in the Requested State for the offense for which extradition is granted." Extradition Treaty, art. 5. This provision embodies a principle of international law known as *non bis in idem* (meaning "not twice"), akin to the double jeopardy rule in American law.[2]

On November 19, 2008, the Court Chamber of the Court of First Instance of Nivelles issued a decision addressing, inter alia, the application of the *non bis* principle to Trabelsi's

[2] Whether the Treaty in fact incorporates the *non bis* principle is itself a matter of some dispute in this case. At least as interpreted in many European courts, the *non bis* principle provides protection against double prosecutions based on not only the same offenses, but also based on any of the same underlying facts, even if those facts are used in support of different charges. *See* John A.E. Vervaele, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, 9(4) Ultrect L. Rev. 211 (2003) (discussing this "*idem factum* approach"). In extraditing Trabelsi, the Belgian state thus referred to the operative portion of the Treaty as embodying a "double jeopardy principle," rather than "a *non bis* principle," given the Treaty's use of the term "offense." Dkt. 367-17 at 12. But the *non bis* principle can also have a more generic meaning, encompassing either fact-based or offense-based prohibitions on double prosecutions. *See* Jennifer E. Costa, *Double Jeopardy and Non Bis in Idem: Principles of Fairness*, 4 U.C. Davis J. Int'l L. & Pol'y 181 (1998). When used in this more generic way, *non bis* can refer to a rule, like the one in the Treaty, that prohibits separate sovereigns from bringing subsequent prosecutions for the same crimes, whereas "double jeopardy" refers to a rule against subsequent prosecutions within a single sovereign. *Id.* at 183. The Court uses the term *non bis* to refer to the relevant Treaty provision for the sake of clarity and consistency and to avoid confusion with the American law of double jeopardy. But the Court's use of the term is not intended to convey support for a fact-based understanding of the Treaty provision. On the contrary, the Court finds persuasive the Belgian state's arguments for why the Treaty incorporates an offense-based approach.

proposed extradition. Dkt. 367-9. The court read the word "offense" in Article 5 to mean "facts . . . or acts . . . falling under the scope of criminal law of one of the two States." Dkt. 367-9 at 7. Based on that interpretation, the court reasoned that the overt acts numbered 23, 24, 25, and 26 in the superseding indictment—specifically, those acts related to the attempted bombing of Kleine-Brogel—"very precisely correspond to the offenses[] committed on Belgian soil" for which Trabelsi had already been convicted. *Id.* The Belgian court thus held that the Extradition Treaty permitted Trabelsi's extradition, except as to those four overt acts. *Id.* at 8. The Brussels Court of Appeal, Dkt 367-11, and the Belgian Court of Cassation, the country's highest court, Dkt. 367-13, affirmed the decision from the Court of First Instance.

The Belgian state, however, took a different position. On November 23, 2011, the Belgian Minister of Justice granted the request from the United States to extradite Trabelsi. Dkt. 367-17 at 14. The Minister's order included substantial legal analysis, including of the *non bis* principle embodied in Article 5 of the Extradition Treaty and the possible exclusion of overt acts 23, 24, 25, and 26. *Id.* at 10–14. Looking to the text of the Treaty, the Minister explained that "Belgium and the United States have mutually committed to reject an extradition under this treaty if the person to be extradited was acquitted in the Requested State or was sentenced there for the same offense as the one for which the extradition is requested." *Id.* at 11. But because the treaty uses the word "offense," the Minister reasoned that "it is not the facts, but their qualification, the offenses, that have to be identical" for the *non bis* provision to apply. *Id.* That is, "the 'double jeopardy' principle mentioned in Article 5 of the Extradition Treaty is limited to the same offenses or to offenses that are substantially the same." *Id.* at 12. Overt acts, the Minister reasoned, are not "offenses," but instead "operate as elements in support of the charges." *Id.* Unless all the elements constituting an offense are the same under both U.S. and

Belgian law, "[t]he 'double jeopardy' principle does not exclude the possibility to use these elements." *Id.*

Applying this understanding of the Extradition Treaty to Trabelsi's case, the Minister concluded that the offenses of which Trabelsi was convicted in Belgium "do not correspond to the offenses listed under the counts . . . that appear in the arrest warrant on which the U.S. extradition request is based." *Id*. The Minister thus ordered that "[t]he extradition of Nizar Trabelsi is granted to the United States government for the offenses for which it is requested," without any mention of exclusions for the four disputed overt acts. *Id.* at 14.

Trabelsi appealed the Minister's extradition order to the Council of State, an administrative court that reviews decisions of the Belgian executive. On September 23, 2013, the Council of State affirmed the extradition order and concluded that overt acts 23, 24, 25, and 26 did not constitute "offenses" within the meaning of the Treaty. Dkt. 367-21. The Council reasoned that the overt acts in the superseding indictment were not themselves offenses, but rather "'overt acts' constitute elements that shall serve the U.S. judicial authorities to determine whether the applicant is guilty or not guilty of the four charges brought against him." *Id.* at 29. On October 3, 2013, Belgium extradited Trabelsi to the United States. *Trabelsi II*, 845 F.3d at 1185.

B. *Trabelsi I*

Nearly a year after his extradition, on September 15, 2014, Trabelsi moved to dismiss the superseding indictment on two grounds. Dkt. 70. First, he argued that his extradition violated the *non bis* provision of the Extradition Treaty because the Minister of Justice "incorrectly concluded that '[t]he constitutive elements of the American and Belgian offenses respectively, their significance, and the place[](s) and time(s) at which they were committed do not match.'"

Id. at 14 (quoting Minister of Justice's Extradition Order (Dkt. 367-17 at 12)). Although the United States had charged a broader conspiracy than had been alleged in Belgium, Trabelsi argued that "the [U.S.] government will present at trial only the narrow evidence of the plot to bomb Kleine-Brogel and thereby circumvent Article 5 of the Treaty." *Id.* at 16. "In other words, Trabelsi argued, the U.S. government seeks to do precisely what the *non bis* principle precludes—it seeks to try him in the United States for the same conspiracy for which he was previously tried and convicted in Belgium." *Trabelsi III*, 2020 WL 1236652, at *3. Alternatively, Trabelsi argued that Belgium had, in fact, denied his extradition with respect to the allegations set forth in overt acts 23, 24, 25, and 26, and that his prosecution based on those acts would therefore violate the doctrine of "speciality." Dkt. 70 at 19–26. That doctrine[3] is embodied in Article 15 of the Treaty, which permits the requesting country to try or to punish a person for only "'the offense for which extradition has been granted.'" *Id.* at 20 (quoting Extradition Treaty, art. 15). Trabelsi argued that, "[b]y continuing to pursue the[] allegation for which extradition was not authorized, the United States is in violation of . . . Article 15 and the doctrine of speciality." *Id.* at 26.

Along with its opposition to that motion, the United States filed a diplomatic note from the Belgian state. Dkt. 80-1. The note, dated October 29, 2014, explained that the Extradition Order, "which is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States, makes clear that Mr. Trabelsi may be tried on all of the charges set out in [the superseding] indictment, and that any similarity between the United

[3] In the United States, the name of this doctrine is usually spelled "specialty," but the Extradition Treaty uses the British spelling, "speciality." *See Trabelsi I*, 2015 WL 13227797, at *10 n.9. The prior opinions in this case have used the two spellings interchangeably. In this opinion, the Court uses the American spelling, "specialty," unless quoting from the Treaty or a pleading that uses the British spelling.

States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment." *Id.* at 1. Specifically with respect to overt acts 23, 24, 25, and 26, the note explained that "[t]he order is also clear that the prosecution may offer facts relating" to those acts, and "[n]either Mr. Trabelsi's trial on the charges set out in the [superseding] indictment[] nor the prosecution's offering proof as to any of the overt acts recited in the indictment[] is inconsistent with the Order." *Id.* The note added that neither "trial" nor "offering of proof" based on those acts would "violate the rule of specialty." *Id.*

The Court (Roberts, C.J.) denied Trabelsi's motion to dismiss. *Trabelsi I*, 2015 WL 13227797, at *11. As a threshold matter, the Court explained that "'an American court must give great deference'" to a foreign government's decision to extradite a defendant, as a matter of international comity. *Id.* at *4 (quoting *Casey v. Dep't of State*, 980 F.2d 1472, 1476–77 (D.C. Cir. 1992)). Next, in the absence of a clear legal test for applying the *non bis* provision of the Extradition Treaty, the Court fell back on the double-jeopardy test from *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Id.* at *5–6. Based on a comparison of the elements, as required by *Blockburger*, the Court determined that the Belgian offenses were different than those charged in the superseding indictment. *Id.* at *6–9. The Court thus concluded that Trabelsi could be tried on all of the U.S. charges without violating the *non bis* provision of the Extradition Treaty. *Id.* Turning to the doctrine of specialty, the Court held that Trabelsi did not have standing to bring a claim under Article 15 of the Treaty because "Belgium has repeatedly consented to Trabelsi's prosecution under the superseding indictment." *Id.* at *10.

C. *Trabelsi II*

Trabelsi took an interlocutory appeal of the Court's order denying his *non bis* motion,[4] and the D.C. Circuit affirmed. *Trabelsi II*, 845 F.3d at 1193. Relying on *United States v. Campbell*, 300 F.3d 202 (2d Cir. 2002), the D.C. Circuit took a "deferential approach." *Id.* at 1189. Interpreting "the scope of Article 5 [was] a matter for Belgium," and the court of appeals declined to "'second-guess [Belgium's] grant of extradition.'" *Id.* at 1188–89 (quoting *Campbell*, 300 F.3d at 209) (alteration in original). Because "[t]he extradition grant did not exclude any of the offenses included in the request for extradition," the court thus "presume[d] that Belgium has determined that none of the offenses in the indictment violate Article 5 of the Treaty." *Id.* at 1189.

The court of appeals explained, however, that this presumption could be rebutted with evidence of (1) "misconduct on the part of the United States in procuring an extradition;" (2) "the absence of review of the extradition request by the requested party;" or (3) "a showing that the requested state or party did not apply the correct legal standard adopted in the Treaty." *Id.* Trabelsi had presented no evidence of either misconduct on the part of the United States or a lack of review on the part of Belgium. *Id.* As to whether Belgium had applied the correct legal standard, the D.C. Circuit concluded that the Belgian state interpreted the Treaty reasonably, especially in light the Treaty's use of the term "offense" in Article 5, rather than "acts." *Id.*

[4] Because double-jeopardy decisions are subject to immediate interlocutory appeal, and because Trabelsi's *non bis* argument was akin to a double-jeopardy challenge, Trabelsi was permitted to take an immediate appeal of the Court's order declining to dismiss the indictment.

Based on the deference that it accorded to Belgium's interpretation of the Extradition Treaty, the D.C. Circuit declined to consult the *Blockburger* test that the district court had employed.[5] *Id.*

C. *Trabelsi III*

After the D.C. Circuit's affirmance, the Court set a trial date of September 16, 2019. Minute Order (April 18, 2019). Trabelsi then filed a motion to compel compliance with the Treaty and the doctrine of specialty, renewing his argument that his extradition had excluded the four overt acts related to the plot to bomb Kleine-Brogel. Dkt. 210. He also argued that evidence of those acts should be excluded under Federal Rule of Evidence 404(b). *Id.*

While that motion was pending, the Belgian courts weighed in again. On August 8, 2019, roughly a month before the trial was scheduled to begin, the Brussels Court of Appeal issued a new decision regarding Trabelsi's extradition. Dkt. 312-2. In considering a claim from Trabelsi that Belgian officials should be precluded from aiding the U.S. prosecution because his Treaty rights had been violated, the Belgian court again disagreed with the Minister of Justice's interpretation of the Extradition Treaty. The Belgian court construed the *non bis* provision as

[5] In at least one place in its opinion, the D.C. Circuit appeared to elide the disagreement between the Belgian courts and the Belgian state, stating that it was "defer[ring] to th[e] decision of the Belgian courts and Minister of Justice that, based on an offense-based analysis, Trabelsi's extradition comports with Article 5 of the Treaty." *Trabelsi II*, 300 F.3d at 1190. Elsewhere in the opinion, however, the D.C. Circuit explained in detail the procedural history of the case, including the back-and-forth between the Belgian courts and the Belgian state. *See id.* at 1184–85. Although not entirely clear, it may be that at this point in its opinion, the court of appeals was referring to the Belgian Council of State, which is an administrative court that concurred in the Minister's extradition order. *See Trabelsi III*, 2020 WL 1236652, at *13. But, in any event, this Court has little doubt that the D.C. Circuit (1) understood that the Belgian courts—and, particular, the Court of First Instance in Nivelles, the Brussels Court of Appeal, and the Belgian Court of Cassation—had concluded that the four overt acts should be excluded from the extradition order; (2) understood that the Belgian Minister of Justice "rejected the limitation on overt acts, explaining that they were 'not the offices for which an extradition [was] requested' because 'an overt act is an element . . . which in itself cannot automatically be qualified as an offense;'" and (3) understood that the Minister spoke on behalf of the Belgian state on matters affecting international relations. *Trabelsi II*, 300 F.3d at 1184–85.

requiring "a review of the identity of the fact and not of its qualification." *Id.* at 23 (emphasis in original). As the court explained, the Belgian courts had unanimously interpreted the Extradition Treaty as requiring a fact-based analysis, and only the Minister's "extradition order of November 23, 2011 departs from this consistent interpretation." *Id.* at 25. The Belgian court further explained that "the Ministerial order on Extradition . . . could only validly grant the extradition by the United States within the limits of the exequatur granted to the arrest warrant, that is to say for the four counts mentioned in the arrest warrant, *but not for the '[o]vert [a]cts' 23, 24, 25, and 26*." *Id.* at 26 (emphasis in original). The court thus concluded, "according to the analysis which prevails in Belgian law." that "the extradition . . . does not allow" Trabelsi "to be tried for the 'overt acts'" in dispute, "namely the facts relating to the attempt of bombing the Kleine-Brogel military base." *Id.* (emphasis in original).

Following this decision, both Trabelsi and the government asked the Court to postpone the trial. Aug. 15, 2019 Hrg. Tr. (Rough at 4, 7–8). Trabelsi moved for reconsideration of this Court's and the D.C. Circuit's decisions rejecting his *non bis* argument and declining to dismiss the indictment on that ground. Dkt. 345. In Trabelsi's view, "the August 8, 2019 decision [of the Belgian court] show[ed] that the Minister of Justice did not reject and could not have rejected the Belgian courts' exclusion of overt acts 23, 24, 25, and 26, and that this Court and the D.C. Circuit mistakenly deferred to an interpretation of the Treaty that Belgium had rejected, and still rejects." *Trabelsi III*, 2020 WL 1236652, at *6.

The government opposed the motion and provided the Court with a second diplomatic note from the Kingdom of Belgium, this one dated November 13, 2019. Dkt. 355-1. This note asserted that the August 8, 2019 decision of the Brussels Court of Appeal was "contrary to the Extradition order of 23 November 2011 and in our view, therefore contrary to the clear wording

of article 5 of the Treaty." *Id.* at 1. The note further explained that, based on this disagreement, the Belgian government had appealed the decision to the Belgian Court of Cassation. *Id.* The note went on to reaffirm that the Minister of Justice's 2011 extradition order "is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States." *Id.* at 2. The note sought to "make[] clear that Mr. Trabelsi may be tried on all of the charges set out in [the] indictment, and that any similarity between the United States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment." *Id.* Finally, the note asserted that the 2011 extradition order was "clear that the prosecution may offer facts relating to all 28 overt acts in prosecuting Mr. Trabelsi on the charges in the indictment." *Id.*

Before the Court ruled on Trabelsi's motions, another Belgian court issued a decision addressing Trabelsi's ongoing challenge to his extradition. On February 26, 2020, the Francophone Court of First Instance of Brussels ordered the Belgian state to provide a copy of this decision to U.S. officials and to "specify[ ] in the accompanying letter" the following:

> According to the analysis prevailing in Belgian law, the extradition of Mr. TRABELSI does not allow him to be prosecuted in the United States to be tried there for the facts set out in the "Overt Acts" Nos. 23, 24, 25 and 26 set out in paragraph 10 of the first count and which are supposed to be repeated in support of the other counts [*of the American arrest warrant which is the basis for the extradition (indictment of the Grand Jury of November 3, 2006, filed on November 16, 2007 at the Registry of the US District Court of the District of Columbia*], namely, the facts relating to the attempted attack on the Kleine-Brogel military base.

Dkt. 373-1 at 72 (brackets and emphasis in original).

In *Trabelsi III*, this Court rejected Trabelsi's motion for reconsideration. As an initial matter, the Court explained the "heavy burden" that Trabelsi faced in seeking reconsideration from a district court of a decision from the court of appeals. *Trabelsi III*, 2020 WL 1236652, at *8. Although a district court may reconsider a question previously resolved in an appellate

decision in "extraordinary circumstances," including where significant new evidence has come to light, the Court emphasized "that respect for the proper roles of trial and appellate courts and the importance of judicial economy and order demand that district courts apply these exceptions only in very special situations." *Id.* (internal quotation marks and citations omitted). Because Trabelsi sought reconsideration of a question already decided by the D.C. Circuit, he bore "the heavy burden of demonstrating that the evidence is new, and not merely cumulative; that it would lead to a different result; and that the evidence could not have been previously adduced through reasonable diligence." *Id.*

Next, the Court clarified that, in reconsidering the earlier decisions, its inquiry was limited to the proper interpretation of the original 2011 extradition order. That is, the subsequent judicial decisions from the Belgium court were relevant only if they provided "significant, new evidence about the meaning of the Minister's 2011 extradition order." *Id.* at *9. The text of the extradition order itself, however, weighed heavily against reconsideration. The extradition order directly addressed the Belgian court decisions excluding the four overt acts, and the Minister of Justice expressly rejected those courts' reasoning in a lengthy legal analysis. *See* Dkt. 367-17 at 10–14. The Minister concluded that the overt acts did "not represent in any way the offenses for which an extradition [was] requested." *Id.* at 13. Based on this text, "the D.C. Circuit read the Minister of Justice's extradition order to grant extradition, without limitation." *Trabelsi III*, 2020 WL 1236652, at *9.

With those considerations in mind, the Court held that the subsequent decisions from the Belgian courts did "not come close to meeting th[e] high bar" of showing that the D.C. Circuit's interpretation was mistaken. *Id.* at *10. On the contrary, when read carefully, these decisions

confirmed that the Minister of Justice had ordered Trabelsi's extradition without exclusion, although, in the view of the Belgian courts, he had done so without legal authority.

Starting with the August 8, 2019 decision of the Brussels Court of Appeal, the Court explained that the opinion "addresses only whether the Minister of Justice acted lawfully, in the view of that court, when he ordered Trabelsi's extradition without excluding those overt acts." *Id.* This Court rejected Trabelsi's argument that the August 8, 2019 decision demonstrated that "the Minister, in fact, limited the extradition order in conformity with" the prior decisions of the Belgian courts. *Id.* As the Court explained, "Even if read to say that the Minister of Justice was, in the view of Brussels Court of Appeal, bound by those judicial decisions and *should have excluded* the overt acts, that does not demonstrate that he *did exclude* them." *Id.* (emphasis in original). Other portions of the August 8, 2019 decision, moreover, showed that the Brussels Court of Appeal agreed with the D.C. Circuit's reading of the extradition order. *Id.* The Belgian court observed that "[o]nly the ministerial extradition order of November 23, 2011 depart[ed] from [the Belgian courts'] consistent interpretation of Article 5 of the Extradition [Treaty]." Dkt. 345-1 at 25. This Court, accordingly, concluded that, "if anything, the August 8, 2019 opinion adds further support for—and certainly does not controvert—the D.C. Circuit's conclusion that the Minister of Justice granted extradition without limitation." *Trabelsi III*, 2020 WL 1236652, at *10.

The Court then turned to the February 26, 2020 decision from the Court of First Instance in Brussels. That decision again held that "the Minister of Justice incorrectly based the grant of extradition on an offense-based, rather than fact-based, analysis," in contravention of the prior decisions of the Belgian courts. *Id.* at *11 (citing Dkt. 373-1 at 62–65). The Court of First Instance held that the Minister's extradition order thus "'constitute[d] an excess of power'

because the Minister of Justice exceeded the limits on extradition set by the courts." *Id.* (quoting Dkt. 373-1 at 65). But this Court explained that it "need not—and, indeed, should not—engage with the question whether the Belgian Minister of Justice exceeded his authority under Belgian law by declining to conform his order to the 'exequatur' granted by the Court of First Instance or to other pronouncements of the Belgian courts." *Id.* Rather, all that mattered for the Court's purposes was "that the February 26, 2020 decision *confirms* the D.C. Circuit's understanding that the Minister of Justice did, in fact, order Trabelsi's extradition to the United States without excluding the four overt acts." *Id.* (emphasis in original).

The Court found further support for its conclusion in the November 13, 2019 diplomatic note. *Id.* As the Court observed, this diplomatic note "offer[ed] the official position of the Belgian state and explains that the Minister of Justice's 2011 extradition order 'is the decision by the Belgian government that sets forth the terms of Mr. Trabelsi's extradition to the United States.'" *Id.* (quoting Dkt. 355-1 at 2). The diplomatic note did not equivocate as to the meaning of the original extradition order, explaining that the order "is also clear that the prosecution may offer facts relating to all 28 overt acts in prosecuting Mr. Trabelsi on the charges in the indictment." *Id.* "That assertion," the Court concluded, "is consistent with the plain language of the 2011 order, the Belgian state's prior diplomatic note (which was before the D.C. Circuit), and with the D.C. Circuit's opinion." *Id.*

The Court placed relatively little weight, however, on a communication from the Belgian state to the United States government concerning the February 26, 2020 decision from the Court of First Instance in Brussels. "The communication does not adopt the conclusion of the Court of First Instance as [the Belgian state's] own position, but, rather, merely apprises the U.S. government that the Court of First Instance 'has ordered the Belgian Government to formally

notify its judgment' and then recites the language that the Court of First Instance required the Belgian state convey to the United States." *Id.* (quoting Dkt. 375-1 at 1). In essence, the Belgian state merely acted as a messenger for the Belgian courts, and the communication, accordingly, did not cast doubt on the D.C. Circuit's understanding of the Minister's original extradition order. Pulling these various strands together, the Court concluded that "Trabelsi [had] offer[ed] no evidence—much less significant, new evidence that was not previously available—that calls the D.C. Circuit's understanding of the extradition order into question." *Id.*

The Court then considered Trabelsi's related contention "that regardless of what the Minister of Justice may have intended, he was precluded as a matter of Belgian law from granting the extradition request without excluding the four overt acts because he was bound by the Belgian courts' decisions excluding those overt acts." *Id.* The Court rejected that argument for two reasons. First, "the D.C. Circuit's reasoning did not turn on whether the Minister of Justice was acting with lawful authority under Belgian law or in conformity with Belgian judicial decisions." *Id.* at 12. Second, "to the extent Trabelsi's argument would require this Court to declare that the Belgian Minister of Justice violated Belgian law by ignoring a domestic judicial decree, the act-of-state doctrine bars the Court from doing so." *Id.* at *13. That doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). Most fundamentally, whether framed under the act-of-state doctrine or otherwise, interests of international comity and respect for the sovereignty of foreign nations counseled against "wad[ing] into a dispute between two branches of a foreign government." *Trabelsi III*, 2020 WL 1236652, at *13.

Finally, the Court rejected Trabelsi's separate motion to compel compliance with the doctrine of specialty and to exclude Rule 404(b) evidence. *Id.* at *14. That motion was premised on interpreting the extradition order as excluding overt acts 23, 24, 25, and 26. *Id.* But the Court had already rejected that interpretation and, like the D.C. Circuit, concluded that "Belgium extradited Trabelsi without that exclusion." *Id.*

The Court's decision in *Trabelsi III* is now on appeal to the D.C. Circuit. See *United States v. Trabelsi*, No. 20-3028 (D.C. Cir.) (appeal docketed Mar. 31, 2020). In one of the two pending motions addressed in this opinion, Trabelsi moves to stay the district court proceedings until his interlocutory appeal is resolved. Dkt. 402. Meanwhile, the D.C. Circuit has held Trabelsi's appeal in abeyance pending this Court's resolution of his motion for indicative ruling, Dkt. 401. *See* Order, *United States v. Trabelsi*, No. 20-3028 (D.C. Cir. Dec. 1, 2020).

D. Further Developments in Belgian Courts and Motion for Indicative Ruling

In arguing that intervening events have cast further doubt on the lawfulness of his extradition, Trabelsi focuses on two decisions from Belgian courts and two court pleadings filed by the Belgian executive.

1. *May 28, 2020 Decision*

On May 28, 2020, the Francophone Court of First Instance in Brussels issued a decision in the ongoing litigation over the legality of Trabelsi's extradition. Dkt. 401-1. Trabelsi had sued the Minister of Justice for approximately € 50,000 on a claim that the Minister's November 13, 2019 diplomatic note, discussed above, violated the Brussels Court of Appeal's judgment of August 8, 2019. *Id.* at 11. In that August 8, 2019 judgment, the Brussels Court of Appeal ordered the Belgian state "to officially notify the US authorities" with " a copy of this ruling, inviting the US authorities to acquaint themselves with the legal analysis" in the opinion,

specifically its conclusion that extradition was improper as to the four overt acts, "under a penalty of € 5,000 per day of delay, with a maximum of € 50,000." *Id.* at 12. Trabelsi argued in his recent suit that the Belgian state had violated that injunction by maintaining its position that Trabelsi could be prosecuted based on those overt acts in its November 13, 2019 diplomatic note. *Id.* at 11.

The Court of First Instance explained that the "disputed injunction" from the Brussels Court of Appeal was "aimed at and was sufficient to [] protect, on the one hand, Mr. TRABELSI's right not to be tried in the United States for acts which had already led to his conviction in Belgium (*non bis in idem*), and on the other hand, his right not to be tried there for acts foreign to those for which his extradition had been granted (principle of specialty)." *Id.* at 13. Such an injunction had been necessary, the Belgian court posited, "due to the fact that the Belgian State's position on the possibility of [Trabelsi] being tried in the United States for the acts linked to the attempted attack on the Kleine Brogel military base was somewhat opaque and therefore a source of confusion on the part of the American authorities." *Id.* at 14. Once this Court was made aware of the August 8, 2019 decision, however, "the confusion was cleared up and the threat, in all logic, removed." *Id.* But "confusion" was reintroduced, the Court of First Instance reasoned, when the Belgian state, in its November 13, 2019 note, reaffirmed its position that Trabelsi's extradition included no limitation with respect to the four disputed overt acts. *Id.* That diplomatic note "sought to destroy the effect which the Brussels Court of Appeal's injunction should normally have had, namely to remove any ambiguity" as to the interpretation of the Extradition Treaty prevailing in Belgian law, and the note had thus "revived the threat to Mr. TRABELSI's rights." *Id.* at 14–15. The Court of First Instance held that the Belgian state

had acted without authority in issuing that note, because it gave the impression that "irrevocably settled" questions of law "would still be open to discussion." *Id.* at 15.

In discussing the harm that the Belgian state had caused, the Court of First Instance observed that, "in the international legal order, a declaration by a Minister of Justice is likely to be legally binding on the State on behalf of whom he is acting vis-à-vis the State to which it is addressed." *Id.* As the Belgian court explained, the Minister of Justice's actions are binding on Belgium where "the Minister of Justice expresses himself in a matter within his jurisdiction, provided, on the one hand, that the declaration in question demonstrates a willingness to commit himself and, on the other hand, that its purpose is sufficiently clear and precise,[] *which was the case here*." *Id.* at 16 (emphasis added). As such, "the Belgian State has therefore not only revived the threat to Mr. TRABELSI's rights, it has also aggravated it." *Id.*

2. *July 8, 2020 Pleading*

The Minister of Justice appealed the May 28, 2020 decision of the Court of Instance holding that the Belgian state had violated the August 8, 2019 injunction. On July 8, 2020, the Minister filed a brief arguing why the state had complied with the injunction. Dkt. 401-3. The Minister's primary argument was that he had complied with the literal text of the injunction because, on August 9, 2019, he had officially sent U.S. authorities a copy of the August 8, 2019 opinion "inviting the US authorities to acquaint themselves with the legal analysis." *Id.* at 7. According to the Minister, nothing more was required. *Id.* As for the November 13, 2019 diplomatic note, the Minister wrote that the note "was only intended to inform the U.S. judicial authorities that the BELGIAN STATE had filed an appeal in cassation." *Id.* at 11. But with that said, in the very next sentence of his brief, the Minister acknowledged that the note not only "explain[ed] the reasons for the appeal" but also reiterated the Belgian state's "point of view

regarding the concept of *non bis in idem*." *Id.* Given the ongoing appeal, the Minister argued, the applicability of the *non bis* principle to Trabelsi's extradition was "not definitely decided." *Id.* In any event, however, the Minister argued that the November 13, 2019 diplomatic note did not revive any threats to Trabelsi's rights, given that his March 5, 2020 communication had "again notified the American authorities of the content of a new ruling [the February 26, 2020 decision] served in Belgium and which confirmed the content of the ruling of the Brussels Court of Appeal." *Id.* at 13. Even more to the point, the Minister stressed that the November 13, 2019 note was not dispositive because the U.S. courts were well aware of the various decisions from the Belgian courts and had nevertheless rejected Trabelsi's *non bis* argument. *Id.* (discussing *Trabelsi III*).

3. *July 15, 2020 Decision*

In response to this Court's decision in *Trabelsi III*, Trabelsi returned to the Brussels Court of Appeal seeking an additional injunction requiring the Belgian state to notify this Court that he could not be prosecuted for offenses related to the four disputed overt acts. Dkt. 401 at 13. Specifically, he sought an order requiring the Belgian state to cease any cooperation in his prosecution in the United States and "to confirm again to the US authorities, within two days of the serving of the upcoming ruling, that the proceedings against Mr. TRABELSI cannot refer to the 'reported acts' 23 to 26, nor to any event taking place on the territory of the Kingdom, including the 'attempted attack' on the military base of Kleine Brogel." Dkt. 401-7 at 24. Curiously, Trabelsi also requested "that the Belgian State, in the interests of effectiveness of the measures prescribed by the judgment to come, be prohibited from mentioning, express or implied, that its actions are carried out following a conviction by the judiciary." *Id.* He even went so far as to ask the court to "[p]rohibit the Belgian State from mentioning the fact that the

said diplomatic note is issued as a result of a new judicial conviction, neither by making explicit reference to it, nor by using quotation marks or any other procedure likely to suggest that the executive would divest itself of the position thus expressed" and to "[p]rohibit the Belgian State from sending communications to the United States authorities other than that to which it is obliged by the judgment to be served, concerning the litigating issue." *Id.* at 26.

The Brussels Court of Appeal denied his request. Dkt. 401-7. It held that Trabelsi had not established "the need to have a new diplomatic note sent out," given that the Belgian state had already notified U.S. authorities of the August 8, 2019 decision. *Id.* at 32. The Belgian court questioned the utility of a further note, because the "American decisions," especially the D.C. Circuit's in *Trabelsi II*,

> make it clear that the American Courts are applying their own law and the law of international relations, that they have full knowledge of the dissensions between the Belgian Courts and the Belgian government, that they take into account the Belgian judicial decisions but that they consider that there is no reason, **by virtue of their own law**, over which this Court does not have the power to substitute its assessment, **and the law of international relations**, . . . to give priority to these Belgian judicial decisions over the ministerial order on extradition, which these decisions do not modify or cancel and the effects of which they do not suspend.

Id. at 34 (bold in original).

Unsurprisingly, the Belgian court also concluded that Trabelsi's request that the court order the Belgian state to withhold certain information from this Court (and potentially to mislead the Court) would be inappropriate and ineffective. In the view of the Belgian court,

> it would, at the very least, be contrary to procedural loyalty and the principle of separation of powers, to instruct the BELGIAN STATE to issue a diplomatic note in terms which would be dictated by the Court and to hide from the American Courts that the issuance of this diplomatic note would be ordered by a Court decision, in an *attempt* to make these jurisdictions believe that the government is issuing a personal and new interpretation of the Ministerial extradition order.

Id. (emphasis in original).

4. *July 31, 2020 Pleading*

In a separate action in Belgian court, Trabelsi against sought damages from the Belgian state, this time alleging that the Belgian state had not complied with the February 26, 2020 decision from the Court of First Instance in Brussels, discussed above, and the accompanying injunction. In responding to Trabelsi's argument, the Belgian state argued that

> the fact that the notification made by the Belgian State specified that it is carried out on court order, *including the details it contains, does not mean that the Belgian State would have* []*distanced itself once again from what was decided by the ruling of February 26, 2020, nor that the Belgian State has, again, not executed the ruling of the Court of First Instance of Brussels of February 26, 2020*.

Dkt. 401-9 at 7 (emphasis in original).

Based on these additional Belgian court materials, Trabelsi asks the Court to reconsider, yet again, its denial of his motion to dismiss the superseding indictment based on an alleged violation of Article 5 of the Treaty.

II. ANALYSIS

A. Motion to Stay

Although Trabelsi filed his motion to stay proceedings in the District Court, Dkt. 402, after his motion for indicative ruling, Dkt. 401, the Court will address the motion to stay first, because the motion for indicative ruling is premised on the assumption that the Court does not have jurisdiction during the pendency of the appeal.

Trabelsi's argument in support of his motion to stay is straightforward. He contends that the filing of his currently pending interlocutory appeal conferred jurisdiction on the D.C. Circuit and divested this Court of jurisdiction. Dkt. 402 at 1 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam) and *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (per curiam)). The government acknowledges that an interlocutory appeal of a

double jeopardy claim typically divests the district court of jurisdiction. Dkt. 424 at 14 (citing *Abney v. United States*, 431 U.S. 651, 657, 659–62 (1977)). But the government contends, relying on out-of-circuit precedent, that "a district court may continue to exercise jurisdiction over a case if the district court finds that the basis for the interlocutory appeal is frivolous or dilatory. *Id.* (citing *United States v. Farmer*, 923 F.2d 1557, 1565 (11th Cir. 1991) and *United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir. 1980) (en banc)). Although the D.C. Circuit has not—to date—explicitly adopted a similar limitation on the default rule that an appeal divests the district court of jurisdiction, it has observed that other courts "have carved out a few narrow exceptions to [the general] rule, such as where the defendant frivolously appeals . . . or takes an interlocutory appeal from a non-appealable order . . . ." *DeFries*, 129 F.3d at 1302–03 (internal citations omitted); *see also United States v. Black*, 759 F.2d 71, 73 (D.C. Cir. 1985).

This Court agrees with the government and that out-of-circuit precedent that there must be some limit on the ability of a defendant to cause delay through the filing of serial interlocutory appeals. As the Tenth Circuit has observed, the rule that an appeal divests the trial court of jurisdiction "should not leave the trial court powerless to prevent intentional dilatory tactics by enabling a defendant unilaterally to obtain a continuance at any time prior to trial by merely filing a motion, however frivolous, and appealing the trial court's denial thereof." *United States v. Hines*, 689 F.2d 934, 936–37 (10th Cir. 1982). At a January 8, 2020 hearing, this Court expressed a similar concern, noting that Trabelsi had already appealed once on the same double-jeopardy issue. Dkt. 370 at 116. The Court asked whether Trabelsi "could . . . come back the next week and do it again" and expressed skepticism of that proposition, observing that "it can't be that you get to keep doing that." *Id.* at 117.

More generally, the Court continues to share the government's concern about the potential for dilatory conduct in this case. Trabelsi should not be permitted to delay his trial indefinitely by bringing an unending stream of litigation in Belgium and then asking this Court to respond to each successive development in a foreign court. As time goes on, each new Belgian court decision is further and further removed from the Belgian state's extradition order and thus provides diminishing insight for interpreting that order. This case has been pending for many years, and further delays could result in the loss of key evidence or the deterioration of the memories of key witnesses. The Court will therefore move this case to trial as expediently as possible, consistent with Trabelsi's legal rights.

With all of that said, wherever the line lies between a legitimate appeal and a frivolous or dilatory one, the Court cannot agree with the government that Trabelsi's current appeal crosses that line. The August 8, 2019 decision from the Brussels Court of Appeal was (at least arguably) a significant development, which the government acknowledged when it joined Trabelsi in requesting that the Court postpone his trial to provide time to consider the implications of that Belgian court decision for Trabelsi's *non bis* claim. Although the Court ultimately denied Trabelsi's motion for reconsideration in *Trabelsi III*, his motion presented the substantial legal question of how to resolve the ongoing conflict between the Belgian courts and the Belgian executive—a question that the D.C. Circuit did not fully address in *Trabelsi II*. Trabelsi's appeal is not frivolous.

As for whether Trabelsi has prosecuted his appeal in a dilatory manner, it appears from the appellate docket that he filed several motions to extend his briefing deadlines, before asking the court of appeals to hold the case in abeyance pending this Court's resolution of his motion for indicative ruling. *See United States v. Trabelsi*, No. 20-3028 (D.C. Cir.). And although the

government did not oppose any of those motions, the government may not have recognized the need to expedite the appeal because Trabelsi only recently asserted that the pendency of the appeal precludes this Court from addressing substantive motions; indeed, the parties participated in scheduling hearings before this Court at which Trabelsi's counsel never suggested that his second interlocutory appeal had divested the Court of jurisdiction. In addition, Trabelsi could have asked this Court for an indicative ruling and could have asked the D.C. Circuit to hold the appeal in abeyance months earlier than he did. Even so, there is no evidence that Trabelsi's extension requests before the D.C. Circuit were made in bad faith or merely for the purpose of delay or that he intentionally dragged his feet in seeking an indicative ruling.

The Court agrees that it is imperative that all work together to move this case along as promptly as possible, both before this Court and the D.C. Circuit. To the extent the government seeks expedition before the court of appeals, however, it must raise its request in that forum.

The Court will therefore stay this case pending the resolution of Trabelsi's appeal. Trabelsi argues that the stay should apply to "all non-ministerial proceedings." Dkt. 402 at 4. In *Abney*, the Supreme Court held that a trial court's rejection of a double jeopardy claim is subject to immediate interlocutory appeal under the collateral order doctrine. *See Abney*, 431 U.S. at 662. Generally, when a party appeals a discrete collateral issue, the district court would retain jurisdiction over the remainder of the case. But the Double Jeopardy Clause protects against not only double convictions but also against even the "risk" or "potential" of a second conviction for the same crime. *Id.* at 661. It is thus generally understood that "an interlocutory appeal from an order refusing to dismiss on double jeopardy . . . grounds relates to the entire action and, therefore, it divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant." *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990) (emphasis in

original). The Court will therefore stay the case with respect to any substantive matters to preserve Trabelsi's double-jeopardy-like rights pending appeal. The Court need not decide at this juncture whether, given the collateral nature of the interlocutory appeal, the Court retains jurisdiction to address procedural or ministerial matters and, if so, which matters properly remain before the Court.

B. Motion for Indicative Ruling

Although the case will be stayed, the Court may still resolve Trabelsi's motion for an indicative ruling. Rule 37 of the Federal Rules of Criminal Procedure provides a mechanism for a district court that lacks jurisdiction over a pending motion for relief because of a pending appeal nevertheless to indicate how it would rule on the motion if it were to have jurisdiction. Fed. R. Crim. P. 37(a). A district court presented with a motion for relief while an appeal is pending has three options. It may "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." *Id.* The third of these options is called an indicative ruling. Here, Trabelsi requests that the Court indicate how it would rule on a motion for reconsideration of its decision in *Trabelsi III*, based on additional Belgian court filings and decisions. Dkt. 401. That is, he asks the Court whether, if it had jurisdiction, it would reconsider its earlier decision in *Trabelsi III* declining to reconsider its decision in *Trabelsi I* and the D.C. Circuit's decision in *Trabelsi II*.

As in *Trabelsi III*, Trabelsi faces a heavy burden. He asks the Court to reconsider three prior decisions declining to dismiss the charges against him, including one from the D.C. Circuit. As the Court explained in *Trabelsi III*, the "mandate rule," which is "an even more powerful version" of the law-of-the-case doctrine, "*requires* a lower court to honor the decisions of a

superior court in the same judicial system." *Trabelsi III*, 2020 WL 1236652, at *8 (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996)) (emphasis in original). In asking the Court to reconsider not only its own prior decisions but also the earlier decision of the D.C. Circuit, Trabelsi "bears the heavy burden of demonstrating that the evidence is new, and not merely cumulative; that it would lead to a different result; and that the evidence could not have been previously adduced through reasonable diligence." *Id.*

As before, moreover, the Court's focus is on "the breadth and effect of the Minister of Justice's extradition order" of November 23, 2011. *Id.* at *7. For Trabelsi to succeed, then, he must present new evidence that would alter the Court's interpretation of that order, which issued almost a decade ago. It would not be enough, for example, for Trabelsi to call into question the Court's prior interpretation of the November 13, 2019 diplomatic note, unless the new evidence about the meaning of the note also undermined the Court's reading of the extradition order itself.

The Court will address in turn each of the recent Belgian court decisions and filings upon which Trabelsi relies. Although Trabelsi picks out the passages from each document most favorable to his position, the Court sees nothing in these recent Belgian judicial records that undermines the understanding of the extradition order relied upon in *Trabelsi I*, *II*, and *III*.

1. *May 28, 2020 Decision*

Trabelsi first contends that the May 28, 2020 decision from the Court of First Instance in Brussels demonstrates that this Court's interpretations of the November 23, 2011 extradition order, the August 8, 2019 decision from the Brussels Court of Appeal, and the November 13, 2019 diplomatic note, as well as the D.C. Circuit's reading of the extradition order, were all incorrect. Trabelsi suggests that "[a]ccording to the representations of the Minister in a court of law, the August 8, 2019 decision made clear that overt acts 23–26 were excluded from the

extradition, and he officially conveyed that exclusion in the August 9, 2019 communication." Dkt. 401 at 10. He also argues that "the May 28, 2020 decision held that the 2011 extradition order had *not* been clear that Mr. Trabelsi could be prosecuted in the U.S. on overt acts 23–26" and, instead, was "'opaque'" and "'a source of confusion.'" *Id.* (quoting Dkt. 401-1 at 14) (emphasis in original). And even beyond that, Trabelsi contends that the Minister acknowledged in the Belgian litigation that the November 13, 2019 diplomatic note's "sole purpose was merely to apprise the U.S. authorities that the Belgian state had appealed the August 8, 2019 decision and of the 'point of view' that it would press in the appeal." *Id.* at 9.

When read in its entirety, the May 28, 2020 decision of the Court of First Instance does not support Trabelsi's arguments. That decision addressed a claim from Trabelsi seeking € 50,000 from the Minister of Justice on the ground that the Minister's November 13, 2019 diplomatic note had violated an earlier injunction. The court held that the Minister had violated the injunction because the November 13, 2019 note "revived the threat" that Trabelsi would face prosecution in the United States. Dkt. 401-1 at 15. In considering Trabelsi's claim, the court thus rejected the interpretation that Trabelsi advances here that the November 13, 2019 diplomatic note functioned merely to notify the United States of the Belgian state's litigating position on appeal.

It is true that the Court of First Instance observed that "the Belgian State's position on the possibility of [Trabelsi] being tried in the United States for the acts linked to the attempted attack on the Kleine Brogel military base was somewhat opaque and therefore a source of confusion on the part of the American authorities." Dkt. 401-1 at 14. But that characterization is difficult to square with the text of the extradition order itself, which stated plainly that "it is not the facts, but their qualification, the offenses, that have to be identical" for Article V of the Treaty to apply and

that the overt acts did "not represent in any way the offenses for which an extradition [was] requested." Dkt. 367-17 at 11, 13. And the court's statement is likewise difficult to square with the following language from the August 8, 2019 decision, which the Court of First Instance itself quotes: "Only the ministerial extradition order of November 23, 2011 deviates from [the Belgian courts'] constant interpretation of Article 5 of the Extradition Convention, arguing that the provision required an identity of qualifications." Dkt. 401-1 at 8.

Moreover, although the May 28, 2020 decision suggested that the August 8, 2019 decision, "in all logic," should have ended the "threat" of Trabelsi's prosecution in the United States, *id.* at 14, it concluded that, instead, the November 13, 2019 diplomatic note resolved the ambiguity in favor of Trabelsi's trial under the superseding indictment without limitation. That is, contrary to Trabelsi's arguments here, the Court of First Instance read the November 13, 2019 diplomatic note as taking a clear position on the scope of Trabelsi's extradition. Far from simply stating a litigating position, the November 13, 2019 diplomatic note, according to the May 28, 2020 decision, "sought to destroy the effect which the Brussels Court of Appeal's injunction should normally have had, namely to remove any ambiguity" as to the interpretation of the Extradition Treaty prevailing in Belgian law and thus "revived the threat to Trabelsi's rights." *Id.* at 14–15. The views of the Belgian state carried unique importance, in the view of the Court of First Instance, because it is the position of the Belgian state, rather than the position of the Belgian courts, that is likely to receive deference in the U.S. courts. As the May 28, 2020 decision explained, "in the international legal order, a declaration by a Minister of Justice is likely to be legally binding on the State on behalf of whom he is acting vis-à-vis the State to which it is addressed." *Id.* at 15.

In sum, the May 28, 2020 decision offered no reason to question or to reconsider this Court's understanding that the Minister's November 23, 2011 extradition order declined to exclude the four overt acts. Beyond that, it affirmed the Court's view that the November 13, 2019 diplomatic note reiterated the position of the Belgian state that the *non bis* provision of the Extradition Treaty does not apply in this case. As the Belgian court explained, the diplomatic note "not only revived the threat to Mr. TRABELSI's rights, it has also aggravated it." *Id.* at 16.

2. *July 8, 2020 Pleading*

Trabelsi next contends that the Minister of Justice's July 8, 2020 pleading on appeal of the May 28, 2020 decision undermines this Court's decision in *Trabelsi III*. But Trabelsi misreads certain portions of the pleading and takes others out of context. Trabelsi first relies on the Minister's statement that the November 13, 2019 diplomatic note "was only intended to inform the U.S. judicial authorities that the BELGIAN STATE had filed an appeal in cassation." Dkt. 401-3 at 11. He concludes from this statement that "the August 8 decision and the August 9 diplomatic note conveying that decision put the U.S. authorities on notice from the Belgian state that Mr. Trabelsi could not be prosecuted in the U.S. for overt acts 23–26, and the November 13 note informed those authorities that the official position of the Belgian state could change if it is successful in its pending appeal." Dkt. 401 at 11–12. Trabelsi's reading, however, ignores the very next sentence of the pleading, which says that the November 13, 2019 diplomatic note not only apprised the Court of the Belgian state's litigating position on appeal but also explained the Belgian state's "point of view regarding the concept of *non bis in idem*." Dkt. 401-3 at 11. Regardless, contrary to Trabelsi's contention, nothing in the July 8, 2020 pleading suggests that the Belgian state had adopted the August 8, 2020 decision from the Brussels Court of Appeal as its own official position. Instead, the Minister's primary argument in his pleading was that he

had complied with the literal terms of the injunction because, on August 9, 2019, he sent U.S. authorities a copy of the August 8, 2019 opinion "*inviting the US authorities to acquaint themselves with the legal analysis*," which was all the injunction required. *Id.* at 7 (emphasis in original).

Trabelsi also contends that the Minister's July 8, 2020 pleading acknowledged that his March 5, 2020 communication, which conveyed the February 26, 2020 decision, "'confirmed the content of the ruling'" that Trabelsi could not be tried on the four overt acts. Dkt. 401 at 12 (quoting Dkt. 401-3 at 13). Here, Trabelsi appears to misread the pleading. The entire phrase from which Trabelsi pulled that snippet asserted:

> it is difficult to claim, in this context, that the diplomatic note of November 13, 2019 would have "revived" threats on the rights of Mr. TRABELSI in the United States, or even "aggravated" them . . . [because,] since the sending of this note, the Belgian State has again notified the American authorities of the content of a new ruling served in Belgium and *which confirmed the content of the ruling* of the Brussels Court of Appeal . . . .

Dkt. 401-3 at 13 (emphasis added). The most natural reading of this sentence is that it was the "new ruling" of February 26, 2020, rather than the communication from the Minister, that "confirmed the content of the [August 8, 2019] ruling." *Id.* As the government points out, the March 5, 2020 communication explicitly "informed the United States that the Court of First Instance of Brussels had ordered the Belgian government to provide the U.S. with the decision" and did not adopt the Belgian court's holding as the Belgian state's own position. *Trabelsi III*, 2020 WL 1236652, at *7.

3. *July 15, 2020 Decision*

Trabelsi does not rely on the Brussels Court of Appeal's July 15, 2020 decision but, rather, seeks to minimize it. He argues that the "court threw up its hands" and "held that since this Court seems to have required unequivocal proof that the August 9, 2019 and March 5, 2020

diplomatic note[s] reflect the 'personal' view of the Minister, there would be no point in requiring that person to issue a new note that was court-ordered." Dkt. 401 at 13–14. But Trabelsi elides the most important aspects of the July 15, 2020 decision. Far from simply throwing up its hands, the Belgian court recognized that the "American decisions," especially the D.C. Circuit's in *Trabelsi II*,

> make it clear that the American Courts are applying their own law and the law of international relations, that *they have full knowledge of the dissensions between the Belgian Courts and the Belgian government*, that they take into account the Belgian judicial decisions but that *they consider that there is no reason*, by virtue of their own law, over which this Court does not have the power to substitute its assessment, and the law of international relations, . . . *to give priority to these Belgian judicial decisions over the ministerial order on extradition*, which these decisions do not modify or cancel and the effects of which they do not suspend.

Dkt. 401-7 at 34 (emphasis added and bold removed). Significantly, then, the Brussels Court of Appeal recognized that (1) the Belgian state and judiciary disagreed about the meaning of the *non bis* provision; (2) the U.S. courts understood this "dissension[;]" (3) the U.S. courts saw "no reason" to defer to the decisions of the Belgian judiciary, as opposed to the Belgian state; and (4) the decisions of the Belgian judiciary did not have the effect of modifying or canceling the November 23, 2011 extradition order. *Id.* These conclusions are fatal to Trabelsi's claim that new evidence now demonstrates that this Court and the D.C. Circuit misread the extradition order. The question before this Court is the proper interpretation of that order, and the Belgian courts themselves acknowledge that the Belgian state and Belgian judiciary are of two minds about the meaning of the Extradition Treaty and that the relevant judicial decisions have not altered (and cannot alter) the meaning of the extradition order.

4. *July 31, 2020 Pleading*

Finally, Trabelsi argues that an assertion from the Belgian state in a July 31, 2020 pleading confirms that the Belgian state has adopted the position of the Belgian courts as its own. In responding to an argument from Trabelsi concerning the March 5, 2020 diplomatic note, the Belgian state argued that

> the fact that the notification made by the BELGIAN STATE specified that it is carried out on court order, *including the details it contains, does not mean that the BELGIAN STATE would have* []*distanced itself once again from what was decided by the ruling of February 26, 2020, nor that the Belgian State has, again, not executed the ruling of the Court of First Instance of Brussels of February 26, 2020*.

Dkt. 401-9 at 7 (emphasis in original). As the government contends, the Belgian state was simply explaining that it had complied with the Court's order to transmit its decision to the U.S. authorities. Dkt. 405 at 19. The Belgian state's assertion that it did not "distance[] itself" from the Belgian court's decision is a far cry from the Belgian state adopting the court's position as its own.

The Court does not doubt that the Belgian state is in a delicate position when litigating these issues in Belgian courts. The Belgian state and Belgian judiciary are not in agreement (at least to date) on an important issue, and the Belgian state has faced multiple lawsuits alleging that it has failed to comply with various Belgian judicial decrees. But as the Court explained in *Trabelsi III*, "[t]his Court need not—and, indeed, should not—engage with the question whether the Belgian Minister of Justice exceeded his authority under Belgian law." *Trabelsi III*, 2020 WL 1236652, at *11. Under principles of international comity and separation of powers, this Court has no role to play in a dispute between coordinate branches of a foreign state. Instead, "[a]ll that matters for current purposes is that the [recent Belgian court pleadings and decisions] *confirm*[] the D.C. Circuit's understanding that the Minister of Justice did, in fact, order

Trabelsi's extradition to the United States without excluding the four overt acts." *Id.* (emphasis in original).

Because the Court would deny Trabelsi's motion for reconsideration if not for his pending appeal, Rule 37 permits the Court to reach the merits of the motion. *See* Fed. R. Crim. P. 37(a)(2). The Court will therefore reach the merits and will deny the motion in accordance with Rule 37 and in the interest of judicial economy. *Cf. United States v. Martin*, No. 18-cr-834-7, 2020 WL 1819961, at *2 (S.D.N.Y. Apr. 10, 2020).

CONCLUSION

For the foregoing reasons, Trabelsi's motion to stay proceedings in the district court pending the resolution of his appeal, Dkt. 402, is hereby **GRANTED**. Trabelsi's motion for an indicative ruling and for reconsideration, Dkt. 401, is hereby **DENIED**. In order to avoid further delay in these proceedings, the parties shall promptly convey this Memorandum Opinion and Order to the D.C. Circuit.

SO ORDERED.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: February 5, 2021

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-3028 **September Term, 2021**

FILED ON: MARCH 25, 2022

UNITED STATES OF AMERICA,
APPELLEE

v.

NIZAR TRABELSI, ALSO KNOWN AS NIZAR BEN ABDELAZIZ TRABELSI, ALSO KNOWN AS ABU QA'QA,
APPELLANT

Consolidated with 21-3009

Appeals from the United States District Court
for the District of Columbia
(No. 1:06-cr-00089-1)

Before: WILKINS, RAO and JACKSON*, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the District Court's orders denying Trabelsi's motions to reconsider the motion to dismiss the indictment be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: March 25, 2022

Opinion for the court filed by Circuit Judge Wilkins.
Concurring opinion filed by Circuit Judge Wilkins.
Concurring opinion filed by Circuit Judge Rao.

* Circuit Judge Jackson was a member of the panel at the time the case was argued but did not participate in the disposition of this matter.