Law, Crime and Law Enforcement

Extradition and Rendition

Background and Issues

Brenden M. Zimmer
Editor

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LAW, CRIME AND LAW ENFORCEMENT

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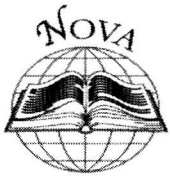

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PREFACE

Extradition is the formal surrender of a person by a State to another State for prosecution or punishment. Extradition to or from the United States is a creature of treaty. The United States has extradition treaties with over a hundred nations, although there are many countries with which it has no extradition treaty. International terrorism and drug trafficking have made extradition an increasingly important law enforcement tool. This book explores the processes of extradition and rendition and the recent treaties used to accommodate American law enforcement interests and the relevant international and domestic law restricting the transfer of persons to foreign states for the purpose of torture.

Chapter 1- "Extradition" is the formal surrender of a person by a State to another State for prosecution or punishment. Extradition to or from the United States is a creature of treaty. The United States has extradition treaties with over a hundred nations, although they are many countries with which it has no extradition treaty. International terrorism and drug trafficking have made extradition an increasingly important law enforcement tool. This is a brief overview of the adjustments made in recent treaties to accommodate American law enforcement interests, and then a nutshell overview of the federal law governing foreign requests to extradite a fugitive found in this country and a United States request for extradition of a fugitive found in a foreign country.

Chapter 2- The Committee on Foreign Relations, to which was referred the Agreement on Extradition between the United States of America and the European Union, signed at Washington on June 25, 2003 (Treaty Doc. 109–14), together with 27 bilateral extradition instruments subsequently signed with the Republic of Austria on July 20, 2005 (Treaty Doc. 109–14), the Kingdom of Belgium on December 16, 2004 (Treaty Doc. 109–14), the

Republic of Bulgaria on September 19, 2007 (Treaty Doc. 110–12), the Republic of Cyprus on January 20, 2006 (Treaty Doc. 109–14), the Czech Republic on May 16, 2006 (Treaty Doc. 109–14), the Kingdom of Denmark on June 23, 2005 (Treaty Doc. 109–14), the Republic of Estonia on February 8, 2006 (Treaty Doc. 109–16), the Republic of Finland on December 16, 2004 (Treaty Doc. 109–14), France on September 30, 2004 (Treaty Doc. 109–14), the Federal Republic of Germany on April 18, 2006 (Treaty Doc. 109–14), the Hellenic Republic on January 18, 2006 (Treaty Doc. 109–14), the Republic of Hungary on November 15, 2005 (Treaty Doc. 109–14), Ireland on July 14, 2005 (Treaty Doc. 109–14), the Italian Republic on May 3, 2006 (Treaty Doc. 109–14), the Republic of Latvia on December 7, 2005 (Treaty Doc. 109–15), the Republic of Lithuania on June 15, 2005 (Treaty Doc. 109–14), the Grand Duchy of Luxembourg on February 1, 2005 (Treaty Doc. 109–14), Malta on May 18, 2006, with a related exchange of letters signed the same date (Treaty Doc. 109–17), the Kingdom of the Netherlands on September 29, 2004, with a related exchange of notes signed the same date (Treaty Doc. 109–14), the Republic of Poland on June 9, 2006 (Treaty Doc. 109–14), the Portuguese Republic on July 14, 2005 (Treaty Doc. 109–14), Romania on September 10, 2007 (Treaty Doc. 110–11), the Slovak Republic on February 6, 2006 (Treaty Doc. 109–14), the Republic of Slovenia on October 17, 2005 (Treaty Doc. 109–14), the Kingdom of Spain on December 17, 2004 (Treaty Doc. 109–14), the Kingdom of Sweden on December 16, 2004 (Treaty Doc. 109–14), and the United Kingdom of Great Britain and Northern Ireland on December 16, 2004, with a related exchange of notes signed the same date (Treaty Doc. 109–14), having considered the same, reports favorably thereon with one condition and a declaration made with respect to each treaty, as indicated in the resolutions of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolutions of advice and consent.

Chapter 3- Persons suspected of criminal or terrorist activity may be transferred from one State (i.e., country) to another for arrest, detention, and/or interrogation. Commonly, this is done through extradition, by which one State surrenders a person within its jurisdiction to a requesting State via a formal legal process, typically established by treaty. Far less often, such transfers are effectuated through a process known as "extraordinary rendition" or "irregular rendition." These terms have often been used to refer to the *extrajudicial* transfer of a person from one State to another. In this report, "rendition" refers to extraordinary or irregular renditions unless otherwise specified.

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Chapter 1

EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES

Michael John Garcia and Charles Doyle

SUMMARY

"Extradition" is the formal surrender of a person by a State to another State for prosecution or punishment. Extradition to or from the United States is a creature of treaty. The United States has extradition treaties with over a hundred nations, although they are many countries with which it has no extradition treaty. International terrorism and drug trafficking have made extradition an increasingly important law enforcement tool. This is a brief overview of the adjustments made in recent treaties to accommodate American law enforcement interests, and then a nutshell overview of the federal law governing foreign requests to extradite a fugitive found in this country and a United States request for extradition of a fugitive found in a foreign country.

Extradition treaties are in the nature of a contract and generate the most controversy with respect to those matters for which extradition may not be had. In addition to an explicit list of crimes for which extradition may be granted, most modern extradition treaties also identify various classes of offenses for which extradition may or must be denied. Common among these are provisions excluding purely military and political offenses; capital

offenses; crimes that are punishable under only the laws of one of the parties to the treaty; crimes committed outside the country seeking extradition; crimes where the fugitive is a national of the country of refuge; and crimes barred by double jeopardy or a statute of limitations.

Extradition is triggered by a request submitted through diplomatic channels. In this country, it proceeds through the Departments of Justice and State and may be presented to a federal magistrate to order a hearing to determine whether the request is in compliance with an applicable treaty, whether it provides sufficient evidence to satisfy probable cause to believe that the fugitive committed the identified treaty offense(s), and whether other treaty requirements have been met. If so, the magistrate certifies the case for extradition at the discretion of the Secretary of State. Except as provided by treaty, the magistrate does not inquire into the nature of foreign proceedings likely to follow extradition.

The laws of the country of refuge and the applicable extradition treaty govern extradition back to the United States of a fugitive located overseas. Requests travel through diplomatic channels and the treaty issue most likely to arise after extradition to this country is whether the extraditee has been tried for crimes other than those for which he or she was extradited. The fact that extradition was ignored and a fugitive forcibly returned to the United States for trial constitutes no jurisdictional impediment to trial or punishment. Federal and foreign immigration laws sometimes serve as an alternative to extradition to and from the United States.

INTRODUCTION

"'Extradition' is the formal surrender of a person by a State to another State for prosecution or punishment."[1] Extradition to or from the United States is a creature of treaty. The United States has extradition treaties with over a hundred of the nations of the world, although there are many with which the United States has no extradition treaty.[2] International terrorism and drug trafficking have made extradition an increasingly important law enforcement tool.[3]

Although extradition as we know it is of relatively recent origins,[4] its roots can be traced to antiquity. Scholars have identified procedures akin to extradition scattered throughout history dating as far back as the time of Moses.[5] By 1776, a notion had evolved to the effect that "every state was

obliged to grant extradition freely and without qualification or restriction, or to punish a wrongdoer itself" and the absence of intricate extradition procedures has been attributed to the predominance of this simple principle of international law.[6]

Whether by practice's failure to follow principle or by the natural evolution of the principle, modern extradition treaties and practices began to emerge in this country and elsewhere by the middle 18th and early 19th centuries.[7]

The first U.S. extradition treaty consisted of a single terse article in Jay's Treaty of 1794 with Great Britain, but it contained several of the basic features of contemporary extradition pacts. Article XXVII of the Treaty provided in its entirety:

> It is further agreed, that his Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of the other, provided that this shall only be done on such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed, by those who make the requisition and receive the fugitive.[8]

The United States has relied almost exclusively upon bilateral agreements as a basis for extradition.[9] However, the United States has entered into several multilateral agreements that may also provide legal authority for extradition. Such agreements take two forms. One form is a multilateral agreement that exclusively concerns extradition. The United States is currently a party to two such agreements: the 1933 Montevideo Convention on Extradition, which apparently has never served as a basis for extradition,[10] and the Extradition Agreement Between the United States and the European Union, which entered into force in February 2010.[11] The provisions of the U.S.-EU extradition treaty are implemented via bilateral instruments concluded between the United States and each EU Member State. These instruments amend or replace any provisions contained in earlier treaties between the United States and individual EU Member States which conflict with the requirements of the multilateral agreement.[12]

The United States is also a party to several multilateral agreements that generally aim to deter and punish transnational criminal activity or serious

human rights abuses, including by imposing an obligation upon signatories to prosecute or extradite persons who engage in specified conduct. Although these agreements are not themselves extradition treaties, they often contain provisions stating that specified acts shall be treated as extraditable offenses in any extradition treaty between parties. [13]

BARS TO EXTRADITION

Extradition treaties are in the nature of a contract and by operation of international law, "[a] state party to an extradition treaty is obligated to comply with the request of another state party to that treaty to arrest and deliver a person duly shown to be sought by that state (a) for trial on a charge of having committed a crime covered by the treaty within the jurisdiction of the requesting state, or (b) for punishment after conviction of such a crime and flight from that state, provided that none of the grounds for refusal to extradite set forth in [the treaty] is applicable."[14]

Subject to a contrary treaty provision, federal law defines the mechanism by which the United States honors its extradition treaty obligations.[15] Although some countries will extradite in the absence of an applicable treaty as a matter of comity, it was long believed that the United States could only grant an extradition request if it could claim coverage under an existing extradition treaty.[16] Dicta in several court cases indicated that this requirement, however, was one of congressional choice rather than constitutional requirement.[17]

No Treaty

Congress appears to have acted upon the assumption that a treaty was not required for extradition in 1996, when it authorized the extradition of fugitive aliens at the behest of a nation with which the United States has no extradition treaty.[18] That same year, Congress passed legislation to implement international agreements made between the United States and the International Tribunals for Yugoslavia and Rwanda, which were entered into as executive agreements rather than treaties.[19] Pursuant to these agreements, the United States pledged to surrender to the requesting tribunal any person found within

its territory who had been charged with or found guilty by the tribunal of an offense.[20]

The constitutional vitality of these efforts was put to the test shortly thereafter when the United States attempted to surrender a resident alien to the International Tribunal for Rwanda. Initially, a federal magistrate judge for the Southern District of Texas ruled that constitutional separation of powers requirements precluded extradition in the absence of a treaty.[21] The government subsequently filed another request for surrender with the district court, and the presiding judge certified the request, holding that an extradition could be effectuated pursuant to either a treaty or an authorizing statute.[22] In a 2-1 panel decision, the Fifth Circuit Court of Appeals upheld this ruling, concluding that "although some authorization by law is necessary for the Executive to extradite, neither the Constitution's text nor ... [relevant jurisprudence] require that the authorization come in the form of a treaty."[23] The Supreme Court subsequently declined a petition for writ of certiorari to review the appellate court's ruling.[24]

A question has occasionally arisen over whether an extradition treaty with a colonial power continues to apply to a former colony that has become independent, or whether an extradition treaty with a prior State remains in effect with its successor. Although the United States periodically renegotiates replacements or supplements for existing treaties to make contemporary adjustments, the United States has a number of treaties that pre-date the dissolution of a colonial bond or some other adjustment in governmental status.[25] Fugitives in these situations have sometimes contested extradition on the grounds that the United States has no valid extradition treaty with the successor government that asks that they be handed over for prosecution. These efforts are generally unsuccessful since successor governments have ordinarily assumed the extradition treaty obligations negotiated by their predecessors.[26]

No Treaty Crime

Extradition is generally limited to crimes identified in the treaty. Early treaties often recite a list of the specific extraditable crimes. Jay's Treaty mentions only murder and forgery; the inventory in thel 852 treaty with Prussia included eight others;[27] and 1974 treaty between the United States and Denmark identified several dozen extradition offenses:

1. murder; voluntary manslaughter; assault with intent to commit murder. 2. Aggravated injury or assault; injuring with intent to cause grievous bodily harm. 3. Unlawful throwing or application of any corrosive or injurious substances upon the person of another. with schemes intended to deceive or defraud, or by any other fraudulent means. 4. Rape; indecent assault; sodomy accompanied by use of force or threat; sexual intercourse and other unlawful sexual relations with or upon children under the age specified by the laws of both the requesting and the requested States. 5. Unlawful abortion. 6. Procuration; inciting or assisting a person under 21 years of age or at the time ignorant of the purpose in order that such person shall carry on sexual immorality as a profession abroad or shall be used for such immoral purpose; promoting of sexual immorality by acting as an intermediary repeatedly or for the purpose of gain; profiting from the activities of any person carrying on sexual immorality as a profession. 7. Kidnaping; child stealing; abduction; false imprisonment. 8. Robbery; assault with intent to rob. 9. Burglary. 10. Larceny. 11. Embezzlement. 12. Obtaining property, money or valuable securities: by false pretenses or by threat or force, by defrauding any governmental body, the public or any person by deceit, falsehood, use of the mails or other means of communication in connection. 13. Bribery, including soliciting, offering and accepting. 14. Extortion. 15. Receiving or transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained. 16. Fraud by a bailee, banker, agent, factor, trustee, executor, administrator or by a director or officer of any company. 17. An offense against the laws relating to counterfeiting or forgery. 18. False statements made before a court or to a government agency or official, including under United States law perjury and subornation of perjury. 19. Arson. 20. An offense against any law relating to the protection of the life or health of persons from: a shortage of drinking water; poisoned, contaminated, unsafe or unwholesome drinking water, substance or products. 21. Any act done with intent to endanger the safety of any person traveling upon a railway, or in any aircraft or vessel or bus or other means of transportation, or any act which impairs the safe operation of such means of transportation. 22. Piracy; mutiny or revolt on board an aircraft against the authority of the commander of such aircraft; any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft. 23. An offense against the laws relating to damage to property. 24. a. Offenses against the laws relating to importation, exportation or transit of goods, articles, or merchandise. b. Offenses relating to willful evasion of taxes and duties. c. Offenses against the laws relating to international transfers of funds. 25. An offense relating to the: a. spreading of false intelligence likely to affect the price of commodities, valuable securities or any other similar interests; or b. making of incorrect or misleading statements concerning the economic conditions of such commercial undertakings as

joint-stock companies, corporations, cooperative societies or similar undertakings through channels of public communications, in reports, in statements of accounts or in declarations to the general meeting or any proper official of a company, in notifications to, or registration with, any commission, agency or officer having supervisory or regulatory authority over corporations, joint-stock companies, other forms of commercial undertakings or in any invitation to the establishment of those commercial undertakings or to the subscription of shares. 28. Unlawful abuse of official authority which results in grievous bodily injury or deprivation of the life, liberty or property of any person, [or] attempts to commit, conspiracy to commit, or participation in, any of the offenses mentioned in this Article, Art. 3, 25 U.S.T. 1293 (1974).[28]

While many existing U.S. extradition treaties continue to list specific extraditable offenses, the more recent ones feature a dual criminality approach, and simply make all felonies extraditable (subject to other limitations found elsewhere in their various provisions).[29]

MILITARY AND POLITICAL OFFENSES

In addition to an explicit list of crimes for which extradition may be granted, most modern extradition treaties also identify various classes of offenses for which extradition may or must be denied. Common among these are provisions excluding purely military and political offenses. The military crimes exception usually refers to those offenses like desertion which have no equivalents in civilian criminal law. [30] The exception is of relatively recent vintage.[31] In the case of treaties that list specific extraditable offenses, the exception is unnecessary since purely military offenses are not listed. The exception became advisable, however, with the advent of treaties that make extraditable any misconduct punishable under the laws of both treaty partners. With the possible exception of selective service cases arising during the Vietnam War period,[32] recourse to the military offense exception appears to have been infrequent and untroubled.

The political offense exception, however, has proven more troublesome.[33] The exception is and has been a common feature of extradition treaties for almost a century and a half. In its traditional form, the exception is expressed in deceptively simple terms.[34] Yet it has been construed in a variety ways, more easily described in hindsight than to predicate beforehand. As a general rule, American courts require that a fugitive seeking to avoid extradition

"demonstrat[e] that the alleged crimes were committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion."[35]

Contemporary extradition treaties often seek to avoid misunderstandings in a number of ways. They expressly exclude terrorist offenses or other violent crimes from the definition of political crimes for purposes of the treaty;[36] they explicitly extend the political exception to those whose prosecution is politically or discriminatorily motivated;[37] and/or they limit the reach of their political exception clauses to conform to their obligations under multinational agreements.[38] Separately, several multinational agreements contain provisions that effectively incorporate enumerated offenses into any pre-existing extradition treaty between parties.[39] A few of these multilateral agreements also specify that enumerated activities shall not be considered political offenses for purposes of extradition.[40]

Capital Offenses

A number of nations have abolished or abandoned capital punishment as a sentencing alternative.[41] Several of these have preserved the right to deny extradition in capital cases either absolutely or in absence of assurances that the fugitive will not be executed if surrendered.[42] More than a few countries are reluctant to extradite in a capital case even though their extradition treaty with the United State has no such provision, based on opposition to capital punishment or to the methods and procedures associated with execution bolstered by sundry multinational agreements to which the United States is either not a signatory or has signed with pertinent reservations.[43] Additionally, "though almost all extradition treaties are silent on this ground, some states may demand assurances that the fugitive will not be sentenced to life in prison, or even that the sentence imposed will not exceed a specified term of years."[44]

Want of Dual Criminality

Dual criminality exists when parties to an extradition treaty each recognize a particular form of misconduct as a punishable offense. Historically, extradition treaties have handled dual criminality in one of three ways: (1) they list extraditable offenses and do not otherwise speak to the

issue; (2) they list extraditable offenses and contain a separate provisions requiring dual criminality; or (3) they identify as extraditable offenses those offenses condemned by the laws of both nations. Today, "[u]nder most international agreements ... [a] person sought for prosecution or for enforcement of a sentence will not be extradited ... (c) if the offense with which he is charged or of which he has been convicted is not punishable as a serious crime in both the requesting and requested state...."[45]

Although there is a split of authority over whether dual criminality resides in all extradition treaties that do not deny its application,[46] the point is largely academic since it is a common feature of all American extradition treaties.[47] Subject to varying interpretations, the United States favors the view that treaties should be construed to honor an extradition request if possible. Thus, dual criminality does not "require that the name by which the crime is described in the two countries shall be same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions."[48] When a foreign country seeks to extradite a fugitive from the United States dual criminality may be satisfied by reference to either federal or state law.[49]

U.S. treaty partners do not always construe dual criminality requirements as broadly. In the past, some have been unable to find equivalents for attempt, conspiracy, and crimes with prominent federal jurisdictional elements (e.g., offenses under the Racketeer Influenced and Corrupt Organization (RICO) and Continuing Criminal Enterprise (CCE) statutes).[50] Many modern extradition treaties contain provisions addressing the problem of jurisdictional elements[51] and/or making extraditable an attempt or conspiracy to commit an extraditable offense.[52] Some include special provisions for tax and customs offenses as well.[53]

Extraterritoriality

As a general rule, crimes are defined by the laws of the place where they are committed. There have always been exceptions to this general rule under which a nation was understood to have authority to outlaw and punish conduct occurring outside the confines of its own territory. In the past, U.S. extradition treaties applied to crimes "committed within the [territorial] jurisdiction" of the country seeking extradition.[54] Largely as a consequence of terrorism and drug trafficking, however, the United States now claims more sweeping extraterritorial application for its criminal laws than recognized either in its