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An Abridged Sketch of Extradition To and From the United States

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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 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.

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 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.

This is an abbreviated version of CRS Report 98-958, *Extradition To and From the United States: Overview of the Law and Recent Treaties*, by Michael John Garcia and Charles Doyle, without the appendices, footnotes, and citations to authority found in the longer report.

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Introduction

“‘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 of the nations of the world, although there are many with which the United States has no extradition treaty.

Extradition treaties are in the nature of a contract. Subject to a contrary treaty provision, federal law defines the mechanism by which the United States honors its extradition treaty obligations. 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. Dicta in several court cases indicated that this requirement, however, was one of congressional choice rather than constitutional requirement.

Extradition is generally limited to crimes identified in the treaty. Early treaties often recite a list of the specific extraditable crimes. 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).

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 political offenses. The political offense exception has proven troublesome. 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. Yet it has been construed in a variety of 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.” Contemporary extradition treaties often seek to avoid misunderstandings over the political offense exception in a number of ways. Some expressly exclude terrorist offenses or other violent crimes from the definition of political crimes for purposes of the treaty; some explicitly extend the political exception to those whose prosecution is politically or discriminatorily motivated; and some limit the reach of their political exception clauses to conform to their obligations under multinational agreements. Separately, several multinational agreements contain provisions that effectively incorporate enumerated offenses into any preexisting extradition treaty between parties. A few of these multilateral agreements also specify that enumerated activities shall not be considered political offenses for purposes of extradition.

Capital Offenses

A number of nations have abolished or abandoned capital punishment as a sentencing alternative. 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. More than a few countries are reluctant to extradite in a capital case even though their extradition treaty with the United States 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.

Dual Criminality

Dual criminality addresses the reluctance to extradite a fugitive for conduct that the host nation considers innocent. Dual criminality exists when the 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 provision requiring dual criminality; or (3) they identify as extraditable offenses those offenses condemned by the laws of both nations. Today, as one commentator has pointed out, “[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....” 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.

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 Organizations [RICO] and Continuing Criminal Enterprise [CCE] statutes). Many modern extradition treaties contain provisions addressing the problem of jurisdictional elements and/or making extraditable an attempt or conspiracy to commit an extraditable offense. Some include special provisions for tax and customs offenses as well.

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. 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 more historic treaties or by many of today’s governments. Success in eliminating extradition impediments by negotiating new treaty provisions has been mixed. More than a few call for extradition regardless of where the offense was committed. Yet perhaps an equal number of contemporary treaties permit or require denial of an extradition request that falls within an area where the countries hold conflicting views on extraterritorial jurisdiction.

Nationality

The right of a country to refuse to extradite one’s own nationals is probably the greatest single obstacle to extradition. The United States has long objected to the impediment, and recent treaties indicate that its hold may not be as formidable as was once the case.

A growing number of U.S. treaties go so far as to declare that “extradition shall not be refused based on the nationality of the person sought.” Another form limits the nationality exemption to nonviolent crimes. A third bars nationality from serving as the basis to deny extradition when the fugitive is sought in connection with a listed offense. A final variant allows a conflicting obligation under a multinational agreement to wash away the exemption. Even where the exemption is preserved, contemporary treaties more regularly refer to the obligation to consider prosecution at home of those nationals whose extradition has been refused.

Double Jeopardy

Depending on the treaty, extradition may also be denied on the basis of a number of procedural considerations. Although the U.S. Constitution's prohibition against successive prosecutions for the same offense does not extend to prosecutions by different sovereigns, it is common for extradition treaties to contain clauses proscribing extradition when the transferee would face double punishment and/or double jeopardy (also known as *non bis in idem*). The more historic clauses are likely to bar extradition for a second prosecution of the "same acts" or the "same event" rather than the more narrowly drawn "same offenses." The new model limits the exemption to fugitives who have been convicted or acquitted of the same offense and specifically denies the exemption where an initial prosecution has simply been abandoned.

Lapse of Time

As the Restatement explains, lapse of time or statute of limitation clauses are also prevalent in extradition treaties:

Many [states] ... preclude extradition if prosecution for the offense charged, or enforcement of the penalty, has become barred by lapse of time under the applicable law. Under some treaties the applicable law is that of the requested state, in others that of the requesting state; under some treaties extradition is precluded if either state's statute of limitations has run.... When a treaty provides for a time-bar only under the law of the requesting state, or only under the law of the requested state, United States courts have generally held that time-bar of the state not mentioned does not bar extradition. If the treaty contains no reference to the effect of a lapse of time neither state's statute of limitations will be applied.

Left unsaid is the fact that some treaties declare in no uncertain terms that the passage of time is no bar to extradition, and others rest the decision with the discretion of the requested state. In cases governed by U.S. law and in instances of U.S. prosecution following extradition, applicable statutes of limitation and due process determine whether pre-indictment delays bar prosecution and speedy trial provisions govern whether post-indictment delays preclude prosecution.

Extradition from the United States

A foreign country usually begins the extradition process with a request submitted to the State Department sometimes including the documentation required by the treaty. When a requesting nation is concerned that the fugitive will take flight before it has time to make a formal request, it may informally ask for extradition and provisional arrest with the assurance that the full complement of necessary documentation will follow. In either case, the Secretary of State, at his discretion, may forward the matter to the Department of Justice to begin the procedure for the arrest of the fugitive "to the end that the evidence of criminality may be heard and considered." The United States Attorneys' Manual encapsulates the Justice Department's participation thereafter in these words:

OIA [Office of International Affairs] reviews ... requests for sufficiency and forwards appropriate ones to the district [where the fugitive is found]. The Assistant United States Attorney assigned to the case obtains a warrant and the fugitive is arrested and brought before the magistrate judge or the district judge. The government opposes bond in extradition cases. A hearing under 18 U.S.C. §3184 is scheduled to determine whether the fugitive is extraditable. If the court finds the fugitive to be extraditable, it enters an order of extraditability and certifies the record to the Secretary of State, who decides whether to surrender the fugitive to the requesting government. In some cases a fugitive

may waive the hearing process. OIA notifies the foreign government and arranges for the transfer of the fugitive to the agents appointed by the requesting country to receive him or her. Although the order following the extradition hearing is not appealable (by either the fugitive or the government), the fugitive may petition for a writ of habeas corpus as soon as the order is issued. The district court's decision on the writ is subject to appeal, and extradition may be stayed if the court so orders.

Hearing

The precise menu for an extradition hearing is dictated by the applicable extradition treaty, but as described by one district court, a common check list for a hearing conducted in this country would include determinations that

1. There exists a valid extradition treaty between the United States and the requesting state;
2. The relator is the person sought;
3. The offense charged is extraditable;
4. The offense charged satisfies the requirement of double criminality;
5. There is "probable cause" to believe the relator committed the offense charged;
6. The documents required are presented in accordance with United States law, subject to any specific treaty requirements, translated and duly authenticated ... ; and
7. Other treaty requirements and statutory procedures are followed.

An extradition hearing is not, however, "in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him.... Instead, it is essentially a preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation.... The judicial officer who conducts an extradition hearing thus performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense."

The purpose of the hearing is in part to determine whether probable cause exists to believe that the individual committed an offense covered by the extradition treaty. The rules of criminal procedure and evidence that would apply at trial have no application at the hearing. Warrants, depositions, and other authenticated documents are admissible as evidence. The individual may offer evidence to contradict or undermine the existence of probable cause, but affirmative defenses that might be available at trial are irrelevant. Hearsay is not only admissible but may be relied upon exclusively; the Miranda rule has no application; initiation of extradition may be delayed without regard for the Sixth Amendment right to a speedy trial or the Fifth Amendment right of due process; nor do the Sixth Amendment rights to the assistance of counsel or cross examine witnesses apply. Due process, however, will bar extradition of informants whom the government promised confidentiality and then provided the evidence necessary to establish probable cause for extradition.

Moreover, extradition will ordinarily be certified without "examining the requesting country's criminal justice system or taking into account the possibility that the extraditee will be mistreated if returned." This "noninquiry rule" is a judicially created rule premised on the view that "[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States."

Review

If at the conclusion of the extradition hearing, the court concludes there is some obstacle to extradition and refuses to certify the case, “[t]he requesting government’s recourse to an unfavorable disposition is to bring a new complaint before a different judge or magistrate, a process it may reiterate apparently endlessly.”

If the court concludes there is no such obstacle to extradition and certifies to the Secretary of State that the case satisfies the legal requirements for extradition, the fugitive has no right of appeal, but may be entitled to limited review under habeas corpus. “[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.” In this last assessment, appellate courts will only “examine the magistrate judge’s determination of probable cause to see if there is ‘any evidence’ to support it.”

Limitations on review or application of the rule of noninquiry may be modified by treaty or statute. Whether a particular treaty or statute precludes review or application of the rule, however, can be a complicated issue. For example, the U.N. Convention Against Torture (CAT) provides that no State Party “shall expel, return ... or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Following U.S. ratification of CAT, Congress enacted Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which requires all relevant federal agencies to adopt appropriate regulations to implement this policy. Some fugitives have argued that CAT or FARRA operate as exceptions to the noninquiry rule. The argument has produced hollow victories at the appellate court level. The Fourth Circuit concluded that the rule of noninquiry posed no obstacle, but went on to hold that FARRA itself barred habeas review of a fugitive’s torture claim. The Ninth Circuit, on the other hand, concluded that FARRA required the Secretary of State to pass upon on a fugitive’s torture claim, but that “[t]he doctrine of separation of powers and the rule on non-inquiry block[ed] any [judicial] inquiry into the substance of the Secretary’s declaration.”

Surrender

If the judge or magistrate certifies the fugitive for extradition, the matter then falls to the discretion of the Secretary of State to determine whether as a matter of policy the fugitive should be released or surrendered to the agents of the country that has requested his or her extradition. The procedure for surrender, described in treaty and statute, calls for the release of the prisoner if he or she is not claimed within a specified period of time, often indicates how extradition requests from more than one country for the same fugitive are to be handled, and frequently allows the fugitive to be held for completion of a trial or the service of a criminal sentence before being surrendered. Extradition treaties may also provide that, in cases where a fugitive faces charges or is serving a criminal sentence in a country of refuge, he may be temporarily surrendered to a requesting State for purposes of prosecution, under the promise that the State seeking extradition will return the fugitive upon the conclusion of criminal proceedings.

Extradition for Trial or Punishment in the United States

The laws of the country of refuge and the applicable extradition treaty govern extradition back to the United States of a fugitive located overseas. The request for extradition comes from the

Department of State whether extradition is sought for trial in federal or state court or for execution of a criminal sentence under federal or state law.

The first step is to determine whether the fugitive is extraditable. The Justice Department's checklist for determining extraditability begins with an identification of the country in which the fugitive has taken refuge. If the United States has no extradition treaty with the country of refuge, extradition is not a likely option. When there is a treaty, extradition is only an option if the treaty permits extradition. Common impediments include citizenship, dual criminality, statutes of limitation, and capital punishment issues.

Many treaties permit a country to refuse to extradite its citizens even in the case of dual citizenship. As for dual criminality, whether the crime of conviction or the crime charged is an extraditable offense will depend upon the nature of the crime and where it was committed. If the applicable treaty lists extraditable offenses, the crime must be on the list. If the applicable treaty insists only upon dual criminality, the underlying misconduct must be a crime under the laws of both the United States and the country of refuge.

Where the crime was committed matters; some treaties will only permit extradition if the offense was committed within the geographical confines of the United States. Timing also matters. The speedy trial features of U.S. law require a good faith effort to bring to trial a fugitive who is within the government's reach. Furthermore, the lapse of time or speedy trial component of the applicable extradition treaty may preclude extradition if prosecution would be barred by a statute of limitations in the country of refuge. Some treaties prohibit extradition for capital offenses; more often they permit it but only with the assurance that a sentence of death will not be executed.

Prosecutors may request provisional arrest of a fugitive without waiting for the final preparation of the documentation required for a formal extradition request, if there is a risk of flight and if the treaty permits it. The Justice Department encourages judicious use of provisional arrest because of the pressures that may attend it. If the Justice Department approves the application for extradition, the request and documentation are forwarded to the State Department, translated if necessary, and with State Department approval forwarded through diplomatic channels to the country from which extradition is being sought.

The treaty issue most likely to arise after extradition and the fugitive's return to this country is whether the fugitive was surrendered subject to any limitations such as those posed by the doctrine of specialty.

Specialty

Under the doctrine of specialty, sometimes called speciality,

a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.

The limitation, expressly included in many treaties, is designed to preclude prosecution for different substantive offenses but does not bar prosecution for different or additional counts of the same offense. And some courts have held that an offense whose prosecution would be barred by the doctrine may nevertheless be considered for purposes of the federal sentencing guidelines, or

for purposes of criminal forfeiture. At least where an applicable treaty addresses the question, the rule is no bar to prosecution for crimes committed after the individual is extradited.

The doctrine may be of limited advantage to a given defendant because the circuits are divided over whether a defendant has standing to claim its benefits. Additionally, one circuit has held that a fugitive lacks standing to allege a rule of specialty violation when extradited pursuant to an agreement other than treaty. Regardless of their view of fugitive standing, reviewing courts have agreed that the surrendering State may subsequently consent to trial for crimes other than those for which extradition was had.

Alternatives to Extradition

The existence of an extradition treaty does not preclude the United States acquiring personal jurisdiction over a fugitive by other means, unless the treaty expressly provides otherwise.

Waiver

Waiver or “simplified” treaty provisions allow a fugitive to consent to extradition without the benefit of an extradition hearing. Although not universal, the provisions constitute the least controversial of the alternatives to extradition.

Immigration Procedures

Whether by a process similar to deportation or by simple expulsion, the United States has had some success encouraging other countries to surrender fugitives other than their own nationals without requiring recourse to extradition. Ordinarily, U.S. immigration procedures, on the other hand, have been less accommodating and have been called into play only when extradition has been found wanting. They tend to be time consuming and usually can only be used in lieu of extradition when the fugitive is an alien. Moreover, they frequently require the United States to deposit the alien in a country other than one that seeks his or her extradition. Yet in a few instances where an alien has been naturalized by deception or where the procedures available against alien terrorists come into play, denaturalization or deportation may be considered an attractive alternative or supplement to extradition proceedings.

Irregular Rendition/Abduction

Although less frequently employed by the United States, “irregular rendition” is a familiar alternative to extradition. An alternative of last resort, it involves kidnaping or deceit and generally has been reserved for terrorists, drug traffickers, and the like. Kidnaping a defendant overseas and returning him to the United States for trial does not deprive American courts of jurisdiction unless an applicable extradition treaty explicitly calls for that result. Nor does it ordinarily expose the United States to liability under the Federal Tort Claims Act or individuals involved in the abduction to liability under the Alien Tort Statute. The individuals involved in the abduction, however, may face foreign prosecution, or at least be the subject of a foreign extradition request. Moreover, the effort may strain diplomatic relations with the country from which the fugitive is lured or abducted.

Foreign Prosecution

A final alternative when extradition for trial in the United States is not available, is trial within the country of refuge. The alternative exists primarily when a U.S. request for extradition has been

refused because of the fugitive's nationality and/or when the crime occurred under circumstances that permit prosecution by either country for the same misconduct. The alternative can be cumbersome and expensive and may be contrary to U.S. policy objectives.

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