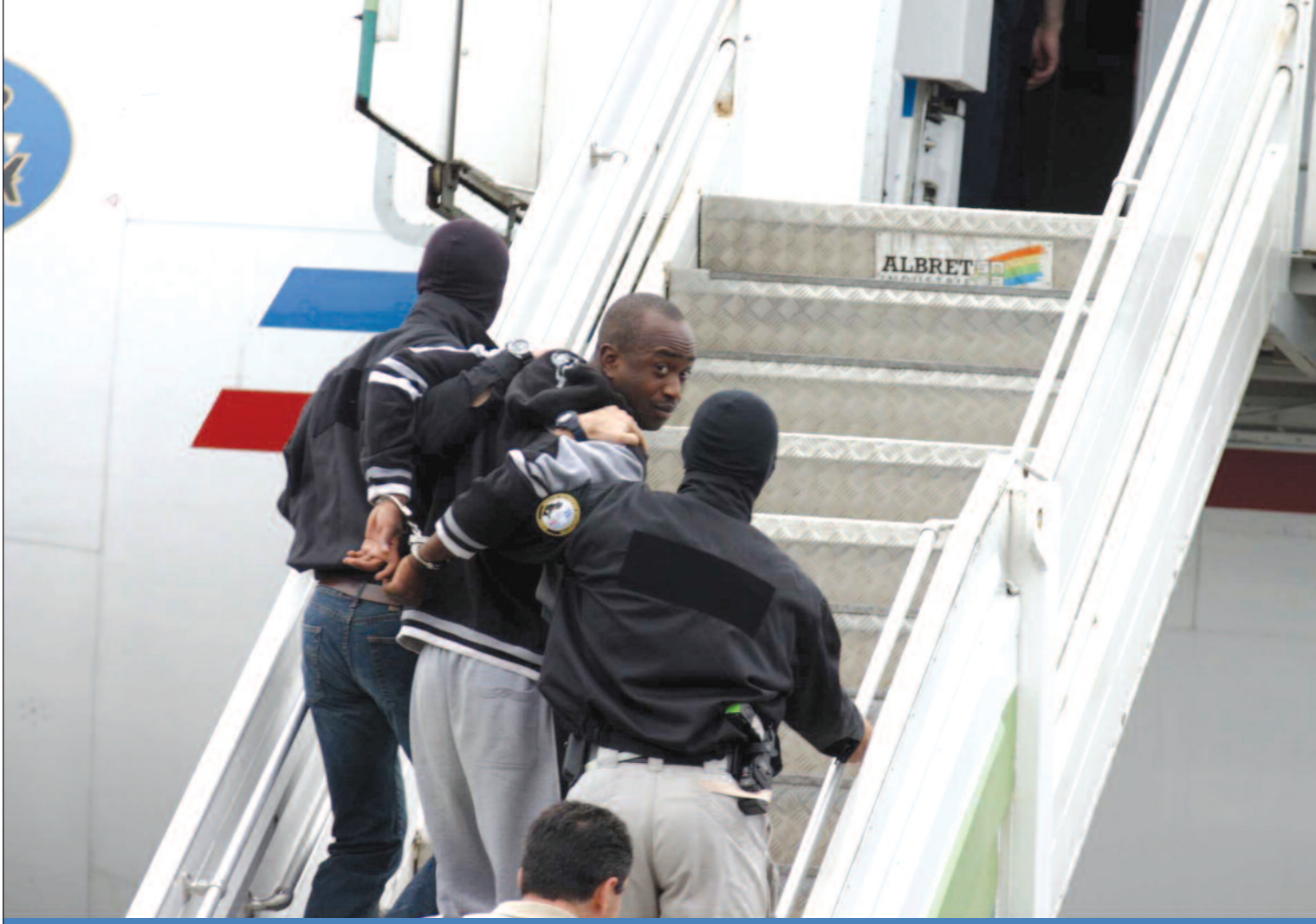

Defending the International Extradition Case

By Jacques Semmelman and Karen Snell

You have just been retained or appointed to handle your first international extradition case. Be prepared for a rude shock. Extradition cases are among the most difficult cases to defend. By the end of this article you will understand why. Hopefully, you will also understand how you can best represent your client under very challenging conditions.

Let's start with some basics. Extradition is an international process whereby a person accused (or convicted) of a crime in a foreign country is sent to that country to stand trial (or to serve a sentence). We will focus on extradition from the United States to a foreign country. Extradition also occurs from other countries into the United States, but that is not the subject of this article.

Extraditing someone, especially a U.S. citizen, to a foreign country sounds like something that should only happen under extremely stringent conditions, doesn't it? High burdens of proof . . . broad discovery . . . compelling evidence that the accused will receive a fair trial in the foreign country, and will not be mistreated . . . a full opportunity to present defenses such as alibi, insanity, duress, or self-defense here, in a U.S. court, before extradition can be ordered. . . and so on. Right? *Wrong.* While the law is starting to evolve in ways favorable to the defense (more about that later), the great body of extradition case law is overwhelmingly unfavorable to the accused.

U.S. extradition law is based upon a statutory scheme (18 U.S.C. § 3181 *et seq.*) that is far from comprehensive. The gaps (which are large) are filled in by the terms of the pertinent extradition treaty, and by an extensive, well-developed body of case law. Overriding the entire process (at least in theory) is the Constitution.

Extradition proceedings are conducted in federal court. They are neither civil nor criminal, but *sui generis.* The federal rules of evidence and criminal procedure do not apply.[1]

The Arraignment And Bail Application

Typically, you will be called in to represent the accused at an arraignment on an instrument called a "provisional arrest warrant with a view toward extradition" (or some

local variant of that).[2] You will be handed a thin set of papers, which will look even thinner once you start reading. Ordinarily, there will be a complaint sworn to by an Assistant U.S. Attorney. The caption will read "United States v. [Client]" or "In the Matter of the Extradition of [Client]."

While the requesting country is not a named party in the case, the Assistant U.S. Attorney, usually acting in consultation with the U.S. Department of Justice's Office of International Affairs, will be representing the interests of the requesting country in seeking the extradition, as well as the interests of the United States in complying with its international treaty obligations.

The complaint will state that the U.S. State Department has received a diplomatic note from the government of [fill in the country]; that the diplomatic note states that so-and-so is accused (or, in some cases, merely suspected) of having committed one or more specified crimes within the jurisdiction of that country; that there is an extradition treaty between the United States and that country; that the crimes alleged fall within the scope of the extradition treaty; that the conduct is criminal in both the requesting country and in the United States (or in one or more U.S. states); and that the accused is known or believed to be residing in your district. The complaint will sketch out some very basic factual allegations. There will also be a description (or, if available, fingerprints, handwriting samples, or a photograph) of the accused. Fattening the packet will be copies or translations of foreign criminal statutes, and usually a copy of the treaty.

Under most extradition treaties, the requesting country has 60 days after a person has been arrested to submit the formal request for extradition, which is much more elaborate and detailed than the complaint. The government's first move likely will be to ask the court to set a date for the formal extradition hearing at least 60 days down the road.

Your immediate task will be to set a date for a bail hearing. Your client has lived in the community for years, has no criminal record, and has an array of sureties who will put up their homes and life savings. Sounds like plenty, doesn't it? Not really. You will be dismayed to learn that the Bail Reform Act[3] does not apply to extradition proceedings, and thus the court is not required to conduct a bail hearing within three days.[4] There is a presumption against bail in extradition cases, irrespective of the crime charged. To get bail, the defendant must demonstrate not only that he is not a flight risk or a danger to the community, but that there are "special circumstances" that rebut the presumption against bail in his case.[5]

There is no definition of what constitutes "special circumstances"; rather, courts determine on a case-by-case basis whether or not "special circumstances" are present.[6] Among the circumstances that have been deemed sufficiently "special" to justify bail — either alone or in combination with other circumstances — are the age of the defendant, the deteriorating health of the defendant, that the defendant had religious needs that could not be met in prison, long delays during the extradition proceedings, that the requesting country likely would not credit the defendant for time spent while detained in the U.S., a substantial likelihood of success on the merits, and that a person whose extradition was sought in the requesting country would be entitled to bail under comparable circumstances.[7] In rare instances, political considerations have been deemed "special circumstances," including (in one case) the fact that the defendants, who were Irish Republican Army supporters wanted by Great Britain, enjoyed the "sympathy and concern" of many Americans.[8] Bail in extradition cases is tough to get. The norm is detention, not bail. A sympathetic magistrate may find special circumstances and grant bail. But the government may appeal the grant of bail to the district court, and then, if necessary, to the court of appeals.[9] If the magistrate denies bail, you can take the issue up to the district court.[10] But wait, you say, where is the probable cause to arrest, let alone detain? Nothing in the packet of materials we described would ordinarily establish probable cause. There certainly has been no determination of probable cause by a neutral and detached magistrate. So on what basis has the accused been arrested? And on what basis is the accused being detained? Doesn't such a procedure violate due process?[11]

The answer, frankly, is rather muddled. The issue has been raised, but has not been definitively adjudicated.[12] Part of the problem, as we will see shortly, is that the probable cause determination is often the very heart of the extradition case. Many defense lawyers are reluctant to raise probable cause at the arraignment, only to have the magistrate determine probable cause before the defense has had a meaningful opportunity to investigate, analyze, and effectively challenge probable cause. On the other hand, because "likelihood of success on the merits" can be a special circumstance warranting bail, in the appropriate case you may want to point out the weaknesses in the government's showing and begin to plant the seeds of your defense as early as the bail application. And in such a case, the due process issue should be litigated vigorously.

Extradition Request

Bail has been determined, one way or the other. The next thing that happens is that the foreign government submits its formal extradition request.

The formal extradition request is an impressively baroque document, festooned with multi-colored ribbons and seals. After several pages of pro forma certifications, you will find the evidence on which the extradition request rests. Depending on the treaty, this evidence may be in the form of affidavits, or it may even consist of unsworn summary memoranda prepared by investigators or prosecutors.[13] The treaty will generally indicate the form of the evidence required to support an extradition request.

Pre-Hearing Motion For Discovery

Extradition magistrates have the inherent authority to order discovery "as law and justice require."[14] But don't get your hopes up. Discovery is discretionary with the extradition magistrate, and courts are usually very chary with discovery in extradition proceedings. However, if specific evidence or information within the possession, custody or control of the government (or the requesting country) would significantly advance your client's defense, you should file a motion for discovery.[15] The key is to pick your battle and to focus your request on specific documents or information. If the government , or the requesting country, refuses to produce the documents or the information, the court might be persuaded to impose presumptions in your client's favor.[16]

Depositions are extremely rare. Applications for letters rogatory and other transnational discovery devices are generally denied.[17] Whether *Brady* applies is not resolved. To the extent some courts believe it applies, it only

applies to materials in the possession, custody or control of the U.S. government , not the requesting government.[18] Whether or not the court orders discovery, you should conduct your own investigation and try to gather evidence to rebut the government's case. You may need to travel to the requesting country to obtain documents or to interview potential witnesses. The possible need for such travel should be taken into account at the time the extradition hearing is scheduled. You should also seek counsel for your client in the requesting country. It may be possible to resolve the case there or to reach agreement concerning bail and perhaps narrowing the charges should your client decide to waive extradition and return voluntarily. If you (or your client's defense counsel in the requesting country) have access to the accusing witnesses, you should try to get statements or affidavits from them and, where appropriate, should try to persuade them to recant and tell the truth. The admissibility of such defense evidence is discussed below.

A statute allows you to subpoena witnesses to come to the extradition hearing.[19] By reasonable implication, you may subpoena documents as well as witnesses, and you can usually persuade the extradition magistrate to direct that the documents be delivered in advance of the hearing so that you can review and analyze them ahead of time rather than waste the court's time at the hearing itself.

Pre-Hearing Motions To Dismiss

Each charge in an extradition request must be individually established by the government to the satisfaction of the extradition magistrate.[20] The underlying rationale is that the doctrine of "specialty" (which is standard in extradition treaties) limits the requesting country's right to prosecute the accused only to charges for which the accused has been extradited. Thus, even if you do not prevent the extradition, you still help your client if you can persuade the extradition magistrate to refuse certification on some of the charges.

You must study the treaty with a careful eye for detail. Some viable legal defenses may be right in the treaty.

For example, some treaties provide that extradition may not be granted if the crime is barred by the statute of limitations of the requested country, or in some instances, of either country.[21] Many treaties preclude extradition if the accused has already been prosecuted by the requested country (the U.S.) for the same offense.[22]

Another provision frequently found, especially in older treaties, is one that allows extradition only for crimes committed "within the jurisdiction" of the requesting country. Some courts have interpreted that provision to require the requesting country to show that the accused was physically present in the requesting country during the commission of the crime.[23]

"Dual criminality" is another standard treaty requirement. Dual criminality mandates that extradition only take place for conduct that is criminal in both countries.[24] It is important to recognize that it is the *conduct* that must be a crime in both countries. The labels applied to the conduct are not determinative. A mirror image analysis must be performed in order to determine whether the conduct would have been a crime if committed in the United States.[25]If the conduct alleged in the extradition request would constitute a felony (a) under federal law; (b) under the law of the state in which the extradition proceeding is pending; or (c) under the laws of a preponderance of the states, dual criminality is satisfied.[26]

By way of illustration of dual criminality, if there is a crime called "money laundering" in the requesting country, that does not necessarily mean that the particular conduct charged would have constituted a crime (whether labeled "money laundering" or otherwise) under U.S. or state law had the conduct occurred in the United States. If not, there is no dual criminality.

As another example, something labeled a "conspiracy" in another country may not be a crime at all had the conduct occurred in the United States. Factual allegations, not labels, determine whether there is dual criminality. However, minor discrepancies will not defeat dual criminality. For example, many treaties provide that, in performing the dual criminality analysis, the court should disregard jurisdictional impediments to dual criminality (such as a requirement in certain U.S. statutes that there has been use of the mails or the instrumentalities of interstate or foreign commerce).[27] Depending upon the circumstances, you may wish to raise dual criminality pre-hearing as a basis for a motion to dismiss some or all of the charges. Nevertheless, because it is the factual allegations in the extradition request that govern the dual criminality analysis, there may be cases in which it is not advisable to alert the government in advance of the hearing to the shortcomings in its proof. The government is entitled to supplement its extradition request, and the supplemental submissions will be admitted, provided the requisite technical certifications are attached.[28] Alerting the government to the deficiencies may invite a supplemental, curative submission. Sometimes you will have no choice but to raise the issue pre-hearing because the magistrate may have ordered that all treaty-based challenges be raised up front. However, if there has been no such order, and if the extradition hearing is well underway, you may be able to persuade the extradition magistrate that it would be fundamentally unfair to allow the government to supplement its request this late in the process. The extradition magistrate has discretion to allow or disallow the supplementation at that point.

Finally, be aware that there is an overriding principle in extradition law that the court is bound to interpret the treaty in a manner that favors extradition.[29]

Extradition Hearing

After you have conducted your own investigation, obtained whatever discovery the magistrate allows, and perhaps filed pre-hearing motions, if the case has not been dismissed there will be an extradition hearing. The extradition hearing is a fundamental part of the accused's right to be accorded due process.[30] The presiding judicial officer is called the "extradition magistrate," which is a technical term.[31] Based on local rules, it is common for the "extradition magistrate" to be a U.S. magistrate judge. But in some cases the "extradition magistrate" is a U.S. district judge, though not sitting in an Article III capacity.[32] The government is said to bear the burden of proof at the extradition hearing. Although the word "burden" just appeared in that sentence, don't think for a moment that the government 's task is burdensome. The government usually does not call any witnesses. Nor does it typically have to. In most cases, the government submits the extradition request (that colorful document with all the ribbons) and rests. That is because the extradition request is automatically admissible as long as the technical certification requirements have been satisfied.[33] And if they haven't been satisfied in some fashion (the form of certification is incorrect, or some other such deficien-

cy) the extradition magistrate typically allows the government to cure the technical defect.

What does the government have to establish at the extradition hearing? While there are slight variations from treaty to treaty, most treaties, read in conjunction with the extradition statutes, require the requesting country to establish four basic elements.

First, that there is an extradition treaty in place between the requesting country and the United States. Usually, there is no controversy over this, but from time to time an issue arises due to the rearrangement of international boundaries, the toppling of regimes, the renaming of sovereign nations, and other political events that raise a question as to whether the treaty is in force.[34] The extradition magistrate will sometimes pay lip service to the notion that the court must decide whether the treaty is in effect, but in reality the court will look to the State Department for guidance. If the State Department says the treaty is in effect, the court will defer to that determination.[35] In lieu of a treaty, a U.S. statute can suffice. An example is the statute that provides for extradition to the international criminal tribunals for Yugoslavia and Rwanda.[36]

Next, the government needs to show at the extradition hearing that the person in custody is the person being sought by the requesting government. The extradition request may contain photographs or fingerprints for that purpose, and, if the issue is disputed, the government may have to call an expert to compare fingerprints or handwriting, or may have to establish identity in some other fashion.[37]

The third issue that must be established by the government at the extradition hearing is actually two issues that are intertwined and sometimes confused. They are (1) whether the defendant has been charged with an offense that falls within the treaty, and (2) whether there is "dual criminality."

Whether the defendant has been charged with an offense that falls within the treaty implicates, in the first instance, the question of what constitutes a "charge." Courts will generally accept documents from the requesting country sufficient to show an intent to prosecute, and will not require a formal charging instrument such as a prosecutor's information.[38]

Assuming there is such a "charge" in the extradition request, whether it falls within the treaty will depend on the text of the treaty. Older treaties typically list crimes by name: murder, robbery, arson, and so on.[39] As modern crime has become more sophisticated, and as new types of crimes (ranging from insider trading to cyberfraud) have begun to emerge in criminal codes throughout the world, governments have recognized that it is inefficient to have to amend treaties repeatedly just to keep them up to date with the criminal codes. Accordingly, newer treaties generally contain clauses that do not list crimes by name, but that provide that extradition shall be granted for any conduct that is a crime in both countries punishable by at least one year in prison.[40] Under this type of clause, a showing that the conduct falls within the treaty will also satisfy dual criminality, the standard treaty provision discussed earlier. Under the treaties that list the offenses, the government has to show dual criminality separately.

The fourth issue that must be established by the government at the extradition hearing is probable cause. This is often the heart and soul of the extradition hearing.

Probable Cause And The Rule Of Non-Contradiction

By statute, the extradition magistrate must determine probable cause "under the provisions of the proper treaty or convention[.]"[41] A typical treaty clause requires the requesting country to submit "such evidence as, *according to the laws of the Requested State*, would provide cause for his arrest and committal for trial if the offense had been committed there."[42]

Thus, probable cause is usually determined on the basis of the law of the requested country, *i.e.*, the United States.[43] Under most treaties, the extradition magistrate will apply the federal probable cause standard: whether the evidence is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt."[44] However, some treaties require the probable cause determination to be made "according to the laws of the place where the person sought shall be found[.]"[45] A few courts have interpreted this language to mean that the probable cause standard is that of the state in which the accused has been apprehended.[46] The probable cause determination must be made on a charge-by-charge basis, and may rest on single or even multiple hearsay.[47] However, mere conclusory allegations

are inadequate to establish probable cause.[48] The requesting country must introduce evidence on each essential element of each charge.[49] The exclusionary rule does not apply.[50]

In support of probable cause, the requesting country will submit affidavits, unless the treaty allows the use of unsworn documents. If there has already been a conviction in the requesting country, the court may (but need not) find probable cause on that basis alone.[51] If the conviction was in absentia, some courts treat the conviction merely as an accusation.[52]

The defense will generally want to introduce evidence to challenge the requesting government's proof. However, there are serious limitations to what the defense may offer. A "Rule of Non-Contradiction" prohibits the defense from countering the requesting government's evidence with contradictory proof.[53] The rationale behind the rule is that disputed issues of fact should be litigated at trial in the requesting country, not at an extradition hearing in the United States.

The precise scope of the Rule varies from court to court. An extreme version of the rule is that the allegations in the requesting country's papers must be regarded as truthful beyond peradventure.[54] However, many courts have shied away from such an extreme application of the Rule, and have diligently evaluated the credibility of the requesting country's evidence.[55] Nevertheless, courts still regularly invoke the Rule as a basis for limiting the defense's ability to introduce contradictory evidence.

A frequently-seen formulation of the rule is that the defense may offer evidence to "explain" but not to "contradict" the requesting country's proof.[56] While the distinction between explanatory and contradictory evidence is not always clear, an example will help illustrate the distinction. Suppose the defendant is accused of receiving payments which the requesting government alleges were bribes. No accusing witness states that the payments were bribes, but the requesting government presents a case of bribery based upon circumstantial evidence. Application of the rule would likely preclude the defendant from disputing the receipt of the payments, but the rule would allow the defendant to "explain" the payments as innocent gifts.[57] However, if there is direct evidence from an accusing witness that the payments were, in fact, bribes, strict application of the rule would prohibit the accused from contradicting that evidence.[58] The rule has also been applied to prohibit impeachment of the accusing witnesses,[59] on the theory that their credibility is best left for the trial in the requesting country, and that the extradition proceeding is not intended to take the place, or to serve as a preview, of such a trial. Even if the accusing witness has been convicted of perjury ten times in ten different countries, U.S. courts following a strict application of the rule will refuse to consider such impeachment evidence in determining whether there is probable cause based upon the statements of that witness. Still, defense counsel should make every effort to bring that evidence before the extradition magistrate, who has the discretion to consider it.

Some extradition magistrates are understandably uncomfortable with strict application of the Rule of Non-Contradiction, and defense counsel should push it to the limit, emphasizing the extradition magistrate's discretion to receive and consider defense evidence.

In addition to allowing evidence that "explains" the requesting country's proof, courts have allowed evidence that "negates" or "obliterates" that proof. As one oft-cited case states:

"In admitting 'explanatory evidence,' the intention is to afford an accused person the opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of *negating* a showing of probable cause.[60]"

The practical application of this principle is far from clear. As a general concept, the notion of "negating" (or, as some courts say, "obliterating"[61]) refers to evidence which demolishes the requesting country's proof in its entirety, as opposed to evidence that rebuts only certain aspects of the requesting country's proof.[62]

For example, suppose the accusation is that your client robbed a bank on a given date, but you have proof, in the form of official prison records, that your client was in prison on that date. In theory, strict application of the Rule would still preclude the contradictory evidence, but such a result is absurd and should be challenged. Such evidence negates and obliterates probable cause, and should be received.[63]

In recent years, the "negates" or "obliterates" exception to the Rule of Non-Contradiction has been applied most effectively by the defense in two sets of circumstances: (i) where the accusing witness reliably recants the accusation;[64] (ii) where there is a compelling alibi[65] Under classic case law, courts would refuse to consider defenses such as alibi, insanity, duress, and self-defense, reasoning that these defenses are best left for adjudication in the requesting country.[66] Similarly, recantation evidence was deemed to be strictly for the courts in the requesting country to sort through.[67] Now, however, these areas of the law are starting to develop in a manner favorable to defendants, and defense counsel should pursue these issues vigorously.

One more argument in favor of admissibility of contradictory evidence on the probable cause issue is that, under U.S. law, probable cause must be determined on the basis of the "totality of the circumstances."[68] It is hard to see how the "totality of the circumstances" can fail to include defense evidence.

At the hearing, the extradition magistrate will allow the accused to testify, and the testimony might or might not be limited by the Rule of Non-Contradiction.[69] The accused also enjoys a Fifth Amendment right not to testify.[70]

Unlike the government's formal extradition request, which must be received in evidence, defense affidavits need not be received.[71] The extradition magistrate has broad discretion in deciding whether to allow defense affidavits and other hearsay.[72]

In challenging probable cause, you will face the obstacles to admissibility already described, but the extradition magistrate has a fair amount of discretion as to what evidence to admit. Helpfully, one court has stated:

> Due process guarantees that there is a fair decision-making process before official action is taken which directly impairs a person's life, liberty or property . . . . Due process mandates that a judicial proceeding give all parties an opportunity to be heard on the critical and decisive allegations which go to the core of the parties' claim or defense *and to present evidence on the contested facts.*[73]

Unfortunately, not all courts agree. You may find yourself stymied as you try to introduce your evidence. The government will object on the basis of the Rule of Non-Contradiction, and you will find it frustrating to hear the magistrate rule, often completely out of context, that a particular piece of evi-

dence is inadmissible because of the rule.

One strategy is to argue that it is not always feasible for a court to determine whether a particular piece of evidence, viewed in isolation, is "explanatory" or "contradictory," or whether the defense evidence in its totality "negates" or "obliterates" the requesting country's proof. You should urge that all of the defense evidence be admitted *provisionally*. At the conclusion of the hearing, with the benefit of the entire picture, the magistrate can perform a *post-hoc* review of the evidence and determine which pieces of evidence are "explanatory" (and therefore admissible) and which are "contradictory" (and therefore potentially excludable), and whether the "contradictory" evidence "negates" or "obliterates" the requesting country's proof.[74] If the magistrate follows this approach, you will at least have the opportunity to make a complete record, and can argue afterwards whether or not certain pieces of evidence should be stricken. Be ready at the start of the hearing with a bench memo supporting this approach.

United States citizenship is not a defense to extradition and generally plays no role in the extradition determination.[75]

Rule Of Non-Inquiry

One issue that has often been raised but that has consistently gone nowhere for defendants is a challenge to the requesting country's investigative, judicial, or penal systems. Many defendants have protested that extradition should be denied on the ground that they will not receive a fair trial, or will otherwise be mistreated, upon surrender to the requesting country. However, these pleas have fallen on deaf judicial ears. The longstanding Rule of Non-Inquiry prohibits the court from scrutinizing the foreign country's legal system or from questioning the requesting government's motive in seeking extradition.[76] Only the Secretary of State has the discretion to refuse to extradite (after the court has found the accused extraditable) on the basis that the requesting country's system is unfair or otherwise deficient, or that the extradition request is motivated by political factors.[77]

The Rule of Non-Inquiry is pretty-much ironclad, but there may now be a small opening based upon the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[78] A claim under the Convention may not be raised until after the judicial process is complete and the Secretary of State has issued a warrant of extradition.

Traditionally, there could be no judicial review of the Secretary of State's determination.[79] However, in 2000, the Ninth Circuit opened the door a crack by ruling that if the Secretary of State rejects a claim of torture and issues an extradition warrant, the court may review the Secretary of State's decision.[80] The Ninth Circuit later reversed itself, but then vacated the reversal *en banc* on other grounds, and then dismissed the case as moot. As a result, the state of the law is unclear at this time.[81]

Political Offense Exception

There is one traditional defense to extradition that merits serious attention in the appropriate case. That is the "political offense" exception to extradition.

Extradition treaties typically contain political offense clauses. If your client is charged with a political offense, extradition is precluded. But it is not enough to establish that your client's alleged conduct was politically *motivated*.[82] Nor is it relevant (or admissible) that the requesting country's motivation for seeking extradition is politically-driven.[83]

There are two types of political offenses: (1) "pure" and (2) "relative."

A "pure" political offense is a crime that is directed solely at the workings of the state and that lacks the characteristics of ordinary crime. The customary examples are sedition, treason, and espionage. A person cannot be extradited for these crimes.[84] A "relative" political offense is an ordinary crime that is incidental to a severe political disturbance, such as an armed rebellion or insurrection.[85] For example, during the strife in Northern Ireland, some attacks on British military targets were determined to be political offenses not subject to extradition.[86] Courts called upon to determine whether a crime is a relative political offense employ the so-called "incidence" test. To establish that the crime charged is a relative political offense, the accused must show, first, that there was an armed uprising or violent insurrection in the place and at the time the alleged crime occurred.[87] That may require the defense to come forward with expert testimony, historical and political books and documents, newspaper articles, and anecdotal evidence from eyewitnesses. Courts will allow you the opportunity to make that case. But you must show a violent, widespread struggle actually underway at the relevant time and in the relevant place, not merely sporadic acts, isolated pockets of politically-motivated violence, or grandiose revolutionary aspirations.[88] Next, the accused must show that the crime of which your client is accused was committed incidental to, or in furtherance of, the armed uprising or insurrection, as opposed to an unrelated crime committed during the turmoil.

Finally, in many courts, the accused must have behaved in accordance with fundamental norms of the laws of war. Essentially, this means that an attack on a military target can qualify for political offense protection, while an attack on a civilian target cannot. This distinction explains, in part, why someone who attacked a military convoy was found to have committed a political offense, while someone who planted a bomb in a civilian population center, and someone who machine-gunned a civilian passenger bus, did not qualify for the exception.[89]

After The Extradition Magistrate's Ruling

You've had your extradition hearing. The extradition magistrate has issued a ruling. Let's take both outcomes.

You win! Congratulations! Now your client can breathe easily. With rare exception, the government has no right of appeal.[90] Time to celebrate! But wait. You are informed that the government is going to refile the extradition request, and start all over, perhaps before a different magistrate or before a district judge. You go apoplectic. Can the government do that? The answer is yes. Because an extradition hearing is considered a preliminary hearing, there is no *res judicata* and no double jeopardy bar. The government may refile, either with better evidence or even with the same evidence, in the hope of a better result.[91]

Many judges will look askance at a refiling and will need to be persuaded by the government why they have to bother to adjudicate a case that has already been adjudicated to the government's detriment. But if the government can persuade the second extradition magistrate that the first one was out to lunch, or especially if there is additional evidence not presented to the first extradition magistrate, the government will get another day in court.[92] In theory, the govern-

ment can keep refiling, but eventually reality catches up.

Now let's take the other outcome. Suppose you lose the extradition hearing. The extradition magistrate finds your client extraditable on one or more of the charges, and certifies to the Secretary of State that your client is extraditable on those charges.[93] What are your remedies? There is no right of appeal — at least not at this stage. Your remedy is to file a *habeas corpus* petition under 28 U.S.C. § 2241.[94] If the extradition magistrate does not do it *sua sponte*, ask him or her to stay the certification to the Secretary of State for at least 30 days to allow you to prepare and file a *habeas corpus* petition.[95]

The scope of *habeas corpus* review is very narrow. Again, the theory is harsh but some of the recent case law has begun to soften the standard.

The traditional standard for review of the probable cause determination is whether there is "any evidence" to support the finding of probable cause.[96] In addition, the *habeas* court can review whether the extradition magistrate had jurisdiction (which is usually not at issue) and whether the crime charged falls within the treaty.[97] Some courts, however, have engaged in a broader review of the record, and in some circumstances have allowed the defense to supplement the record with newly-obtained evidence.[98] Political offense issues are usually given comprehensive review at the *habeas corpus* level.[99] The standard of review is the customary one — findings of fact are reviewed for clear error, while conclusions of law are reviewed de novo.[100]

If your extradition "magistrate" was a district judge, don't be surprised if the habeas "review" is conducted by the very same judge. In an extradition case, one judge can collaterally review his or her own decision.[101]

Whichever party loses the *habeas corpus* proceeding can then appeal that determination to the court of appeals, and after that, can file a *certiorari* petition. Don't hold your breath on the Supreme Court's granting *certiorari* — it hasn't done so in an extradition case since 1936.[102]

Secretary Of State's Decision

Once all judicial proceedings have concluded, the decision whether or not to extradite rests with the Secretary of State.[103] The Secretary of State cannot extradite on any charge that has not been certified by the extradition magistrate.[104] Following extradition, the principle of specialty (mentioned earlier), prohibits the requesting country from adding charges not included in the Secretary of State's warrant of surrender.[105]

Before the Secretary of State makes her decision on extradition, you have the opportunity to write to the Secretary of State, urging that your client not be extradited. If you have a concern that your client will be tortured or otherwise mistreated in the requesting country, this is the time to raise that concern with the Secretary of State. On rare occasions, the Secretary of State has refused to extradite.[106]

As a fallback, you should consider asking the Secretary of State to impose limitations on the requesting country, such as conditioning extradition on the assurance that the trial will be held in an open proceeding, in a civilian court, and with a right to defense counsel. The Secretary of State has unfettered discretion to impose conditions on the extradition.[107]

Conclusion

The U.S. law of international extradition is fraught with obstacles for the defense. However, overall, the state of the law is more favorable for the defense today than it has ever been. The law is continuing to develop gradually in this direction. Defense counsel should be aware of the emerging issues and should be prepared to litigate those issues vigorously.

Notes

1. See Fed. R. Evid. 1101(d)(3); Fed.R. Crim. P. 1(a)(5)(A).

2. 18 U.S.C. § 3184.

3. 18 U.S.C. § 3141 et seq.

4. *Cf.* 18 U.S.C. § 3142(f)(2).

5. Wright v. Henkel, 190 U.S. 40, 63 (1903); Salerno v. United States, 878 F.2d 317 (9th Cir. 1989); United States v. Leitner, 784 F.2d 159, 160 (2d Cir. 1986).

6. *In re Mainero*, 950 F. Supp. 290, 294 (S.D. Cal. 1996); *In re Nacif-Borge*, 829 F. Supp. 1210, 1213-14 (D. Nev. 1993).

7. Hu Yau-Leung v. Soscia, 649 F.2d 914, 920 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981); Salerno v. United States, 878 F.2d 317, 317 (9th Cir. 1989); United States v. Taitz, 130 F.R.D. 442, 445 (S.D. Ca. 1990); *In re Kirby*, 106 F.3d 855, 863-65 (9th Cir. 1996); United States v. Lui Kin-Hong, 83 F.3d 523, 524 (1st Cir. 1996); *In re Molnar*, 182 F. Supp. 2d 684, 688-89 (N.D. Ill. 2002); *In re Gonzalez*, 52 F. Supp. 2d 725 (W.D. La. 1999); *In re Morales*, 906 F. Supp. 1368, 1376 (S.D. Cal. 1995); *In re Nacif-Borge*, 829 F. Supp. 1210, 1221 (D. Nev. 1993); *In re Gannon*, 27 F.2d 362 (E.D. Pa. 1928).

8. *In re Kirby*, 106 F.3d 855, 864-65 (9th Cir. 1996); *In re Sacirbegovic*, 2005 U.S. Dist. LEXIS 707, at *6-7 (S.D.N.Y. Jan. 19, 2005). *But see* Borodin v. Ashcroft, 136 F. Supp. 2d 125 (E.D.N.Y. 2001).

9. United States v. Leitner, 784 F.2d 159 (2d Cir. 1986); *In re Kirby*, 106 F.3d 855 (9th Cir. 1996).

10. Borodin v. Ashcroft, 136 F. Supp. 2d 125 (E.D.N.Y. 2001).

11. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

12. Parretti v. United States, 122 F.3d 758 (9th Cir. 1997), *op. withdrawn and appeal dism'd,* 143 F.3d 508 (9th Cir. 1998).

13. *See, e.g.*, Afanasjev v. Hurlburt, 418 F.3d 1159 (11th Cir. 2005); U.S. — Switzerland Treaty, S. Treaty Doc. 104-9, 104th Cong., 1st Sess. (Sept. 10, 1997), art. 9 (not requiring sworn evidence).

14. Quinn v. Robinson, 783 F.2d 776, 817 n.41 (9th Cir. 1986), *cert. denied*, 479 U.S. 882 (1986) (citing cases); *In re McMullen*, 1988 U.S. Dist. LEXIS 7201, at *22, 25 (S.D.N.Y. June 24, 1988); *In re Smyth*, 826 F. Supp. 316 (N.D. Cal. 1993), *rev'd on other grounds*, 61 F.3d 711 (9th Cir. 1995).

15. United States v. Hunte, 2005 U.S. Dist. LEXIS 1209 (E.D.N.Y. Jan. 24, 2005); United States v. Montemayor Seguy, 329 F. Supp. 2d 871, 879 (S.D. Tex. 2004).

16. *See In re Smyth*, 61 F.3d 711 (9th Cir. 1995).

17. Gill v. Imundi, 747 F. Supp. 1028, 1040 (S.D.N.Y. 1990); *In re Koskotas*, 127 F.R.D. 13 (D. Mass. 1989), later proceeding, Koskotas v. Roche, 740 F. Supp. 904, 917-18 (D. Mass. 1990), *aff'd*, 931 F.2d 169 (1st Cir. 1990). *Cf. In re Singh*, 123 F.R.D. 108, 117 n.12 (D.N.J. 1987) (court assumes it has power to issue letters rogatory but declines to do so).

18. Demjanjuk v. Petrovsky, 10 F.3d 338, 353 (6th Cir. 1993), *cert. denied*, 513 U.S. 914 (1994). *Cf. In re Drayer*, 190 F.3d 410 (6th Cir. 1999).

19. 18 U.S.C. § 3191.

20. *In re Lang*, 905 F. Supp. 1385, 1392 n.11 (C.D. Cal. 1995).

21. *See, e.g.*, U.S. — Mexico Treaty, 31 U.S.T. 5059 (Jan. 25, 1980), art. 7 (extradition barred if statute has run under the law of either country); U.S. — Belgium Treaty, S. Treaty Doc. No. 104-7, 104th Cong., 1st Sess. (Sept. 1, 1997), art. 2(6) (extradition barred if statute has run under laws of requested state). Absent such a treaty provision, extradition may not be barred on the basis of the passage of time, however substantial. *See In re Drayer*, 190 F.3d 410 (6th Cir. 1999); Martin v. Warden, 993 F.2d 824 (11th Cir. 1993).

22. *See, e.g.*, U.S. — Fed. Rep. Germany Treaty, 32 U.S.T. 1485 (Aug. 29, 1980), art. 8.

23. *See, e.g., In re Fuminaya Aguilar*, 2004 U.S. Dist. LEXIS 6731 (S.D. Fla. Apr. 7,

2004). *But see In re Sacirbegovic*, 280 F. Supp. 2d 81 (S.D.N.Y. 2003).

24. Collins v. Loisel, 259 U.S. 309, 311-12 (1922); Wright v. Henkel, 190 U.S. 40, 58 (1903).

25. Hu Yau-Leung v. Soscia, 649 F.2d 914, 918 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981); Bozilov v. Seifert, 983 F.2d 140, 143 (9th Cir. 1992); Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); Republic of France v. Moghadam, 617 F. Supp. 777, 785-86 (N.D. Cal. 1985); United States v. Poon Sai-Wah, 270 F. Supp. 2d 748 (W.D.N.C. 2003).

26. *See, e.g.*, *In re Chan Seong-I*, 346 F. Supp. 2d 1149, 1159 (D.N.M. 2004); Shapiro v. Ferrandina, 478 F.2d 894, 910-912 (2d Cir.), *cert. denied*, 414 U.S. 884 (1973).

27. *See, e.g.*, Agreement with Hong Kong for the Surrender of Fugitive Offenders (Dec. 20, 1996), U.S. — Great Britain, S. Treaty Doc. No. 105-3, art. II(4)(b).

28. 18 U.S.C. § 3190.

29. Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997).

30. *In re Singh*, 123 F.R.D. 108, 125 (D.N.J. 1987); Sayne v. Shipley, 418 F.2d 679, 686 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970).

31. 18 U.S.C. § 3184.

32. *In re Atta*, 706 F. Supp. 1032 (E.D.N.Y. 1989). In theory, even a state court judge can serve as an extradition magistrate, see 18 U.S.C. § 3184, but in practice that does not happen.

33. 18 U.S.C. § 3190.

34. United States v. Lui Kin-Hong, 110 F.3d 103 (1st Cir. 1997).

35. *See, e.g.*, Kastnerova v. United States, 365 F.3d 980, 985-987 (11th Cir. 2004); *In re Coe*, 261 F. Supp. 2d 1203 (C.D. Cal. 2003); United States v. Poon Sai-Wah, 270 F. Supp. 2d 748 (W.D.N.C. 2003); United States ex rel. Saroop v. Garcia, 109 F.3d 165, 171 (3d Cir. 1997); Then v. Melendez, 92 F.3d 851, 854 (9th Cir. 1996); Terlinden v. Ames, 184 U.S. 270, 288 (1902).

36. Pub. L. No. 104-106, § 1342(a), 110 Stat. 186, 486 (1996), reprinted in 18 U.S.C. § 3181 note; Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000).

37. *See In re Atuar*, 300 F. Supp. 2d 418, 427 (S.D. W.Va. 2003); *In re Cervantes Valles*, 268 F. Supp. 2d 758 (S.D. Tex. 2003).

38. *See* Borodin v. Ashcroft, 136 F. Supp. 2d 125, 129-30 (E.D.N.Y. 2001); *In re Sacirbegovic*, 2005 U.S. Dist. LEXIS 707, at *46-50 (S.D.N.Y. Jan. 19, 2005).

39. U.S. — Israel Treaty, 14 U.S.T. 1707 (Dec. 5, 1963), art. II (listing crimes).

40. *See, e.g.,* U.S. — Switzerland Treaty, S. Treaty Doc. 104-9, 104th Cong., 1st Sess. (Sept. 10, 1997), art. 2.

41. 18 U.S.C. § 3184.

42. *See, e.g.*, U.S. — Philippines Treaty, S. Treaty Doc. 104-16, 104th Cong., 1st Sess. (Nov. 22, 1996), art. 7, § 3; *see also* U.S. — Netherlands Treaty, T.I.A.S. No. 10733 (Sept. 15, 1983), art. 9(3)(b) (similar).

43. Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

44. *See, e.g., In re Atta*, 706 F. Supp. 1032, 1050 (E.D.N.Y. 1989) (quoting Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973)).

45. *See, e.g.*, U,S. — Canada Treaty, 27 U.S.T. 983 (Mar. 22, 1976), art. 10.

46. *See, e.g., In re Schweidenback*, 3 F. Supp. 2d 113, 115 (D. Mass. 1998); *In re Williams*, 496 F. Supp. 16, 17 (S.D.N.Y. 1979).

47. *In re Suarez-Mason*, 694 F. Supp. 676, 686 (N.D. Cal. 1988); Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980).

48. *See, e.g.*, *In re Garcia*, 188 F. Supp. 2d 921, 932 (N.D. Ill. 2002).

49. *In re Sauvage*, 819 F. Supp. 896, 901 (S.D. Cal. 1993).

50. Simmons v. Braun, 627 F.2d 635, 636-37 (2d Cir. 1980); *In re Powell*, 4 F. Supp. 2d 945, 954 (S.D. Cal. 1998).

51. *Sidali v. INS*, 107 F.3d 191, 196 (3d Cir. 1997); Spatola v. United States, 925 F.2d 615, 618 (2d Cir. 1991).

52. *See, e.g.*, *In re Harrison*, 2004 U.S. Dist. LEXIS 9183, at *3 n.1 (S.D.N.Y. May 21, 2004).

53. See generally, Jacques Semmelman, *The Rule of Non-Contradiction in International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence,* 23 FORDHAM INT'L L.J. 1295 (2000).

54. *In re Marzook*, 924 F. Supp. 565, 592 (S.D.N.Y. 1996); *In re Atta*, 706 F. Supp. 1032, 1051 (E.D.N.Y. 1989).

55. *In re Strunk*, 293 F. Supp. 2d 1117 (E.D. Cal. 2003); *Gill v. Imundi*, 747 F. Supp. 1028, 1041 (S.D.N.Y. 1990); Quinn v. Robinson, 783 F.2d 776, 815 (9th Cir. 1986), *cert. denied*, 479 U.S. 882 (1986); Shapiro v. Ferrandina, 355 F. Supp. 563, 572 (S.D.N.Y. 1973).

56. *See, e.g.*, *In re Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978).

57. United States v. Lui Kin-Hong, 110 F.3d 103, 118-19 (1st Cir. 1997).

58. *See, e.g.*, Freedman v. United States, 437 F. Supp. 1252, 1266 (N.D. Ga. 1977).

59. *See, e.g.*, *In re Garcia*, 890 F. Supp. 914, 923 (S.D. Cal. 1994).

60. *In re Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) (emphasis added).

61. Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973), *cert. denied*, 414 U.S. 884 (1973).

62. Sandhu v. Burke, 97 Civ. 4608 (JGK), 2000 U.S. Dist. LEXIS 3584, at *20 (S.D.N.Y. Feb. 10, 2000).

63. *In re Singh*, 170 F. Supp. 2d 982, 994 (E.D. Cal. 2001); Sandhu v. Burke, 97 Civ. 4608 (JGK), 2000 U.S. Dist. LEXIS 3584, at *20, 52-55 (S.D.N.Y. Feb. 10, 2000).

64. *See, e.g.*, *In re Contreras*, 800 F. Supp. 1462 (S.D. Tex. 1992); Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337 (S.D. Fla. 1998), *rev'd mem.*, 172 F.3d 883 (11th Cir. 1999), *cert. denied*, 528 U.S. 969 (1999).

65. *In re Gonzalez*, 52 F. Supp. 2d 725 (W.D. La. 1999); In re Strunk, 293 F. Supp. 2d 1117 (E.D. Cal. 2003); *In re Cervantes Valles,* 268 F. Supp. 2d 758 (S.D. Tex. 2003); *In re Alatorre Pilego*, 320 F. Supp. 2d 947, 950 (D. Ariz. 2004).

66. Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973), *cert. denied*, 414 U.S. 884 (1973); *In re Herrera*, 268 F. Supp. 2d 688, 696-97 (W.D. Tex. 2003); Charlton v. Kelly, 229 U.S. 447, 461-62 (1913).

67. Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

68. Illinois v. Gates, 462 U.S. 213, 238 (1983); *cf. In re Sacirbegovic*, 2005 U.S. Dist. LEXIS 707, at *54 (S.D.N.Y. Jan. 19, 2005).

69. *See, e.g.*, Then v. Melendez, 92 F.3d 851, 852 (9th Cir. 1996); United States v. Seguy, 329 F. Supp. 2d 871, 879 (S.D. Tex. 2004). *Cf.* United States v. Wiebe, 733 F.2d 549, 552 (8th Cir. 1984) (defendant testified and disputed the allegations); *In re Alatorre Pilego*, 320 F. Supp. 2d 947, 950 (D. Ariz. 2004) (similar).

70. United States v. Lui Kin-Hong, 110 F.3d 103, 118 n.20 (1st Cir. 1997).

71. United States v. Taitz, 134 F.R.D. 288 (S.D. Cal. 1991); *In re* Luis Oteiza y Cortez, 136 U.S. 330 (1890).

72. *In re Singh*, 170 F. Supp. 2d 982, 1020-29 (E.D. Cal. 2001); *In re Singh*, 123 F.R.D. 108, 123 (D.N.J. 1987); In re Strunk, 293 F. Supp. 1117, 1134-37 (E.D. Cal. 2003); Republic of France v. Moghadam, 617 F. Supp. 777, 783 (N.D. Cal. 1985); Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337, 1344 (S.D. Fla. 1998), *rev'd mem.*, 172 F.3d 883 (11th Cir. 1999), *cert. denied*, 528 U.S. 969 (1999).

73. *In re Singh*, 123 F.R.D. 108, 125 (D.N.J. 1987) (emphasis added).

74. *In re Strunk*, 293 F. Supp. 2d 1117, 1134-38 (E.D. Cal. 2003); *In re Sandhu*, 90 Cr. Misc. No.1, 1997 U.S. Dist. LEXIS 7314, at *16-20 (S.D.N.Y. May 23, 1997); *In re Singh*, 170 F. Supp. 2d 982, 1019-29 (E.D. Cal. 2001); *In re Sacirbegovic,* 2005 U.S. Dist. LEXIS 707, at *10-11, 57 (S.D.N.Y. Jan. 19, 2005).

75. 18 U.S.C. § 3196. There have been more than a few instances in which the government has lost the extradition case, only to turn around and *deport* the defendant to the country seeking extradition.

See, e.g., I.N.S. v. Doherty, 502 U.S. 314 (1991). Of course, U.S. citizens are not subject to deportation.

76. See generally Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings,* 76 CORNELL L. REV. 1198 (1991); Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005).

77. Ahmad v. Wigen, 910 F.2d 1063 (1990).

78. 1465 U.N.T.S. 85; art. 3 implemented in Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (1998).

79. *See* Cornejo-Barreto v. Seifert [sic], 218 F.3d 1004, 1010 (9th Cir. 2000).

80. Cornejo-Barreto v. Seifert [sic], 218 F.3d 1004, 1012-13 (9th Cir. 2000).

81. Cornejo-Barreto v. Siefert, 379 F.3d 1075 (9th Cir.), *vacated*, 386 F.3d 938 (9th Cir.), *dism'd* as moot, 389 F.3d 1307 (9th Cir. 2004). *See* Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005); Hoxha v. Levi, 371 F. Supp. 2d 651 (E.D. Pa. 2005); Mironescu v. Costner, 345 F. Supp. 2d 538 (M.D.N.C. 2004). *See also* Sandhu v. Burke, 97 Civ. 4608 (JGK), 2000 U.S. Dist. LEXIS 3584, at *52-55 (S.D.N.Y. Feb. 10, 2000).

82. Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990).

83. *In re Sacirbegovic,* 2005 U.S. Dist. LEXIS 707, at *60-61 (S.D.N.Y. Jan. 19, 2005); Eain v. Wilkes, 641 F.2d 504, 516 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

84. Quinn v. Robinson, 783 F.2d 776, 793-94 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

85. Quinn v. Robinson, 783 F.2d 776, 806-811 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); *In re Sacirbegovic*, 2005 U.S. Dist. LEXIS 707, at *58-59 (S.D.N.Y. Jan. 19, 2005).

86. *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

87. *See, e.g.*, Barapind v. Enomoto, 360 F.3d 1061, 1074 (9th Cir. 2005).

88. *In re Atta*, 706 F. Supp. 1032 (E.D.N.Y. 1989); *In re Sacirbegovic*, 2005 U.S. Dist. LEXIS 707, at *59 (S.D.N.Y. Jan. 19, 2005). *But see* United States v. Pitawanakwat, 120 F. Supp. 2d 921 (D. Or. 2000).

89. *Cf. In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984) (extradition denied), with *In re Atta*, 706 F. Supp. 1032 (E.D.N.Y. 1989) (extradition granted), and Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981) (extradition granted) *But see* Ordinola v. Clark, 402 F.Supp. 2d 667. 678 (E.D. Va 2005.)

90. *In re Mackin*, 668 F.2d 122 (2d Cir. 1981). *Cf.* US — UK Supplementary Extradition Treaty, S. Exec. Report No. 17, 99th Cong., 2d Sess. 15-17 (1986) (explicit right of appeal).

91. Collins v. Loisel, 262 U.S. 426, 430 (1923); *In re Atta*, 706 F. Supp. 1032 (E.D.N.Y. 1989); United States v. Poon Sai-Wa, 270 F. Supp. 2d 748 (W.D.N.C. 2003).

92. *In re Atta*, 706 F. Supp. 1032 (E.D.N.Y. 1989).

93. 18 U.S.C. § 3184; Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.), *cert. denied*, 414 U.S. 884 (1973).

94. Collins v. Miller, 252 U.S. 364, 369-70 (1920); Spatola v. United States, 925 F.2d 615, 617 (2d Cir. 1991).

95. *See, e.g.*, *In re Atta*, 706 F. Supp. 1032, 1052 (E.D.N.Y. 1989).

96. Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Afanasjev v. Hurlburt, 418 F.3d 1159, 1163 (11th Cir. 2005).

97. Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Kastnerova v. United States, 365 F.3d 980, 985 (11th Cir. 2004).

98. Sandhu v. Burke, 97 Civ. 4608 (JGK), 2000 U.S. Dist. LEXIS 3584, at *52-55 (S.D.N.Y. Feb. 10, 2000).

99. *See, e.g.*, Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd,* 910 F.2d 1063 (2d Cir. 1990); Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

100. Afanasjev v. Hurlburt, 418 F.3d 1159, 1163 (11th Cir. 2005).

101. *See* Seguy v. United States, 329 F. Supp. 2d 880 (S.D. Tex. 2004). *See also* Wang v. Masaitis, 416 F.3d 992, 999-1000 (9th Cir. 2005) (extradition magistrate designated by habeas judge to issue report and recommendation on habeas petition).

102. Valentine v. United States *ex rel. Neidecker,* 299 U.S. 5 (1936).

103. 18 U.S.C. § 3186. Although traditionally, the Secretary of State's determination has not been judicially reviewable, the Ninth Circuit's unsettled position with respect to the judicial review of the Secretary of State's decision to extradite in the face of a claim of likely torture provides an opportunity, at least for the moment, to request judicial review of the Secretary's determination. See *supra* text accompanying notes 79 through 81.

104. *In re Lang*, 905 F. Supp. 1385, 1392 n.11 (C.D. Cal. 1995).

105. Enforcement of that obligation in the requesting country may be difficult, and may depend on who has standing under the requesting country's law to object to the requesting country's violation of the specialty provision in the extradition treaty. Moreover, a U.S. court will not enjoin the Secretary of State from consenting after extradition to the enlargement of the charges beyond those set forth in the warrant of surrender. *See* Berenguer v. Vance, 473 F. Supp. 1195, 1197 (D.D.C. 1979).

106. See examples in Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1233 n.240 (1991).

107. *In re Singh*, 123 F.R.D. 127, 137 (D.N.J. 1987); Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Restatement (Third) of Foreign Relations § 478 comment d (1987).

About the Authors

Jacques Semmelman is a partner in the global law firm Curtis, Mallet-Prevost, Colt & Mosle LLP, specializing in complex civil litigation, white collar criminal defense and international extradition. A 1983 graduate of Harvard Law School, he served as an Assistant U.S. Attorney in the Eastern District of New York. He was counsel in the Atta/Ahmad, Borodin and Hunte extradition cases. He has written many law review articles on extradition and related topics.

Jacques Semmelman
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178
212-696-6067
Fax 212-697-1559
E-MAIL jsemmelman@cm-p.com

Karen L. Snell is a San Francisco attorney specializing in civil rights litigation and international extradition. A 1981 graduate of Stanford Law School, she spent seven years as an Assistant Federal Public Defender. She formed the boutique firm Clarence, Snell & Dyer LLP and now works on select cases from home. Ms. Snell gained prominence in the field of extradition through her representation of Irish nationalist Jimmy Smyth and Sikh freedom fighter Kulvir Singh Barapind. She often teaches trial advocacy and lectures on ethics for the Northern District of California Criminal Justice Panel.

Karen L. Snell
Clarence & Snell
102 Buena Vista Ter.
San Francisco, CA 94117
415-749-1800
Fax 415-749-1694
E-MAIL ksnell@clarencedyer.com