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International Litigation Guide

International Extradition:

A Guide for Judges

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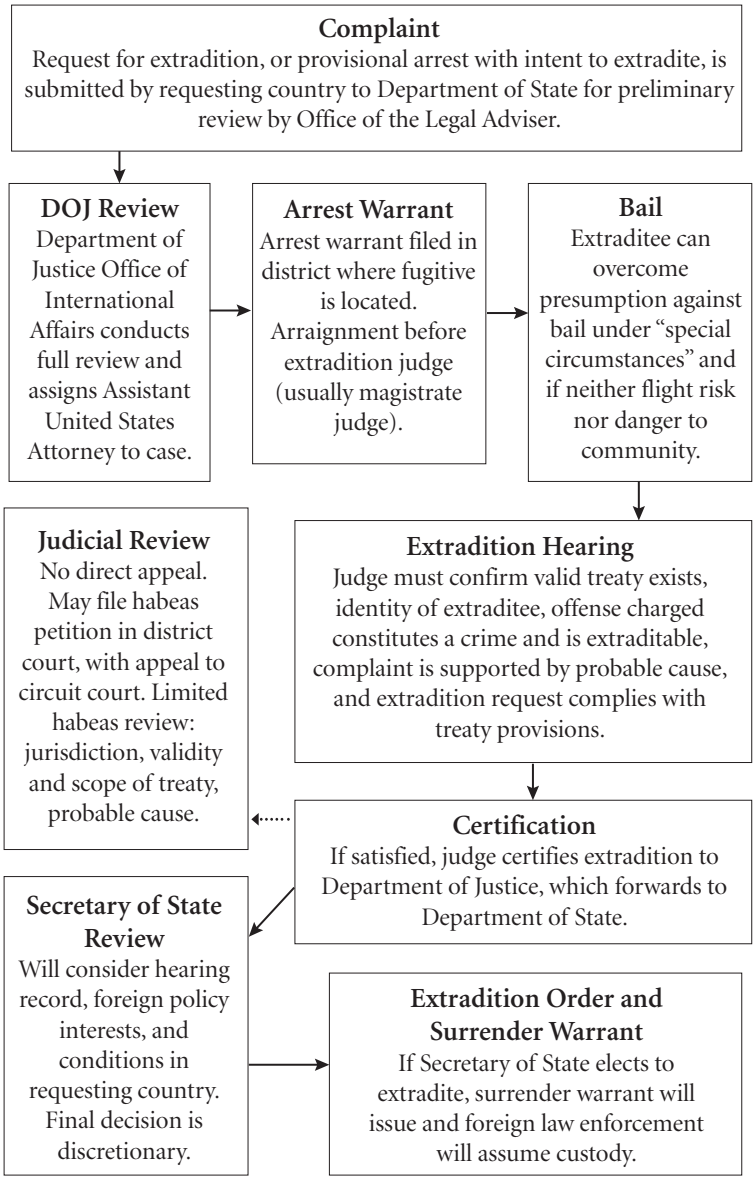

Introduction

International extradition is a process by which an individual taken into custody in one country is surrendered to another country for prosecution, to serve a sentence, or, in some cases, for a criminal investigation. Although extradition proceedings are *sui generis*, they retain characteristics of criminal proceedings.[1] The Federal Rules of Civil Procedure, Criminal Procedure, and Evidence do not apply, though specific rules may be adopted by analogy when appropriate. Similarly, the full panoply of rights accorded to an accused in a criminal action does not apply during extradition proceedings.

Historically, extradition arrangements between two nations were based on principles of international comity. The majority of modern extradition proceedings derive from bilateral or multilateral extradition treaties, substantive international instruments that contain an extradition clause, a military rendition agreement, or a treaty for the transfer of fugitives.[2]

Responsibility for overseeing the extradition process is shared between the executive and judicial branches, with the Secretary of State serving as the final arbiter of whether or not to extradite an individual. The law of extradition has evolved to include interpretive doctrines that balance the obligations and prerogatives of the executive and judiciary: treaties are to be construed in favor of extradition, but the courts play an essential role in reviewing evidentiary and procedural issues.[3]

1. M. Cherif Bassiouni, International Extradition: United States Law and

2. *Note on terminology:* Throughout this guide the term "fugitive" applies to an individual for whom extradition is sought. Once the fugitive is arrested and extradition proceedings have begun, the term "extraditee" will be used. When extradition issues arise in the context of petitions for a writ of habeas corpus or criminal proceedings, a court may refer to the extraditee as "petitioner" or "defendant." When an excerpt from a case is quoted in this guide, the court's terminology is used.

3. The law of extradition in the United States is well established, dating back to the late nineteenth and early twentieth centuries. *See, e.g.*, United States v.

This guide provides a brief overview of extradition law, focusing primarily on the extradition of fugitives from the United States. It describes the grounds for extradition, extradition proceedings, legal issues that may emerge, and related case management considerations.[4]

Jurisdiction and Venue

Extradition proceedings derive from the treaty-making authority of Article IV, Section II, Clause II of the U.S. Constitution and are conducted pursuant to 18 U.S.C. §§ 3181–3196.

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under Section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under Section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems

Rauscher, 119 U.S. 407 (1886); Neely v. Henkel, 180 U.S. 109 (1901); Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

4. When a fugitive is extradited to the United States, legal issues related to extradition law may emerge as part of the underlying criminal action (rather than in the context of an extradition proceeding). The rule of specialty, discussed *infra* pages 22–24, is one such example.

> the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under Section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.[5]

Accordingly, a district court may authorize, by local rule, magistrate judges to preside over extradition requests. Absent such authorization, magistrate judges cannot conduct extradition proceedings.

The initial question for a judge presiding over an extradition request is whether there is a "treaty or convention for extradition between the United States and any foreign government."[6] The Department of Justice attorney representing the United States in an extradition proceeding typically will file a copy of an extradition treaty with the court on two occasions: (1) when a "provisional arrest warrant"[7] is sought, and (2) when an extradition hearing is held and the government moves into evidence a copy of the treaty authenticated pursuant to 18 U.S.C. § 3190.

If the government's initial attempt to move forward with an extradition fails and it has a good-faith basis to believe extradi-

5. 18 U.S.C. § 3184 (2012).

6. *Id.*

7. A "provisional arrest warrant" is a term derived from § 3184. It begins the extradition process before a court. A provisional arrest warrant is based on the same grounds as would authorize a warrant in a U.S. criminal case. *See* Bassiouni, *supra* note 1, at 833. For a discussion of limitations that may be imposed on the issuance of a provisional arrest warrant "without an evidentiary showing of probable cause to believe that an extraditable offense has been committed," see generally *Parretti v. United States,* 112 F.3d 1363, 1372–78 (9th Cir. 1997).

tion is warranted, it may try again.[8] This is because there is no "finality" to a denial within the meaning of 28 U.S.C. § 1291.[9]

Pursuant to § 3184, venue is established wherever the fugitive is "found."[10] For example, if a fugitive wanted by law enforcement authorities in Canada is arrested while a passenger in a car on the New Jersey Turnpike, he is "found" in the United States District Court for the District of New Jersey and venue lies in that judicial district.[11] Challenges on the basis of improper venue are uncommon.[12]

The Extradition Process

Complaint and Provisional Arrest Warrant

Extradition proceedings typically begin when the prosecuting attorney—usually an Assistant United States Attorney—files a complaint in district court indicating an intent to extradite and often seeking the provisional arrest of a fugitive if necessary to prevent the fugitive from fleeing before a formal extradition request is filed. The complaint includes information provided by the requesting country, usually presented in sworn affidavits. The complaint sets forth the relevant terms of the extradition treaty,

8. The government is "not barred from pursuing multiple extradition requests irrespective of whether earlier requests were denied on the merits or on procedural grounds." Hooker v. Klein, 573 F.2d 1360, 1366 (9th Cir. 1978).

9. *See*, *e.g.*, Hoxha v. Levi, 465 F.3d 554, 560 (3d Cir. 2006).

10. 18 U.S.C. § 3184 (2012).

11. In the context of venue, "found" means "'present within his jurisdiction.'" *In re* Sindona, 584 F. Supp. 1437, 1444–45 (E.D.N.Y. 1984).

12. This is likely owing to the difficulty of mounting a successful venue challenge. *See, e.g.*, Shapiro v. Ferrandina, 478 F.2d 894, 898–99 (2d Cir. 1973) (rejecting venue challenge even though judge failed to specify that fugitive was "found" within the jurisdiction in the arrest warrant); *In re* Tafoya, 572 F. Supp. 95, 97 (W.D. Tex. 1983) ("Venue is proper in the Western District of Texas because Tafoya is a resident of El Paso, which is in this district, and was first found there.").

the nature of and basis for the underlying criminal charges, the identity of the fugitive, and his or her believed location.

If the terms of the extradition treaty or case law within a judicial circuit[13] require a showing of probable cause to support a provisional arrest, the complaint will also set forth the basis for believing the fugitive committed the crimes alleged. If the complaint is deemed sufficient,[14] the presiding judge will issue a warrant for the provisional arrest of the fugitive. The government may amend the complaint to provide additional details of the criminal charges or to add new charges.[15]

Initial Appearance and Case Management

When a fugitive whose extradition is sought is taken into custody, he or she will be brought before a judge for an initial appearance.[16] During the initial appearance, the judge should:

13. The Second Circuit construed the language of the extradition treaty between the United States and Italy as requiring probable cause before the provisional arrest would issue, and thus declined to decide the case on constitutional grounds. *See* Caltagirone v. Grant, 629 F.2d 739, 748 (2d Cir. 1980). In contrast, the Ninth Circuit held that as a matter of constitutional law, the Fourth Amendment required the government to show that probable cause exists to believe that a fugitive committed the offense charged. *See* Parretti v. United States, 122 F.3d 758, 763–64 (9th Cir. 1997), *withdrawn and appeal dismissed*, 143 F.3d 508 (9th Cir. 1998). That opinion was subsequently withdrawn, however, under the "fugitive disentanglement doctrine" after the fugitive fled the United States, and is no longer binding precedent. *Parretti*, 143 F.3d 508 (9th Cir. 1998).

14. When reviewing the extradition application, judges may look by analogy to Fed. R. Crim. P. 4(a) and (b), which address the issuance and content of a criminal warrant.

15. *See* Bassiouni, *supra* note 1, at 823.

16. *See, e.g.*, *In re* Extradition of Liu, 913 F. Supp. 50, 51 (D. Mass. 1996). *Cf.* Fed. R. Crim. P. 5(d) ("Procedure in a Felony Case"). Although the Federal Rules of Criminal Procedure are not applicable in extradition proceedings, they may offer guidance.

- inform the extraditee that his or her extradition is being sought by country X to answer the charge of Y, which carries a sentence of Z;
- advise the extraditee of his or her rights;
- consider the appointment of counsel for the extraditee if indigent; and
- consider bail pending the extradition hearing.[17]

The initial appearance provides an early opportunity for the judge to engage in active case management. Preliminary case management issues that may arise include:

- setting a date on which the government will advise the extraditee of the evidence it intends to introduce at the extradition hearing, including the names of witnesses and expected scope of witness testimony—the government will also provide copies of documents it intends to introduce;
- setting a reciprocal date for the extraditee to do the same;
- confirming that the extraditee and counsel understand the limited nature of the extradition hearing and clarifying any limitations on proof the extraditee can introduce; and
- setting a firm hearing date and, if appropriate, dates for one or more interim conferences.

These case management considerations are not derived from any federal rule of procedure; rather, they represent practical considerations for moving an extradition proceeding toward conclusion.

Rather than resolve some or all of these matters at the initial appearance, the judge may raise relevant legal and procedural issues and schedule a case management conference to take place shortly thereafter, possibly by telephone. Counsel for the extra-

17. *See In re* Yusev, No. 12 M 727, 2013 WL 1283822, at *1 (N.D. Ill. Mar. 27, 2013). Bail pending an extradition hearing is further discussed *infra* pages 7–8.

ditee and the government may discuss stipulations as to one or more of the factors that the government would otherwise be required to prove at the hearing.

Bail Pending Extradition Hearing

A bail hearing should be scheduled as soon as possible after the fugitive is arrested, similar to domestic criminal proceedings. There is a presumption against bail in extradition proceedings, reflecting the value placed on the United States fulfilling its obligations under international law to the requesting country.[18] Bail pending an extradition hearing is not governed by the Bail Reform Act or any other statute.[19] Instead, courts have developed federal common law in this area, resulting in sometimes contradictory rulings.

Bail in extradition proceedings is granted only upon a showing that the extraditee is neither a flight risk[20] nor a danger to the community[21] and that "special circumstances" warrant the extraditee's release, a determination that lies within the discretion of the judge.[22] The extraditee bears the burden of proof.[23] Some courts have required that this showing be established by clear and

18. Wright v. Henkel, 190 U.S. 40, 62–63 (1902); *In re* Extradition of Russell, 805 F.2d 1215, 1216–17 (5th Cir. 1986).

19. *See Yusev*, 2013 WL 1283822, at *1.

20. *See* United States v. Taitz, 130 F.R.D. 442, 444–45 (S.D. Cal. 1990) (noting the debate over whether risk of flight is a special circumstance but finding that once the absence of flight risk is determined, courts must then look for special circumstances).

21. *See In re* Extradition of Garcia, 761 F. Supp. 2d 468, 473–74 (S.D. Tex. 2010).

22. *Id*. at 470–72.

23. *Id.* at 474.

convincing evidence[24] and others by a preponderance of the evidence.[25]

Determining the existence of special circumstances involves a fact-specific inquiry and will be found only where justification for release is clear.[26] Examples of circumstances warranting the setting of bail in extradition proceedings include a strong likelihood that extradition will not be granted, unreasonable delays in the extradition process, and serious medical concerns.[27]

Waiver of Extradition

Extraditees may waive their right to all formal extradition proceedings.[28] By waiving their right to a hearing, extraditees concede that extradition requirements are met and sign an Affidavit of Consent to Extradition under the applicable extradition treaty.[29]

24. *See* United States v. Ramnath, 533 F. Supp. 2d 662, 665–66 (E.D. Tex. 2008).

25. *See In re* Extradition of Santos, 473 F. Supp. 2d 1030, 1036 n.4 (C.D. Cal. 2006); *see also Garcia*, 761 F. Supp. 2d at 474–75.

26. *See* United States v. Williams, 611 F.2d 914, 915 (1st Cir. 1979); *Ramnath*, 533 F. Supp. 2d at 666–67.

27. *See* Salerno v. United States, 878 F.2d 317, 317 (9th Cir. 1989). Although most cases follow this presumption against bail, in his treatise on international extradition in the U.S. courts, M. Cherif Bassiouni discusses the due process implications of detaining an extraditee without bail if there has been no predicate showing of probable cause (supporting the underlying criminal offense). He notes, "For all practical purposes, this process has given the government the right to detain people without due process of law, on the sole representation of the requesting government . . . ." Moreover, that initial representation often amounts to no more than a one-page fax from a foreign law-enforcement official. Bassiouni, *supra* note 1, at 849.

28. *See* United States v. Vega, No. 7-CR-707 ARR, 2012 WL 1925876, at *8 (E.D.N.Y. May 24, 2012) ("When a criminal defendant waives extradition, . . . without following the formal procedures of the treaty, the defendant has not been 'extradited' under that treaty.").

29. *See infra* Appendix B.

Extraditees may waive their right to formal extradition proceedings either at initial appearance or the final hearing.[30] The extraditee must sign a written waiver acknowledging that he or she is waiving the right to a hearing *and* the right not to be extradited except upon the judge's certification and the Secretary of State's authorization.[31] The judge must ensure that the waiver is "knowing and voluntary."[32]

Some, but not all, extradition treaties entered into in 1980 or after provide for the waiver of extradition.[33] When the relevant treaty lacks a waiver provision, the waiver request may be denied. In *Blaxland v. Commonwealth Director of Public Prosecutions*,[34] the extraditee offered to waive extradition to Australia in exchange for permission to take with him materials necessary to his defense.[35] An Australian representative insisted upon formal extradition and the court denied the extraditee's request.[36]

In a separate but related issue, extraditees wishing to retain the right to raise treaty-based defenses during subsequent criminal proceedings may instead *consent* to extradition, "conced[ing] that the requirements of extradition are met."[37] In so doing, extraditees merely waive the right to an extradition hearing, as opposed to waiving all formal extradition proceedings, and request

30. *See* U.S. Dep't of State, 7 foreign aff. manual 1600, 1631.4 (2010).

31. *See id.*

32. *Id.*

33. *See id.* at 31 & n.153 (listing treaties containing waiver provisions).

34. 323 F.3d 1198 (9th Cir. 2003).

35. *See id.* at 1202.

36. *See id.* The extradition treaty between the United States and Australia entered into force on May 8, 1976, *see* Extradition Treaty with Australia, May 8, 1976, 27 U.S.T. 957, and thus does not provide for waiver of extradition. *See* Bruce Zagaris, *U.S. Efforts to Extradite Persons for Tax Offenses*, 25 Loy. L.A. Int'l & Comp. L. Rev. 653, 676 (2003) (U.S. extradition treaties that entered into force prior to 1980 do not provide for waiver of extradition).

37. *See* U.S. Dep't of State, *supra* note 30; Michael John Garcia & Charles Doyle, Cong. Research Serv., 7-5700, Extradition To and From the United States: Overview of the Law and Recent Treaties 31 (2010).

that the judge immediately certify extradition to the State Department.[38]

For example, extraditees concerned that the requesting country may prosecute them for crimes other than those for which extradition was sought may consent to extradition under the applicable treaty, thus retaining the protections provided by rule of specialty[39] treaty provisions.[40]

The Extradition Hearing

Because extradition is primarily the prerogative of the executive branch, the scope of the court's inquiry during an extradition hearing is limited.[41] An extradition hearing is not a criminal trial and is not intended to ascertain guilt. The proceeding more closely resembles a preliminary hearing under Federal Rule of Criminal Procedure 5.1,[42] with the central issue being whether there is competent evidence to establish probable cause that the fugitive committed the offenses underlying the request for extradition.[43]

In addition to the probable cause inquiry, the extradition hearing will address the following:

- the existence of a valid extradition treaty;
- the identity of the extraditee;
- whether the crime for which extradition is sought is covered by the treaty;

38. *See* U.S. Dep't of State, *supra* note 30.

39. *See infra* pages 22–24.

40. *Cf.* United States v. DiTommaso, 817 F.2d 201, 212 (2d Cir. 1987) (rejecting defendant's contention that the United States violated the rule of specialty because defendant waived formal extradition and was subsequently deported).

41. *See* Hoxha v. Levi, 465 F.3d 554, 560 (3d Cir. 2006).

42. Fed. R. Crim. P. 5.1(e)–(f).

43. *See* Lo Duca v. United States, 93 F.3d 1100, 1104 (2d Cir. 1996).

- whether the required documents are complete and authenticated;
- whether probable cause exists to believe the extraditee committed the offense in question;[44] and
- whether other requirements under the extradition treaty have been met.[45]

The government will present documentary evidence establishing these issues and has the burden of establishing probable cause.[46]

Depending on the language of the treaty, the judge may be required to make additional findings of fact. For example, a treaty may require the government to show that the offense charged is a crime under both the law of the requesting country and the United States pursuant to the doctrine of dual criminality, discussed below. If the judge finds the evidence presented at the extradition hearing is "sufficient to sustain the charge under the provisions of the proper treaty or convention, the court . . . shall certify the same, together with a copy of all of the testimony taken before him, to the Secretary of State . . . ."[47] Alternatively, the extraditee may elect to waive an extradition hearing and seek relief directly from the Secretary of State.[48] The ultimate decision to extradite is an executive rather than a judicial function.[49]

44. *See Hoxha*, 465 F.3d at 560 (interpreting the "sufficient" evidence standard set forth in 18 U.S.C. § 3184 as requiring probable cause); *see also* Bassiouni, *supra* note 1, at 877 ("The finding of probable cause is specifically required by . . . 18 USC § 3184 . . . .").

45. *See* Bassiouni, *supra* note 1, at 870.

46. *See In re* Extradition of Trinidad, 754 F. Supp. 2d 1075, 1079 (N.D. Cal. 2010) (detailing similar list of issues for the hearing); *In re* Extradition of Atuar, 300 F. Supp. 2d 418, 425–26 (S.D. W. Va. 2003); Garcia & Doyle, *supra* note 37, at 21; *see also* Cheung v. United States, 213 F.3d 82, 88 (2d Cir. 2000).

47. 18 U.S.C. § 3184 (2012).

48. *See supra* pages 8–10 (discussing waiver of extradition).

49. *See Cheung*, 213 F.3d at 88.

Evidentiary Issues

The Federal Rules of Evidence do not apply to extradition proceedings—instead there is a more lenient standard of admissibility.[50] Although the nature of the extradition hearing limits proof that might be offered by the extraditee, as well as his or her access to discovery, testimony may be taken and documentary and other evidence may be introduced by counsel. The admissibility of this evidence is governed by 18 U.S.C. § 3190:

> Depositions, warrants, or other papers or copies thereof offered in evidence . . . shall be received and admitted . . . for all purposes . . . if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country . . . and the certificate of the principal diplomatic or consular officer of the United States resident . . . shall be proof that the same, so offered, are authenticated in the manner required.[51]

During the hearing, the government submits documents and other relevant materials. The materials may vary depending on the terms of the treaty, but should include: certification from an American diplomatic officer as to the genuineness of materials from the foreign state; the governing treaty; the foreign charging instrument (generally an arrest warrant); and the evidence presented to secure that instrument.

Hearsay is permitted, both in the supporting materials and at the hearing.[52] For example, the written statements of witnesses describing the criminal conduct of the accused are usually entered into evidence. The credibility of witnesses and the weight to be accorded evidence falls within the discretion of the judge.[53]

50. *See Trinidad*, 754 F. Supp. 2d at 1081 ("[T]he extradition judge is not limited by the Federal Rules of Evidence.") (citing Mainero v. Gregg, 164 F.3d 1199, 1206 (9th Cir. 1999)).

51. 18 U.S.C. § 3190 (2012).

52. *See* Garcia & Doyle, *supra* note 37, at 22.

53. *See Trinidad*, 754 F. Supp. 2d at 1081.

Right to Present Evidence

The extraditee's right to offer evidence at an extradition hearing is limited, and the procedural framework of an extradition hearing gives the requesting country "advantages most uncommon to ordinary civil and criminal litigation."[54]

The extraditee may introduce evidence that is "explanatory" and serves to undermine the government's showing of probable cause. But, evidence that merely contradicts the government's case or is proffered to undermine credibility is not permitted.[55] This rule enables the extraditee to mount a defense against extradition without transforming the proceeding into a trial on the merits.

Distinguishing between explanatory and contradictory evidence—sometimes a challenging task—is left to the discretion of the extradition judge.[56] For example, in *In re Extradition of Alatorre Pliego*,[57] the government of Mexico sought extradition for the crime of fraud. At the extradition hearing, the extraditee presented testimony by a document examiner disputing the evidence that he signed the document underlying the charges, as well as evidence disputing his identity as the perpetrator of the

54. Skaftouros v. United States, 667 F.3d 144, 155 (2d Cir. 2011) (quoting First Nat'l City Bank v. Aristeguieta, 287 F.2d 219, 226 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49 (1963)).

55. *See* Koskotas v. Roche, 931 F.2d 169, 175 (1st Cir. 1991).

56. *See* Hoxha v. Levi, 465 F.3d 554, 561 (3d Cir. 2006) ("In practice, this line is not so easily drawn, but the rule serves the useful purpose of allowing the defendant 'to present reasonably clear-cut proof . . . of limited scope [that has] some reasonable chance of negating a showing of probable cause,' while preventing the extradition proceedings from becoming 'a dress rehearsal trial.'"); *In re* Extradition of Sidona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) (citing Collins v. Loisel, 259 U.S. 309, 315–17 (1922)) ("The extent of such explanatory evidence to be received is largely in the discretion of the judge ruling on the extradition request.").

57. 320 F. Supp. 2d 947 (D. Ariz. 2004).

crime. The court denied the extradition request, finding that the evidence proffered by Mexico failed to establish probable cause.[58]

Federal courts are divided as to whether defense evidence that a key witness has recanted his testimony rises to the level of explanatory evidence,[59] and the Supreme Court has not yet addressed this issue. Courts will consider the circumstances surrounding the alleged recantation[60] before deciding whether to exclude the evidence.

In *Hoxha v. Levi*,[61] the Third Circuit rejected petitioner's argument that the magistrate judge erred in excluding the telephonic testimony of witnesses who recanted their earlier declarations. Noting the split of authority, the court held that the magistrate judge did not abuse his discretion in barring the telephonic recantation testimony. The court observed that in Hoxha's case the original declaration was independently corroborated and concluded that the proffered recantation provided an alternative narrative that could be presented at trial.[62]

Most courts will circumscribe the type of evidence the extraditee can introduce during the hearing. For example, proffered witness testimony that challenges the credibility of evidence offered by the requesting country is usually deemed a matter for trial rather than relevant to the extradition hearing.[63] If the extraditee can establish that proffered testimony is material to under-

58. *See id.* at 947, 949–50.

59. *See* Eain v. Wilkes, 641 F.2d 504, 511 (7th Cir. 1981) (recantations are inadmissible as explanatory evidence); *In re* Extradition of Contreras, 800 F. Supp. 1462, 1465 (S.D. Tex. 1992) (admitting evidence of recantation); Republic of France v. Moghadam, 617 F. Supp. 777, 783 (N.D. Cal. 1985) (same); *see also Hoxha*, 465 F.3d at 561 (discussing the disagreement among the courts).

60. *See Atuar*, *supra* note 46, at 431 (if original statement was coerced, evidence of recantation may be admissible; court will examine circumstances surrounding alleged coercion and whether independent evidence corroborates original statement).

61. 465 F.3d 554 (3d Cir. 2006).

62. *See id.* at 561.

63. *See Eain*, 641 F.2d at 511–12.

mining the government's showing of probable cause, he or she may petition the court to order the subpoena of such witnesses, with costs borne by the United States if the extraditee is indigent.[64]

Access to Discovery

Although the extraditee does not have a right to discovery from the government or the requesting country, the court has the discretion to grant a discovery request.[65] The request for discovery must be tailored to the limited issue of undermining the government's showing of probable cause.[66] This rule is consistent with the narrow scope of extradition proceedings.

When considering a request for discovery, the court may inquire whether the government, as an exercise of *its* discretion, would allow some limited discovery to address a dispositive legal issue raised by the defense. This would enable the parties and the court to avoid or at least minimize the cost, burden, and related delays that discovery disputes might entail.[67]

64. *See* 18 U.S.C. § 3191 (2012).

65. *See* Quinn v. Robinson, 783 F.2d 776, 817 n.41 (9th Cir. 1986) ("Although there is no explicit statutory basis for ordering discovery in extradition hearings, the extradition magistrate has the right, under the court's 'inherent power,' to order such discovery procedures as law and justice require.") (citation omitted); *see also* Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1407 (9th Cir. 1988). *But see In re* Extradition of Singh, 123 F.R.D. 108, 115 (D.N.J. 1987) (concluding that the court does not have the inherent power to allow discovery in an extradition proceeding).

66. *See* Koskotas v. Roche, 931 F.2d 169, 175 (1st Cir. 1991); *In re* Extradition of Handanovic, 826 F. Supp. 2d 1237, 1239 (D. Or. 2011). The Sixth Circuit has held, however, that the *Brady* rule requiring the government to share exculpatory evidence applies to extradition. *See* Demjanjuk v. Petrovsky, 10 F.3d 338, 353 (6th Cir. 1993).

67. *Cf.* Bassiouni, *supra* note 1, at 866–67 (observing the court's prerogative to request that the government provide materials pertinent to the "identity of the requested person" or "treaty defenses . . . preclud[ing] extradition").

Bars and Defenses to Extradition

Political or Military Offense

The political offense exception, a standard provision in most extradition treaties, is intended to ensure that the extradition process is not used to achieve the political goals of the requesting state.[68] Under the political offense exception, a fugitive cannot be extradited for crimes committed "in the course of and incidental to a violent political disturbance such as war, revolution or rebellion."[69] The underlying criminal conduct must be motivated by the intent to accomplish political change. This exception does not apply to "less fundamental" efforts to effect change or to "common crimes" distantly related to political unrest.[70]

For example, allegations of financial fraud and political corruption that may have a connection to political opposition do not qualify as political offenses.[71] Moreover, the fact that the offense was committed by a political figure or public official does not convert a crime into a political offense. While an individual's identity as a senior political figure may be relevant to assessing the motive of the requesting state, the extraditee's identity is not sufficient to convert a common crime into a political offense.[72]

The extraditee bears the burden of proving a nexus between the crime underlying the extradition request and the alleged political activity.[73] Courts must review the facts underlying the political offense claim to determine whether this burden has been met.[74]

68. *See id.* at 651, 658.
69. *Koskotas*, 931 F.2d at 171 (quoting *Eain*, 641 F.2d at 518).
70. *Id*. 171–72.
71. *Id*. at 172.
72. *See* Bassiouni, *supra* note 1, at 659.
73. *See* Barapind v. Enomoto, 400 F.3d 744, 751 (9th Cir. 2005).
74. *See In re* Extradition of Singh, 170 F. Supp. 2d 982 (E.D. Cal. 2001) (murders of Punjab security forces by leader of movement for independent Sikh state in the context of general and violent unrest of the late 1980s and early

Extradition treaties often include a list of offenses for which extradition must or may be denied. A few of the more recently executed extradition treaties expressly exclude terrorist offenses or other crimes from the definition of political crimes.[75]

Some extradition treaties include a provision prohibiting extradition when the alleged criminal conduct is deemed a "military offense." As with the political offense exception, such offenses must be proven to be outside the realm of "ordinary criminal law."[76]

Criminal Trial Defenses

Defenses potentially available to a defendant in a U.S. criminal proceeding are, generally speaking, not available to an individual whose extradition is sought.[77] For example, the extradition judge may refuse to hear testimony concerning an alibi or supporting a finding of insanity.[78] Such defenses are not considered relevant to

1990s are non-extraditable political offenses); United States v. Pitawanakwat, 120 F. Supp. 2d 921, 938 (D. Or. 2000) (discharging weapon at police helicopter during occupation of private property in Canada by a member of the Ts'peten Defenders (indigenous group defending native land) was a non-extraditable political offense because it was "part of a broader protest in 1995 aimed at the Canadian government in support of sovereignty by the native people over their land"); *In re* McMullin, No. 3-78-1099 MG (N.D. Cal. May 11, 1979) (former IRA member accused of murder in connection with the bombing of a military installation in England could not be extradited because the crime had taken place during a larger uprising intended to remove the British from Northern Ireland). *But see Eain*, 641 F.2d at 518–23 (holding that "indiscriminate bombing of a civilian population" despite being in the context of the larger PLO uprising "is not recognized as a protected political act").

75. *See* Garcia & Doyle, *supra* note 37, at 7–8.

76. *In re* Extradition of Suarez-Mason, 694 F. Supp. 676, 702–03 (N.D. Cal. 1988).

77. *See In re* Extradition of Salas, 161 F. Supp. 2d 915, 924 & n.14 (N.D. Ill. 2001).

78. *See* Charlton v. Kelly, 229 U.S. 447, 462 (1913) (holding that the extradition magistrate properly excluded the evidence of insanity at the hearing stage); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973).

extradition proceedings as they concern issues that should be resolved during trial proceedings in the requesting state.

The extradition court will also not consider evidence of a statute of limitations violation unless the applicable extradition treaty expressly provides for a lapse of time bar.[79] Similarly, a defense of double jeopardy will be considered only if so provided for in the treaty;[80] a number of international extradition treaties bar extradition for prosecution of the "same acts or event."[81]

Other Legal Issues

Although the majority of extradition proceedings proceed in a *pro forma* manner, some cases present more complicated legal issues that require judicial consideration.

Did the Requesting Country Follow Its Own Law?

When a U.S. court reviews a challenge to an extradition request, its inquiry is limited to ensuring that the requesting state complied with the applicable treaty and typically should not extend to an examination of whether the requesting country complied with its own law.

79. *See In re* Extradition of Chan Seong-I, 346 F. Supp. 2d 1149, 1157 (D.N.M. 2004); United States v. Neely, 429 F. Supp. 1215, 1225 n.9 (D. Conn. 1977); *see also* Garcia & Doyle, *supra* note 37, at 15–16 (citing extradition treaties that include provisions addressing lapse of time).

80. *See In re* Ryan, 360 F. Supp. 270, 275 (E.D.N.Y. 1973), *aff'd*, 478 F.2d 1397 (2d Cir. 1973).

81. Garcia & Doyle, *supra* note 37, at 14–15 ("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*).") (citation omitted).

In *Skaftouros v. United States*,[82] the district court granted the petitioner's writ of habeas corpus, finding that the arrest warrant did not comply with Greek law and that the Greek statute of limitations had expired.[83] The Second Circuit reversed and reiterated the district court's narrow role in extradition proceedings:

> U.S. courts are strongly discouraged from reviewing whether the demanding country has complied with its own law and, indeed, it is error to do so except to the limited extent necessary to ensure compliance with the applicable extradition treaty. . . . Technical objections to the demanding nation's compliance with its own laws are particularly disfavored . . . .[84]

Similarly, in *In re Assarsson*,[85] the Seventh Circuit rejected a challenge to an extradition request from Sweden. The petitioner argued that he had not been "charged" with a crime under Swedish law. Rejecting this claim, the court held that extradition proceedings are not appropriate fora for reviewing compliance with foreign criminal procedure. "While our courts should guarantee that all persons on our soil receive due process under our laws, that power does not extend to overseeing the criminal justice system of other countries."[86]

Legal challenges to the underlying indictment or other issues of criminal procedure under foreign law should be made in the courts of the requesting country.[87]

82. 667 F.3d 144 (2d Cir. 2011), *vacating* 759 F. Supp. 2d 354 (S.D.N.Y. 2010).

83. *See id.* at 147.

84. *Id.* at 156.

85. 635 F.2d 1237, 1245 (7th Cir. 1980).

86. *Id.* at 1244.

87. *See* Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990) (citing Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960)) ("A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge."). *But see* Sacribey v. Guccione, 589 F.3d 52 (2d Cir. 2009) (absence of valid arrest warrant "falls within the narrow category of issues that is cognizable on habeas review of an extradition order").

Dual Criminality

The offense underlying a request for extradition must be recognized as a crime in both the requested and requesting countries, a principle known as dual criminality. Dual criminality is a common maxim in international law and is a standard provision in most extradition treaties.[88] For purposes of finding an analogous offense under U.S. law, either federal or state law may be considered.[89]

Dual criminality does not require "exact congruity of offenses" or that they have the same name or scope of liability.[90] Rather, in keeping with the practice of construing extradition treaties broadly,[91] "it is enough if the particular act charged is criminal in both jurisdictions."[92]

In order to ascertain whether the dual criminality doctrine is satisfied, the court must engage in an analysis of the offenses charged and look for "substantial equivalents." In *In re Zhenly Ye Gon*,[93] the court compared money laundering statutes in Mexico and the United States and acknowledged petitioner's argument that the two statutes included somewhat different elements.[94] However, dual criminality requires courts to focus on a defendant's acts and not each element of the crime. The court concluded that Mexican and U.S. statutes addressed "the same evil" and shared underlying factual predicates.[95]

88. *See* United States v. Kin-Hong, 110 F.3d 103, 114 (1st Cir. 1997).

89. *See* Garcia & Doyle, *supra* note 37, at 9–10 & n.49.

90. *In re* Extradition of Manzi, 888 F.2d 204, 207 (1st Cir. 1989).

91. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 10 (1936) ("It is a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties.").

92. Collins v. Loisel, 259 U.S. 309, 312 (1922).

93. 768 F. Supp. 2d 69 (D.D.C. 2011).

94. *Id.* at 84.

95. *Id.* at 85; *see also* United States v. Sensi, 879 F.2d 888, 893–94 (D.C. Cir. 1989) (comparison of U.K. and U.S. mail fraud statutes; court focused analysis on the acts of the defendant and not legal doctrine).

Although the vast majority of federal cases have rejected extradition challenges based on dual criminality,[96] if the overlap of foreign and U.S. criminal codes is not clear, the court may need to probe further.[97]

Some types of U.S. criminal offenses, such as conspiracy, wire fraud, and certain inchoate crimes, do not have foreign law corollaries. For this reason, many modern extradition treaties include provisions that extend coverage over these types of crimes.[98] If such provisions are absent, the reviewing court must examine whether the elements of the U.S. crime have a foreign analog. *United States v. Khan*[99] involved appellate review of a conviction of a Pakistani national for conspiracy to distribute heroin. At the request of the United States, Khan was extradited from Pakistan to face trial. Khan was convicted and on appeal, argued that the doctrines of dual criminality and specialty precluded his prosecution on the charges in Count VIII (violation of 21 U.S.C. § 843(b), the use of a telephone to facilitate the commission of a drug felony). Khan alleged that although drug conspiracy is a prosecutable offense in Pakistan, using a telephone during the commission of a drug offense is not. Noting that although dual criminality does not require that Pakistan have a provision that is the exact duplicate of § 843(b), the government did not present the court with a Pakistani crime that is even analogous. Accordingly, the court ruled, the doctrine of dual criminality was not satisfied with respect to Count VIII and

96. *See Zhenly Ye Gon*, 768 F. Supp. 2d at 82 ("exhaustive research discloses precious few cases in which a federal court held there was not dual criminality").

97. *See* Caplan v. Vokes, 649 F.2d 1336, 1344 (9th Cir. 1981) (requiring "extensive inquiry into such questions"). *But see* Skaftouros v. United States, 667 F.3d 144, 156 (2d Cir. 2011) (the "extradition judge should avoid making determinations regarding foreign law").

98. *See* Garcia & Doyle, *supra* note 37, at 11.

99. 993 F.2d 1368 (9th Cir. 1993).

Khan's conviction on Court VIII should be reversed and dismissed.[100]

The Rule of Specialty

Under the rule of specialty, the country requesting extradition may not prosecute the extraditee for any offense other than the charge underlying the extradition request.[101] Reflecting a respect for international comity, this rule assures the requested state that the extraditee will not be subject to indiscriminate prosecution upon return to the requesting state.[102]

U.S. courts typically address the rule of specialty in the context of criminal proceedings involving fugitives extradited to the United States.[103] Although the comity considerations address relations between countries (not between a country and the extraditee), federal circuits are split on whether the extraditee has standing to raise the rule of specialty, or whether it can only be raised by the requested nation.[104] Courts may condition standing

100. *See id.* at 1372–73; *see also In re* Extradition of Robertson, No. 11-MJ-0310 KJN, 2012 WL 5199152, at *19 (E.D. Cal. Oct. 19, 2012) (extradition request from Canada for violation of a "Long Term Supervision Order"; finding no analogous violation of U.S. law, the court held dual criminality had not been satisfied).

101. United States v. Lopesierra-Gutierrez, 708 F.3d 193, 205–06 (D.C. Cir. 2013).

102. United States v. Lomeli, 596 F.3d 496, 501 (8th Cir. 2010).

103. The Supreme Court of the United States adopted the rule of specialty as part of domestic law in *United States v. Rauscher*, 119 U.S. 407 (1886). Because the decision to extradite ultimately rests with the executive, courts have construed *Rauscher* to apply only "when the United States is the requesting country." *In re* Extradition of Hurtado, No. EP–13–MC–00166–ATB, 2013 WL 4515939, at *4 (W.D. Tex. Aug. 21, 2013) (citing Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973)).

104. *See Hurtado*, 2013 WL 4515939, at *3. The First, Third, Sixth, and Seventh Circuits do not permit extraditees to challenge extradition on the basis of a rule of specialty violation. *See* United States *ex rel.* Saroop v. Garcia, 109 F.3d 165, 168 (3d Cir. 1997) (citing cases); Demjanjuk v. Petrovsky, 776 F.2d 571, 583–84 (6th Cir. 1985) (right to assert specialty lies with requested state). The

on the inclusion of a treaty provision addressing the rule of specialty. For example, the Eighth Circuit recognized the standing of extraditees to raise "any objection that the surrendering country might have raised to their prosecution."[105]

Similarly, in *United States v. Baez*,[106] the petitioner argued that the rule of specialty was violated when he was sentenced to life imprisonment despite the Colombian government's diplomatic note conditioning his extradition on the U.S. government's promise to request that a life sentence be commuted to a term of years. Although it affirmed the sentence, the Second Circuit criticized the district court for "erroneously suggest(ing) that it could ignore the consequences of an extradition agreement between Colombia and the United States because the Judiciary is a branch of our tripartite government independent of the Executive branch."[107] Reiterating the importance of the judiciary's respect for international comity, the court noted:

> [T]he cauldron of circumstances in which extradition agreements are born implicate the foreign relations of the United States. In sentencing a defendant extradited to this country in accordance with a diplomatic agreement between the Executive branch and the extraditing nation, a district court delicately must balance its discretionary sentencing decision with the principles of international comity in which the rule of specialty

Second and Eleventh Circuits permit individual standing. *See* United States v. Baez, 349 F.3d 90, 93 (2d Cir. 2003); United States v. Puentes, 50 F.3d 1567, 1572 & n.2 (11th Cir. 1995) ("We hold that a criminal defendant has standing to allege a violation of the principle of specialty. We limit, however, the defendant's challenges under the principle of specialty to only those objections that the rendering country might have brought."). The Fifth Circuit has not decided the issue. *See Hurtado*, 2013 WL 4515939, at *3; *see also* United States v. Kaufman, 858 F.2d 994, 1009 n.5 (5th Cir. 1988) (declining to address standing to raise the rule of specialty).

105. *Lomeli*, 596 F.3d at 500 (observing that the treaty governing extradition between the United States and Mexico included such a provision).

106. 349 F.3d 90 (2d Cir. 2003).

107. *Id.* at 93.

> sounds. Courts should accord deferential consideration to the limitations imposed by an extraditing nation in an effort to protect United States citizens in prosecutions abroad.[108]

In a similar case involving a diplomatic note appended to extradition documents from Colombia, the Eleventh Circuit found that specialty was not violated by a jury instruction on vicarious liability, even though Colombian law did not recognize such a concept. Specialty focuses on "conduct prosecuted" rather than an "evidentiary fact to prove guilt in related substantive offenses."[109]

The rule of specialty also has been invoked to object to an enhanced criminal sentence based on (uncharged) conduct that was not part of the underlying extradition request. Most courts have rejected this argument, concluding that this rule should not impinge on a court's discretion during sentencing.[110] Specialty relates to the conduct alleged in the indictment and not facts considered during the sentencing process.

Although less common, courts may also consider the rule of specialty during extradition hearings.[111] *In re Extradition of Lahoria*,[112] involved a challenge to an extradition request from India. Extraditees argued that India was in violation of the rule of specialty by pursuing prosecution for violations of the Terrorism and Disruptive Activities (Prevention) Act of 1987 ("TADA"),[113] an offense not included in the extradition request. The court determined that the rule of specialty precluded India from prosecuting the extraditees for any offenses other than those upon which extradition was sought—including TADA violations.[114]

108. *Id.*

109. Gallo-Chamorro v. United States, 233 F.3d 1298, 1306 (11th Cir. 2000).

110. *Lomeli*, 596 F.3d at 502.

111. *See, e.g.*, *In re* Extradition of Diaz Medina, 210 F. Supp. 2d 813 (2002).

112. 932 F. Supp. 802 (1996).

113. *Id.* at 820.

114. *Id.*

The Rule of Non-Inquiry

In some cases, the extraditee will oppose extradition on the grounds that he will face physical threat, unjust treatment, or torture if returned to the requesting country. The rule of non-inquiry limits a court's ability to address these arguments. It holds that the U.S. judiciary does not have the authority to scrutinize the fairness of the requesting nation's legal system or examine the conditions that await an extraditee upon return, including the ability to provide for his or her physical security.[115] This doctrine is based on considerations of international comity and institutional competence very similar to those underlying the rule of specialty.

In *Hoxha v. Levi*,[116] the petitioner alleged that if returned to Albania to face trial for murder, he would be subjected to torture and possibly murdered.[117] The district court had noted these concerns and "strongly encouraged the State Department to seriously examine the charges."[118] Under the rule of non-inquiry, the Third Circuit upheld the district court's decision not to consider Hoxha's claim because "such humanitarian considerations are within the purview of the executive branch and generally should not be addressed by the courts in deciding whether petitioner is extraditable."[119]

The First Circuit reached a similar conclusion in *Koskotas v. Roche*,[120] acknowledging the petitioner's concerns for his physical safety if returned to Greece, but declining to scrutinize his allega-

115. *See* United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997); *In re* Extradition of Manzi, 888 F.2d 204, 206 (1st Cir. 1989); *see also In re* Extradition of Singh, 123 F.R.D. 127, 131–40 (D.N.J. Nov. 2, 1987) (reviewing conflicting case law and concluding that accused not entitled to offer evidence that he could not receive a fair trial if extradited to India).

116. 465 F.3d 554 (3d Cir. 2006).

117. *See id.* at 557.

118. *Id.* at 563 n.13.

119. *Id.* at 563.

120. 931 F.2d 169 (1st Cir. 1991).

tions because international comity "would be ill-served by requiring foreign governments to submit their purposes and procedures to the scrutiny of United States courts."[121]

Judicial review of extradition proceedings, though an essential element of the extradition process, is limited in scope. Questions about another sovereign's legal and political systems are reserved for the Secretary of State. Conditions in a requesting country may indeed be relevant to whether extradition is appropriate, and the United States maintains extradition treaties with a wide range of nations, some of which have "oppressive and arbitrary regimes."[122] But the rule of non-inquiry reserves for the Secretary of State the task of assessing whether there are political or humanitarian grounds to deny extradition.

Is There a Humanitarian Exception to the Rule of Non-Inquiry?

In several cases extraditees have challenged the rule of non-inquiry in the context of allegations that they will face torture if extradited, raising claims pursuant to the United Nations Convention against Torture, codified into U.S. law by the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), 8 U.S.C. § 1231.[123] Pursuant to FARRA, the United States will not extradite "any person to a country in which there are substantial grounds for believing the person would be in danger of being subject to torture."[124]

The majority of courts considering challenges to extradition under FARRA have declined to rule on this issue because the cases have not presented a "final agency decision" (the Secretary of

121. *See id.* at 174.

122. United States v. Kin-Hong, 110 F.3d 103, 111 n.12 (1st Cir. 1997).

123. *See* Mironescu v. Costner, 480 F.3d 664, 666–68 (4th Cir. 2007); *Hoxha*, 465 F.3d at 563–65; Prasoprat v. Benov, 622 F. Supp. 2d 980, 983–87 (C.D. Cal. 2009).

124. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2422, 112 Stat. 2681, 2682.

State's extradition order) and, accordingly, have not been ripe for adjudication.[125]

If the Secretary of State certifies extradition despite an extraditee's claim under FARRA, may the extraditee challenge this determination in court? The case law on this issue remains sparse but is evolving.[126] Commentators have argued that allegations of torture or similar atrocities may rise to the level of a cognizable humanitarian exception to extradition.[127] While some courts have acknowledged this possibility in dicta, others have concluded that such considerations are relegated to the Secretary of State, and the Secretary's conclusions are not reviewable by the courts.[128]

In *Trinidad y Garcia v. Thomas*,[129] the petitioner alleged that extradition to the Philippines would violate his rights under the Convention against Torture and the due process clause of the Fifth Amendment. In an en banc decision, the plurality found:

> The process due here is that prescribed by the statute and implementing regulation: The Secretary must consider an extra-

125. *Hoxha*, 465 F.3d at 564–65; Cornejo-Barreto v. Siefert, 218 F.3d 1004, 1016 (9th Cir.), *rev'd*, 379 F.3d 1075 (9th Cir.), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004); *see also* Prasoprat v. Benov, 421 F.3d 1009, 1016 (9th Cir. 2005) (recognizing that while the courts have occasionally referred to the possibility of a humanitarian exception in dicta, they have "never actually relied on it to create such an exception") (internal quotation marks omitted).

126. In *Prasoprat v. Benov*, 622 F. Supp. 2d 980, 983–87 (C.D. Cal. 2009), petitioner refiled a habeas petition after the Secretary of State certified petitioner's extradition despite allegations that he would be tortured if returned to Thailand, arguing that the Secretary's decision is subject to judicial review under FARRA. The district court agreed to review but ultimately declined to grant habeas relief, finding that petitioner did not show that torture was "more likely than not." *Id.* at 988.

127. 2 Ved P. Nanda & David K. Pansius, Litigation of International Disputes in U.S. Courts § 10:21 (2d ed. 2013) (detailed discussion of the implications of the Convention Against Torture for extradition law).

128. *Id.* nn.23–27.

129. 683 F.3d 952 (9th Cir. 2012) (en banc) (per curiam), *cert denied*, 133 S. Ct. 845 (2013).

> ditee's torture claim and find it not "more likely than not" that the extraditee will face torture before extradition can occur. An extraditee thus possesses a narrow liberty interest that the Secretary comply with her statutory and regulatory obligations.[130]

Concluding that the record lacked evidence of this review, the court remanded the case to the district court "so that the Secretary of State may augment the record by providing a declaration that she has complied with her obligations."[131]

Significantly, the court also ruled that once the State Department makes a determination regarding extraditability, the rule of non-inquiry "block(s) any inquiry into the substance of the Secretary's declaration."[132] The majority in *Trinidad* made the limited scope of judicial review explicit: "[t]o the extent that we have previously implied greater judicial review of the substance of the Secretary's extradition decision other than compliance with her obligations under domestic law, we overrule that precedent."[133]

Review Pursuant to Writ of Habeas Corpus

An order certifying extradition is not appealable because it is not considered "final" within the meaning of 28 U.S.C. § 3191.[134] The ultimate decision to extradite lies with the Secretary of State. Therefore, an extraditee's sole remedy from an extradition order is a writ of habeas corpus.[135] This writ may be sought at any point

130. *Id.* at 957 (internal citation omitted).

131. *Id*.

132. *Id*.

133. *Id*. Of note, four judges on the en banc panel issued a dissent, concluding that the rule of non-inquiry renders remand to the lower court unnecessary. *See id.* at 963 (Tallman, J., dissenting). However, two other judges on the panel would have left open the issue of whether the rule of non-inquiry precludes substantive judicial review. *See id.* at 984 (Berzon, J., concurring in part and dissenting in part).

134. 28 U.S.C. § 3191 (2006).

135. *See* Ahmad v. Wigen, 910 F.2d 1063, 1065 (2d Cir. 1990).

during the extradition proceeding and is filed with the district court. Appeal may be taken to the U.S. court of appeals.

Appellate review of a district court's ruling in an extradition habeas is de novo and is limited to whether:

- the judge reviewing the extradition request had jurisdiction;
- the offense charged fell within the extradition treaty; and
- probable cause existed to believe the accused was guilty of the underlying offense.[136]

The burden of proof in a habeas proceeding challenging extradition rests with the petitioner. In *Skaftouros v. United States*, the Second Circuit reversed the district court's ruling that imposed the burden of proof on the government:

> [C]ollateral review of an international extradition order should begin with the presumption that both the order and the related custody of the fugitive are lawful.
>
> We therefore hold that, in order to merit habeas relief in a proceeding seeking collateral review of an extradition order, the petitioner must prove by a preponderance of the evidence that he is "in custody in violation of the Constitution or laws or treaties of the United States" which, in this context, will typically mean in violation of the federal extradition statute or the applicable extradition treaty.[137]

Although habeas review of an extradition proceeding is narrow in scope, the reviewing court is not "expected to wield a rubber stamp" and must review the sufficiency of the probable cause showing and examine the record to ensure that applicable treaty provisions and U.S. law have been followed.[138]

136. *See* Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Skaftouros v. United States, 667 F.3d 144, 157 (2d Cir. 2011); Ntakirutimana v. Reno, 184 F.3d 419, 423 (5th Cir. 1999).

137. *Skaftouros*, 667 F.3d at 158 (citations omitted).

138. *Id.*

Conclusion

In most cases, the judge's role in an extradition proceeding is limited to ensuring that the extradition request is adjudicated in compliance with U.S. law and the applicable treaty. The United States is party to over 150 extradition treaties, and in some cases judges are called on to interpret treaty provisions; other cases may require judges to exercise their discretion over areas addressed neither by treaty nor statute, including bail proceedings, discovery, and unusual evidentiary requests. While not an exhaustive review of U.S. case law, this guide should provide judges with a general understanding of the procedural, practical, and substantive law issues that may arise when a foreign country requests the extradition of a fugitive located in the United States.

Appendix A

UNITED STATES DISTRICT COURT FOR THE
[Jurisdiction]

IN THE MATTER OF THE EXTRADITION	)	Hon. [Judge]
	)	
OF	)	
	)	
[EXTRADITEE]	)	Mag. No.[XX-XXXX]

CERTIFICATION OF EXTRADITABILITY
AND
ORDER OF COMMITMENT

The Court has received the Complaint filed on [Date], by [Assistant United States Attorney], Assistant United States Attorney for the District of [State], for and on behalf of the Government of the United States, pursuant to that Government's request for the provisional arrest and extradition of [Extraditee]. The Court has also received an affidavit executed by [Extraditee] and witnessed by his attorney, [Attorney].

On [Date] this Court held a formal extradition proceeding during which [Extraditee] [Insert relevant facts, for example: appeared before the Court in open session, accompanied by his attorney, and in the presence of the aforementioned Assistant United States Attorney. The Court addressed [Extraditee] and is satisfied that he is aware of his rights as set forth in the affidavit of consent to extradition and that the affidavit was executed knowingly and voluntarily].

Inasmuch as [Extraditee] has conceded that [he] is extraditable on the charges for which extradition was requested, and has consented to a certification by this Court to that effect, and has further consented to remain in custody pending the arrival of agents from the requesting state to effect [his] transfer to the requesting state, the Court finds on the basis of the record herein and the representations of [Extraditee] and counsel that:

1. the undersigned judicial officer is authorized under Title 18, United States Code, Section 3184, to conduct an extradition hearing;
2. the Court has personal jurisdiction over [Extraditee] and subject-matter jurisdiction over the case;

3. there is currently in force an extradition treaty between the Government of the United States and the Government of [Country], S. Treaty Doc. [Treaty citation];
4. [Extraditee] has been charged in [Country] with [Offense], in violation of [Country]'s Criminal Code [Relevant codes from the Statute]; [Relevant language from the statute], in violation of [Country]'s Criminal Code [Relevant codes from the Statute]; and [Other offense], in violation of [Country]'s Criminal Code [Relevant codes from the Statute];
5. these charges constitute extraditable offenses within the meaning of [section, subsection] of the Treaty;
6. the requesting state seeks the extradition of [Extraditee] for trial for these offenses;
7. [Extraditee] has stipulated that the evidence is sufficient to support a finding that probable cause exists to support his extradition to [Country] for the charges for which extradition was sought;
8. that there is probable cause to support [Extraditee]'s extradition to [Country] for the charges for which extradition was sought; and
9. [Name of Extraditee] reserves all rights he may have under the Rule of Specialty, as described in [Relevant section of the Treaty] of the extradition treaty between the United States and [Country].

Based on the foregoing findings, the Court concludes that [Extraditee] is extraditable for [the/each] offense for which extradition was requested, and certifies this finding to the Secretary of State as required under Title 18, United States Code, Section 3184.

IT IS THEREFORE ORDERED that the Clerk of the Court deliver to the Assistant United States Attorney a certified copy of this Certification of Extraditability and the executed Affidavit of Consent to Extradition and, further, that the Clerk forward certified copies of the same to the Secretary of State (to the attention of the Legal Adviser) and the Director, Office of International Affairs, Criminal Division, U.S. Department of Justice, in Washington, D.C., for the appropriate disposition.

IT IS FURTHER ORDERED that [Extraditee] be committed to the custody of the United States Marshal pending final disposition of this matter by the Secretary of State and arrival of agents of the requesting state, at which time [Extraditee] will be transferred to the custody of the agents of the requesting state at such time and place as mutually agreed

upon by the United States Marshal and the duly authorized representatives of the Government of [Country] to be transported to [Country].

SO ORDERED.

Dated this [Date] day of [Month], [Year].

_____

Hon. [Judge]
United States [District] Judge

Appendix B

UNITED STATES DISTRICT COURT FOR THE
[Jurisdiction]

IN THE MATTER OF THE EXTRADITION	)	Hon. [Judge]
	)	
OF	)	
	)	
[EXTRADITEE]	)	Mag. No. [XX-XXXX]

AFFIDAVIT OF CONSENT TO EXTRADITION

I [Extraditee], have been fully informed by my attorneys, [Attorney] of the firm [Law Firm] and [Second Attorney] of the firm [Law Firm] with whose services I am satisfied, that I have certain rights pursuant to United States law, including Title 18, United States Code, Section 3184 et seq., and the extradition treaty between the United States and [Country].

In particular, I understand that:

1. the Government of [Country], has requested my provisional arrest and extradition; and
2. under Title 18, United States Code, Section 3184, I am entitled to a hearing at which certain facts would need to be established, including:
   a. that currently there is an extradition treaty in force between the United States and [Country];
   b. that the treaty covers the offenses for which my extradition was requested;
   c. that I am the person whose extradition is sought by [Country]; and
   d. that probable cause exists to believe that I committed the offenses for which extradition was requested.

I further understand that I cannot be extradited to the requesting state unless and until a court of the United States certifies its finding of extraditability to the Secretary of State and the Secretary signs a warrant of surrender.

In full knowledge of the above, I hereby concede that I am the individual against whom charges are pending in [Country] and for whom process is outstanding there.

I further stipulate, without conceding guilt that the evidence is sufficient to support a finding that probable cause exists to support my extradition to the requesting state for the charges for which extradition was sought. I consent to a certification by the Court of my extraditability without the need for a hearing as contemplated under 18 U.S.C. § 3184; to a decision by the Secretary of State authorizing my surrender; to be transported in custody to the requesting state as soon as its agents may arrive; and to remain in the custody of the United States Marshal pending the arrival of agents of the requesting state. I give this consent voluntarily, knowingly, and entirely of my own free will. I specifically reserve all rights I have under the Rule of Specialty, as described in [Article] of the extradition treaty between the United States and [Country]. No representative, official, or officer of the United States or of the Government of [Country], nor any other person whom has made any promise or offered any other form of inducement nor made any threat or exercised any form of intimidation against me.

Dated this [Date] day of [Month], [Year].

[Signature of Extraditee]
[Extraditee]

[Signature of Extraditee's Attorney]
[Name of Attorney], Esq.
Attorney for [Extraditee]

I hereby certify that on this [Date] day of [Month], [Year], [Name of Extraditee] personally appeared before me and made his oath that the statements herein are true.

The Federal Judicial Center

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About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person programs, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational mission. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work. Two units of the Director's Office—the Information Technology Office and Communications Policy & Design Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.