New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 233—NO. 64 TUESDAY, APRIL 5, 2005 ALM

WHITE-COLLAR CRIME

BY ROBERT G. MORVILLO AND ROBERT J. ANELLO

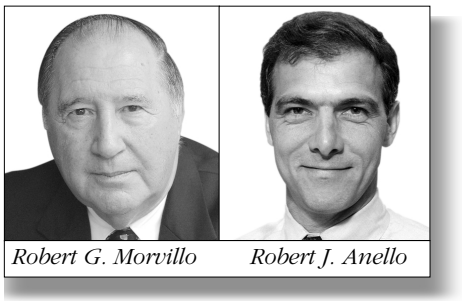
# *Prosecutorial Limitations in Cross-Border Investigations*

Federal prosecutors' activities in investigating and prosecuting white-collar cases generally are subject to fairly well-known constitutional, statutory and ethical limitations, including the Due Process Clause, the Fourth, Fifth and Sixth amendments, and others.

When, however, the scope of their cases requires them to delve into the international arena, treaties, which are entered into in order to assist their investigative and prosecutorial efforts, also pose additional limitations on means by which prosecutors may use the evidence they gather. Extradition treaties not only spell out procedures for bringing defendants to the United States but often impose substantive limitations on their prosecution here.

Similarly, Mutual Legal Assistance Treaties, that have been established to allow cooperation between countries' prosecutors, in addition to specifying the protocol for securing evidence found within a co-signatory's borders, typically impose restrictions on how that evidence may be used. Another international treaty, the Vienna Convention on Consular Relations, which recently has received considerable attention, was intended to provide rights to the citizens of signatory countries in connection with their interrogation while within the jurisdiction of another treaty member.

Because the Supremacy Clause confers upon a ratified treaty the status of preemptive federal law, the Constitution ensures that the United States does not enter into treaties lightly. Only the president has the power to enter into a treaty, and he may do so only with the consent of two-thirds of the Senate.[1] Unfortunately, some cases recently in the news suggest that when it comes to cross-border criminal matters, the United States and its prosecutors do not always take United States treaty obligations as seriously as the treaties and the treaty-entering process appear to contemplate.



*Robert G. Morvillo* *Robert J. Anello*

## Two Recent Cases

In December, the U.S. Supreme Court granted certiorari in the case of *Medellín v. Dretke*[2] from the U.S. Court of Appeals for the Fifth Circuit, which had held that the petitioner, José Ernesto Medellín, a citizen of Mexico on death row in Texas, had no claim under the Vienna Convention, which "requires an arresting government to notify a foreign national of his right to contact his consul." The petitioner's claim failed, the court of appeals held, because it was procedurally defaulted and because the Vienna Convention does not confer an individually enforceable right.

The Fifth Circuit's holdings contradicted two prior holdings by the International Court of Justice (ICJ).[3] One, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, was a recent decision in a case brought by the government of Mexico in which the ICJ adjudicated Mexico's claim that Mr. Medellín's Vienna Convention rights, along with those of 50 other Mexican nationals on death row in the United States, had been violated. As a result, the ICJ in *Avena* held that the United States must provide "review and reconsideration" of the convictions and sentences of Mr. Medellín and the 50 others, "within the overall judicial proceedings relating to the individual defendant concerned." In Mr. Medellín's case, the review would need to take place in Texas state court. In his appellate brief to the Supreme Court, Mr. Medellín argued that the Court should enforce the ICJ's judgment in *Avena*.[4]

On Feb. 28, just three weeks before the Supreme Court was scheduled to hear oral arguments in the *Medellín* case, President George W. Bush sent a memorandum to Attorney General Alberto Gonzales directing state courts to abide by the decision of the ICJ, thereby rendering the Supreme Court case at least partially moot. On March 7, however, the United States diminished the import of the Bush memorandum as it withdrew from the Optional Protocol to the Vienna Convention on Consular Relations, ratified in 1969, which gives the ICJ jurisdiction to hear disputes and allows it to make the final decision when citizens claim they have been illegally denied the right to contact their consular officials when arrested abroad.[5]

As if to pacify critics, however, after the March 7 U.S. withdrawal, the State Department posted the following announcement on its Web site: "The obligations of American law enforcement personnel regarding consular notification and access for arrested or detained foreign

**Robert G. Morvillo** *and* **Robert J. Anello** *are partners at Morvillo, Abramowitz, Grand, Iason & Silberberg.* **Elizabeth J. Carroll,** *an attorney, assisted in the preparation of this article.*

nationals are unchanged by this event." These guidelines for "Federal, State and Local law enforcement" are outlined in detail on the Web site. The announcement notes specifically that law enforcement personnel "must continue to inform, without delay, all foreign nationals who are arrested or detained that consular officials of their country may be notified of the detention." Further, "[i]f the detainee requests it, law enforcement personnel must continue to notify consular officials from the detainee's country of the detention and must continue to give such consular officials access to the detainee."[6]

Although the fact that—"courts generally tread lightly when matters involving foreign policy come into play"[7]—may make it appear as though prosecutors are permitted to operate under loose standards when it comes to treaties. Limits exist—in theory if not always in practice—on what actions prosecutors can take pursuant to treaties.

Extradition is the formal process by which a person found in one country is surrendered to another country for trial or punishment. Extradition to and from the United States generally is pursuant to bilateral or multilateral treaty; the United States has extradition treaties with approximately 60 percent of the world's nations.[8] Some are "list" treaties, listing specific extraditable offenses, while others are "dual criminality" treaties, providing in general terms that a person may be extradited for conduct that is criminal in both jurisdictions. No matter what type of treaty is at issue, courts will grant an extradition request only if the underlying conduct violates the law in both countries.

Prosecutors are limited in their use of extradition treaties to prosecuting the extradited individual only for those offenses for which he has been extradited, a limitation known as the "Rule of Specialty." The United States Attorneys' Manual makes clear that "all extradition treaties restrict prosecution or punishment of the fugitive to the offense for which extradition was granted unless (1) the offense was committed after the fugitive's extradition, or (2) the fugitive remains in the jurisdiction after expiration of a "reasonable time…following completion of his punishment."[9]

These limitations are evident in U.S. Court of Appeals for the Second Circuit case law.[10] In *United States v. Campbell*,[11] the limitations on the offenses for which the defendant could be prosecuted arose not only from the terms of the extradition treaty at issue, but also from the court order granting extradition. Although the Second Circuit found that Costa Rica—the extraditing country—had extradited the defendant for the same offense with which he was charged in the United States, the court also recognized that the treaty and the court order issued by the extraditing jurisdiction imposed binding limitations on the scope of any prosecution in the United States, which the defendant could enforce.

A notable oddity in connection with efforts to bring defendants abroad before United States courts is found in situations when the government disregards the extradition process entirely. While courts carefully evaluate the niceties of the limits imposed by extradition treaties in particular cases, in some notable cases undeterred by the unavailability of extradition, the prosecutors instead have used "extraordinary renditions" to arrange for a fugitive to be "forcibly abducted." As appalling as this sounds, three Supreme Court cases, decided over the past century, have upheld the practice.[12]

The most recent, *United States v. Alvarez-Machain*, held that a court has jurisdiction to try a criminal defendant even if she was abducted from a foreign country against her will by United States agents. The United States Attorneys' Manual implicitly authorizes such operations, but notes the seriousness of them: "Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Departments of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation."[13]

So far, the Second Circuit is the only court of appeal to place limits on the Supreme Court doctrine, holding in *United States v. Toscanino*[14] that it "does not apply where a defendant has been brought into the district court's jurisdiction by forcible abduction in violation of a treaty." In *Toscanino*—a case involving "government misconduct in kidnapping [Mr.] Toscanino and forcibly bringing him to the United States" and "corruption and bribery of a foreign official as well as…violence and brutality to the person"—the court "view[ed] due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." The facts of *Toscanino* were particularly harsh—the defendant allegedly was brutally tortured and interrogated over 17 days. The court remanded the case to the district court which, if the defendant's allegations were proven, was directed to divest itself of jurisdiction.

## MLATs

In addition to being a party to bilateral extradition treaties with over one hundred countries, the United States is a party to approximately 50 Mutual Legal Assistance Treaties (MLATs), with individual nations. The United States also is a signatory to the 2003 United States-European Union Extradition and Mutual Legal Assistance Treaties (discussed below) and the 1996 Inter-American Convention on Mutual Assistance in Criminal Matters, which provides guidelines for mutual legal assistance among the nations of the Americas, including guidelines for the taking of testimony, searches and seizures and service of documents. The convention states that it "shall not be interpreted as affecting or restricting obligations in effect under any other international, bilateral, or multilateral convention that contains or might contain clauses governing specific aspects of international criminal judicial assistance, wholly or in part, or more favorable practices which those states might observe in the matter."[15]

MLATs with individual nations are bilateral treaties between the United States and other countries. Each is individually negotiated with the particular country. These treaties, administered by the Department of Justice's Office of International Affairs (OIA) and its foreign counterparts, provide procedures for evidence—gathering abroad in criminal matters, such as deposing witnesses and collecting documents and

other information.[16] Most MLATs contain confidentiality provisions, allowing the requesting party to apply for confidential treatment of the request itself and/or any documents and testimony provided, as well as of the sources of that evidence.[17] When testimony is taken pursuant to an MLAT request, the target of the investigation generally can only be present and cross-examine if the United States makes that request.[18] MLAT requests are available to the government only, not to private parties. The use of MLAT requests, however, is not restricted to the Department of Justice; the SEC may make an MLAT request as well.[19]

The United States Attorneys' Manual establishes that prosecutors are to proceed with caution and to vet every step they take with the OIA. It specifically notes that, for countries that limit assistance to the purpose stated in the MLAT request, "as a general rule [prosecutors] will not be able to use the evidence for another reason without the express permission of the country that provided it."[20]

In the most significant recent MLAT opinion to come out of the courts in the Second Circuit, Judge John G. Koeltl of the U.S. District Court for the Southern District of New York in 2002 in *United States v. Blech*,[21] refused to prohibit the government from making any use of evidence obtained from interviews with witnesses conducted in Switzerland pursuant to the U.S.-Switzerland MLAT. The defendant was indicted on charges of securities fraud and wire fraud in January 2002. The Swiss authorities interviewed the witnesses in March 2002 without the presence of any United States representatives, even though the United States Attorney's Office, via the OIA and at the request of Judge Koeltl, had asked the Swiss authorities to delay the examinations in order for the court to consider issues the defendant had raised concerning his lack of representation at the interviews.

Although he allowed the evidence to be used under the facts in that case, the standard Judge Koeltl announced allows a court to exercise considerable discretion in determining whether any "abuse of the MLAT process" or government actions have occurred that "are unfair so as to warrant the exercise of th[e] [c]ourt's supervisory powers."

## U.S.-European Union

• ***The U.S.-European Union Extradition and Mutual Legal Assistance Treaties.*** The United States and the European Union signed the United States-European Union Extradition and Mutual Legal Assistance Treaties (U.S.-EU Treaties) in June 2003, in part in response to the Sept. 11 attacks. Under the terms of the U.S.-EU Treaties, member states are obligated to bring their existing bilateral MLATs and extradition treaties into conformity with the U.S.-EU Treaties.[22]

The mutual legal assistance aspects of the U.S.-EU Treaties provide for, among other things, the formation of joint investigative teams, the use of video technology for taking testimony and the exchange of information regarding bank accounts. Extradition under the new treaties will be available for a broader range of offenses punishable under both countries' laws.

• ***Actions Against Government Officials.*** In addition to limitations on the use that prosecutors may make of evidence obtained in violation of these treaties, treaty violations also may subject prosecutors to lawsuits by disgruntled criminal defendants—and other parties—who believe prosecutors have not acted within the limits of the treaty at issue.

In the Second Circuit, such actions have proceeded (1) against the United States Department of Justice and state and federal officials "involved in making [an MLAT] request to Switzerland;"[23] (2) against local officials, including two sheriffs, and officials from Canadian Social Services who allegedly "obtained private information from the Canadian government without following the procedures set forth in the [United States-Canada MLAT];"[24] and (3) against the United States Department of Justice and the attorney general of the state of New York.[25] Although plaintiffs in such actions generally have not met with success, these suits do raise the ante in situations when prosecutors ignore treaties entered into by the president and ratified by Congress.

1. U.S. Const. art. II, §2, cl. 2.

2. 371 F.3d 270 (5th Cir.), cert. granted, 125 S. Ct.686 (2004).

3. See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 ICJ 128 (Judgment of March 31); *LaGrand Case (Germany v. United States of America)*, 2001 ICJ 104 (Judgment of June 27).

4. Brief for Petitioner, *Medellín v. Dretke*, No. 04-5928, 2005 WL 176452 (Jan. 24, 2005).

5. See Charles Lane, "U.S. Quits Pact Used in Capital Cases," Wash. Post, March 10, 2005; Adam Liptak, "U.S. Says It Has Withdrawn from World Judicial Body," N.Y. Times, March 10, 2005.

6. U.S. Department of State, Bureau of Consular Affairs, "Consular Notification and Access," available at travel.state.gov/law/consular/consular_753.html.

7. *Colello v. SEC*, 908 F. Supp. 738 (C.D. Cal. 1995).

8. H.R. Rep. No. 107-062 (2003).

9. See United States Attorneys' Manual, "Post-Extradition Considerations—Limitations on Further Prosecution," §9-15.500.

10. See *United States v. Campbell*, 300 F.3d 202 (2d Cir. 2002), cert. denied, 538 U.S. 1049 (2003); *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994); see also *Johnson v. Browne*, 205 U.S. 309 (1907).

11. 300 F.3d 202 (2d Cir. 2002), cert. denied, 538 U.S. 1049 (2003).

12. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

13. United States Attorneys' Manual, "Deportations, Expulsions, or other Extraordinary Renditions," §9-15.610.

14. 500 F.2d 267 (2d Cir. 1974).

15. 1996 Inter-American Convention on Mutual Assistance in Criminal Matters, art. 37, available at www.oas.org.

16. Some extradition treaties may also provide for legal assistance. See United States Attorneys' Manual, "Treaty Requests," Criminal Resource Manual at 276.

17. See, e.g., Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., arts. 8, 15, 27 U.S.T. 2019.

18. See, e.g.,Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., art. 12, 27 U.S.T. 2019.

19. See, e.g., *SEC v. Unifund SAL*, 917 F.2d 98 (2d Cir. 1990); *SEC v. Certain Unknown Purchasers*, 81 Civ. 6553 (WCC), 1986 WL 2686 (SDNY Feb. 26, 1986).

20. See United States Attorneys' Manual, "Intended Use of Evidence," Criminal Resource Manual at 269.

21. 208 F.R.D. 65 (S.D.N.Y. 2002).

22. As of 2004, France, the Netherlands, the United Kingdom, Spain, Sweden, Finland and Belgium have signed bilateral Extradition and Mutual Legal Assistance Treaties with the United States that are in conformity with the U.S.-EU Treaties. The United States will not start its ratification process until each member state has signed such a bilateral treaty. See United States Mission to the European Union Web site at www.useu.be; see also www.statewatch.org.

23. *Barr v. United States Department of Justice*, 819 F2d 25 (2d Cir. 1987).

24. *Lacey v. Yelle*, No. 096-CV-1714 (FJS), 1998 WL 22068 (N.D.N.Y.), aff'd, 166 F.3d 1200 (2d Cir. 1998). The court granted the motion to dismiss of a municipal court judge who also was named as a defendant based on judicial immunity. See *Lacey v. Yelle*, 962 F. Supp. 334 (N.D.N.Y. May 16, 1997), aff'd, 166 F.3d 1200 (2d Cir. 1998).

25. *Siddiqui v. United States Department of Justice*, No. CV 92-0706, 1992 WL 175604 (E.D.N.Y. July 15, 1992).