

## WHITE-COLLAR CRIME

## Expert Analysis

# Increased Extradition For Business Crime

Today, many significant white-collar cases have cross-border implications. Often the presence of defendants for trial in cases pursued by U.S. authorities can only be obtained with the assistance of foreign authorities. To ensure such cooperation, in recent years the federal government has entered into or updated extradition and law enforcement treaties with a number of other nations to better facilitate the extradition process.<sup>1</sup> The result has been a significant increase in the return and prosecution of persons located on foreign soil. According to the Department of Justice figures quoted in *The Wall Street Journal*, 579 individuals were extradited to the United States in 2008—double the number reported in 2000.<sup>2</sup>

This uptick is partly due to increasing international law enforcement attributable to the growing number of multinational financial institutions and the borderless trade and communication caused by technological innovations. White-collar practitioners have seen a growth in international investigations involving antitrust, the Foreign Corrupt Practices Act, tax evasion, and securities law violations, among other things. Extradition is necessarily an important issue in such cases. For instance, the United States currently is seeking the extradition of Leroy King, the former banking supervisor of the government of Antigua, for his role in a multibillion-dollar Ponzi scheme run by jailed Texas financier R. Allen Stanford.<sup>3</sup>

In another case, Raoul Weil a Swiss citizen and the former chairman and chief executive of global wealth management for the Swiss bank UBS was declared a fugitive by the United States after refusing to come to the United States to face charges that he conspired to evade taxes. To date, the United States has not been successful in its attempts to extradite Mr. Weil.<sup>4</sup>

In the case of hotel executive Stanley Tollman and his nephew Gavin Tollman, the United States was unsuccessful in extraditing the defendants from Britain and Canada, respectively, on criminal tax charges in connection with their ownership and management of Days Inn hotels throughout the United States.<sup>5</sup> With respect to the attempted



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extradition of Gavin Tollman, the Canadian courts were critical of the U.S. government, finding an abuse of process harmful not only to Mr. Tollman, but also to the integrity of the Canadian judicial system.<sup>6</sup>

Once extradited, the U.S. government has had success in prosecuting individuals for white-collar criminal activity. In July 2010, Ian Norris, a citizen of the United Kingdom and former CEO of Morgan Crucible Co., became the first foreign defendant extradited to, and convicted in, the United States for charges arising from a criminal antitrust investigation.<sup>7</sup>

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In March 2011, Jeffrey Tesler, a British lawyer and dual citizen of the United Kingdom and Israel, pled guilty in the United States to charges that he helped a Halliburton subsidiary bribe Nigerian officials to win more than \$6 billion in contracts in violation of the Foreign Corrupt Practices Act, after losing a long extradition battle in which his lawyers argued he should not be extradited to the United States because the crimes alleged did not have a substantial link to the United States.<sup>8</sup>

Extradition therefore is no longer relegated to drug cases, but has become relevant in white-collar cases. Accordingly, practitioners should have a working knowledge of extradition law and procedure. This article addresses the fundamentals of extradition proceedings to and from the United States.

### The Basics of Extradition

**Extradition to the United States.** Although statutory restrictions limit the U.S. government's authority to surrender a fugitive to a foreign jurisdiction, no analogous limit exists on the government's authority to request the extradition of a fugitive from another sovereign. However, the U.S. government typically asserts its authority to request and receive the extradition of a fugitive pursuant to a treaty.

In a typical treaty, the party-countries agree that they may (but are not required to) extradite individuals found within their jurisdiction who have been charged with extraditable offenses in the requesting country. Extraditable offenses usually are listed in an appendix to the treaty or defined by formula (i.e., those offenses for which the punishment is a term of incarceration for a specific period). A treaty also may contain offenses for which extradition will not be granted, such as political or military offenses, or offenses punishable by death under the laws of the requesting nation.<sup>9</sup>

Federal prosecutors must submit a formal request for extradition through the Office of International Affairs (OIA) which makes a determination of extraditability based on a number of factors, including the location of the fugitive, the citizenship of the fugitive, status of the case, and the potential for trial or retrial.<sup>10</sup> Because the preparation of a formal extradition request and accompanying documentation can be time-consuming, the OIA will determine whether the facts of the case justify a request for the provisional arrest and detention of the fugitive in question by the foreign nation. Once such an arrest is made, prosecutors typically have between one and three months to submit a certified and authenticated extradition request.<sup>11</sup>

The OIA will advise prosecutors as to the specific documents required under the applicable extradition treaty. Generally, extradition treaties require that the requesting country submit an affidavit from the prosecutor explaining the facts of the case, copies of the statutes alleged to have been violated and the applicable statutes of limitation, evidence in the form of affidavits or other documents demonstrating that the defendant committed the crime, and any applicable arrest warrants, complaints, indictments or judgments of conviction.<sup>12</sup>

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decision whether to extradite, often in the context of a judicial hearing, based on these documents and any evidence submitted in opposition by the fugitive. A foreign government's decision ultimately to extradite an individual in response to a request from the United States is not subject to review by U.S. courts.<sup>13</sup>

**Extradition From the United States.** The relevant treaty, case law, and statutes set forth in 18 U.S.C. §§3181-3195 govern an extradition proceeding in the United States. U.S. law provides that a person may be extradited from the United States only pursuant to a treaty, unless he has committed a crime of violence against nationals of the United States in foreign countries, in which case a person may be extradited under the principle of reciprocity or comity.<sup>14</sup> U.S. citizenship is not a defense to extradition from the United States.<sup>15</sup> In extradition proceedings initiated in the United States, the foreign government seeking the return of a fugitive is represented by the U.S. Attorney's Office in the U.S. district in which the proceeding is filed.

Although the individual sought by the foreign government may be accused of criminal activity, the extradition process itself is not a criminal proceeding.<sup>16</sup> However, on the basis of a complaint filed by the U.S. government on behalf of a requesting country, a warrant may be issued for the arrest of an individual accused or suspected of having committed a crime in the requesting country.

Once the individual is arrested in the United States, an arraignment is held and, after procedural matters are addressed, a date will be set for the extradition hearing.<sup>17</sup> Defendants may overcome the presumption against bail by demonstrating by clear and convincing evidence 1) that they are neither a flight risk nor a danger to the community, and 2) the existence of "special circumstances," such as a high probability of success on the merits or unusually prolonged or delayed extradition proceedings.<sup>18</sup>

**Proof Required at the Extradition Hearing.** Before a defendant will be extradited from the United States, our government, acting on behalf of the requesting nation, must establish that: 1) the offense is an extraditable offense listed under the applicable treaty; 2) the individual in custody is the person being sought by the requesting nation and that he has actually been charged with an extraditable offense in that country; 3) the acts alleged constitute criminal conduct under the laws of both the United States and the requesting nation in satisfaction of the requirement of "dual criminality;" and 4) there is probable cause to believe the individual is guilty of the crimes charged.<sup>19</sup>

As analyzed by U.S. courts, "dual criminality" exists where the "essential character" of the laws is the same or, as stated by the U.S. Court of Appeals for the Second Circuit, "where the laws of both the requesting and the requested party appear to be directed to the same basic evil."<sup>20</sup> In assessing dual criminality, a court may examine analogous federal statutes, similar laws of the state where the fugitive is found, and the laws of the various states within the United States.<sup>21</sup>

In establishing probable cause to warrant extradition from the United States, the government must present "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief in the accused's guilt." Thus, a judge is not required

to find sufficient evidence to justify a conviction during an extradition hearing.

### The Rule of Specialty

The rule of specialty, a principle of international law that an extradited defendant may only be tried by the requesting state for the specific offenses for which extradition is granted, is an issue that frequently arises in extradition cases. Practitioners should be aware that there are many intricacies to the rule which are not addressed in detail in this column. Generally, a country seeking extradition must "adhere to any limitations placed on prosecution by the surrendering country."<sup>22</sup> With respect to individuals extradited to the United States, federal courts, including district courts in the Second Circuit, are split on whether a defendant, in addition to the countries that are party to the treaty, has standing to raise the rule of specialty to challenge a subsequent conviction.<sup>23</sup>

When objections are raised under the rule of specialty in cases where an extradition is effected pursuant to treaty, courts look to the treaty's provisions to determine the nature and scope of any intended limits on the terms of extradition.<sup>24</sup> A court also may look to other evidence of limits imposed by the surrendering country that may be set forth in an extradition order or diplomatic correspondence between the countries.<sup>25</sup>

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### Conclusion

In this era of global transactions with instantaneous international impact, the pursuit of defendants outside the United States is more common. Although these cooperative efforts among law enforcement agencies bring a new host of questions, such as which nation has priority where concurrent jurisdiction exists,<sup>26</sup> little doubt exists that the number of white-collar cases in which extradition is sought—both from and to the United States—will continue to grow.



1. See, e.g., Department of Justice Press Release, "Joint Statement of Attorney General Eric Holder and Italian Minister of Justice Angelino Alfano Regarding Continued Cooperation" (April 4, 2011); Department of Justice Press Release, "U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force" (Feb. 1, 2010).

2. Nathan Koppel and Deborah Ball, "Fugitives Run Out of Places to Hide," *The Wall Street Journal* (Oct. 6, 2009). In the white-collar area, there has been a marked increase in the number of foreign based antitrust defendants in Department of Justice antitrust cases. In the period between 1998 and 2005, the number of such defendants rose from one percent to almost fifty percent. Daseul Kim, "'Perfectly Properly Triable' in the United States: Is Extradition a Real and Significant Threat to Foreign Antitrust Offenders?" 28 *Nw. J. Int'l L. & Bus.* 583 (Spring 2008).

3. Clifford Krauss, "'Blood Oath' Sealed Stanford Deal, Court is Told," *The New York Times* (Aug. 28, 2009).

4. Lynneley Browning, "Executive at UBS Is Deemed a Fugitive," *The New York Times* (Jan. 13, 2009).

5. Charles V. Bagli, "Britain Won't Extradite New York Ho-

telier in Fraud and Tax Evasion Case," *The New York Times* (June 29, 2007); *The Ottawa Citizen*, "Abuse of Process," *Canada.com* (Jan. 6, 2007). Stanley Tollman ultimately pled guilty to one count of tax evasion and was sentenced to a one-day term of probation and the repayment of more than \$60 million in back taxes. Martin Espinoza, "Exiled Hotel Executive Makes Plea Deal," *The New York Times* (Nov. 22, 2008).

6. *United States v. Tollman*, 2006 CarswellOnt 5545 (Ont. Sup. Ct. Justice 2006).

7. Christopher Yaszajko and Phil Milford, "Former Morgan Crucible Chief Norris Found Guilty of Conspiracy in the U.S.," *Bloomberg.com* (July 27, 2010).

8. Associated Press, "Lawyer to Pay \$150 Million in Foreign Bribery Plea Deal," *The New York Times* (March 11, 2011).

9. See, e.g., A Treaty Between the United States of America and the Federal Republic of Germany Concerning Extradition signed at Bonn on June 28, 1978, 32 U.S.T. 1485.

10. United States Attorneys Criminal Resource Manual §603.

11. United States Attorneys Manual (USAM), "International Extradition and Related Matters," §§9-15.210, 9-15.230.

12. USAM §9-15.240.

13. *United States v. Medina*, 985 F.Supp. 397, 401 (S.D.N.Y. 1997).

14. 18 U.S.C. §3184.

15. 18 U.S.C. §3196.

16. *McDonald v. Burrows*, 731 F.2d 294, 297 and n.5 (5th Cir.), cert. denied, 469 U.S. 852 (1984); *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir.), cert. denied, 454 U.S. 894 (1981).

17. 18 U.S.C. §3187. See also Jaques Semmelman and Brian M. White, "Obtaining Bail in International Extradition Cases," *NACDL Champion Magazine* (January/February 2011) (detailing process).

18. Semmelman and White, "Obtaining Bail in International Extradition Cases."

19. Linda Friedman Ramirez, "Evolving Extradition," *NACDL Champion Magazine* (September/October 2009).

20. *Shapiro v. Ferrandina*, 478 F.2d 894, 908 (2d Cir. 1973), cert. dismissed, 414 U.S. 884 (1973).

21. See, *In re Extradition of Exoo*, 522 F. Supp.2d 766, 776 (S.D. W.Va. 2007) (in determining dual criminality not satisfied in Ireland's request to extradite defendant for crime of assisting a suicide, magistrate judge considered that there was no comparable federal or West Virginia statute and that only half of the other states criminalized the secondary participation in a suicide).

22. *United States v. Baez*, 349 F.3d 90, 92 (2d Cir. 2003).

23. See *Antwi v. United States*, 349 F.Supp.2d 663, 670 (S.D.N.Y. 2004) (detailing split in circuits). Practitioners should be aware that the rule of specialty does not apply in the sentencing context and does not govern the scope of admissible evidence during trial. See id. at 673-74.

24. *Fiocconi v. Attorney General of the United States*, 462 F.2d 475 (2d Cir.), cert. denied, 409 U.S. 1059 (1972).

25. See *United States v. Flores*, 538 F.2d 939 (2d Cir. 1976) (interpreting extradition order of the Spanish Court which specifically excluded "any previous or subsequent act" to mean that the U.S. government could not prosecute defendant for previous offenses or offenses foreign to the extradition request).

26. Peter Binning, "United Kingdom: Current Issues in US/UK Cross-Border Criminal Cases," *Mondaq.com* (Aug. 26, 2010) (available at [http://www.mondaq.com/article.asp?article\\_id=108586](http://www.mondaq.com/article.asp?article_id=108586)).