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## Outside Counsel

## Expert Analysis

# International Prison Transfer Program

In our last column, we discussed the basics of extradition law and its increasing relevance in white-collar cases.<sup>1</sup> A related topic is the transfer of foreign citizens convicted in the United States to their home countries to serve their sentence, as in the case of the “NatWest Three”—three British businessmen who pled guilty in 2007 to Enron-related fraud charges in the U.S. District Court in Houston and served only six months in the United States before being transferred to the United Kingdom for the balance of their 37-month sentences.<sup>2</sup>

Treaties facilitating such transfers initially were formalized by the federal government in the 1960s and 70s to allow for the return of U.S. citizens convicted abroad to serve their sentence in the United States in response to concerns regarding their harsh treatment in foreign prisons. Today, these treaties are employed more frequently to transfer foreign nationals out of the United States in a wide variety of cases, including white-collar cases with cross-border implications.

Statistics reveal that for the period 2008 to 2010, 595 foreign nationals were transferred from the United States to serve sentences in their home countries, as compared to the return of 163 Americans from prisons abroad.<sup>3</sup> Despite the disproportionate



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numbers, fewer than half of the transfers sought by foreign nationals serving criminal sentences in the United States are approved. The former chief of the International Prison Transfer Unit (IPTU), a unit within the Justice Department that administers such transfer requests, has opined that the high denial rate frustrates the United States’ treaty partners and recently led Congress to pass legislation requiring the IPTU to provide an annual report on the effectiveness of the treaties in “bringing about the return of deportable incarcerated aliens to the country of which they are nationals.”<sup>4</sup>

Real governmental benefits for both the United States and home countries attend to the transfer of non-citizens to their home country to serve a sentence of imprisonment. First, prison transfer often is preferable to traditional removal or deportation proceedings, which occur after a foreign national has completed his sentence and do not provide the home country with an opportunity to “take precautionary steps to ensure the safety of its populace, help the former prisoner to receive necessary medical or rehabilitative assistance, or reintegration into its society.”<sup>5</sup> Second, an economic

benefit exists to the transfer of foreign nationals out of U.S. prisons. Currently, almost 59,000 foreign nationals are imprisoned in the United States, which accounts for approximately 27 percent of the federal prison population.<sup>6</sup> On average, it costs more than \$25,000 annually to incarcerate one prisoner.<sup>7</sup>

### Governing Treaties

The United States is party to 12 bilateral and two multilateral treaties with 74 other countries that provide for the execution of a foreign national’s penal sentence in the defendant’s home country.<sup>8</sup> Under these treaties, a number of requirements must be satisfied before a transfer can take place. For instance, the Council of Europe Convention on the Transfer of Sentenced Persons permits prisoners to be transferred when: 1) the sentenced person is a citizen of the “administering State” (the State to which he or she requests to be transferred); 2) the judgment is final; 3) the sentenced person consents to the transfer; 4) six months or more of the sentence remain to be served; 5) “the acts or omissions on account of which the sentence has been imposed constitute a criminal offense according to the law of the administering State”; and 6) the sentencing and administering States agree to transfer.<sup>9</sup>

The request may be initiated by either the administering or the sentencing state.<sup>10</sup> The Inter-American Convention on Serving Criminal Sentences Abroad contains the same requirements with the additional requirement that “[t]he

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sentence to be served must not be the death penalty.<sup>11</sup>

## Administration of Transfers

The administration of inmate transfers is carried out in the United States pursuant to the IPTU created by the federal government in the mid-70s after the United States entered into the bilateral Treaty on the Execution of Penal Sentences with Mexico. The IPTU is a part of the Justice Department's Office of Enforcement Operations (OEO), which acts pursuant to powers delegated by the Attorney General<sup>12</sup> under the Transfer of Offenders to and from Foreign Countries Act (the "Transfer Act").<sup>13</sup>

The Transfer Act and its regulations specifically confer upon the Attorney General or his designee "the authority to find appropriate or inappropriate the transfer of offenders to or from a foreign country under a treaty."<sup>14</sup> Transfers may only be made to and from the United States where: 1) a treaty governing such transfers exists; 2) the offender has consented; 3) the conviction and sentence are final with no appeal or collateral attack pending; and 4) the requirement of dual criminality is satisfied.<sup>15</sup> Dual criminality requires that the offense for which the defendant has been sentenced is an offense in both the transferring and receiving countries.<sup>16</sup>

## Transfer Out of United States

Pursuant to Transfer Act regulations, the Bureau of Prisons (BOP) is tasked with informing all inmates who are citizens or nationals of a foreign country of their ability to request a transfer to their country of citizenship upon arrival at their designated facility.<sup>17</sup> The period between sentencing and arrival at said facility can take several months and is considered "dead time" for purposes of a prisoner transfer application.<sup>18</sup>

Inmates interested in a transfer are required to submit a Transfer Inquiry Form to the warden at the institution where he or she is confined. Upon receipt and verification that the inmate

is qualified for transfer, the warden will compile a "classification packet" (which includes a presentence report, judgment, fingerprints, photographs, and a case summary)<sup>19</sup> and forward the application to the Assistant Director of the BOP's Correctional Programs Division, who reviews and forwards the materials to the OEO's International Prison Transfer Unit.<sup>20</sup>

The OEO has full discretion in deciding whether to grant a transfer request, and applications can be denied for any reason.<sup>21</sup> Nevertheless, the OEO has issued non-binding internal guidelines for evaluating prisoner applications for transfer. The guidelines focus on three main issues: 1) whether transfer will facilitate the defendant's social rehabilitation; 2) the law enforcement concerns of the sending and receiving countries; and 3) whether the inmate, if transferred, is likely to return to the United States.

The Chief of the IPTP has stated that "[o]ne of the major goals of the transfer program is to return the prisoner to his home environment where, hopefully, there is familial and peer support, for in this type of environment, the prisoner has the best chance of successful rehabilitation and reintegration into society."<sup>22</sup> In the evaluation of whether social rehabilitation will be furthered by an inmate's transfer, factors considered include the defendant's acceptance of responsibility, criminal history (distinguishing between the "low-level, minor, first-time or infrequent offender" and a "career criminal"), seriousness of the offense, criminal and family ties to the sending and receiving countries, humanitarian concerns, and the length of time the defendant has been in the United States.<sup>23</sup>

The length of time the inmate has resided in the United States is an important factor in prison transfer decisions. Experts note that "[d]omiciliary status is conclusively presumed where the inmate has made the effort to obtain lawful permanent resident status in the United States"

and, as a general rule, that factor will be considered.<sup>24</sup>

The OEO also considers law enforcement concerns that would arise in any typical sentencing and parole decision. These include the seriousness of the offense, the impact transfer will have on "public sensibilities," public policy, the likelihood of reintegration and renewed criminal activity in the receiving country, possible sentencing disparities, and the law enforcement and prosecutorial needs in the sending country.<sup>25</sup> Finally, the OEO Guidelines state that it only makes sense to allow foreign nationals to serve out their sentence in their home country if they will remain there after release. Accordingly, the OEO considers the defendant's existing ties to the United States, whether he or she has previously received a prisoner transfer, and previous deportations and illegal reentries.<sup>26</sup>

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In evaluating these factors, the OEO case analyst assigned to the case contacts all interested parties, including the prosecuting U.S. Attorney's Office and any other involved federal agencies such as the Federal Bureau of Investigation, Internal Revenue Service, and Office of Homeland Security.<sup>27</sup> Prosecutors are asked to provide facts and recommendations to assist the OEO in making a determination whether to approve the transfer request. Practitioners have found that "[a]lthough the views and recommendations of the U.S. Attorney's Office are

accorded greater weight than those of law enforcement agencies, neither are determinative of the final decision on any particular transfer request.”<sup>28</sup>

If the OEO approves the inmate’s request, the foreign national’s home country is asked whether it will accept the prisoner and, if so, how it will enforce the sentence.<sup>29</sup> Once the transfer is approved by the foreign government, the inmate’s consent must be verified. Such verification comes by way of a hearing before a U.S. Magistrate Judge or District Court judge who is asked to “document the inmate’s voluntary consent for transfer.” The inmate is entitled to counsel during the hearing.<sup>30</sup> Once consent is verified, the Bureau of Prisons is authorized to arrange for the physical transfer of the inmate to the foreign country. Because of the numerous bureaucracies involved and the complex manner in which transfer requests are prepared, reviewed and approved, foreign nationals may experience significant delays at various points in the process.<sup>31</sup>

## Transfer Into United States

The OEO also administers the Transfer Program for Americans convicted abroad seeking to serve their sentence on American soil. As in the case of a foreign national seeking transfer outside the United States, U.S. citizens imprisoned in another country cannot initiate a transfer application until their criminal case is final and all appeals have been exhausted in the foreign country.

Depending on the applicable treaty, either the prisoner or the American Embassy should apply to the foreign government for transfer. The transfer classification package documentation is forwarded to the Department of Justice as well, where the OEO reviews the application and decides whether to approve the request.<sup>32</sup>

If both the OEO and the foreign government approve the request, a consent verification hearing is held before a U.S. judge where the prisoner is represented by a federal public defender. Once the prisoner’s desire to be transferred is verified, the BOP

and the foreign government arrange for the inmate’s physical transfer. After the inmate’s arrival in the United States, a probation officer prepares a post-sentence report and a special transferee hearing is held before the U.S. Parole Commission for the purpose of determining a release date.<sup>33</sup> Although the release date may sometimes reduce the duration of the inmate’s sentence, it can never be greater than the foreign sentence.<sup>34</sup>

## Conclusion

The growth of international law enforcement and increased extradition for business crimes dictate that white-collar practitioners familiarize themselves with all aspects of representing foreign clients convicted in the United States or American clients convicted in foreign jurisdictions. The International Prison Transfer Program is an integral part of this process. Given the cost savings to the United States and the attitude of Congress, it will be surprising if this mechanism is not utilized more frequently in the future.

1. Robert G. Morvillo and Robert J. Anello, “Increased Extradition for Business Crime,” *New York Law Journal* (Aug. 2, 2011).

2. Laurel Brubaker Calkins and Thom Weidlich, “Ex-NatWest Banker Transferred to U.K. to Finish Prison Sentence,” *Bloomberg.com* (Nov. 25, 2008) (further noting that the defendants’ guilty pleas hinged, in part, on the federal government’s commitment to “support” their prisoner transfer applications).

3. Office of Enforcement Operations—Criminal Division, U.S. Department of Justice, *Prison Transfer Statistics* (available at <http://www.justice.gov/criminal/oeo/docs/Statistics.pdf>) (last viewed Sept. 15, 2011).

4. Sylvia Royce, “International Prison Transfer,” *Federal Sentencing Reporter*, Vol. 21, No. 3, at 186, 188 (February 2009).

5. Paula A. Wolff, “The International Prison Transfer Program,” *U.S. Attorneys’ Bulletin*, Vol. 55, No. 1, p. 23, 24 (January 2007).

6. Federal Bureau of Prisons, “Quick Facts about the Bureau of Prisons—Inmate Breakdown,” (available at <http://www.bop.gov/news/quick.jsp#2>) (last viewed on Sept. 15, 2011).

7. *Federal Register*, “Annual Determination of Average Cost of Incarceration—A Notice by the Prisons Bureau” Vol. 76, No. 23 (Feb. 3, 2011).

8. U.S. Department of State, “Prison Transfer Treaties” (available at [http://www.travel.state.gov/law/legal/treaty/treaty\\_1989.html#](http://www.travel.state.gov/law/legal/treaty/treaty_1989.html#)) (last viewed on Sept. 15, 2011).

9. July 1, 1985, 35 U.S.T. 2867, art. 3.1(a)-(f).

10. *Id.* art. 2.3.

11. Jan. 10, 1995, S. Treaty Doc. No. 104-35, art. 3.

12. The Attorney General has delegated his authority under the Transfer Act to the Assistant Attorney General for the Criminal Division, who in turn is authorized to further delegate this authority to the Deputy Attorney General and various officials within the OEO. 18 C.F.R. §0.64-2.

13. 18 U.S.C. §4100, et. seq.

14. 18 C.F.R. §0.64-2.

15. 18 U.S.C. §4100.

16. *Id.* §4101(a).

17. 18 C.F.R. §527.43. Foreign nationals convicted of state crimes also can seek a transfer through the IPTP. The United States typically approves such transfer requests in deference to the state’s judgment, unless a compelling federal interest to deny the request exists. Office of Enforcement Operations, International Prison Transfer Program, “Guidelines for Evaluating Prison Transfer Applications” at ¶3.c.1. (OEO Guidelines) (available at <http://www.justice.gov/criminal/oeo/iptu/guidelines.html>) (last viewed Sept. 14, 2011).

18. Royce, “International Prison Transfer” at 188.

19. Federal Bureau of Prisons, Program Statement P5140.40, “Transfer of Offenders to or From Foreign Countries,” at 7 (Aug. 4, 2011).

20. *Id.* §527.44 (a)-(c).

21. See *Yosef v. Killian*, 2009 WL 2244643, \*5 (S.D.N.Y. Jun. 25, 2009).

22. Wolff, “The International Transfer Program” at p. 26.

23. OEO Guidelines at ¶1.

24. Royce, “International Prison Transfer” at 190.

25. OEO Guidelines at ¶2.

26. OEO Guidelines at ¶3.

27. Alan Ellis, “An Introduction to International Prison Transfers: Going Home,” *The NACDL Champion Magazine* (July 1999).

28. *Id.* The U.S. Attorney’s Manual directs that a “United States Attorney’s Office may not...promise that a transfer will in fact be granted” and further cautions that any position taken by the U.S. Attorney’s Office on a transfer request is not binding on any other government agency. USAM §9-35.100 (Role of the U.S. Attorney’s Offices—Inclusions of Promises Regarding Transfers in Plea Agreements).

29. Royce, “International Prison Transfer” at 189. An inmate whose request is denied by the OEO is not permitted to reapply for two years from the date of denial. BOP Program Statement P5140.40 at 8.

30. 28 C.F.R. §527.44(g).

31. Royce, “International Prison Transfer” at 188-89 (detailing ways in which the process may be delayed).

32. U.S. Department of Justice, Criminal Division, Office of Enforcement Operations, International Prison Transfer Unit, “Prison Transfer Background Information for Americans Incarcerated Abroad” (available at <http://www.justice.gov/criminal/oeo/docs/americans-arrested.pdf>) (last viewed on Sept. 15, 2011).

33. 18 U.S.C. §4106 (for offenses committed before Nov. 1, 1987); §4106A (for offenses committed on or after Nov. 1, 1987).

34. *Id.* §4106A(b)(1)(C).