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Last Chance: Secretary of State's Discretion to Deny Extradition Requests

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In an article last month,[1] we described how the United States, unlike many other countries, extradites its own citizens as a matter of course where certain legal requirements are met by requesting states. In short, if a foreign country makes a proper request for extradition through appropriate diplomatic channels, federal judges are permitted only a limited review of the request. Judges must consider basic issues such as whether the court has jurisdiction and whether an applicable extradition treaty is in force. Judges also must determine whether the crime for which the individual faces prosecution in the foreign country is also a crime in the United States and whether the request makes a sufficient showing of probable cause that the individual may have committed the crime.

If the request passes this review, the judge's inquiry is at an end and the judge must certify the individual's extraditability to the U.S. Secretary of State. If an individual makes humanitarian arguments, such as the likelihood of being tortured in the requesting country, the "rule of non-inquiry" prohibits judges from undertaking such considerations. Instead, once the judge certifies the individual's extraditability to the Department of State, only the Secretary of State undertakes such considerations. Judges are not to inquire into the Secretary's determination and can only require that the Secretary certify that she has discharged her duty to consider any such allegations. The Secretary thus is the last hope for any individual ordered extradited out of the United States. This article examines the Secretary of State's exercise of her discretion after judges have certified individuals as extraditable and considers what opportunities this may present for individuals seeking to avoid extradition.

The Johnson Declaration

The Secretary's authority to extradite is statutory.[2] The procedure followed by the Secretary has been described in detail in what is seemingly a standard declaration submitted to courts by the Department of State. In at least two cases, the Department of State has submitted nearly identical declarations by Clifton M. Johnson, Assistant Legal Advisor for Law Enforcement and Intelligence in the Office of the Legal Adviser of the U.S. Department of State ("Johnson Declaration"),[3] to support its applications for extraditions. The Johnson Declaration was submitted by the government in *Trinidad y Garcia v. Beniov*[4] in the Central District of California and *Juarez-Saldana v. United States*[5] in the Western District of Tennessee.

The Johnson Declaration describes the Department of State's procedure in handling extradition requests primarily in the context of cases where allegations of potential torture have been raised. It also describes the rule of non-inquiry, whereby judges deciding extradition requests should not consider the conditions an individual may face after extradition. Such considerations—even allegations of potential torture—are only for the Secretary to review. Once a judge certifies extraditability, the Secretary may undertake a de novo review of all issues properly raised before the extradition court or the habeas court (extradition decisions are reviewable through a petition for a writ of habeas corpus). Typical considerations include determining whether the foreign prosecution is political or whether the individual will receive a fair trial or inhumane treatment in the foreign country.[6]

The Johnson Declaration describes no limits on the Secretary's discretion. Although its description of the Secretary's discretion was mostly limited to determinations by the Secretary

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regarding the likelihood of torture, it also makes clear in a brief statement that the Secretary's discretion to permit or deny extradition is extremely broad. The Declaration states that the Secretary may also contemplate "any other considerations for or against surrender." In short, the position of the Department of State is that the Secretary has essentially unlimited discretion in deciding whether to authorize extradition of an individual to a foreign country.[7] The Declaration also asserts that the Secretary's exercise of her discretion is not reviewable by courts.

The extent of the Secretary's discretion was reaffirmed in 2008 by the U.S. Supreme Court in *Munaf v. Geren*. Although not an extradition case, *Munaf* has been cited in extradition opinions for the proposition that courts should not review the Secretary's exercise of her discretion on extradition matters.[8] In *Munaf*, the court considered whether individuals detained in Iraq by the multinational force for transfer to Iraqi custody for prosecution under Iraqi law were entitled to habeas relief.

In concluding that they were not, the court confirmed that concerns over due process or potential torture are matters for "political branches" rather than the courts. The court even cited the Federalist Papers for the proposition that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." The court also stated, "The Executive Branch may, of course, decline to surrender a detainee for many reasons, including humanitarian ones."[9]

Refusals to Extradite Are Rare

In rare instances, the Secretary of State has refused extradition even after a court has certified extraditability.[10] For example, in 1968 Secretary of State Dean Rusk refused to extradite controversial labor leader Harold C. Banks to Canada after his conviction in Canada on charges of assaulting another labor leader. The Secretary's reasons for refusing to extradite remain unclear, with some newspaper accounts at the time even pointing to a large donation by Bank's union to Rusk's political party soon after the decision.[11]

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In 1977, Secretary of State Henry Kissinger refused to extradite Elijah Ephraim Jhirad, former Judge Advocate General of the Indian Navy, to India to face allegations of corruption. Although this decision was ostensibly predicated on a statute of limitations issue, articles at the time suggested that the decision was based on concerns that Jhirad was being persecuted because he was Jewish and a staunch anti-communist.[12]

Unfortunately, historical cases provide little guidance as to what might cause the Secretary to exercise her discretion and deny extradition. The problem for defendants seeking ways to avoid extradition is that the Secretary's discretion is typically exercised in the strictest confidentiality. For example, the Johnson Declaration describes at length the sorts of confidential negotiations that take place between the Secretary and requesting countries. In the context of allegations of torture, the Johnson Declaration explains that the United States sometimes extradites individuals to countries where torture occurs, but only after negotiating assurances with the requesting state that the individual will not be mistreated. Such negotiations, however, are kept confidential. The Declaration explains, "[T]he Department does not make public its decisions to seek assurances in extradition cases in order to avoid the chilling effects of requesting States' willingness to make such assurances…. Seeking assurances may be seen as raising questions or criticism about the requesting State's institutions or commitment to the rule of law."

The Declaration also notes that there may be an interest in confidentiality to protect sources of information about torture in a foreign country, which sometimes even include sources inside the foreign government itself.[13] The Declaration concludes that revealing communications with requesting states might make them less likely to communicate candidly with the United States.

A Possible Defense?

Although the issue of the Secretary's exercise of her discretion typically arises where the individual potentially faces inhumane treatment after extradition, the question remains whether the Secretary's discretion presents an opportunity for other individuals facing extradition from the United States. As set forth above, it is the position of the Department of State—as confirmed by the Supreme Court in *Munaf*—that the Secretary can reject extradition on any ground she sees fit. This may present an opportunity for attorneys representing individuals facing extradition.

For example, U.S. courts have made quite clear that judges should not reject extradition applications over concerns about shortcomings in the legal system in a foreign country. Yet, there is nothing to stop the Secretary from rejecting extradition on this basis. This was made clear in the case of *In re Extradition of Harrison* in the Southern District of New York.[14] In *Harrison*, Belgium sought Harrison's extradition from the United States after he was convicted in absentia in Belgium on charges alleging millions of euros in tax evasion on petroleum transactions in Belgium. Among other arguments Harrison raised was that his conviction in absentia violated his due process rights.

The court rejected this and other arguments, writing, "Although the fact that an extraditee was not present for his trial and sentencing is a factor

properly considered by the Secretary of State in deciding whether to grant extradition, it is not a defense to a request for extradition nor is it a basis for dismissing an extradition request."[15] *Harrison* thus makes clear that while courts are not to consider due process concerns in their review of extradition applications, it is perfectly appropriate for the Secretary to undertake such considerations.

Another possible means to avoid extradition would be to enter a plea and/or cooperation agreement with U.S. prosecutors that restricts the government's ability to extradite. Given the global scope of certain offenses and overlapping international jurisdiction, this may be an increasingly available route. For example, the United States is currently poised to deny extradition to India of David Headley, an individual who participated in the 2008 Mumbai terrorist attack. Headley, a Pakistani-American, pleaded guilty in Chicago in March 2010 to counts alleging that he attended terrorist training camps and performed surveillance trips in India for the group that perpetrated the attacks. Headley has since testified that he was a Drug Enforcement Administration informant at the same time he engaged in terrorist activities. Headley's Plea Agreement indicates that he agreed to plead and cooperate in exchange for the government not seeking the death penalty or permitting his extradition to India or Pakistan.[16]

Headley's fate is of intense interest in India. Presumably to assuage India's concerns, U.S. officials publicly revealed that the United States was permitting Indian officials direct access to Headley.[17] In February 2012, an Indian court authorized Headley's prosecution in India, clearing the way for a November 2012 letter from Indian officials directly to Secretary of State Hillary Clinton requesting Headley's extradition.[18] The United States and India have had an extradition treaty in force since 1997.[19] The Department of State has said only that the request is under consideration, although no formal extradition request has actually been filed with any court.[20] On Jan. 24, 2013, Headley was sentenced in Chicago to 35 years in prison. Headley faced life in prison, but prosecutors requested a sentence of 30 to 35 years based on his extensive cooperation with the government.[21]

Headley's extradition seems highly unlikely. The Department of Justice—undoubtedly coordinating with the Department of State—agreed to negotiate away the United States' extradition treaty obligation to India in exchange for Headley's plea and cooperation. Were the United States to extradite Headley now, it would be a breach by the government of the plea agreement with Headley, setting up a potential basis for a court to block extradition and enforce the terms of the plea agreement. The Secretary thus has probably already decided not to extradite Headley under any circumstances despite his participation overseas in a horrific terrorist attack.

The 'Harrison' case makes clear that while courts are not to consider due process concerns in their review of extradition applications, it is perfectly appropriate for the Secretary to undertake such considerations.

The Secretary thus will in certain situations cut a deal and prevent extradition of individuals accused of even the most extreme criminal conduct. This may present an opportunity for individuals facing extradition who are accused of lesser, non-violent crimes in the requesting country. Presumably, such persons would have an easier time avoiding extradition than someone like Headley, so long as they can offer a reason for the Secretary to exercise her discretion. Due process concerns or cooperation with U.S. authorities present two possible grounds for the Secretary to exercise her discretion—and the scope of the Secretary's discretion and the increasingly international reach of the law promises that these grounds and others may be more frequently traveled.

1. Nicholas M. De Feis and Philip C. Patterson, "Citizenship a Good Defense Against Extradition—but Not in U.S.," NYLJ, Dec. 14, 2012.

2. 18 U.S.C. §3186 ("The Secretary of State *may* order the person committed…to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged") (emphasis added).

3. Available at http://www.state.gov/documents/organization/153464.pdf.

4. 08 CV 07719, 715 F.Supp.2d 974 (C.D. Cal. 2009).

5. 09 CV 02786; 700 F.Supp.2d 953 (W.D. Tenn. 2010).

6. Johnson Declaration ¶¶3-4.

7. Johnson Declaration ¶4.

8. See, e.g., *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 960 (9th Cir. 2012) (holding that *Munaf* prohibited the court from reviewing a substantive due process defense to extradition).

9. 553 U.S. 674, 702 (2008) (citing *The Federalist* No. 42, p. 279 (J. Cooke ed. 1961) (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations")).

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

11. Roy Reed, "Gift to Humphrey by Union at Issue; Seafarers Deny Tie to Rusk Action in Extradition Case," *New York Times*, July 20, 1968, p. 12.

12. See "State Department Denies India's Request for Jhirad's Extradition," *Jewish News Archive*, Jan. 3, 1977, available at http://archive.jta.org/article/1977/01/03/2977637/state-department-denies-indias-request-for-jhirads-extradition.

13. Johnson Declaration ¶¶9-13.

14. No. 03 Crim. Misc. 01, Page 49 (HP), 2004 U.S. Dist. Lexis 9183, at *23 (S.D.N.Y. May 19, 2004).

15. 2004 U.S. Dist. Lexis 9183, at *23 (citing *Gallina v. Fraser*, 278 F.2d 77, 78-79 (2d Cir. 1960)).

16. *United States v. Headley*, No. 09 CR 830 (N.D. Ill.), ECF Doc. No. 73.

17. "India granted access to Headley," Indianexpress.com, June 5, 2012, available at http://www.indianexpress.com/news/india-granted-access-to-headley/629839/

18. "Salman Khurshid writes to Hillary Clinton seeking extradition of David Headley, Tahawwur Rana," NDTV.com, Dec. 1, 2012, available at http://www.ndtv.com/article/india/salman-khurshid-writes-to-hillary-clinton-seeking-extradition-of-david-headley-tahawwur-rana-299858.

19. 18 U.S.C. §3181, notes (listing treaties).

20. "Interview of Wendy Sherman, Under Secretary for Political Affairs," CNN IBN, Nov. 26, 2012, transcript available at http://www.state.gov/p/us/rm/2012/201006.htm.

21. *United States v. Headley*, 09 CR 830 (N.D. Ill.), ECF Doc. No. 358.