

## Outside Counsel

# Citizenship a Good Defense Against Extradition—but Not in U.S.

The media has lately reported some instances of individuals who have managed to avoid extradition to face prosecution. The common theme in these cases is a reluctance or even outright policy in some countries against extraditing their own citizens. Most shocking of all, in May 2012 various media outlets reported on the death in Germany of Klaas Carel Faber, a convicted World War II era war criminal whom Germany repeatedly refused to extradite. Faber, a Dutch citizen, received German citizenship in 1943 when he enlisted with the German Waffen SS after Germany occupied The Netherlands. Apparently part of the firing squad at the Westerbork concentration camp, he was convicted by a Dutch court of war crimes in 1947. His sentence of death was commuted, and he thereafter escaped and fled to Germany. Germany, which has a policy against extraditing its citizens, refused various requests for his extradition. In 2006, extradition was denied on the grounds that the crimes alleged amounted to manslaughter and were beyond the statute of limitations. In January 2012, German authorities requested a German court to enforce the Dutch life sentence against Faber, but Faber died before the request was granted.<sup>1</sup>

Not surprising, in view of this precedent, Germany has also thus far refused to extradite the “Siemens 8”—eight Siemens executives and German citizens indicted in the Southern District of New York on Foreign Corrupt Practices Act and other charges alleging bribery of Argentinean government officials.<sup>2</sup> Siemens itself reached an \$800 million settlement with the U.S. Department of Justice and Securities and Exchange Commission in the District of Columbia.<sup>3</sup> Filings in the criminal case indicate that the Justice Department would seek extradition, but a May 2012



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deadline for a status report to the court has since passed without any filings by the government. The government has not yet revealed how it plans to extradite these German citizens.

Like Germany, many countries have policies against extraditing their own citizens. For example, France and Brazil both have extradition treaties with the United States but reserve the right to refuse extradition of their own citizens.<sup>4</sup> Many countries that refuse to extradite their citizens have laws authorizing domestic prosecution of their citizens for crimes committed abroad, but these policies are applied inconsistently, if at all, and thus provide little consolation for foreign prosecutors. Moreover, the United States only has extradition treaties with 109 countries,<sup>5</sup> or about half the sovereign states in the world.

Even Americans can be difficult to extradite to the United States if they obtain citizenship in foreign countries. Former Willbros International Inc. executive James Tillery remains in Nigeria despite being indicted in November 2008 in the Southern District of Texas on Foreign Corrupt Practices Act charges alleging bribery of Nigerian and Ecuadorian officials.<sup>6</sup> The United States and Nigeria have had an extradition treaty since 1935, and Nigeria extradited a U.S. citizen to the district of New Jersey as recently as February 2012.<sup>7</sup>

Tillery was arrested in Nigeria on an Interpol “Red Notice” but a Nigerian court subsequently ruled that the arrest failed to comply with Nigerian law. Nigerian media accounts noted that

Tillery had renounced his U.S. citizenship and became a naturalized Nigerian citizen, with one periodical running an editorial openly calling for an investigation into whether Tillery obtained Nigerian citizenship solely to avoid extradition.<sup>8</sup>

### United States Less Reluctant

Despite some countries’ seeming reluctance or even outright policy against extraditing their own citizens, the United States has no such reservations. A recent Eastern District of New York opinion provides an example of the limited role courts play in reviewing extradition requests from foreign countries. On Sept. 20, 2012, Magistrate Judge Joan Azrack of the Eastern District issued an opinion granting a request from the government of Brazil to extradite U.S. citizen Alex Suyanoff.<sup>9</sup> Azrack’s opinion is not surprising, for despite humanitarian pleas by Suyanoff’s attorneys based on poor conditions and medical treatment in Brazilian prison, Suyanoff was convicted in Brazil in 2004 for drug trafficking and sentenced to 16 years in prison. He appealed, and his sentence was reduced to 12 years, and he thereafter escaped after serving 3½ years. He was arrested in May 2012 in Queens, N.Y., and held for extradition proceedings.

Azrack’s opinion notes that U.S. judges considering requests for extradition are not to assess whether the evidence presented supports the conviction. Instead, judges are to focus primarily on dual criminality—whether the crime for which the defendant is prosecuted in the foreign country is also a crime in the United States—and whether the foreign authority’s application via the U.S. Justice Department establishes probable cause. As Azrack states, “[T]his Court’s determination must be ‘whether there is competent evidence to justify holding the accused... not to determine whether the evidence is sufficient to justify a conviction.’”<sup>10</sup> Suyanoff, having been convicted of trafficking large quantities of cocaine, had no dual criminality argument to make. Moreover, Azrack’s opinion indicates that Brazilian authorities carefully provided the

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necessary documentation regarding Suyanoff's drug trafficking conviction to support a finding of probable cause.

Azrack's opinion is fairly routine, except that it further confirms the acceptance by courts in this circuit of the "non-inquiry doctrine," whereby courts will not inquire into the substance of determinations by the Department of State about the conditions a person may face after extradition to a foreign jurisdiction. Suyanoff's attorneys, as a final argument, asserted that regardless of the merits of the extradition application, Suyanoff should not be extradited on humanitarian grounds.

Azrack's opinion acknowledges *United State ex rel Bloomfield v. Gengler*, a 1974 U.S. Court of Appeals for the Second Circuit opinion containing dictum that extreme situations are conceivable where courts might properly look beyond dual criminality and probable cause considerations. Azrack, quoting the Second Circuit, describes these hypothetical situations as those where extradition would be "antipathetic to a federal court's sense of decency," such as a case where the defendant was unable to put up a defense.<sup>11</sup> The judge, however, does not find Suyanoff's circumstances antithetical to decency, citing certain procedural protections afforded the defendant.

Indeed, while citing *Bloomfield*, Azrack's opinion in *Suyanoff* seemingly strengthens the non-inquiry doctrine by favorably citing the U.S. Court of Appeals for the Ninth Circuit's opinion in *Trinidad y Garcia v. Thomas* for the proposition that only the U.S. Secretary of State can prevent extradition on humanitarian grounds.<sup>12</sup> In *Trinidad y Garcia*, a defendant filed a habeas petition to challenge a magistrate judge's certification of his extradition to The Philippines.<sup>13</sup> The defendant argued, among other things, that he should not be extradited because he might be subjected to torture in The Philippines. The Convention Against Torture (CAT), adopted by Congress as part of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), permits participating countries to refuse extradition where the defendant may face torture in the requesting country.

Because FARRA has been adopted as domestic law, the U.S. Department of State is required to review allegations of potential torture after extradition and cannot extradite someone who likely faces torture after extradition.<sup>14</sup> In *Trinidad y Garcia*, the Ninth Circuit, en banc, cited the FARRA requirement but noted that the Department of State submitted only "generic" information about extradition procedure. The court thus remanded for a declaration from the Secretary of State that she had complied with her FARRA obligations.

The court concluded that once the district court receives such a declaration from the Secretary, "the court's inquiry shall have reached its end and Trinidad y Garcia's liberty interest shall be fully vindicated." The court went on to

hold, "The doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration.... To 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."<sup>15</sup> Trinidad y Garcia subsequently filed a petition for a writ of certiorari with the Supreme Court.

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### Testing the U.S. Policy

The *Suyanoff* and *Trinidad y Garcia* opinions confirm that federal courts continue to perform only limited reviews in extradition proceedings, with the most common reviews focusing on proper procedure, dual criminality and probable cause. Extradition challenges on other grounds, however, are generally left to the discretion of the Secretary of State.

The Secretary of State's discretion may soon be put to a test. In September 2012, Italy's highest court upheld the convictions in absentia of 22 CIA employees and an Air Force colonel on charges based on the abduction of an Italian terrorist suspect.<sup>16</sup> Abducted in Milan, the individual was subjected to the now abandoned U.S. policy of rendition. Italian officials must now determine whether to seek extradition of the defendants to Italy. The fact that the convictions were in absentia will not bar extradition. Indeed, the convictions can provide support for a finding of probable cause, although courts will not rely on the convictions alone to make such a finding.<sup>17</sup>

A U.S. court might conclude, however, that because the conduct was an official government policy it lacks dual criminality. Should the extradition request survive these legal challenges, the defendants' only recourse is to the Secretary of State. At that point, the Secretary may have an opportunity to articulate the limits of our willingness to extradite our own.

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1. "Klaas Faber, War Criminal Who Escaped Punishment, Is Dead at 90," *New York Times*, Jun. 1, 2012, available at [http://www.nytimes.com/2012/06/01/world/europe/klaas-faber-war-criminal-from-the-](http://www.nytimes.com/2012/06/01/world/europe/klaas-faber-war-criminal-from-the-netherlands-dies-at-90.html)

[netherlands-dies-at-90.html](http://www.nytimes.com/2012/06/01/world/europe/klaas-faber-war-criminal-from-the-netherlands-dies-at-90.html).

2. *United States v. Sharef*, No. 11 CR 1056 (filed Dec. 12, 2011); *SEC v. Sharef*, 11 CV 9073 (filed Dec. 13, 2011).

3. *United States v. Siemens*, 08 CR 367 (filed Dec. 12, 2008); *SEC v. Siemens*, 08 CV 2167 (filed Dec. 12, 2008).

4. See, e.g., French Code of Criminal Procedure, Section 696-4, official translation available at [http://www.legifrance.gouv.fr/content/download/1958/13719/version/3/file/Code\\_34.pdf](http://www.legifrance.gouv.fr/content/download/1958/13719/version/3/file/Code_34.pdf); Treaty of Extradition Between the United States of America and the United States of Brazil of Jan. 13, 1961, Article VII, 15 U.S.T. 2093 (1961).

5. 18 U.S.C. §3181, notes (listing treaties).

6. *United States v. Tillery*, 08 CR 22 (filed 1/17/08).

7. *United States v. Mustapha*, 08 CR 429 (filed 3/5/08).

8. "The Tillery Affair," *Nigerian Tribune*, Aug. 27, 2012, available at <http://www.tribune.com.ng/index.php/editorial/10285-the-tillery-affair>; see also "Court Stops Extradition of a Nigerian Citizen," *The Nigerian Observer*, Sept. 2, 2012, available at <http://nigerianobservernews.com/02092010/news/national/news3.html>; "Naturalised American challenges extradition from Nigeria," *AfricaBusiness.com*, Aug. 28, 2012, available at <http://africabusiness.com/2010/08/28/naturalised-american-challenges-extradition-from-nigeria>.

9. *United States v. Suyanoff*, 12 MJ 462, 2012 U.S. Dist. Lexis 135093 (E.D.N.Y. Sept. 20, 2012).

10. 2012 U.S. Dist. Lexis 135093, at \*18.

11. 2012 U.S. Dist. Lexis 135093, at \*19-20 (quoting *United State ex rel Bloomfield v. Gengler*, 507 F.2d 925, 927 (2d Cir. 1974)); see also *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960), cert. denied, 364 U.S. 851 (1960).

12. 2012 U.S. Dist. Lexis 135093, at \*21. Notably, the Second Circuit's opinion in *Ahmad v. Wigen*, without mentioning *Bloomfield*, arguably overruled it by holding that courts should not consider the conditions a defendant faces in the requesting country. 910 F.2d 1063 (2d Cir. 1989).

13. 683 F.3d 952, 960 (9th Cir. 2012).

14. The Department of State has discretion to prevent extradition on other grounds. For example, the Secretary of State can prevent extradition if the prosecution in the foreign jurisdiction is politically motivated.

15. 683 F.3d at 957 (citations omitted).

16. High Court in Italy Backs Convictions for Rendition, *New York Times*, Sept. 20, 2012, available at [http://www.nytimes.com/2012/09/20/world/europe/rendition-convictions-of-23-americans-upheld-in-italy.html?\\_r=0](http://www.nytimes.com/2012/09/20/world/europe/rendition-convictions-of-23-americans-upheld-in-italy.html?_r=0).

17. *Haxhiaj v. Hackman*, 528 F.3d 282, 291 (4th Cir. 2008) (collecting cases holding that probable cause requirement can be satisfied where foreign conviction was in absentia).