

INTERNATIONAL CRIMINAL LAW AND ENFORCEMENT

Expert Analysis

The Perils of Resisting Extradition To the United States

Individuals in foreign countries who are under investigation in the United States sometimes avoid travelling here, and once charged often fight extradition. These choices may make legal sense for individuals located in countries that have no extradition treaty with the United States. They may also make sense for foreign nationals located in their home country if that country has a policy, as many do, against extraditing its own citizens.

Individuals whose circumstances may result in extradition to the United States must carefully consider whether they should fight extradition. Fighting extradition may simply become a waste of time and money and have serious unintended consequences. Individuals who resist extradition may even come to regret their decisions.

Extradition Basics

An individual charged with a serious offense in the United States

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who is located in a treaty country is usually the subject of an extradition request. The United States has extradition treaties with about 100

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sovereign nations. If treaty requirements are met, and if the foreign country recognizes the charges as something that is also illegal in that country, extradition may well occur.

There are, of course, political and other factors that may come into play. Some countries, such as Germany, France and Brazil, generally

will not extradite their own citizens to the United States. Some countries do not recognize every type of crime recognized in the United States. For example, much of the world is only now catching up to the United States in criminalizing anti-competitive business conduct. Thus, there are still places in the world where individuals are theoretically safe from extradition to the United States.

The days of these so-called “safe havens,” however, appear to be numbered. Governments are more frequently cooperating and sharing information, and countries are gradually joining the United States in criminalizing all manner of business crimes. Indeed, the year 2014 saw the first-ever extradition of an individual to the United States to face charges for anti-competitive conduct. In September 2016, the United States and China announced talks about a potential extradition treaty between the two nations.

To Fight or Not to Fight?

If an individual is charged with a crime that is recognized globally,

and located in a country that routinely extradites to the United States, there may be no point in fighting extradition. In addition, a country seeking extradition of an individual can request “provisional arrest” pending extradition. The request must explain why the individual is a risk of flight. If it meets certain requirements, the receiving nation may well detain the individual, oftentimes by imprisonment. Nations reciprocate on this procedure because they do not want to be embarrassed and jeopardize international relations by agreeing to extradite someone who they subsequently cannot even find.

In certain situations, the possibility of provisional arrest can be a serious risk. As the recent Southern District prosecution in *United States v. Tuzman*, 15 CR 536 (S.D.N.Y. filed Aug. 15, 2016) illustrates, if the individual is located in a country that has a less-than-enlightened prison system, he or she may suffer under terrible conditions waiting for a lengthy extradition procedure to play out.

‘Tuzman’

In August 2015, Tuzman and a co-conspirator were indicted in the Southern District of New York on securities fraud charges. According to the indictment, Tuzman and his co-defendant were officers of a publicly traded video software firm called KIT digital (KIT). The government alleges that they conspired with a hedge fund to inflate KIT’s share price.

The indictment was filed under seal so as not to alert the defendants before they were apprehended. U.S. prosecutors were aware that Tuzman was located in Colombia and requested his provisional arrest. Colombia complied and arrested Tuzman.

Tuzman’s arrest by Colombia was not unusual. Colombia extradites many individuals to the United States, although many are powerful drug cartel figures who Colombian

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officials are happy to turn over. Tuzman, however, is a businessman with dual U.S.-Colombian citizenship. According to court filings, he was born in Boston, graduated from Harvard, and then went to work at Goldman Sachs. He then became an Internet entrepreneur working on ventures in the United States, Europe and Latin America. At the time of his arrest, he was apparently working on a luxury hotel venture in Colombia.

Unfortunately for Tuzman, Colombian officials detained him in the notorious La Picota prison in Bogota pending extradition. La Picota houses some of Colombia’s most violent offenders. Its inmates are a

mix of left and right-wing militants, with drug cartel members mixed in. Gangs are said to literally control the prison, with inmates even able to make outside calls to continue running their criminal organizations. In 2015, Colombian officials apparently even had to “re-take” one wing of the prison where wealthy inmates had remodeled interiors and changed locks.

Tuzman’s extreme circumstances turned typical extradition procedure on its head. His attorneys filed a novel motion asking the court to vacate the U.S. warrant supporting the extradition request so that Colombia would have to release him, and also to compel the government to expedite his transfer here. The filings stated that Tuzman’s life was in danger, and redacted portions that likely described horrific prison conditions. The motion stated that Tuzman would waive extradition and travel to the United States with law enforcement officials. Tuzman, rather than fighting extradition, was fighting to be extradited.

According to Tuzman’s counsel, they were in contact with U.S. prosecutors during the investigation and volunteered to respond to future inquiries. They asserted that Tuzman often travelled to the United States, but prosecutors nevertheless indicted him without warning when he was in Colombia. Despite Tuzman’s counsel stating outright that they did not question the prosecutors’ motives, some portions of

the filings hint that the government acted vindictively.

In fairness, however, prosecutors cannot be expected to proceed on the timetable most convenient for suspected criminals. Nor can prosecutors be certain that suspects who promise to make themselves available if charged will not change their minds once charges are filed. Indeed, the government's response to Tuzman's motion notes that he had worked on the subject transactions with an attorney who had previously fled to the United Arab Emirates (a non-extradition treaty country) after being convicted of fraud in the United States. Tuzman had also travelled to the UAE in the year preceding his indictment.

The government's filings also indicate that Colombia holds all extradition candidates in La Picota, including white-collar defendants. The filings further indicate that U.S. prosecutors made real efforts to get consular and Colombian officials to look into Tuzman's complaints. They apparently succeeded in eventually getting Tuzman moved to a safer facility. Finally, the filings also note that prosecutors spoke with State Department officials about the notion of withdrawing the arrest warrant and were told that doing so might jeopardize one of the U.S.'s best law enforcement relationships.

Ultimately, Judge Paul Gardephe denied the motion on straightforward grounds. First, Tuzman did

not challenge the indictment or U.S. arrest warrant underlying the extradition request. The court thus had no basis for vacating a valid warrant. Second, courts have no authority over a decision by the Executive Branch to request an extradition. Finally, Judge Gardephe noted that the relief Tuzman was seeking—release after an extradition request on the promise of surrender to the United States—was completely unprecedented.

Conclusion

Tuzman was eventually extradited to the United States and is currently under home confinement pending trial. The significance of his saga is unclear. His plight became a bit of a cause célèbre. Some commentators even suggested that prosecutors had him provisionally arrested in Colombia to terrorize him into capitulation, but the government's filings seem to dispel any such notion.

Tuzman's experience, however, was not necessarily an outlier. Colombia does provisionally detain white-collar defendants in La Picota, and such risks are not confined to Colombia. Alleged drug lord El Chapo claimed that his provisional detention in Mexico was so intolerable that he would waive extradition to the United States. Similarly, a federal prosecutor in Miami, announcing an extradition request for an attorney provisionally detained in Brazil, revealed that individuals who fight extradition from Brazil typically come to regret their

decision when they are extradited anyway after languishing in a Brazilian prison.

Indeed, bad conditions in foreign prisons have even been used (improperly) as leverage by U.S. officials. For example, international arms dealer Viktor Bout won suppression of statements he made upon his arrest in Thailand in part because the U.S. agents who questioned him had either intimated or outright threatened him about the conditions he faced in a Thai prison pending extradition.

Depending on circumstances, individuals overseas who are under investigation in the United States should consider having counsel inform prosecutors that they are willing to surrender to the United States to face any charges. This could prevent any unpleasant surprises. At the very least, individuals under investigation in the United States should think very carefully about where they travel.