

Blending Law, Politics, and Strategy in the Fight Over Extradition

By Pamela Brownstein

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Efforts to fight extradition are inherently complex and often determinative of whether an individual will be surrendered to a foreign legal system with limited procedural protections. The process draws on international, constitutional, and criminal law, and involves the courts and the Department of State.

In recent years, threats of cross-border organized crime, cybercrime, drug trafficking, and terrorism have increased, and in tandem, the complexity of the extradition process has become more formidable, according to **Zuckerman Spaeder** partners **Shawn P. Naunton** and **David M. Rody**. They point to unsettled political dynamics, limited transparency by the Department of State, and less adherence to the rule of law by some U.S. treaty partners.

Against that backdrop, a client's early, strategic engagement of trusted outside counsel is critical. It's important "for the client and their counsel to get their arms around and address" key issues at the outset of the case, says Naunton.

The extradition system is unusual and unlike other U.S. legal proceedings. No trial takes place on the merits of the extradition question itself. Instead, the court conducts an initial hearing, but only to confirm that certain basic minimum



Courtesy photo

Shawn Naunton and David Rody, partners at Zuckerman Spaeder

requirements are met—such as whether the person in custody is the one sought and the offense charged is one covered by the extradition treaty.

The court is only allowed to consider explanatory, not contradictory, evidence. And most substantive and affirmative defenses, such as self-defense or insanity, are not permitted. Because of this, it is important for counsel to investigate and assert any defenses that are available, such as expiration of the statute of limitations.

By contrast, for the government, the process is typically straightforward and easily fulfilled. For example, "[o]ne of the only hurdles that the government has in seeking extradition is establishing probable cause. And when they have

a charging instrument, like a complaint, that's already taken care of," says Rody.

Reduced Transparency

If the court certifies the person as extraditable, the request then moves to the Department of State, which exercises its discretion in determining whether to authorize the extradition.

Naunton describes the second element of the process as lacking transparency. "This can vary from administration to administration, but the trend in recent administrations is for State not to engage in meaningful dialogue with outside counsel," he observes.

Rody, a former Assistant U.S. Attorney who has seen the process from both sides, points to political volatility as a particular stumbling block. "You don't know what will attract the attention of [regulators/prosecutors]—particularly with an administration that demonstrates a fluidity in priorities which could make them act in a way that might be contrary to the normal courtroom and State Department processes," he says.

In some cases, he adds, "there may be a better prospect of success" if a client subject to extradition were able to slow the process down "long enough for a new administration."

Democratic Backsliding

Adding yet another complicated dimension, some treaty partners are experiencing an erosion in democratic practices and turning their backs

on treaty agreements that have long provided guiding principles for intergovernmental cooperation on issues like extradition.

Naunton says the U.S. extradition process is based on the premise that the nation trusts its treaty partners not to mistreat extradited individuals and to ensure they receive a fair trial.

"In this era of democratic backsliding, we should rethink whether that premise still holds with respect to certain of our treaty partners," Naunton says. He notes that some of America's close allies are doing just that.

Further, there are often unexpected diplomatic intricacies in extradition matters; for example, treaty partners might choose to make a trade of individuals held in another country.

"It can present a real opportunity if you are on the side that is benefiting from [such a trade]," says Rody. However, clients sometimes suffer the consequences of "a political process that is out of the hands of defense lawyers and prosecutors."

Amidst increasing uncertainty, the complexity of extradition proceedings and the inherent difficulty in fighting extradition underscores the importance of hiring experienced counsel who can navigate overlapping legal frameworks, institutional roles, and shifting geopolitical dynamics.

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