

WHITE-COLLAR CRIME

Invitation Declined: Defenses Against Extradition to the United States

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As law enforcement continues to globalize, white collar defense lawyers have become increasingly likely to face efforts to extradite a client to the United States.

The arm of U.S. extradition law is long. The United States has treaties with over 100 nations across the globe, and in some cases has the ability to secure extradition from countries in the absence of any treaty. Fortunately, practitioners have defenses at their disposal that they may raise in the requested country's courts to help either limit the scope of prosecution once extradition occurs, or to prevent it altogether.

Commonly asserted defenses pursued by prominent defendants such as Autonomy software co-founder Michael Lynch, FTX CEO Sam Bankman-Fried, Wikileaks founder Julian Assange and Huawei CFO Meng Wanzhou include the requirement of dual criminality, rule of specialty and risk of inhumane or unfair treatment in the requesting country.

The extradition process is, naturally, governed by international law, generally in the form of standalone bilateral or multilateral extradition treaties, or as a component of a broader mutual legal assistance treaty, commonly referred to as an MLAT. These treaties typically contain standard procedural components, such as those relating to provisional arrest warrants, evidentiary standards, and the issuance of formal extradition requests themselves.



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The treaties also contain standards for when extradition requests should be granted or denied, which form the basis of many of the defenses discussed herein. Treaties also frequently contain categorical bars to extradition—for example, many wholly preclude the extradition of a country's own citizens.

Treaties themselves, however, do not tell the whole story. Prudent practitioners should work closely with co-counsel in the requested country to examine precedent and constitutional law, as well as international human rights law, to craft thoughtful and creative arguments to safeguard their clients' rights. Once extradited, criminal defendants generally lack standing to raise extradition-related defenses in American courts. See Robert Anello, "Extradition: Whose Rights Are Really At Stake?", *Forbes* (June 29, 2023). Thus, fighting extradition may be seen not simply as a "first line of defense" but as a client's best opportunity to avoid criminal liability by pleading their case before a potentially more sympathetic tribunal.

Moreover, zealous advocacy opposing extradition can provide many benefits, including the opportunity to narrow the scope of prosecution, gain deeper insight into the prosecution's evidence, obtain additional time to prepare a substantive defense or leverage the uncertainty of extradition to secure a favorable disposition.

Felonies, Foreign and Domestic?

Most extradition treaties contain a requirement of dual criminality, i.e., that the offense for which extradition is sought be criminalized in both the requesting and requested countries. Typically, the offense must also be of a certain severity—e.g., the equivalent of a felony, punishable by imprisonment of one year or more in both countries. An individual may thus oppose extradition by arguing that the alleged conduct is not a crime in the country from which extradition is sought.

The defense of the British co-founder of Autonomy software, Michael Lynch, on charges arising from alleged accounting misconduct preceding the multibillion-dollar sale of Autonomy to Hewlett Packard, began with a vigorous, multi-year defense against extradition to the United States, including that his alleged conduct failed to meet the dual criminality requirement.

Last week, after an 11-week trial in the U.S. District Court for the Northern District of California on charges of wire fraud, securities fraud and conspiracy, a jury acquitted Lynch, along with Autonomy Finance Vice-president Stephen Chamberlain, on all counts in a high-profile loss for the Department of Justice.

In opposing extradition, Lynch claimed that his conduct did not occur within the United States, and that such extraterritorial conduct would not constitute a crime in the United Kingdom. His chances of success on this argument dimmed when, in August 2020, in the appeal of Autonomy's earlier convicted CFO Sushovan Hussain, the U.S. Court of Appeals for the Ninth Circuit ruled that the use of U.S. wires was sufficient to defeat claims that the alleged wire fraud conduct was extraterritorial under U.S. law.

Lynch's dual criminality claim ultimately failed when a British appellate court held that, not only had the

United States established that the harmful effects of his actions were felt within the United States, but that several overt acts in furtherance of the conspiracy occurred there, making his conduct an offense in both countries.

Under the terms of the U.K. Extradition Act of 2003, Lynch also argued that the United States was not the proper forum for the prosecution, which allowed him to argue more broadly that extradition was not "in the interests of justice." The British appellate court ultimately rejected this claim as well, in a ruling that focused on the questionable availability of U.S. cooperators to testify in the United Kingdom, and the alleged harm suffered in the United States.

Meng Wanzhou, a Chinese citizen and chief financial officer of Chinese tech giant Huawei, also raised dual criminality in opposing the United States' high-profile attempt to extradite her from Canada. Meng was accused of fraud related to the violation of U.S. sanctions against Iran, based on alleged lies to HSBC about the nature of Huawei's dealings. Her attorneys argued that the accusations against her were predicated on alleged violations of U.S. sanctions that had no analogue in Canadian law.

Meng's challenge ultimately failed when, in May 2020, a Canadian court held that making false statements to HSBC would constitute criminal fraud under Canadian law notwithstanding the country's lack of relevant international sanctions. The court rejected Meng's argument that it should ignore the relevant U.S. sanctions, finding that doing so would artificially narrow the meaning of fraud in the extradition context and preclude courts from considering the motive behind making false statements and the resulting harm.

The Meng case demonstrates a key element of dual criminality analysis: the government may succeed in asserting that an offense fulfills the requirement if its substance is criminal in both the requested and requesting states, regardless of how the offense is categorized, named or described.

Although Meng's legal defense to extradition was not successful, it helped give her time to pursue other avenues. The United States Attorney for the Eastern District of New York ultimately offered her

a non-prosecution agreement—a result that was undoubtedly influenced by high level diplomatic efforts by China in this unusually sensitive case.

More Than They Bargained For

The rule of specialty works to limit the scope of a requesting country's ability to prosecute an extradited individual by requiring that the individual only be prosecuted for the specific offense or offenses that served as the basis for extradition. An individual may invoke the doctrine as a defense to extradition by arguing that the requesting country intends to prosecute the individual for other crimes. Although there are hurdles to doing so, a defendant may also seek to invoke specialty in the post-extradition context if prosecutors in fact bring additional charges in the United States,

The latter scenario arose in 2023 during the prosecution of Sam Bankman-Fried on fraud charges relating to the high-profile collapse of cryptocurrency exchange FTX.

In late 2022, shortly after his arrest in the Bahamas, Bankman-Fried consented to extradition to the United States and thereafter appeared in the U.S. District Court for the Southern District of New York to face an eight-count indictment.

In early 2023, the government, through a series of superseding indictments, brought five new counts against him. In accordance with the Bahamian extradition act, which incorporates the rule of specialty but allows for additional charges if the Bahamian government consents, the United States made a formal application requesting that consent.

Bankman-Fried then moved in the Southern District of New York for dismissal of the new counts, arguing that they violated the rule of specialty. In opposing such arguments, the government typically cites the general rule that specialty protects only foreign sovereigns and thus individual criminal defendants lack standing to invoke the rule. Bankman-Fried argued, however, that under U.S. Court of Appeals for the Second Circuit precedent, a defendant has standing if the requested nation "would object," and that the bar to the addition of charges post-extradition contained in the Bahamian extradition treaty satisfies that requirement.

The government responded that the rule of specialty cannot be violated at the indictment stage, and that in any event the Bahamian government's decision on its waiver application would be dispositive.

Ingeniously, Bankman-Fried concurrently petitioned the Bahamian courts to grant him an opportunity to be heard by the Bahamian government before it consented to a waiver of the rule of specialty. In June 2023, the court granted him that leave, as well as an injunction preventing the Bahamian government from addressing the U.S request before the issue could be decided in Bahamian court.

The government thereafter opted to sever the new counts to be tried separately. After Bankman-Fried's conviction in November 2023, the government opted not to proceed on the additional counts. Following the district court's imposition of a 25-year sentence, Bankman-Fried again raised the rule of specialty, vowing to argue on appeal that permitting the jury to consider certain evidence at trial violated the rule.

Another recent case entailing a more successful invocation of the rule of specialty involved charges against Russian nationals, including politically connected businessman Artem Uss, facing charges of violating U.S. sanctions laws by, among other things, arranging to smuggle aerospace technology to Russia and to smuggle oil out of Venezuela.

One Russian national, arrested in Germany, successfully invoked the dual-criminality requirement, arguing that a substantial portion of the charges did not sufficiently allege criminal conduct under German law. When the German court agreed in part but ordered extradition on the remaining charges, the individual invoked the rule of specialty, arguing that the U.S. Department of Justice could give no binding assurance that a U.S. court would not either admit at trial proof of the acts underlying the non-extradited counts as "other acts" evidence, or rely upon such acts as "relevant conduct" at the time of sentencing.

Based thereon, the German court reversed course and declined extradition. See *In Re Extradition Proceedings Concerning Yury Yurevich Orekhov*, (Hanseatic Higher Regional Court, Hamburg, FRG, Aug. 16, 2023). (The authors note that one of them participated in the representation of the individual arrested in Germany).

Cruel and Usual Punishment

Individuals also may oppose extradition by arguing that they face the risk of inhumane treatment or other human rights violations in the requesting country. Julian Assange, an Australian citizen currently jailed in the United Kingdom, has raised such claims in defending against extradition by the United States.

Assange faces charges, first issued in 2017, arising from his alleged multi-year efforts to obtain and publish classified information from U.S. government computer files regarding U.S. antiterrorism efforts and the detention of prisoners at Guantanamo Bay. Section 91 of the United Kingdom's extradition act allows U.K. authorities to consider a person's physical or mental condition, and to refuse extradition in cases where such condition renders extradition unjust or oppressive.

In 2021, Assange's legal team asserted that his mental condition, coupled with the oppressive conditions in U.S. prisons, put him at a high risk of suicide. In so doing, they offered testimony regarding the conditions at Manhattan's since-shuttered Metropolitan Correctional Center, including references to the suicide of Jeffrey Epstein there the previous year.

The court declined extradition on this basis, finding that Assange posed a substantial risk of suicide if extradited.

U.S. authorities appealed that decision, providing assurances that Assange would be held in humane conditions. These assurances included that barring any misconduct in jail, Assange would not be subjected to special administrative measures (which typically amount to solitary confinement), would receive adequate psychological care, and, in a significant win for Assange's defense team, that the United States would consent to him serving any sentence imposed in his home country of Australia.

Assange's extradition remains pending in the United Kingdom. On May 20, 2024, a U.K. appellate court granted him the right to appeal the issue of whether he will be able to rely on his free speech rights—both under the First Amendment of the U.S. Constitution as well as Article 10 of the European Convention on Human Rights—in U.S. court.

This ruling came after a lower court ruling had accepted U.S. assurances in response to Assange's arguments based on U.S. legal precedent that national security concerns can justify restricting a non-citizen's First Amendment rights.

The U.K. appellate court found that the DOJ's statement that Assange could "seek to rely upon" the First Amendment was not persuasive enough to prevent his appeal.

Time will tell whether the DOJ will make a sufficiently concrete concession that it will not argue that Assange's free speech rights are more limited than a U.S. citizen's, or whether the U.K. court, like the German court cited above, will deny extradition altogether on the basis that the DOJ cannot guarantee what the U.S. court will do.

Conclusion

Defending against an individual's extradition to the United States requires counsel to work closely with foreign counsel to tailor arguments based on relevant treaties, domestic law, and principles of international human rights to their client's unique circumstances. Doing so effectively can offer a critical opportunity to protect a client's interests and gain significant advantages should extradition ultimately occur.

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