

TBI BORDER BRIEF

U.S.-Mexico Extradition and Cross-Border Prosecution

By Yvonne M. Dutton

Overview

Extradition of suspects from Mexico to the United States has recently become one of the most sensitive issues in the bi-national relationship. Since the signing of the 1978 U.S.-Mexico Extradition Treaty, the number of suspects successfully extradited from Mexico to the United States has grown from less than one annually during the 1980s to the recent peak of 31 in 2003. Still, while the number of extraditions between both countries has increased dramatically in the last decade, there remain concerns in the United States that serious felons are escaping justice in Mexico. Under the U.S.-Mexico Extradition Treaty, Mexico may refuse to extradite unless the United States provides assurances that the death penalty will not be imposed. Yet, in an October 2001 decision, the Mexican Supreme Court held that suspects may not be extradited unless the United States furnishes similar assurances that suspects will not be sentenced to life in prison. Mexican officials explain that sentences of death or life imprisonment would effectively constitute “cruel and unusual” punishment under the Mexican Constitution. Nevertheless, because the United States often seeks to extradite suspects who face such severe penalties, prosecutors must now either forgo prosecution under U.S. laws or seek a lesser sentence to achieve extradition. Equally frustrating for U.S. law enforcement is the sense that the most serious criminals have incentives to seek safe haven in Mexico, if only to assure that—once extradited and convicted—they will serve a lesser sentence than if they had not fled.

This brief describes the pertinent terms of the U.S.-Mexico Extradition Treaty and the processes each country employs to seek the extradition. It then discusses the Mexican Supreme Court’s decision requiring “no life sentence” assurances and reactions within the United States to the ruling. Next, the article briefly reviews the history and status of extraditions in the U.S.-Mexico context. Finally, the article concludes by presenting some of the alternative legal avenues available to punish criminals who commit crimes on one side of the border but flee to the other.

The U.S.-Mexico Extradition Treaty

The international community generally recognizes that a state has a sovereign interest in enforcing its criminal laws by prosecuting those that violate them. Hence, extradition is governed by mutually agreed terms laid out by treaty, and the nation from which extradition is sought plays a critical role in determining whether an individual will be extradited. The U.S.-Mexico Extradition Treaty was signed in 1978 and went into effect on January 25, 1980. It contains a total of 23 Articles that broadly facilitate extradition of persons who have been charged with, or convicted of, an offense committed within the territory of the requesting country. The Treaty also governs extradition for criminal offenses committed outside the territory of the requesting country where either (i) the laws of the requested country would provide for punishment in similar circumstances or (ii) the person to be extradited is a national of the requesting country. For a crime to give rise to extradition, it must be punishable by a term of imprisonment of more than

one year under the laws of both countries. Among other things, because Mexico's criminal law does not permit capital punishment, Article 8 of the Treaty states that Mexico may refuse to extradite any suspect who faces capital punishment unless the United States provides assurances that a death sentence will not be imposed. The death penalty was eliminated from Mexico's federal criminal code in 1930, and from all state codes by 1975 (execution is still applicable in the Mexican military for insubordination or treason). Also, under Article 9, both countries may refuse to extradite their own citizens, but must then pursue domestic prosecution if possible.

The Extradition Process

The U.S.-Mexico Extradition Treaty establishes, under Article 10, that the extradition process is to be handled through diplomatic channels. If there is any concern that the suspect may flee (or some other urgent reason to detain the suspect), either nation may request a provisional arrest for up to 60 days while a formal request for extradition – and all the accompanying paperwork – is prepared. If the formal request is not received within that time period, the provisional arrest will terminate. The documentation necessary to support the request is voluminous, and must be translated to the language of the requested country. For example, while the precise documentation presented to support the extradition request will vary depending on the circumstances of the case, under the Treaty the package must include (i) the text of the laws describing the elements of the offense, its potential penalties, and its limitations period; (ii) information sufficient to identify the suspect and a certified copy of the arrest warrant; and (iii) evidence sufficient under the laws of the requested country to justify a trial of the suspect for commission of the offense. Given these cumbersome requirements, the United States and Mexico generally do not rely on provisional arrest.

Figure 1. Key Provisions of the U.S.-Mexico Extradition Treaty

Article 3: To extradite, evidence must be sufficient under laws of requested nation to justify trial had the offense been committed in the requested state.

Article 5: To be extraditable, offense may not be of a political or military nature.

Article 6: No obligation to extradite an individual who has already been prosecuted, tried and convicted or acquitted by the requested country for the same offense.

Article 7: Offense for which extradition is sought may not be barred by the lapse of time according to the laws of either party.

Article 8: When the offense is punishable by death, Mexico may refuse extradition unless the United States furnishes assurances that such penalty will not be imposed.

Article 9: Neither country is required to extradite its own nationals, but the executive authority of the requested country may extradite a national using its own discretion.

The Extradition Of A Suspect From Mexico

In the United States, requests for extradition are made by the Department of State through the United States Embassy in Mexico. The request is then presented to the Mexican Ministry of Foreign Affairs (the equivalent body to the Department of State), which then decides whether the request conforms to the Treaty and Mexican law. If so, the package is presented to the Mexican Attorney General, after which it is presented in an extradition hearing before a Mexican district judge. During that hearing, the judge will determine whether the evidence presented by the United States in support of the extradition is sufficient to demonstrate—in effect—that there is probable cause to believe the suspect committed the crimes charged.

The evidence the Mexican court will review to make that determination will generally consist only of the written materials (such as statutes) and evidence submitted with the extradition

package. The evidence will include a prosecutor's affidavit describing the facts of the case, witness affidavits identifying the defendant and detailing his role in the offense, and any evidentiary reports, such as ballistics reports or laboratory reports identifying illegal substances. The use of affidavits is very important since testimony given to grand juries (which do not exist in Mexico) may be unfamiliar or given lesser weight in Mexican courts.

A suspect in Mexico may delay a decision on extradition through procedural challenges to the request. Those challenges include the *amparo* (injunction) process, whereby the suspect may present constitutional challenges to the requested extradition. Depending on the challenges raised, the extradition process can take several years to conclude in a final decision by the Mexican court granting or denying the request. Once that decision is received, it is forwarded to the Ministry of Foreign Affairs for review and a final decision by the executive branch on whether to grant or deny extradition.

The Extradition Of A Suspect From The United States

In Mexico, the extradition process begins when the Mexican Embassy in Washington, D.C. presents the extradition package to the Department of State. According to the Department of Justice U.S. Attorney's Office Manual, the documents are then forwarded to the Department of Justice's Office of International Affairs (OIA), which office reviews the file to determine whether the documents will likely be sufficient to show the defendant committed an extraditable crime. If so, a federal prosecutor in the district where the suspect is located is assigned to represent the Mexican nation during the extradition proceedings in federal court. Those court processes begin after the prosecutor prepares and swears out a complaint with supporting documentation seeking the suspect's arrest. The extradition process within the United States is governed by 18 U.S.C. § 3184 and includes a hearing before either a district judge or a magistrate judge, who will determine whether there is probable cause to believe a crime was committed and that the suspect committed it.

In the United States, once the court concludes the suspect is extraditable, it certifies that fact and the record of the proceedings to the Secretary of State. Even if the judge found the suspect extraditable, however, the Secretary of State still has the final say on whether to surrender the suspect to the requesting nation. In the United States, as in Mexico, defendants may procedurally challenge the extradition process, often creating delays. For example, Rogelio Montemayor Seguy, a former director of the state oil company Pemex accused of improperly diverting some \$170 million in public funds, surrendered to U.S. authorities to face extradition in Houston in 2002. However, because of the many procedural challenges raised in that case, the decision certifying the extradition was delayed approximately two years.

Mexican Supreme Court Rulings

In 2001, Mexico's Supreme Court of Justice issued two major opinions affecting the ability of the United States to obtain the surrender of Mexican nationals and others who would otherwise be extraditable under the U.S.-Mexico Extradition Treaty. On the one hand, in January 2001, the Mexican Supreme Court affirmed the absolute discretion of the executive branch to extradite Mexican citizens pursuant to Article 9 of the Treaty, thereby putting an end to legal arguments that extradition of Mexican nationals to answer charges in the United States was unconstitutional. On the other hand, in an October 2, 2001 decision, the Mexican Supreme Court

...in an October 2, 2001 decision, the Mexican Supreme Court ruled that extraditions may not be granted when the suspect faces the possibility of a life sentence...

www.sandiego.edu/tbi

ruled that extraditions may not be granted when the suspect faces the possibility of a life sentence (regardless of the suspect's nationality). The court ruled that life imprisonment is a punishment that violates the Mexican Constitution since it does not contemplate the possibility of social rehabilitation. Hence, although Mexican courts may impose sentences up to 60 years for some crimes—and sometimes even 70 years for kidnappers who kill their victims—the United States government must now provide assurances that a life sentence will not be imposed once a subject is extradited from Mexico.

Reaction To The “No Life Sentence” Assurances Ruling

The Mexican Supreme Court's decision to prohibit extraditions in cases where the suspect could be sentenced to life imprisonment has received harsh criticism in the United States. Commentators have noted that the decision runs counter to the U.S.-Mexico Extradition Treaty since the Treaty mentions only the possibility of a sentence of death, not life. In any event, requiring the government to assure that no life sentence will be imposed on a suspect is more problematic than the promise not to impose capital punishment. Prosecutors in the United States generally have the authority to determine whether to seek the death penalty as punishment for a particular crime. The possibility of a life sentence, on the other hand, is often found in the statute governing the offense, meaning that a court could impose a sentence up to that maximum in accordance with U.S. Sentencing Guidelines presently in effect. Thus, because some crimes necessarily carry a sentence that ranges to a maximum of life in prison, prosecutors may have to drop the primary charges and charge the suspect with a crime that carries a lesser potential maximum sentence in order to obtain an extradition. In either event, critics charge that conditioning extradition on assurances that neither a death nor a life sentence will be imposed creates incentives for suspects to flee to Mexico to avoid these harsher penalties. Even more troubling is the fact that this incentive only comes into play when the nature of the crime is so serious that the law provides for penalty by death or life imprisonment – for example, crimes such as murder or drug trafficking.

... critics charge that conditioning extradition on assurances that neither a death nor a life sentence will be imposed creates incentives for suspects to flee to Mexico to avoid these harsher penalties.

In response to the October 2001 decision, the Attorney Generals of all 50 U.S. states, the National League of Cities, elected officials, and others called for the Attorney General of the United States and the Secretary of State to address this extradition issue with their counterparts within the Mexican government. Furthermore, several noteworthy cases—including the murder of Los Angeles County Sheriff's Officer David March in April 2002 allegedly committed by Mexican citizen Armando Garcia before he fled to Mexico—have resulted in cries for reform. For example, elected officials, including United States Senator Dianne Feinstein, have called for the President to renegotiate the Treaty or take other measures to insure that criminals facing capital or life sentences will be extradited to the United States to be prosecuted in a timely manner.

While the Treaty has not been renegotiated, and while Mexican courts continue in some instances to deny extraditions based on the alleged inadequacy of the assurances regarding life imprisonment, reports suggest that cooperation between the United States and Mexico on extraditions and related issues is improving. According to the March 2004 Department of State International Narcotics Strategy Control Report for 2003 (2003 Strategy Control Report), the United States and officials from the Office of the Federal Attorney General of Mexico (PGR) have been working together to narrow the impact of the October 2001 decision and insure that suspects are extradited to the United States to face charges. For example, both the PGR and officials from the Foreign Relations Secretariat (SRE) (part of Mexico's equivalent of the

Department of State) petitioned the court to reconsider its ruling. The SRE has also apparently asserted that it – as a member of the executive branch, rather than the judiciary – has the right to judge the adequacy of the government’s sentencing assurances. Furthermore, while the SRE and some courts had initially denied some extradition requests based on the timing of the assurances from the United States, according to the 2003 Strategy Control Report, the SRE has now concluded that such assurances need not be given at the start of the extradition process. Moreover, the United States now apparently takes the position that as long as the suspect is eligible for parole, the United States can assure that a sentence of life will not be imposed.

Extradition Trends in the U.S.-Mexican Context

Notwithstanding the frustration caused within the United States by the Mexican Supreme Court’s October 2001 ruling, reports indicate that the number of extraditions granted by Mexico to the United States is steadily increasing. Reports also indicate that the number of Mexican nationals surrendered – including nationals who are wanted for serious crimes such as murder or narcotics trafficking – continues to rise. For example, although the Treaty has been in effect since 1980 Mexico granted only a few extraditions of suspects to the United States prior to 1995 (see Figure 2). During the administration of President Ernesto Zedillo (1994-2000) the numbers improved. For the period from 1995 to 2000, Mexico extradited roughly 60 suspects, including for the first time some seven Mexican nationals who had been charged with or convicted of crimes in the United States. During that same period of time, the United States extradited approximately 85 fugitives to Mexico, 12 of whom were United States citizens.

... the number of extraditions granted by Mexico to the United States is steadily increasing.

Since 2001, and despite the “no life sentences assurances” ruling of the Mexican Supreme Court, those extradition numbers have continued to improve

Figure 2. International Extraditions in the U.S.-Mexican Context, 1980-2003

Extraditions	1980-94	1995-2000	2001	2002	2003
From Mexico	8	61	17	24	31
From U.S.	30	86	11	18	17
Total	38	147	28	42	48

Source: Adapted from Congressional testimony by Mary Lee Warren in February 2000 and a 2003 fact sheet on website of Mexican Embassy in the United States www.sre.gob.mx/usa.

under the administration of President Fox. According to figures released by the Mexican Embassy in the United States, between 2001 and 2003, Mexico extradited 72 fugitives to the United States and the United States extradited 46 fugitives to Mexico. According to State Department International Narcotics Control Strategy Reports, of the 17 fugitives extradited by Mexico in 2001, 11 were charged or convicted of narcotics offenses. Among them was Mexican national Arturo “Kiti” Paez Martinez, a member of Mexico’s most notorious drug cartel, the Arellano Felix Organization. Paez was extradited in May 2001 and is serving a 30-year sentence for smuggling cocaine. With respect to the 31 individuals extradited by Mexico to the United States in 2003, the United States noted several record-breaking statistics: 18 were Mexican citizens and 19 were narcotics defendants, facts which suggest improvement in cross-border collaboration and cooperation to prosecute and punish narcotics traffickers. According to those same reports, the number of extradition requests denied by Mexico has correspondingly fallen over the years, from 25 in 2002 to 10 in 2003.

Nevertheless, there remains a sense that cooperation could still improve. The United States has indicated that Mexico’s extradition denials continue to include some major narcotics fugitives.

For example, according to the Department of State International Narcotics Strategy Control Report of 2002, in 2002 Mexico reportedly denied extraditions in three notable cases: two fugitives were alleged narcotics major traffickers and one was a murder suspect. The bases for the denials in two of the cases included the alleged inadequacies of the “no life sentence” assurances. In one case, Mexican prosecutors indicated they would prosecute the case domestically. However, as discussed further below, United States officials have some reservations about Mexican domestic prosecutions, citing concerns about the possibility of corruption or a lower success rate on convictions.

Alternatives To Extradition

Although extradition is a preferred method by which the United States can obtain custody of suspects who flee to Mexico after committing prosecutable crimes, it is not the only method. As discussed below, deportation and expulsion can be used in certain circumstances to return suspects very promptly to the United States. In addition, the United States may detain and prosecute a suspect after a cross-border abduction—though this method is seen as a violation of Mexican sovereignty and therefore politically undesirable. Finally, where the suspect cannot be produced to stand trial in the United States, Article IV of Mexico’s Federal Penal Code permits domestic prosecution of individuals charged with committing crimes in the United States.

Deportations, Expulsions, And Abductions

In the wake of the Mexican Supreme Court ruling requiring sentencing assurances, reports indicate that officials in the Fox administration have been increasingly cooperative in using deportations and expulsions to return suspects who have fled the United States. Deportation proceedings have the benefit of being more expeditious than the extradition process. However, the United States may seek deportation or expulsion only of non-nationals of Mexico and those who have otherwise violated some immigration law of Mexico. According to the 2003 Strategy

... officials in the Fox administration have been increasingly cooperative in using deportations and expulsions to return suspects...

Control Report, during 2003, Mexico and the United States worked together to have some 70 fugitives expelled to the United States to stand trial. One notable expulsion involved the case of Max Factor heir and convicted rapist, Andrew Luster, a United States citizen who was deported in 2003 after Mexican authorities determined that he had entered the country under a false name.

While the U.S. Supreme Court ruled that... abduction of fugitives does not violate the U.S.-Mexico Extradition Treaty, resort to such non-cooperative processes is not recommended ...

Fugitives have also been abducted from Mexico and returned to the United States for prosecution. While U.S. Supreme Court ruled in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), that abduction of fugitives does not violate the U.S.-Mexico Extradition Treaty, though resort to such non-cooperative processes is not recommended. *Alvarez-Machain* involved the forcible abduction of a Mexican doctor who was accused of participating in the murder of a Special Agent with the Drug Enforcement

Administration (DEA). The United States initially failed to obtain the doctor’s surrender through negotiations with Mexican officials. Subsequently, in April 1990, under the apparent direction of DEA officials, the doctor was abducted from his medical office in Guadalajara and flown in a private plane to El Paso, Texas, where he was then arrested. Although the Supreme Court, as noted above, concluded that the abduction did not violate the Treaty or divest the courts of jurisdiction over Alvarez-Machain, the international community, and the Mexican government in

particular, condemned the decision. In 1994, the United States and Mexico signed a Treaty prohibiting cross-border abductions, but that treaty was never ratified. Thus, abductions appear to be a legal means of obtaining a fugitive's presence in the United States. However, the risks associated with damaging the increasingly cooperative relationship between the United States and Mexico as it relates to bringing fugitives to justice would suggest that forcible abductions should not be utilized.

Cross-Border Prosecution: Legal Assistance and the Article IV Process

Although both countries would obviously prefer to enforce their laws by prosecuting criminals domestically, there are legal mechanisms that allow cross-border evidence gathering and prosecution in the United States-Mexican context. First, a Mutual Legal Assistance Cooperation Treaty has been in effect since 1987, under which Mexico and the United States agree to provide each other with legal assistance in criminal matters under certain circumstances. The types of assistance contemplated by that Treaty include obtaining witness testimony, providing documents or other evidence, executing searches, and securing foreign assets, among other things. Second, under Article IV of Mexico's Federal Penal Code, the United States may seek prosecution in Mexico in instances where extradition or deportation of a suspect is not possible.

Under that provision, Mexico may prosecute crimes committed by both Mexicans and foreigners, as long as (i) the accused is located in Mexico, (ii) the accused has not already been tried in the country where the crime was committed, and (iii) the crime would be punishable in Mexico as well as the country where it was committed. Under the U.S.-Mexico Extradition Treaty, when extradition of a Mexican or U.S. national is denied solely on the grounds of citizenship, that country must pursue prosecution.

In other cases, however, neither country is obligated to comply with requests for prosecution. For that reason, and to insure continued and future cooperation by Mexico, prosecutors in the United States are usually cautious to seek assistance in only those cases where the evidence is very strong and where the crime is quite serious.

...under Article IV of Mexico's Federal Penal Code, the United States may seek prosecution in Mexico in instances where extradition or deportation of a suspect is not possible.

Critics suggest that the Article IV process is not a viable option for bringing fugitives to justice because of concerns about corruption within the Mexican criminal justice system. However, the Fox administration, at least, appears to be taking steps to combat corruption within the ranks of law enforcement and other branches of public service, including punishment—sometimes criminal punishment—of corrupt government employees, new standards of conduct for employees, and higher pay and benefits. According to the 2003 Strategy Control Report, the Mexican Attorney General's office stated that it obtained convictions in 178 of 194 Article IV prosecutions between 2001 and 2003, thus suggesting that the judicial processes in Mexico do function properly. However, given significant irregularities in the Mexican prison system outlined in recent studies and media reports, skeptics doubt that prison sentences in Mexico are ultimately comparable to U.S. sentences. Therefore, in order to determine the true effectiveness of the Article IV process—and to determine whether it is a satisfactory alternative to proceeding with trial in the United States—greater analysis of successfully prosecuted cases is needed to determine the nature of the crimes charged, the swiftness of sentencing, the comparability of the sentences imposed, and to track convicted criminals through the penitentiary system.

An amendment to Section 11055 of the California Penal Code (in effect as of January 1, 2005) that allows for tracking of the results of Article IV prosecutions may help to ferret out the truth

behind these perceptions. By the new provisions, the Foreign Prosecution Unit of the California Department of Justice (Cal-DOJ) will collect information on a statewide basis regarding Article IV prosecutions for the precise purpose of analyzing the information and disseminating its conclusions to local law enforcement agencies. The tracking of Article IV prosecutions will involve collaboration between Cal-DOJ and the Mexican Attorney General's office, with the goal of analyzing several hundred past cases to determine conviction rates and sentences imposed.

Conclusion

The United States and Mexico have a mutual interest in insuring that those who have committed transnational crimes or those who have fled to one side of our shared 2000-mile border to escape prosecution for crimes committed on the other side are brought to justice. Both also have an interest in insuring that Mexico's different sentencing laws – prohibiting the death penalty and life sentences – do not make Mexico a haven, or perceived haven, for violent or other serious criminals. Although the evidence suggests that these interests are being furthered through an ever-increasing number of extraditions, deportations, and successful prosecutions of fugitives, significant frustrations remain. At present, prosecutors in the United States must be satisfied with seeking near-life sentences if they wish to pursue charges in this country. While the Article IV process does provide a viable alternative to United States prosecutors, still lost is the possibility of a maximum sentence of death or life imprisonment. Nevertheless, further study of the outcomes of Article IV prosecutions over the long term may help to assuage concerns about the comparability of rates of conviction or sentencing outcomes. Finally, continued dialogue between judges and law enforcement in both nations should facilitate increased understanding of the issues relating to extradition and the Article IV process, and hopefully, help to address these issues to the satisfaction of both nations.

Yvonne M. Dutton currently teaches Lawyering Skills I at University of San Diego School of Law. Prior to teaching full-time, Ms. Dutton was Of-Counsel in the San Diego office of Allen Matkins Leck Gamble & Mallory LLP, where she practiced business litigation and white-collar criminal defense. Between 1994 and 1998, Ms. Dutton was an Assistant United States Attorney in the criminal division of the United States Attorney's Office for the Southern District of New York. While serving in the Narcotics and Organized Crime Units of that office, she investigated, prosecuted, and tried cases involving crimes of narcotics trafficking, fraud, extortion, and racketeering. Ms. Dutton received her law degree from Columbia University School of Law in 1991, where she was a member of the Columbia Law Review. She earned her B.A. degree, magna cum laude and phi beta kappa, from Columbia University in 1989. Ms. Dutton is a member of the California and New York State Bars. She is presently serving a two-year term as a Lawyer Representative for the Southern District of California to the Ninth Circuit Judicial Conference. Ms. Dutton is the President Elect of the San Diego Chapter of the Federal Bar Association.

Note: The Trans-Border Institute (TBI) is based at the University of San Diego, which is a non-partisan, non-profit organization. TBI provides information and analysis for the benefit of policy makers and stakeholders in the border region. TBI Briefs do not reflect the opinions or political positions of the Trans-Border Institute or the University of San Diego. Please direct any comments or inquiries to the Trans-Border Institute (write to: tbiadmin@sandiego.edu).