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Due Process, the Sixth Amendment, and International Extradition

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Due Process, the Sixth Amendment, and International Extradition

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I. INTRODUCTION

Fugitives whose extradition from the United States is sought by foreign countries at times argue that the delay between the commission of the alleged crime for which they are wanted and the submis-

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sion of the request for their extradition violates their rights to a speedy trial or extradition under the Sixth Amendment, and/or their right to due process under the Fifth Amendment. In a similar vein, defendants who are returned to the United States from abroad to face criminal charges often argue that their right to a speedy trial under the Sixth Amendment was violated because the government failed to exercise “reasonable diligence” in procuring their presence.¹

This Article discusses the developing case law on these questions. First, by way of background, the Article provides an overview of the process governing international requests for extradition.² The Article then analyzes how courts have treated challenges by fugitives to extradition requests on the grounds that the timing of the request violates interests protected under the Fifth and Sixth Amendments. This is followed by a discussion of the law governing the right to a speedy trial under the Sixth Amendment. The Article then analyzes how courts have treated efforts by defendants to dismiss the charges against them on the grounds that the delay in securing their presence before the court to face said charges—because of the government’s decision not to seek their extradition—violated their right to a speedy trial under the Sixth Amendment.³ A conclusion follows.

II. OVERVIEW OF EXTRADITION

Broadly speaking, in the international context, extradition involves “the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.”⁴ In the United States,

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1. *See* *Doggett v. United States*, 505 U.S. 647, 656 (1992) (“[I]f the Government had pursued [defendant] with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail.”); *United States v. Tchibassa*, 452 F.3d 918, 925 n.6 (D.C. Cir. 2006) (“[T]here is persuasive authority that the government need not take extraordinary measures in order to satisfy the reasonable diligence standard.”).
 2. The overview of the extradition process contained in this Article follows the format I have used in articles discussing other international extradition topics. *See, e.g.*, Roberto Iraola, *Second Bites and International Extradition*, 44 CREIGHTON L. REV. 953, 954–57 (2011); Roberto Iraola, *Foreign Extradition and In Absentia Convictions*, 39 SETON HALL L. REV. 843, 843–48 (2009).
 3. Aside from extradition, there are other ways to secure a defendant’s return from a foreign government, such as deportation or expulsion. While this Article focuses exclusively on extradition, those avenues, among others, may also factor into a court’s analysis of whether the government exercised reasonable diligence in procuring the return of a defendant to stand trial.
 4. *Terlinden v. Ames*, 184 U.S. 270, 289 (1902); *see* *Ward v. Rutherford*, 921 F.2d 286, 287 (D.C. Cir. 1990) (“Through extradition proceedings, one nation turns over custody of a person at the request of another nation, pursuant to a treaty between the two nations.”). The origins of international extradition date back many centuries. As noted by two commentators:

the process is governed by statute (18 U.S.C. §§ 3181, 3184, 3186, 3188–3191) and treaty.⁵ The process begins when the Department of State receives an extradition request from a foreign country.⁶ After reviewing the request to ascertain that it complies with the particular treaty's requirements, the Department of State will prepare a declaration authenticating the request and send it to the Department of Justice's Office of International Affairs, which will in turn review it more thoroughly and, if sufficient, send it to the United States Attorney in the district where the person sought to be extradited is located.⁷ The United States Attorney in that judicial district then files a complaint in support of an arrest warrant for the fugitive.⁸

Although extradition as we know it is of relatively recent origins, its roots can be traced to antiquity. Scholars have identified procedures akin to extradition scattered throughout history dating as far back as the time of Moses. By 1776, a notion had evolved to the effect that every state was obliged to grant extradition freely and without qualification or restriction, or to punish a wrongdoer itself and the absence of intricate extradition procedures has been attributed to the predominance of this simple principle of international law.

MICHAEL JOHN GARCIA & CHARLES DOYLE, CONG. RESEARCH SERV., 7-5700, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 1 (2010) (footnotes and internal quotation marks omitted), available at <http://www.fas.org/sgp/crs/misc/98-958.pdf>.

5. See *In re* Extradition of Aquino, 697 F. Supp. 2d 586, 595 (D.N.J. 2010) ("International extradition proceedings are governed by statute . . . and by treaty."). As the court observed in *Cheung v. United States*, 213 F.3d 82 (2d Cir. 2000):

In general, extradition treaties have served several functions, including: securing the obligation to surrender a fugitive; insuring reciprocity between the signatories; tailoring the list of extraditable offenses to specific political situations; and establishing the procedures each party must follow vis-a-vis the other. Whereas the treaty promulgates the inter-party procedures, the federal extradition statute allocates responsibility for extradition within the U.S. Government to a judicial officer and the Secretary of State.

Id. at 88 (citation omitted). In addition to a treaty, the authorization to extradite also may be conferred by statute. See *Ntakirutimana v. Reno*, 184 F.3d 419, 424–27 (5th Cir. 1999).

6. *Juarez-Saldana v. United States*, 700 F. Supp. 2d 953, 955 (W.D. Tenn. 2010) ("The process begins with the submission of an extradition request by a foreign state to the United States Department of State."); see *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009 (9th Cir. 2000) ("Extradition is ordinarily initiated by a request from the foreign state to the Department of State.").
7. See U.S. DEP'T. OF JUSTICE, U.S. ATTORNEYS' MANUAL, § 9-15.700 (1997) available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm#9-15.700 (explaining how OIA will review request for sufficiency and then forward it to appropriate district). See generally *Mironescu v. Costner*, 480 F.3d 664, 665–66 (4th Cir. 2007) (explaining the extradition process).
8. See *Wang v. Masaitis*, 316 F. Supp. 2d 891, 896 (C.D. Cal. 2004) ("Once approved, the United States attorney for the judicial district where the person sought is located files a complaint in federal district court seeking an arrest warrant for the person sought." (quoting *Barapind v. Reno*, 225 F.3d 1100, 1105 (9th Cir. 2000))). A fugitive's risk of flight may prompt the requesting country to request a fugitive's provisional arrest pending submission of a formal request for his extra-

After the fugitive is apprehended,⁹ a judicial officer¹⁰ holds a hearing under § 3184 to determine whether the evidence presented by the foreign government is “sufficient to sustain the charge under the provisions of the proper treaty or convention.”¹¹ At this hearing, which is not deemed a criminal proceeding¹² but is “akin to a preliminary hearing” in a criminal case,¹³ the governing standard is probable cause,¹⁴ “meaning that the magistrate’s role is merely to determine whether there is competent evidence to justify holding the accused to await

dition. *See* *Duran v. United States*, 36 F. Supp. 2d 622, 624 (S.D.N.Y. 1999) (“In order to avoid the flight of a defendant during preparation of a full formal request, many extradition treaties permit a provisional arrest to be made upon receipt of an informal request.”). Upon the fugitive’s arrest, and as called for by the treaty, the requesting country will then furnish the U.S. with additional information necessary to execute the extradition request. *See* Jeffrey M. Olson, Note, *Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of Parretti v. United States*, 48 CATH. U. L. REV. 161, 172 (1998) (“After executing the provisional arrest request, the requesting state furnishes the United States with any additional information that is required for extradition under the governing statute and treaty.”) (footnote omitted). *See generally* Roberto. Iraola, *Foreign Extradition, Provisional Arrest Warrants, and Probable Cause*, 43 SAN DIEGO L. REV. 347 (2006) (discussing provisional arrest warrants).

9. In international extradition proceedings, there is a presumption against granting a fugitive bail. *See, e.g.*, *United States v. Kin-Hong*, 83 F.3d 523, 524 (1st Cir. 1996). *See generally* Roberto Iraola, *The Federal Common Law of Bail in International Extradition Proceedings*, 17 IND. INT’L & COMP. L. REV. 29 (2007) (discussing bail in international extradition proceedings).
10. Under § 3184, “any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State” may preside over an extradition hearing. 18 U.S.C. § 3184 (2006). Furthermore, as to federal magistrates, their authority to preside over “extradition proceedings has been upheld as being consistent with Article III of the Constitution.” *In re Extradition of Rodriguez Ortiz*, 444 F. Supp. 2d 876, 882 (N.D. Ill. 2006).
11. 18 U.S.C. § 3184; *see* *Manta v. Chertoff*, 518 F.3d 1134, 1140 (9th Cir. 2008) (“A judge or magistrate judge must then hold an extradition hearing to determine if the evidence is sufficient to sustain the charge of extradition under the relevant treaty.”); *accord* *Afanasjev v. Hurlburt*, 418 F. 3d 1159, 1162 (11th Cir. 2005).
12. *See* *Martin v. Warden*, 993 F.2d 824, 828 (11th Cir. 1993) (“An extradition proceeding is not an ordinary Article III case or controversy. It clearly is not a criminal proceeding.”).
13. *In re Extradition of Cervantes Valles*, 268 F. Supp. 2d 758, 772 (S.D. Tex. 2003); *see* *Benson v. McMahan*, 127 U.S. 457, 463 (1888) (noting that an extradition proceeding is “of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused”).
14. *See* *Hoxha v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006) (“The probable cause standard applicable to an extradition hearing is the same as the standard used in federal preliminary hearings.”); *In re Extradition of Exoo*, 522 F. Supp. 2d 766, 777 (S.D. W. Va. 2007) (same).

trial.”¹⁵ Neither the *Federal Rules of Criminal Procedure*, the *Federal Rules of Evidence*, nor the *Federal Rules of Civil Procedure* apply in extradition proceedings.¹⁶ Under 18 U.S.C. § 3190, properly authenticated evidence submitted by the requesting country in support of the extradition request must be received into evidence at the extradition hearing¹⁷ and a fugitive “is not permitted to introduce evidence on the issue of guilt or innocence, but can only offer evidence that tends to explain the government’s case of probable cause.”¹⁸ In addition, the evidence at the extradition hearing may consist of unsworn statements and reports containing hearsay evidence.¹⁹

After the hearing, the judicial officer will issue a certificate of extraditability if he determines that he had jurisdiction over the subject matter and the person sought to be extradited, the offense for which extradition was sought was an extraditable offense under a treaty in effect at the time of the request, and competent evidence was presented sufficient to establish probable cause that the fugitive committed the alleged offense.²⁰ Upon the issuance of a certificate of ex-

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15. *Haxhiaj v. Hackman*, 528 F.3d 282, 287 (4th Cir. 2008) (internal quotation marks omitted); *see Ward v. Rutherford*, 921 F.2d 286, 287 (D.C. Cir. 1990) (“A magistrate presiding over the hearing . . . performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense.”).
 16. *See Skaftouros v. United States*, No. 11-0462-CV, 2011 WL 6355163, at *7 n.16 (2d Cir. Dec. 20, 2011) (“Neither the Federal Rules of Criminal Procedure nor the Federal Rules of Evidence apply to extradition proceedings.”); *In re Extradition of Chavez*, 408 F. Supp. 2d 908, 911 (N.D. Cal. 2005) (“[T]he rules of evidence and civil procedure . . . do not apply in extradition hearings.”); FED. R. EVID. 1101(d)(3) (“The rules . . . do not apply . . . [to] [p]roceedings for extradition or rendition”); FED. R. CRIM. P. 1(a)(5)(A) (“Proceedings not governed by these rules include: the extradition and rendition of a fugitive”).
 17. 18 U.S.C. § 3190 (2006); *see Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1406 (9th Cir. 1988) (“[A]uthentication is the only requirement for admissibility of evidence under general United States extradition law.”).
 18. *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978); *see Sandhu v. Bransom*, 932 F. Supp. 822, 827 (N.D. Tex. 1996) (“[A] fugitive’s right to introduce evidence is limited to testimony which explains rather than contradicts the demanding country’s proof.”) (internal quotation marks omitted). *See generally* Roberto Iraola, *Contradictions, Explanations, and the Probable Cause Determination at a Foreign Extradition Hearing*, 60 SYRACUSE L. REV. 95 (2009) (discussing the “Rule of Non-Contradiction” at foreign extradition hearings).
 19. *See Collins v. Loisel*, 259 U.S. 309, 317 (1922) (“[U]nsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the State on a preliminary examination.”); *Harshbarger v. Regan*, 599 F.3d 290, 293 (3d Cir. 2010) (“Evidence that might be excluded at a trial, including hearsay evidence, is generally admissible at extradition hearings.”); *Bovio v. United States*, 989 F.2d 255, 259 (7th Cir. 1993) (“[H]earsay testimony is often used in extradition hearings.”).
 20. *See, e.g., Mironescu v. Costner*, 480 F.3d 664, 665 (4th Cir. 2007) (identifying factors); *In re Extradition of Rodriguez Ortiz*, 444 F. Supp. 2d 876, 881–82 (N.D. Ill. 2006) (same).

traditability, the Secretary of State will review the case and determine whether to issue a surrender warrant for the fugitive.²¹

While there is no direct appeal from a ruling certifying a fugitive as extraditable, a limited review of the certification order is available to the fugitive through a petition for a writ of habeas corpus under 28 U.S.C. § 2241.²² The review of the findings of the judicial officer who presided over the extradition hearing, typically a magistrate, is “narrow in scope.”²³ That is to say, the review is limited only to “whether the magistrate had jurisdiction, whether the offence charged [wa]s within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.”²⁴ Lastly, under 28 U.S.C. § 2253, a final order in a habeas proceeding is subject to appellate review.²⁵

III. DELAY & EXTRADITION

In our domestic criminal justice system, delay in bringing charges against one suspected of committing a crime and in trying him after he has been officially charged may implicate constitutional rights under the Fifth²⁶ and Sixth Amendments.²⁷ Most extradition treaties

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21. See 18 U.S.C. § 3184 (noting that a judicial officer “shall certify the same . . . to the Secretary of State, that a warrant may issue . . . for the surrender of such person”); 18 U.S.C. § 3186 (“The Secretary of State may order the person committed under section[] 3184 . . . to be delivered to any authorized agent of such foreign government. . . .”). When considering whether or not to issue a surrender warrant, the Secretary enjoys broad discretion. This discretion encompasses “reviewing de novo the judge’s findings of fact and conclusions of law, refusing extradition on a number of discretionary grounds, including humanitarian and foreign policy considerations, granting extradition with conditions, and using diplomacy to obtain fair treatment for the fugitive.” *Mironescu*, 480 F.3d at 666; see also *Lo Duca v. United States*, 93 F.3d 1100, 1103–04 (2d Cir. 1996) (“[T]he Secretary of State has final authority to extradite the fugitive, but is not required to do so. Pursuant to its authority to conduct foreign affairs, the Executive Branch retains plenary discretion to refuse extradition.”).
 22. See *Manta v. Chertoff*, 518 F.3d 1134, 1140 (9th Cir. 2008) (“[A] habeas petition is the only available avenue to challenge an extradition order.” (internal quotation marks omitted)).
 23. See *Sacirbey v. Guccione*, 589 F.3d 52, 62 (2d Cir. 2009) (internal quotation mark omitted).
 24. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); accord *Sacirbey*, 589 F.3d at 63.
 25. See *Hoxha v. Levi*, 465 F.3d 554, 560 n.9 (3d Cir. 2006); *In re Requested Extradition of Artt*, 158 F.3d 462, 468–69 (9th Cir. 1998).
 26. The Fifth Amendment provides in part that no person “shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. In *United States v. Lovasco*, 431 U.S. 783 (1977), the Supreme Court recognized that “the Due Process Clause has a limited role to play in protecting against oppressive [preindictment] delay.” *Id.* at 789. In *United States v. Corona-Verbera*, 509 F.3d 1105 (9th Cir. 2007), the Ninth Circuit enunciated the test for pre-indictment delay as follows:

currently in force contain a provision barring the surrender of a fugitive if prosecution of the offense(s) for which extradition is sought is barred by the statute of limitations of the requested state,²⁸ the requesting state,²⁹ or either the requested or the requesting state.³⁰

When contesting extradition requests, fugitives at times have argued that, independent of the application of any statute of limitations provision in the treaty, the delay associated with the submission of the request for their extradition triggers interests protected under the Fifth and Sixth Amendments, which preclude the grant of the request. At times, fugitives have maintained that liberty interests protected by these amendments—standing alone—confer rights to them as putative extraditees. In other instances, they have argued that certain protections in these amendments are incorporated by reference in the

In order to succeed on his claim that he was denied due process because of pre-indictment delay, [a defendant] must satisfy both prongs of a two-part test. First, he must prove actual, non-speculative prejudice from the delay. Second, the length of the delay is weighed against the reasons for the delay, and [defendant] must show that the delay offends those fundamental conceptions of justice which lie at the basis of our civil and political institutions. The second prong of the test applies only if [defendant] has demonstrated actual prejudice.

Id. at 1112 (citation and internal quotation marks omitted). Other circuits have adopted different formulations. *See, e.g.*, *United States v. Schaffer*, 586 F.3d 414, 424 (6th Cir. 2009) (“In this circuit, dismissal for pre-indictment delay is warranted only when the defendant shows substantial prejudice to his right to a fair trial and that the delay was an intentional device by the government to gain a tactical advantage.” (internal quotation marks omitted)).

27. The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. CONST. amend. VI. The Sixth Amendment right to a speedy trial is triggered when there has been an “arrest, indictment, or other official accusation.” *Doggett v. United States*, 505 U.S. 647, 655 (1992). As discussed more fully in Part IV in the text above, in ascertaining whether a criminal defendant’s right to a speedy trial has been violated, a court must balance four factors: “[l]ength of delay, the reason[s] for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Barker v. Wingo*, 407 U.S. 514, 530 (1972).
28. *See, e.g.*, *Extradition Treaty Between the United States of America and the Kingdom of Belgium*, U.S.-Belg., art. 2, ¶ 6, Apr. 27, 1987, S. TREATY DOC. No. 104-7 (1995).
29. *See, e.g.*, *Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India*, U.S.-India, art. 7, June 25, 1997, S. TREATY DOC. No. 105-30 (1997) [hereinafter U.S.-India Treaty].
30. *See, e.g.*, *Extradition Treaty Between the Government of the United States of America and the Government of Belize*, U.S.-Belize, art. 8, Mar. 30, 2000, S. TREATY DOC. No. 106-38 (2000); *Extradition Treaty Between the Government of the United States of America and the Government of Barbados*, U.S.-Barb., art. 8, Feb. 28, 1996, S. TREATY DOC. No. 105-20 (1997). *See generally* MICHAEL ABELL, *EXTRADITION TO AND FROM THE UNITED STATES*, 105–07 (2010). The United States also has entered into extradition treaties which omit provisions relating to the statute of limitations. *See, e.g.*, *Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia on Extradition*, U.S.-Bol., June 27, 1995, S. TREATY DOC. No. 104-22 (1995).

extradition treaty itself, either under a “lapse of time” (i.e., statute of limitations) or a “remedies and recourses” provision. As shown by the discussion below, courts consistently have rejected these contentions.

A. Straightforward Application of the Fifth and Sixth Amendments

In *In re Extradition of Burt*,³¹ petitioner, a serviceman in (then) West Germany, shot and killed a cab driver.³² He then travelled to the United States without authorization where, shortly after his return, he was arrested and later pled guilty to the commission of an armed robbery and murder in Wisconsin.³³ Petitioner was sentenced to life imprisonment for the murder and up to thirty years’ imprisonment for the armed robbery and the Army filed a detainer with the state authorities based on the murder of the West German cab driver.³⁴ The Army thereafter notified West Germany of petitioner’s involvement in the murder of the cab driver pursuant to a status of forces agreement.³⁵ After being assured by the Army that petitioner would be tried by the military authorities for the murder, West Germany notified the American authorities, within the time prescribed under the status of forces agreement, that it would not seek to exercise jurisdiction over the murder of the cab driver.³⁶

The Army charged petitioner for the murder of the cab driver under the *Uniform Military Code of Justice* and then initiated procedures to obtain his temporary release from the Wisconsin penitentiary so that he could be prosecuted.³⁷ As the military was preparing its case, the Supreme Court issued its ruling in *Miranda v. Arizona*³⁸ and the authorities determined that since petitioner’s confession to the murder of the cab driver had been obtained in violation of the strictures of *Miranda*, the Army no longer could prosecute him.³⁹ After the Army advised West Germany of its decision, the West German authorities sought to retract their prior waiver of jurisdiction in favor of the Army.⁴⁰ The U.S. Government declined West Germany’s request for petitioner’s return under the status of forces agreement and gave petitioner a dishonorable discharge.⁴¹

31. 737 F. 2d 1477 (7th Cir. 1984).

32. *Id.* at 1478.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1480.

37. *Id.*

38. 384 U.S. 436 (1966).

39. *Burt*, 737 F. 2d at 1480.

40. *Id.*

41. *Id.* West Germany’s request for petitioner’s return was rebuffed because the U.S. Government “did not want to set a precedent of allowing West Germany to recall

After serving twelve years in prison for the Wisconsin murder and armed robbery, petitioner was paroled.⁴² The following year, West Germany and the United States entered into a new extradition treaty, which, unlike the prior treaty, authorized the surrender of each party's citizens.⁴³ After execution of the new treaty, West Germany once again requested petitioner's extradition for the murder of the cab driver.⁴⁴

After a magistrate judge entered an order certifying his extraditability, petitioner sought relief by filing a writ of habeas corpus.⁴⁵ Petitioner argued that extradition to West Germany would violate his right to due process because the request was presented fifteen years after the United States elected not to prosecute him for that murder and not to surrender him to West Germany for prosecution.⁴⁶ In addition, petitioner asserted that extradition would deprive him of his right to a speedy trial under the Sixth Amendment.⁴⁷ The district court denied the petition and he appealed.⁴⁸

In affirming the order of the district court, the Seventh Circuit framed the first issue as whether there was a right under the Due Process Clause of the Fifth Amendment analogous to that recognized in domestic criminal proceedings involving pre-indictment delay,⁴⁹ which "ma[d]e it fundamentally unfair for the United States to decide not to return a serviceman pursuant to a status of forces agreement and then subsequently decide to extradite him pursuant to a separate extradition request after considerable time ha[d] transpired."⁵⁰ Concluding that "no such right exists,"⁵¹ the Seventh Circuit reasoned the government had different obligations when it prosecutes a person as opposed to when it assists a foreign government to secure that person's extradition pursuant to the requirements of an operative treaty,⁵² and that conflating the two roles presented the danger of infringing on the broad discretion the executive branch possesses in foreign policy matters.⁵³ The court went on to state the executive's decision would not be judicially questioned as long as it had not

its waiver at such a late date and after the Army had exercised its prosecutorial discretion." *Id.*

42. *Id.* at 1481.

43. *Id.*

44. *Id.* at 1478, 1481.

45. *Id.* at 1481.

46. *Id.* at 1481-82.

47. *Id.* at 1482.

48. *Id.*

49. *See supra* note 26.

50. *Burt*, 737 F.2d at 1486.

51. *Id.*

52. *Id.* ("We view the role of the executive branch as prosecutor and as extraditer as implicating different standards of conduct vis-a-vis a criminal accused.")

53. *Id.* at 1486-87. The court stated:

breached any promise to the fugitive regarding extradition and its decision was not based on “constitutionally impermissible factors [such] as race, color, sex, national origin, religion, or political beliefs, and in accordance with such other exceptional constitutional limitations as may exist because of particularly atrocious procedures or punishments employed by the foreign jurisdiction.”⁵⁴

Regarding the speedy trial claim, the Seventh Circuit first observed that the extradition treaty under which petitioner had been surrendered did not provide for any right to a speedy trial.⁵⁵ Furthermore, assuming the status of forces agreement in existence at the time of the murder was somehow implicated in his surrender under the treaty and that it could be interpreted to encompass delay prior to the filing of charges, the provision of that agreement made clear that it governed the actions of the prosecuting state which, in this case, was West Germany.⁵⁶

In a similar vein, the the Sixth Circuit held in *In re Extradition of Drayer*⁵⁷ that a defendant accused of murder whose extradition was requested by Canada fourteen years after the arrest warrant was issued was not denied due process under the Fifth Amendment.⁵⁸ When the complaint seeking the defendant’s extradition was filed, he was serving a sentence for an unrelated murder in the United States.⁵⁹ The defendant argued that the delay in the submission of the extradition request deprived him of the right to serve his murder

We hold that no standards of fair play and decency sufficient to trigger due process concerns are automatically implicated when, in undertaking its foreign policy mission, a governmental extradition decision subjects a citizen accused of committing crimes in a foreign jurisdiction to prosecution in the foreign state after a substantial time has elapsed since the commission of the crime. . . . To constrain the government by placing on it the duty to undertake its extradition decisions with an eye not only toward the legitimate international interests of the United States as determined by the branch charged with that responsibility, but also toward the prejudice that might result to an individual accused because of the amount of time that has elapsed, would be to distort the aims of the diplomatic effort.

Id. at 1487.

54. *Id.* at 1487 (footnote omitted); see *McMaster v. United States*, 9 F.3d 47, 49 (8th Cir. 1993) (adopting rationale of *Burt* holding that petitioner had failed to establish any violation of his right to due process under the Fifth Amendment when the U.S. failed to facilitate his earlier extradition to Canada to face murder charges where the government did not break any promise regarding extradition and where the failure to extradite was not based on consideration of constitutionally impermissible factors and was in accordance with such other constitutional limitations as may exist).

55. *Burt*, 737 F.2d at 1486.

56. *Id.* at 1487.

57. 190 F.3d 410 (6th Cir. 1999).

58. *Id.* at 415.

59. *Id.* at 412.

sentences concurrently; however, the Sixth Circuit ruled he failed to provide any “viable authority” for the proposition that Canada’s delay infringed on his right to due process.⁶⁰

Lastly, in *Sabatier v. Dabrowski*,⁶¹ the First Circuit squarely rejected the contention that a criminal defendant’s right to a speedy trial under the Sixth Amendment also provided a fugitive in an extradition proceeding with a right to a “speedy adjudication.”⁶² It reasoned that the Sixth Amendment was not “germane” because extradition proceedings are not criminal prosecutions.⁶³ The issue of a fugitive’s innocence or guilt was to be determined by the country requesting his extradition and the role of the judiciary was simply to ascertain “whether a treaty applie[d] and whether the evidence of criminal conduct [wa]s sufficient to justify his extradition and trial by that country.”⁶⁴

B. Incorporation by Reference—“Remedies and Recourses” Provision

What if the extradition treaty contains a provision that allows the fugitive to avail himself of “all remedies and recourses” provided for by

60. *Id.* at 415; see *In re Extradition of Velasco Hernandez*, No. 07mj833, 2008 WL 4567108, at *9 (S.D. Cal. Oct. 7, 2008) (noting that four year delay in bringing charges and formally requesting extradition did not violate due process); cf. *In re Extradition of Ribaud*, No. 00 CRIM. MISC. 1PG.(KN, 2004 WL 213021, at *11 (S.D.N.Y. Feb. 3, 2004) (“[I]n the absence of any viable authority for the proposition that the delay involved in this case constitutes a defense to extradition or that the doctrine of laches applies, and taking into consideration the rule that extradition treaties are to be construed liberally, the Court finds that [petitioner’s] claim is unavailing.”); see also *Freedman v. United States*, 437 F. Supp. 1252, 1264–65 (N.D. Ga. 1977) (rejecting the contention that delay in seeking extradition triggered interests protected by Fifth and Sixth Amendments).

61. 586 F.2d 866 (1st Cir. 1978).

62. *Id.* at 869 (internal quotation marks omitted).

63. *Id.*

64. *Id.*; see *Martin v. Warden, Atlanta Pen*, 993 F.2d 824, 829 (11th Cir. 1993) (“[Defendant] concedes that he has no Sixth Amendment right to a speedy extradition.”); *Jhirad v. Ferrandina*, 536 F.2d 478, 485 n.9 (2d Cir. 1976) (“[T]he Sixth Amendment’s guarantee to a speedy trial, limited by its terms to criminal prosecutions, is inapplicable to international extradition proceedings.”); *In re Extradition of Sainez*, No. 07-MJ-0177-JMA, 2008 WL 366135, at *19 (S.D. Cal. Feb. 8, 2008) (“Case authority makes it clear . . . that there is no Sixth Amendment right to a speedy trial in extradition cases.”); *Freedman v. United States*, 437 F. Supp. 1252, 1265 (N.D. Ga. 1977) (“[T]he Sixth Amendment’s guarantee of a speedy trial is not an appropriate consideration in the instant extradition proceedings.”); see also *United States v. Galanis*, 429 F. Supp. 1215, 1225 (D. Conn. 1977) (finding that even under standards governing an American court in a domestic prosecution, there was no denial of the defendant’s Sixth Amendment right to speedy trial because no prejudice was shown); cf. *McDonald v. Burrows*, 731 F.2d 294, 297 (5th Cir. 1984) (finding no Sixth Amendment right to a speedy domestic extradition).

the law of the requested state in defending the request for his or her extradition?⁶⁵ Does the analysis then change in terms of the application of the Fifth or Sixth Amendments? No.

In *Kamrin v. United States*,⁶⁶ Australia sought petitioner's extradition on charges of fraud and conspiracy to defraud.⁶⁷ While the conspiracy ended in 1974, petitioner was not charged until 1980, and extradition proceedings were instituted against him in the United States in 1982.⁶⁸ Australia had no statute of limitations for these offenses and the extradition treaty provided that only the requesting country's statute of limitations should be considered in evaluating an extradition request.⁶⁹ After the magistrate found him extraditable, petitioner sought review of that ruling through a petition for a writ of habeas corpus arguing the extradition should be denied because his prosecution on the Australian charges was barred by the U.S. statute of limitations, and if not, by a right to due process under federal law incorporating the interests protected by that statute.⁷⁰ The district court denied the petition and he appealed.⁷¹

In affirming the ruling below, the Ninth Circuit recognized that while application of the U.S. statute of limitations (which was five years) would preclude extradition, the parties made clear in the treaty that the requesting country's statute of limitations would apply.⁷² Thus, while "delay in seeking extradition may be relevant to the Secretary of State's final determination as to whether extradition may go forward," the court found that such delay could not serve as a defense to the judicial determination of extraditability.⁷³

As to petitioner's contention that the "remedies and recourse" article⁷⁴ in the treaty entitled him to the due process rights underpinning the U.S. statute of limitations—"the right to a trial in which his defense [wa]s unimpaired by the passage of time"⁷⁵—the court held that

65. See, e.g., Treaty on Extradition Between the United States of America and Australia, U.S.-Austl. art. X, May 14, 1974, 27 U.S.T. 957 [hereinafter U.S.-Austl. Treaty] ("The determination that extradition based upon the request therefore should or should not be granted shall be made in accordance with the law of the requested State and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by that law.").

66. 725 F.2d 1225 (9th Cir. 1984).

67. *Id.* at 1226.

68. *Id.* at 1226–27.

69. *Id.* at 1227.

70. *Id.* at 1226–27.

71. *Id.* at 1227.

72. *Id.*

73. *Id.*

74. "Article X of the Treaty 'provide[d] that the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by the law of the requested state.'" *Id.*

75. *Id.*

due process rights did not extend extraterritorially.⁷⁶ In support of its holding in *Kamrin*, the Ninth Circuit relied on the Supreme Court's admonition in *Neely v. Henkel*⁷⁷ that a person who commits a crime abroad "cannot complain if required to submit to such modes of trial . . . as the laws of the country may prescribe for its own people, unless a different mode be provided for by treaty."⁷⁸

Two years after *Kamrin*, in *In re Extradition of Kraiselburd*⁷⁹ the Ninth Circuit again confronted a variation of the argument that a treaty's "remedies and recourses" article incorporated domestic law—this time speedy trial and due process interests recognized by the U.S. Constitution.⁸⁰ In *Kraiselburd*, Argentina sought petitioner's extradition on two murder charges approximately five years after their commission.⁸¹ After petitioner was found extraditable and his petition for writ of habeas corpus denied, he appealed.⁸² He argued, in part, that even if his extradition was not barred by either country's statute of limitations (under the treaty, both countries' statutes needed to be considered), Argentina's delay in submitting the request for his extradition violated his right to due process and a speedy trial under the Constitution as incorporated into the treaty by the "remedies and recourses" provision.⁸³

Relying on *Kamrin*, the Ninth Circuit, per now Justice Kennedy, rejected the argument that the remedies and recourses article at issue in the treaty with Argentina conferred upon petitioner protections afforded to defendants in domestic criminal prosecutions.⁸⁴ As to petitioner's contention that the government's delay of more than three years before proceeding with the extradition after having received the request infringed on his right to due process,⁸⁵ the court determined that even assuming such an interest was cognizable under the law, no

76. *Id.* at 1228; accord *Murphy v. United States*, 199 F.3d 599, 603 (2d Cir. 1999) (adopting rationale of *Kamrin* that the Due Process Clause does not establish a right, under the treaty's remedies and recourse clause, barring extradition if such would be precluded by the statute of limitations of the requested state but the treaty only calls for application of the laws of the requesting state, and that state's statute does not bar prosecution); see also *In re Extradition of Chan Seong-I*, 346 F. Supp. 2d 1149, 1157 (D.N.M. 2004) ("The delay in this case and the absence of a statute of limitation on the charged offenses d[id] not violate [petitioner's] substantive or procedural due process rights.")

77. 180 U.S. 109 (1901).

78. *Id.* at 123.

79. 786 F.2d 1395 (9th Cir. 1986).

80. *Id.* at 1398.

81. *Id.* at 1396.

82. *Id.*

83. *Id.* at 1398.

84. *Id.*

85. The Argentine authorities requested petitioner's extradition on March 5, 1981, and the United States initiated proceedings on June 27, 1984. *Id.* at 1396.

violation existed for two reasons.⁸⁶ First, petitioner was incarcerated on U.S. charges during that period and the treaty specifically allowed the parties to defer any surrender of a fugitive who is serving a sentence until the sentence expired.⁸⁷ Second, and “[m]ore important,” petitioner failed to demonstrate any prejudice.⁸⁸

The contention that a fugitive has right to a speedy extradition under the Due Process Clause of the Fifth Amendment, as incorporated under the treaty’s “remedies and recourses” clause, was also addressed by the Eleventh Circuit in *Martin v. Warden*.⁸⁹ In *Martin*, Canada sought petitioner’s extradition for vehicular homicide close to eighteen years after the commission of the offense.⁹⁰ After he was found extraditable, petitioner challenged that finding on appeal arguing the Fifth Amendment’s Due Process Clause granted him a right to a speedy extradition.⁹¹ In rejecting this argument, the court observed that because it was well established that a fugitive has no Sixth Amendment right to a speedy extradition, it would not make sense to provide that same fugitive with an equivalent right indirectly under the Fifth Amendment.⁹² Furthermore, recognizing a right to a speedy extradition under the Fifth Amendment would run afoul of the rule of

86. *Id.* at 1398.

87. *Id.*

88. *Id.*; see also *id.* at 1399 (“[Petitioner] does not allege and the record before us does not reveal any prejudice from the government’s delay. Absent prejudice we conclude there is no due process violation.”); cf. *Sabatier v. Daborowski*, 586 F.2d 866, 869 (1st Cir. 1978) (holding there was no Sixth Amendment right to a speedy extradition hearing).

89. 993 F.2d 824 (11th Cir. 1993). While the opinion in *Martin* makes reference to the fact that the treaty at issue in that case contained a “remedies and recourse” clause, it is not readily apparent from a plain reading of the opinion that the petitioner in that case specifically maintained that such clause incorporated rights under the Fifth Amendment, as opposed to arguing that the Due Process Clause of the Fifth Amendment, on its own, conferred a right to a speedy extradition. *Id.* at 829–30. In *In re Commissioner’s Subpoenas*, 325 F.3d 1287 (11th Cir. 2003), an opinion that came out ten years after *Martin*, a different panel of the Eleventh Circuit interpreted *Martin* as holding that the court there rejected petitioner’s attempt to incorporate, through the “remedies and recourses” clause of the extradition treaty with Canada, rights conferred under either the Fifth or the Sixth Amendment. *Id.* at 1302–03. Given this interpretation of *Martin* by *Commissioner’s Subpoenas*, the discussion of *Martin* is grouped here with other cases addressing the reach of a “remedies and recourse” clause.

90. *Martin*, 993 F.2d at 826–27.

91. *Id.* at 829. The court found in *Martin* the government had not made any commitments to petitioner not to extradite him. *Id.* at 830.

92. *Id.* at 829. The Ninth Circuit in *Martin* also took the opportunity to “expressly disapprove” the holding of the district court in *In re Extradition of Mylonas*, 187 F. Supp. 716 (N.D. Ala. 1960), that a fugitive “has a Sixth Amendment right to a ‘speedy extradition.’” *Martin*, 993 F.2d at 829 n.8.

non-inquiry governing the conduct of extradition proceedings⁹³ and “would simply be an oblique method of forcing treaty partners to adhere to the speedy trial guarantee contained in the United States Constitution.”⁹⁴

C. Incorporation by Reference—“Lapse of Time” Provision

What about a “lapse of time” provision in an extradition treaty?⁹⁵ Has that been treated differently than a “remedies and recourses” provision in terms of incorporating a right to a speedy trial under the Sixth Amendment? No.

In *Yapp v. Reno*,⁹⁶ the Bahamas sought petitioner’s extradition for drug related charges a little over two years after the alleged commission of the offenses.⁹⁷ After the petitioner was found extraditable and her writ of habeas corpus denied, she appealed arguing the extradition treaty’s “lapse of time” provision incorporated a right to a speedy trial under the Sixth Amendment.⁹⁸

In rejecting this contention, the Eleventh Circuit observed “that for over a century, the term ‘lapse of time’ ha[d] been commonly associated with a statute of limitations violation.”⁹⁹ Furthermore, interpreting the lapse of time provision in the treaty to incorporate a right to a speedy trial would run afoul of the rule of non-inquiry because it “would require a district judge or magistrate judge, generally unfamiliar with foreign judicial systems and the problems and circumstances facing them, to assess the reasonableness of a foreign government’s actions in an informational vacuum.”¹⁰⁰

93. *Id.* at 829 (“[T]he rule of non-inquiry . . . precludes extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request.”).

94. *Id.* at 830.

95. *See, e.g.*, U.S.-India Treaty, *supra* note 29, at art. 7 (“Extradition shall not be granted when the prosecution has become barred by lapse of time according to the laws of the Requesting State.”).

96. 26 F.3d 1562 (11th Cir. 1994).

97. *Id.* at 1563–64.

98. *Id.* at 1565–66. Article 5 of the treaty with the Bahamas barred extradition “if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.” *Id.* at 1566 (quoting Extradition Treaty Between the United States of America and Great Britain and Exchanges of Notes Extending the Applicability of the Treaty to Palestine and Trans-Jordan, U.S.-U.K., art. 5, Dec. 22, 1931, 47 Stat. 2122).

99. *Id.* at 1567 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 (1986)).

100. *Id.* at 1568 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 cmt. e); *see* 1 JOHN B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION § 373 (1891). Relying on the teaching of *Kraiselburd* and *Kamrin*, with respect to the interpretation of a “remedies and recourses” pro-

IV. OVERVIEW OF THE SIXTH AMENDMENT'S SPEEDY TRIAL GUARANTEE

The Sixth Amendment provides in part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”¹⁰¹ The right to a speedy trial, triggered when there has been an “arrest, indictment, or other official accusation,”¹⁰² serves as “an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.”¹⁰³

In ascertaining whether a criminal defendant’s right to a speedy trial has been violated, the Supreme Court in *Barker v. Wingo*¹⁰⁴ identified four factors which must be balanced: “Length of delay, the reasons for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”¹⁰⁵ By themselves, none of these factors is “either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.”¹⁰⁶ The remedy for a violation of the right to a speedy trial is the dismissal of the charges.¹⁰⁷

The first factor, the length of the delay, triggers the inquiry.¹⁰⁸ That is to say, “unless a presumptively prejudicial amount of time has elapsed, it is unnecessary to conduct a searching analysis of all the factors.”¹⁰⁹ Delays approaching or exceeding one year are considered presumptively prejudicial by the courts.¹¹⁰ If the defendant is able to

vision in an extradition treaty, and the holding of *Yapp*, magistrate judges in the Ninth Circuit uniformly have ruled that a “lapse of time” provision in an extradition treaty does not incorporate a right to speedy trial under the Sixth Amendment. See *In re Extradition of Flores Ortis*, No. 10-MJ-2016-JMA, 2011 WL 3441618, at *5–6 (S.D. Cal. Feb. 9, 2011); *In re Extradition of Salazar*, No. 09MJ2545-BLM, 2010 WL 2925444, at *6–7 (S.D. Cal. July 23, 2010); *United States v. Garfias*, No. CR-09-xr-90128 EMC, 2009 WL 2580641, at *2–3 (N.D. Cal. Aug. 20, 2009).

101. U.S. CONST. amend. VI. In *Klopfer v. North Carolina*, 386 U.S. 213, 222–23 (1967), the Supreme Court incorporated the right to a speedy trial to the states under the Fourteenth Amendment.

102. *Doggett v. United States*, 505 U.S. 647, 655 (1992); accord *United States v. Marion*, 404 U.S. 307, 320–21 (1971).

103. *United States v. Ewell*, 383 U.S. 116, 120 (1966).

104. 407 U.S. 514 (1972).

105. *Id.* at 530.

106. *Id.* at 533.

107. *Strunk v. United States*, 412 U.S. 434, 440 (1973).

108. *Barker*, 407 U.S. at 530.

109. *United States v. Wanigasinghe*, 545 F.3d 595, 597 (7th Cir. 2008).

110. See, e.g., *United States v. Mendoza*, 530 F.3d 758, 762 (9th Cir. 2008) (“Generally, a delay of more than one year is presumptively prejudicial.” (citing *United States v. Gregory*, 322 F.3d 1157, 1161–62 (9th Cir. 2003))); *United States v. Oriedo*,

make this showing, “the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.”¹¹¹

The second *Barker* factor, the reasons for the delay, is “[t]he flag all litigants seek to capture.”¹¹² This factor focuses on “whether the government or the criminal defendant is more to blame” for an “uncommonly long” delay before the start of the trial.¹¹³ Generally, when the court or the prosecution is the cause of the delay, the delay will count against the government.¹¹⁴ In assessing the period of delay, however, “different weights should be assigned to different reasons.”¹¹⁵ Thus, for example, “[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government.”¹¹⁶ On the other hand, “[a] more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.”¹¹⁷ Lastly, “a valid reason, such as a missing witness, should serve to justify appropriate delay.”¹¹⁸ If, by contrast, “delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine.”¹¹⁹

The third factor looks at the defendant’s assertion of his right to a speedy trial. If the defendant is aware that charges are pending against him and he fails to make any effort to secure a timely trial on

498 F.3d 593, 597 (7th Cir. 2007) (“We have considered delays that approach one year presumptively prejudicial.” (citing *United States v. White*, 442 F.3d 582, 589–90 (7th Cir. 2006); *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992))).

111. *Doggett*, 505 U.S. at 652.

112. *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986); see *United States v. Fernandes*, 618 F. Supp. 2d 62, 67 (D.D.C. 2009) (“[A] careful review of speedy trial jurisprudence reveals that while all factors are relevant, the second factor—who is more to blame for the delay—often dictates the outcome of cases.” (citing *Loud Hawk*, 474 U.S. at 315)).

113. *Doggett*, 505 U.S. at 651.

114. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* (footnote omitted).

119. *Vermont v. Brillon*, 129 S. Ct. 1283, 1290 (2009) (This “rule accords with the reality that defendants may have incentives to employ delay as a ‘defense tactic’: delay may ‘work to the accused’s advantage’ because ‘witnesses may become unavailable or their memories may fade’ over time.” (quoting *Barker*, 407 U.S. at 521)); *Barker*, 407 U.S. at 529. Under *Barker*, delay caused by the defendant may be analyzed under the “standard waiver doctrine,” or through application of its second factor and weighing that factor against the defendant. See *United States v. Loud Hawk*, 474 U.S. 302, 316 (1986) (noting that delay brought about by defendant’s filing of interlocutory appeal “ordinarily will not weigh in favor of a defendant’s speedy trial claims”).

said charges, then this factor will be weighed against him.¹²⁰ On the other hand, defendant's assertion of his right to a speedy trial "provides evidence that the defendant was being deprived of his constitutional right since '[t]he more serious the deprivation, the more likely a defendant is to complain.'"¹²¹

The last factor entails an analysis of prejudice. The defendant bears the burden of showing that he was prejudiced by the delay.¹²² Three interests are at play here: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) the possible impairment of the presentation of a defense.¹²³ Of the three interests, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."¹²⁴ Furthermore, when evaluating this factor, it must be "recognize[d] that *excessive delay* presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."¹²⁵ This presumption can be extenuated by a showing that the defendant acquiesced in the delay, or rebutted if the government can

120. See *United States v. Tchibassa*, 452 F.3d 918, 926 (D.C. Cir. 2006) ("[I]f [defendant] was aware that charges were pending against him . . . , his failure to make any effort to secure a timely trial on them . . . manifests a total disregard for his speedy trial right.")

121. *United States v. Battis*, 589 F.3d 673, 680 (3d Cir. 2009) (alteration in original) (quoting *Barker*, 407 U.S. at 531).

122. *United States v. Seltzer*, 595 F.3d 1170, 1179 (10th Cir. 2010) (quoting *United States v. Toombs*, 574 F.3d 1262, 1275 (10th Cir. 2009)).

123. *Barker*, 407 U.S. at 532.

124. *Id.* As the Court explained in *Barker*, "[i]f witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Id.*

125. *Doggett v. United States*, 505 U.S. 647, 655 (1992) (emphasis added). Addressing why the delay in *Doggett* triggered a "presumption" of prejudice, the Court explained:

To be sure, to warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice. But even so, the Government's egregious persistence in failing to prosecute [defendant] is clearly sufficient. The lag between [defendant's] indictment and arrest was 8½ years, and he would have faced trial 6 years earlier than he did but for the Government's inexcusable oversights. The portion of the delay attributable to the Government's negligence far exceeds the threshold needed to state a speedy trial claim; indeed, we have called shorter delays "extraordinary."

Id. at 657–58 (citing *Barker*, 407 U.S. at 533). Applying *Doggett*, circuit courts have found that delays of less than six years will trigger a presumption of prejudice. See, e.g., *Battis*, 589 F.3d at 683) (finding forty-five month delay presumptively prejudicial, even if only thirty-five months of that delay was attributable to the government); *United States v. Bergfeld*, 280 F.3d 486, 489–91 (5th Cir. 2002) (finding five year and three months delay presumptively prejudicial).

“affirmatively prove[] that the delay left [defendant’s] ability to defend himself unimpaired.”¹²⁶

V. BLAME, REASONABLE DILIGENCE, AND EXTRADITION

As noted above, the second *Barker* factor asks “whether the government or the criminal defendant is more to blame” for an “uncommonly long” delay before the start of the trial.¹²⁷ In *Barker*, the Court also made clear that “the primary burden” falls “on the courts and the prosecutors to assure that cases are brought to trial.”¹²⁸

The government is not required to “make heroic efforts to apprehend a defendant who is purposefully avoiding apprehension.”¹²⁹ If,

126. *Doggett*, 505 U.S. at 658; see *id.* at n.4.

127. *Id.* at 651.

128. *Barker*, 407 U.S. at 529; *id.* at 527 (“A defendant has no duty to bring himself to trial . . .”). A number of circuit courts relying on *Smith v. Hooey*, 393 U.S. 374 (1969), a case decided prior to *Barker*, have observed that the government “has a constitutional duty to make a diligent, good faith effort to bring a defendant to trial promptly.” *United States v. Mitchell*, 957 F.2d 465, 468 (7th Cir. 1992); see *United States v. Diacolios*, 837 F.2d 79, 82 (2d Cir. 1988) (“[T]he issue to be decided . . . is whether the government satisfied its ‘constitutional duty to make a diligent good faith effort’ to bring [defendant] to trial without unnecessary delay.”); *United States v. Bagga*, 782 F.2d 1541, 1543 (11th Cir. 1986) (“[Government] has a constitutional duty to make a diligent good faith effort to locate and apprehend a defendant and bring the defendant to trial.” (internal quotation marks omitted)). Thus, a few words on *Smith* are in order. In *Smith*, the petitioner was incarcerated at the federal penitentiary in Leavenworth, Kansas, when he was indicted in Harris County, Texas, on a theft charge. 393 U.S. at 375. Shortly after the state charge was filed, and then for the next six years, through letters and motions, petitioner requested that Texas authorities try him for the theft charge. *Id.* Nothing occurred. *Id.* He then filed a motion to dismiss the charge against him for want of prosecution, which apparently was not ruled upon, and then a writ of mandamus in the Texas Supreme Court, which was refused. *Id.* The Supreme Court granted certiorari and overruled a prior decision of the Texas Supreme Court that if an accused was confined in a federal prison, the state was absolved from any obligation under the Sixth Amendment to procure his presence. *Id.* at 377. In the case before it, the Court held, “[u]pon the petitioner’s demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial.” *Id.* at 383; see *Dickey v. Florida*, 398 U.S. 30, 37 (1970) (recognizing that under *Smith*, “on demand a State has a duty to make a diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction and afford him a trial.”). Clarifying the formulation of the government’s obligation, the court in *United States v. Sandoval*, 990 F.2d 481 (9th Cir. 1993) observed that “[i]t is true that the government has a constitutional duty to bring an accused to trial ‘[u]pon the [accused]’s demand.’ Once that speedy trial demand is made, the government is obligated to make a ‘diligent, good-faith effort’ to bring the accused before the court for trial.” *Id.* at 484 (quoting *Smith*, 393 U.S. at 383) (alterations in original) (footnote omitted).

129. *Sandoval*, 990 F.2d at 485 (quoting *Rayborn v. Scully*, 858 F.2d 84, 90 (2d Cir. 1988)); *Rayborn*, 858 F.2d at 89 (“[W]hile a defendant’s status as a fugitive will not relieve the state of its sixth amendment obligations, law enforcement officials

however, “the defendant is not attempting to avoid detection and the government makes no serious effort to find him, the government is considered negligent in its pursuit.”¹³⁰ In order to improve its chances of “capturing the flag” under the second *Barker* factor, does reasonable diligence require the government to request a defendant’s extradition in all instances where it has reason to believe or knows that a defendant is present in a country with which the United States has an extradition treaty? And what if the defendant is incarcerated or the government makes a request, and the defendant contests it? How should those circumstances be weighed? The cases below address these issues.

A. Imprisoned Defendants

In *United States v. Pomeroy*,¹³¹ the government returned an indictment against the defendant in April 1982, charging him with armed robbery of a bank.¹³² That same month, the defendant, who was in Canada, was convicted of an armed robbery in Canada and sentenced to fourteen years imprisonment.¹³³ Two years later, during the pendency of his appeal before the Canadian courts, the defendant requested that the U.S. extradite him so he could stand trial for the armed bank robbery charge.¹³⁴ In November 1984, he renewed his request.¹³⁵ No formal action was taken by U.S. authorities.¹³⁶ The defendant’s Canadian conviction thereafter was reversed on appeal, resulting in his entry of a plea of guilty to the Canadian armed robbery charge in June 1985, after which he was sentenced to imprisonment for a year and a day.¹³⁷ The defendant was released from prison in Canada in October of 1985 and then deported to the U.S., where he was then prosecuted for the armed bank robbery.¹³⁸ The end result was that the defendant was incarcerated for three and one half years

are not expected to make heroic efforts to apprehend a defendant who is purposefully avoiding apprehension or who has fled to parts unknown.” (citing *Diacolios*, 837 F.2d at 83; *United States v. Bagga*, 782 F.2d 1541, 1543 (11th Cir. 1986); *United States v. DeLeon*, 710 F.2d 1218, 1221–22 (7th Cir. 1983)).

130. *United States v. Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008) (citing *Doggett*, 505 U.S. at 653).

131. 822 F.2d 718 (8th Cir. 1987).

132. *Id.* at 719.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* It appears, however, that U.S. authorities learned, at least informally after the reversal of his Canadian conviction, that Canadian authorities were not willing “to release [the defendant] until the outcome of his retrial had been determined.” *Id.*

138. *Id.* at 720.

on the Canadian charge prior to his deportation to the U.S.¹³⁹ Before the district court, the defendant moved to dismiss the indictment on the grounds that the government had violated his right to a speedy trial under the Sixth Amendment.¹⁴⁰ The district court agreed, entering an order dismissing the indictment with prejudice, and the government appealed.¹⁴¹

In affirming the ruling below, the Eighth Circuit initially rejected the government's contention that the treaty, as amplified by Canadian domestic law, prohibited the defendant's extradition.¹⁴² What the treaty provided, the circuit court found, was discretion on the part of the Canadian authorities to defer the defendant's surrender until he served his Canadian sentence and "there [wa]s nothing in the record to indicate they would have done so had a proper request been made by the Government."¹⁴³ Thus, in light of the fact that it could not be said the request would have been futile, the court reasoned that the district court had not abused its discretion since the government had not made a "diligent, good-faith effort" to secure defendant's presence.¹⁴⁴ The court further determined that the district court had not abused its discretion when it found each of the *Barker* factors weighed in defendant's favor.¹⁴⁵

In cases involving imprisoned defendants who do not appear to have requested their extradition, courts have found that reasonable diligence does not require the formal submission of an extradition request. For example, informal diplomatic efforts or agreements may be sufficient to establish that the government was reasonably diligent in its efforts to secure the defendant's presence.¹⁴⁶ In addition, if a de-

139. *Id.* at 720 n.2

140. *Id.* at 720.

141. *Id.*

142. *Id.* at 721.

143. *Id.* at 721–22.

144. *Id.* at 722 (quoting *United States v. McConahy*, 505 F.2d 770, 773 (7th Cir. 1974)). The "diligent, good-faith effort" language came from the Court's opinion in *Smith v. Hooey*, 393 U.S. 374, 383 (1969). See discussion *supra* note 128.

145. *Pomeroy*, 822 F.2d at 722; see *United States v. Raffone*, 405 F. Supp. 549, 550 (S.D. Fla. 1975) (noting that the overnment made no effort to procure the defendant's presence after learning that he was incarcerated in Canada because "it seemed a better use of Government time and money to prosecute other cases, rather than devote the same to the extremely complex and costly business of extraditing a foreign felon." (internal quotation marks omitted)); see also *United States v. Rowbotham*, 430 F. Supp. 1254 (D. Mass. 1977) ("That Canada may not honor an extradition request is no excuse for failing to make one. 'The possibility of a refusal is not the equivalent of asking and receiving a rebuff.'" (quoting *Smith*, 393 U.S. at 382)).

146. See *United States v. Valencia-Quintana*, No. 02-21225, 2005 WL 1526134, at *1–3 (5th Cir. June 29, 2005) (noting that informal notification agreement reached between Dominican Republic authorities and DEA to notify DEA of the defendant's release from prison and DEA's regular periodic inquiries as to defen-

defendant does not ask for his extradition but instead remains mute and conceals his identity, he cannot later claim that the government did not act diligently by failing to seek his extradition. The following case is illustrative.

In *United States v. Wangrow*,¹⁴⁷ the defendant argued the government's failure to extradite him from Mexico where he was serving a sentence on narcotics and murder charges violated his right to a speedy trial.¹⁴⁸ In *Wangrow*, there was a nineteen-year gap between the time the government learned in December of 1970, that the defendant was incarcerated in Mexico, and September of 1989, when he stood trial in the U.S. on an indictment charging him with burglary and related offenses.¹⁴⁹

Although the offenses for which the defendant was charged were extraditable under the treaty, the government did not seek the defendant's extradition at any time during his incarceration in Mexico because it believed Mexico would reject the request.¹⁵⁰ Nonetheless, in August 1979, the government investigated the defendant's claim that he was a Mexican citizen, an assertion apparently supported by an assumed name and false fingerprints and a birth certificate.¹⁵¹ In 1981, the American consulate tried to meet with the defendant, but he refused, asserting again he was a Mexican citizen.¹⁵² In upholding the district court's ruling denying the defendant's motion to dismiss the indictment on speedy trial grounds, the Eighth Circuit found that because the delay was attributable to the defendant, he "ha[d] waived his right to a speedy trial."¹⁵³

defendant's status reflected reasonably diligent efforts to secure defendant's presence); *Garcia Montalvo v. United States*, 862 F.2d 425, 426 (2d Cir. 1988) (finding that the defendant was incarcerated in Venezuela when indictment returned; even though the extradition treaty did not provide for extradition of narcotics offenders, U.S. lodged a warrant for his arrest with Venezuelan authorities); *United States v. Walton*, 814 F.2d 376, 379 (7th Cir. 1987) (noting that in making informal inquiries about the possibility of extraditing the defendant who was imprisoned in Sweden—without submission of a formal request—and where the State Department files revealed informal exchanges and reluctance of Swedish officials to extradite defendant until the service of his sentence there, the government demonstrated that it acted with due diligence under the Speedy Trial Act); see also *United States v. Mitchell*, 957 F.2d 465, 467 (7th Cir. 1992) (stating that while government sought the defendant's provisional arrest, it never submitted a formal request, the defendant was released, and the window of opportunity within which to seek extradition of fugitives from Colombia closed).

147. 924 F.2d 1434 (8th Cir. 1991).

148. *Id.* at 1437.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

Insofar as the defendant's contention that his case was controlled by *Pomeroy*, the court of appeals found that even if extradition from Mexico had been viable—and the finding by the district court below was that a request would have been futile—the defendant's "attempts to conceal his identity from the government indicate[d] that he did not want to be extradited, much less stand trial."¹⁵⁴ In addition, unlike the accused in *Pomeroy*, the defendant waited nineteen years to assert his speedy trial right.¹⁵⁵ Since the defendant was responsible for the delay, the court rejected his claim that he suffered undue prejudice.¹⁵⁶

B. No Need to Submit Extradition Request if Futile to Do So

Where the defendant is in a foreign country, but not serving a sentence, reasonable diligence does not require that the government submit a request for his extradition if it can establish that extradition would have been futile. The following cases illustrate this point.

In *United States v. Blanco*,¹⁵⁷ the defendant, a Colombian citizen, was charged along with thirty-seven others with conspiring to manufacture, import, and distribute cocaine.¹⁵⁸ When the indictment was returned in April 1975, the defendant was living in Colombia.¹⁵⁹ Through an informant, the Drug Enforcement Administration (DEA) learned by 1977 where the defendant resided in Colombia and took measures to keep track of her whereabouts.¹⁶⁰ In 1977, the informant advised the DEA that the defendant would not travel to the U.S. because she was "wanted" there and a DEA agent asked the informant to try to persuade the defendant to travel to Costa Rica, a country from which her extradition might be possible.¹⁶¹ In 1977, when the DEA agent heard that the defendant may have been shot in Miami, Florida, and in 1980, when he heard that she had been killed in Miami, he followed up with inquiries at hospitals and then later with U.S. Customs to check whether bodies shipped to Colombia matched the defendant's description.¹⁶² The DEA agent also listed the defendant's name with the National Criminal Information System and the Treasury Enforcement Communications System, and put her name on visa and passport "lookouts."¹⁶³

In May of 1984, the defendant was spotted in Newport Beach, California, by the DEA during its investigation of suspected drug smug-

154. *Id.* at 1438.

155. *Id.*

156. *Id.*

157. 861 F.2d 773 (2d Cir. 1988).

158. *Id.* at 775.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 776.

gling involving her sons.¹⁶⁴ She was seen again in September of 1984 delivering cash to a DEA informant, and in February of 1985, she was arrested in Irvine, California.¹⁶⁵ Following a trial which commenced in late June of 1985 and ended in early July of the same year, the defendant was convicted of conspiring to manufacture, import, and distribute cocaine and was sentenced to fifteen years' imprisonment.¹⁶⁶ On appeal, the defendant argued the government had violated her right to a speedy trial given the more than ten-year delay between the return of her indictment and the start of her trial.¹⁶⁷ The Second Circuit disagreed.¹⁶⁸

In analyzing the reason for the delay, the court found the government had acted diligently, notwithstanding its decision not to request the defendant's extradition from Colombia during the nine-year period she presumably resided there.¹⁶⁹ The court first determined that before 1982, the extradition treaty between the U.S. and Colombia did not require Colombia to surrender its citizens and that Colombia had a policy of denying requests involving its citizens.¹⁷⁰ So, the court reasoned, any request before 1982 "would have been futile."¹⁷¹

In 1982, the United States and Colombia entered into a new extradition treaty which required Colombia to surrender its nationals, but the President of Colombia indicated that he would not enforce the treaty.¹⁷² Further, according to a government witness familiar with the U.S./Colombian extradition practice, before April 1984, the United States had no chance to obtain the extradition of any Colombian citizen.¹⁷³ Indeed, it appeared to be uncontroverted that until January of 1985 no Colombian citizens were extradited to the United States under the 1982 treaty.¹⁷⁴ Therefore, the court determined that any request made before April of 1984 would have been futile and the government was not required to make such a request.¹⁷⁵

The futility of any extradition request to Colombia, coupled with the finding by the district court that the defendant knew of the indictment, and also the recognition that she made no effort to return to the U.S. to face charges, and that when she came to California, she used a false name, led the court of appeals to conclude the defendant was

164. *Id.*

165. *Id.*

166. *Id.* at 776–77.

167. *Id.* at 778.

168. *Id.* at 778–81.

169. *Id.* at 778.

170. *Id.*

171. *Id.*

172. *Id.* at 776.

173. *Id.*

174. *Id.*

175. *Id.* at 778.

responsible for the delay.¹⁷⁶ The court also found the remaining *Barker* factors did not weigh in her favor and upheld the district court's ruling that the defendant was not denied her right to a speedy trial.¹⁷⁷

A similar result was reached by the Ninth Circuit in *United States v. Corona-Verbera*.¹⁷⁸ In *Corona-Verbera*, there was nearly an eight-year delay between the defendant's indictment on narcotics trafficking charges in 1995 and his arrest in Mexico pursuant to a provisional arrest warrant in 2003.¹⁷⁹ In the district court, the defendant sought to dismiss the charges on the grounds the delay in bringing him to trial violated his rights under the Sixth Amendment.¹⁸⁰ The government responded by presenting the testimony of a U.S. Customs agent—testimony that was not refuted by the defendant's expert—that until the late 1990s, Mexico did not extradite its citizens on narcotics charges.¹⁸¹ That same agent testified that in 1990 (when the defendant had been charged by complaint with drug trafficking) the defendant's name had been placed in the National Crime Information Center computer system, as well as “the border computer system.”¹⁸² When the indictment was returned against the defendant in 1995, that information was also entered into both systems.¹⁸³

In addition, between 1991 and 1997, at the United States government's behest, the television program *Unsolved Mysteries* on twenty occasions in the United States and at least once in Mexico aired a segment on the defendant's drug trafficking activities, which involved the use of a 200 foot tunnel between Queen Creek, Arizona and Agua Prieta, Mexico.¹⁸⁴ The program *America's Most Wanted* likewise aired a segment on the tunnel in 1996.¹⁸⁵ Also, the government submitted a report from the State Department which affirmed that in 1999 and 2000, only one Mexican national had been extradited each year, the number then increased to eleven in 2001, and seventeen in 2002.¹⁸⁶ When the government received a tip in 2002 that the defendant was in Mexico, it sought his provisional arrest and ultimately was able to obtain his extradition the following year.¹⁸⁷

176. *Id.* at 779–80.

177. *Id.* at 780.

178. 509 F.3d 1105 (9th Cir. 2007).

179. *Id.* at 1111. The defendant's extradition to the U.S. was granted approximately two months after his provisional arrest. *Id.*

180. *Id.* at 1114.

181. *Id.*

182. *Id.* at 1115.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1115. It is unclear from the opinion whether the government had any concrete proof that the defendant was in Mexico prior to October 2002.

Applying the teaching of *Blanco*, the court in *Corona-Verbera* held that “where our government has a good faith belief supported by substantial evidence that seeking extradition from a foreign country would be futile, due diligence does not require [the] government to do so.”¹⁸⁸ The court also determined that the remaining *Barker* factors did not weigh in the defendant’s favor and upheld the ruling of the district court that the eight year delay between indictment and arrest did not warrant a dismissal of the indictment.¹⁸⁹ *Blanco, Corona-Verbera*, and the developing case law make clear that the submission of a formal request for extradition is not a precursor to a finding that the government acted with reasonable diligence in procuring the return of a defendant to face pending charges if such a submission would be futile.¹⁹⁰

188. *Id.* at 1114.

189. *Id.* at 1115–16.

190. *Id.*; see *United States v. Mitchell*, 957 F.2d 465, 469 (7th Cir. 1992) (“[M]uch of the delay between [the defendant’s] release from custody in October 1988 and his re-arrest in January 1990 is due to the fact that extradition from Colombia was not possible during that time. The government is not duty-bound to pursue futile legal gestures to return the defendant for trial.”); *United States v. Bagga*, 782 F.2d 1541, 1543 (11th Cir. 1986) (noting that the attempt at extradition from India would have been futile—there was “great doubt” that the offense for which the defendant was wanted was an extraditable offense under the treaty and the government had no address for defendant in India); *United States v. Chaudhry*, No. 00 Cr. 152 (DLC), 2010 WL 4118071, at *3, 7 (S.D.N.Y. Oct. 19, 2010) (explaining that government’s “detailed presentation” in support of its position that extradition request to Pakistan would have been futile included information provided by the Office of International Affairs that Pakistan had a record of refusing to grant request involving white collar criminals); *United States v. Payan-Baez*, No. 8:05-CR-492, 2010 WL 3608049, at *1 (M.D. Fla. Sept. 9, 2010) (stating that extradition would have proved futile since the defendant, who had been removed to Mexico, provided identifying information, none of which could be verified); *United States v. Barraza-Lopez*, No. 04CR1962, 2009 WL 5091913, at *3 (S.D. Cal. Dec. 17, 2009) (seeking extradition from Mexico would have been futile—escape was not an extraditable offense and the offense of being a deported alien found in the U.S. was not an offense for which Mexico had ever surrendered a national); *United States v. Ramos*, 420 F. Supp. 2d 241, 247 (S.D.N.Y. 2006) (noting that extradition is not a “practical option” because government agent testified that that he had been advised by DOJ’s authority on Dominican Republic extradition matters that the Dominican Republic did not extradite anyone prior to 1998, and that afterwards, it extradited only violent offenders (not drug dealers)); *United States v. Escamilla*, 244 F. Supp. 2d 760, 766 (S.D. Texas 2003) (finding that government agents testified that any attempt at extradition of Mexican citizen from Mexico would have been futile, thus, failure to undertake such an attempt did not constitute negligence on the part of the government); *United States v. Marquez-Charry*, No. 85 CR 764-16, 1997 WL 208403, at *2 (N.D. Ill. Apr. 22, 1997) (noting that the defendant did not contest that efforts to extradite him from Venezuela and Switzerland would have been futile since Venezuela did not extradite its nationals and Switzerland would not have released him until he served his sentence); *United States v. McGeough*, No. CR-82-00327-11, 1992 WL 390234, at *3–4 (E.D.N.Y. Dec. 8, 1992) (finding that government’s decision not to at-

C. Reasonable Diligence and Requests for Surrender as a Matter of Comity

Where comity, as opposed to a treaty, may serve as the basis for an extradition request, consideration of diplomatic factors plays an integral role in the reasonable diligence determination.¹⁹¹ The following cases illustrate the point.

In *United States v. Diacolios*,¹⁹² the defendant, a Greek citizen, was charged with conspiracy to defraud the United States and mail fraud.¹⁹³ When the indictment was returned against him, the defendant was living in Greece and not subject to extradition.¹⁹⁴ After en-

tempt to extradite defendant from Sweden and then Germany did not reflect a lack of due diligence since Swedish treaty did not provide for extradition of offenses with which the defendant was charged and Germany had expressed its intention to try defendant so efforts would have been futile); *United States v. Perez-Cestero*, 737 F. Supp. 752, 764 (S.D.N.Y. 1990) (“[T]he Government was not obliged to seek extradition where such a request would undoubtedly be unavailing. . . . Prior to 1986, Venezuela’s extradition with the United States did not provide for the extradition of narcotics offenders.”); *see also* *United States v. Wathne*, No. CR 05-0594, 2008 WL 4344112, at *5–6 (N.D. Cal. Sept. 22, 2008) (denying defense motion for discovery ancillary to a motion to dismiss on speedy trial grounds because substantial evidence supported government’s position that extradition from Russia under the UN Drug Convention would have been futile). *But see* *United States v. Ebanks*, No. 03-20954-CR, 2009 WL 2852737, at *5 (S.D. Fla. Sept. 2, 2009) (rejecting argument that extradition request would have been futile since the government could have presented the testimony of a cooperating witness as independent corroborating evidence in support of the request); *United States v. Fernandes*, 618 F. Supp. 2d 62, 69 (D.D.C. 2009) (noting that a single conversation involving prosecutor and agent where they were told extradition from India may take several years “[wa]s meager evidence that extradition would have been futile; it d[id] not approach the definitive, multi source evidence other courts have found sufficient to excuse a failure to request extradition”); *United States v. Dionisio*, No.04-Cr-30-bbc, 2008 WL 4949914, at *3 (W.D. Wis. Nov. 17, 2008) (finding conclusory, vague, and anecdotal testimony of agent was not sufficient to establish that extradition request to the Philippines would have been futile); *United States v. McDonald*, 172 F. Supp. 2d 941, 949 (W.D. Mich. 2001) (“While it is true that the Bahamian government might have elected to defer extradition pending resolution of the local charges, it is equally possible that they might have elected to dismiss their charges and extradite the Defendant immediately.”).

191. *See* *United States v. Hooker*, 607 F.2d 286, 289 (9th Cir. 1979); *see also* *United States v. Salzmann*, 548 F.2d 395, 402 (2d Cir. 1976) (“Where the American right to demand extradition is established by treaty, considerations of foreign policy might well be subordinated to speedy trial. Where the United States must rely on comity, however, diplomatic factors may properly be taken into account in determining what diligence is due.”).

192. 837 F.2d 79 (2d Cir.1988).

193. *Id.* at 80.

194. *Id.* at 80–81. Defendant was not subject to extradition because under the treaty, neither party was bound to deliver its citizens and also because Greece did not allow the extradition of its citizens outside of the treaty as a matter of comity. *Id.* at 81.

tering a plea of not guilty through his attorney and unsuccessfully seeking to be tried *in absentia*, and twenty-two months after his indictment, the defendant moved to dismiss the charges against him on speedy trial grounds.¹⁹⁵ The district court granted his motion finding that the government had failed to exercise due diligence in seeking his timely return to the U.S. from Greece.¹⁹⁶ The government thereafter appealed and the Second Circuit reversed and directed the reinstatement of the indictment.¹⁹⁷

The court of appeals found the record before the district court established that the United States had a considered policy of not requesting extradition from Greece, independent of the treaty, because like most other European countries, Greece did not allow for extradition as an act of comity.¹⁹⁸ Thus, testing reasonable diligence by whether the government had considered making an exception to the policy “in every case would vitiate the policy and render meaningless [the judiciary’s] traditional deference to the judgment of the executive department in matters of foreign policy.”¹⁹⁹ Accordingly, in light of that deference, the court held “that the speedy trial clause d[id] not prevent the government from adhering to its general policy not to seek extradition as a matter of comity.”²⁰⁰

195. *Id.* at 81.

196. *Id.* at 80.

197. *Id.* Notably, the issue of whether the defendant had a right to dismiss the indictment on Sixth Amendment grounds, since he was a foreign national living outside the U.S. when he brought his motion apparently, never came up during the litigation. *Cf.* *United States v. Koch*, No. 03-144, 2011 WL 284485, at *3 (W.D. Pa. Jan. 25, 2011) (dismissing motion to dismiss indictment on speedy trial grounds because as “a foreign national presently residing outside the United States, [defendant had] no Sixth Amendment right to a speedy trial or to other constitutional protections”). *But see In re Hijazi*, 589 F.3d 401, 410–14 (7th Cir. 2009).

198. *Diacolios*, 837 F.2d at 83.

199. *Id.* at 83 (internal quotation marks omitted).

200. *Id.* at 84; *see United States v. Hooker*, 607 F.2d 286, 289 (9th Cir. 1979) (noting it is improper “to adopt a rule . . . that would, in substance, require the Attorney General or his agents to embark on [negotiations for the release of a person not subject to extradition by treaty], or require [the Attorney General] to try to persuade the Department of State to do so”); *United States v. Salzman*, 548 F.2d 395, 402 (2d Cir. 1976) (“Where the American right to demand extradition is established by treaty, considerations of foreign policy might well be subordinated to speedy trial. Where the United States must rely solely on comity, however, diplomatic factors may properly be taken into account in determining what diligence is due.”); *cf. United States v. Blake*, No 2:02-CR-34(01) RLM, 2001 WL 4435691, at *4 (N.D. Ill. Sept. 23, 2011) (“When the government made its single request to extradite [defendant], it did what was needed to secure [defendant]; the treaty authorized no further efforts, so further efforts were unnecessary.”); *see also United States v. Tchibassa*, 452 F.3d 918, 925 n.6 (D.C. Cir. 2006) (rejecting contention that “the government should have used ‘available alternatives’ to extradition to effect [the defendant’s] arrest”).

A different rule appears to have been adopted by the Seventh Circuit in *United States v. McConahy*.²⁰¹ In *McConahy*, the defendant was tried on a bail jumping charge approximately five years after his indictment.²⁰² Shortly before the commencement of his trial, the defendant had been imprisoned in England for over three years, mostly on account of a prosecution and conviction there involving forgery charges.²⁰³ While incarcerated in England, the defendant made two or more requests to be returned to the U.S. to face the bail jumping charge.²⁰⁴ Following his conviction, the defendant appealed, arguing that his prosecution violated his right to a speedy trial.²⁰⁵ The Seventh Circuit agreed and ordered the dismissal of the indictment.²⁰⁶

The government in *McConahy* conceded on appeal that the delay involving defendant's trial was substantial and that the third and fourth *Barker* factors weighed in his favor.²⁰⁷ It maintained, however, that the delay was occasioned by the defendant's conduct—his voluntary departure from the U.S. and subsequent incarceration because he violated British law—and under *Barker*, “if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside.”²⁰⁸ The court of appeals rejected the government's contention.

The court reasoned that while a delay caused by a defendant's imprisonment in a jurisdiction other than that which seeks to prosecute him is attributable to the defendant, *Barker's* waiver rule would not apply to such a case “unless either the defendant faile[d] to demand that an effort be made to have him returned for trial or, after a demand ha[d] been made by him, the prosecuting authorities ma[d]e a diligent, good faith effort to have him returned and [we]re unsuccessful.”²⁰⁹ In this case, the court found that it was immaterial that bail jumping may not have been an extraditable offense since the defendant “was not resisting extradition.”²¹⁰ To the contrary, he was requesting to be returned to the United States.²¹¹ The government did not rebut the defendant's assertion that the British authorities had advised him that they would have honored a request from the United States to have him returned prior to the completion of the service of

201. 505 F.2d 770 (7th Cir. 1974).

202. *Id.* at 772.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 774.

207. *Id.* at 773.

208. *Id.* (quoting *Barker v. Wingo*, 407 U.S. 514, 529 (1972)).

209. *Id.*

210. *Id.*

211. *Id.*

his sentence there.²¹² In light of that uncontroverted assertion, the court determined that “it might have been possible” for the United States to secure the defendant’s return with the cooperation of the British authorities, and in this case, the government failed to make any “effort whatsoever.”²¹³

D. Contesting an Extradition Request May Lead to a Finding that Defendant Waived His Right to a Speedy Trial and Delays Caused by Proceedings in Compliance with Treaty are Attributed to Defendant

Resisting extradition efforts may lead to a finding that a defendant waived his right to a speedy trial. In a similar vein, the government also generally will not be assigned fault for delays associated with the prosecution of an extradition request. The cases below address those points.

In *United States v. Manning*,²¹⁴ the defendant was indicted in July of 1988, of one count of murder by use of a mail bomb.²¹⁵ He was arrested in Israel in March of 1991, and extradited to the United States in July of 1993, to stand trial.²¹⁶ Following his conviction, the defendant was sentenced to life imprisonment.²¹⁷ On appeal, the defendant argued that the thirty-month delay between his indictment and the government’s request for his extradition violated his right to a speedy trial under the Sixth Amendment.²¹⁸

The Ninth Circuit rejected the defendant’s contention that his right to a speedy trial was violated as a result of the delay between the return of the indictment and the request for his extradition thirty months later.²¹⁹ The court of appeals determined that because the defendant had known of the indictment and resisted efforts to return him home, he could not now “complain about the delay that he ha[d] caused by refusing to return voluntarily to the United States.”²²⁰

212. *Id.*

213. *Id.* at 773–74. In support of its holding, the court relied heavily on *Smith v. Hooy*, 393 U.S. 374 (1969), finding no reason to distinguish application of its rule “when the defendant is incarcerated by a foreign government rather than the United States or one of its states.” *Id.* at 773; *see supra* note 30.

214. 56 F.3d 1188 (9th Cir. 1995).

215. *Id.* at 1193.

216. *Id.*

217. *Id.*

218. *Id.* at 1194.

219. *Id.* at 1195.

220. *Id.*

Foregoing any further analysis of his claim, the court held the defendant had “waived his constitutional right to a speedy trial.”²²¹

Courts also have not been receptive to assigning fault to the government for delays caused by formal extradition proceedings. Thus, in *United States v. Thirion*,²²² the Eight Circuit held that “[a]bsent evidence of any formal waiver of extradition, [it was] unwilling to attribute to the government any delay caused by formal extradition proceedings initiated in compliance with the [U.S./Monaco extradition] treaty.”²²³

VI. CONCLUSION

The developing case law makes clear that the Due Process Clause of the Fifth Amendment—by its own force—is not implicated by delay associated with a demanding country’s request for the extradition of a fugitive.²²⁴ Courts also consistently have rejected the argument that liberty interests protected under the Due Process Clause are incorporated by reference under an extradition treaty’s “remedies and recourses” provision.²²⁵ As to a Sixth Amendment hook within which to hang an argument challenging undue delay in the submission of an extradition request, by its terms, the Sixth Amendment applies to “criminal prosecutions.”²²⁶ Extradition proceedings, as noted above, are not considered criminal prosecutions.²²⁷ Courts uniformly have

221. *Id.* (“His affirmative resistance of the government’s efforts to secure his presence in the United States constitutes an intentional relinquishment of his right to a constitutional speedy trial, and he cannot now complain of the delay that he himself caused.”); *cf.* *United States v. McDonald*, 172 F. Supp. 2d 941, 950 (W.D. Mich. 2001) (“While the filing of an extradition contest in some cases may constitute a waiver of speedy trial, in this case the opposite conclusion is warranted.”).

222. 813 F.2d 146 (8th Cir. 1987).

223. *Id.* at 154; *see also In re Bramson*, No. 96-622, 1997 WL 65499, at *1 (4th Cir. Feb. 18, 1997); *United States v. Reumayr*, 530 F. Supp. 2d 1200, 1206 (D.N.M. 2007); *United States v. Stone*, 510 F. Supp. 2d 338, 343 (S.D.N.Y. 2007). *See generally United States v. Asiegbu*, No. CR 02-00673 MMM, 2009 WL 413132, at *4 (C.D. Cal. Feb. 17, 2009).

224. *See In re Extradition of Drayer*, 190 F.3d 410, 415 (6th Cir. 1999); *McMaster v. United States*, 9 F.3d 47, 49 (8th Cir. 1993); *Bovio v. United States*, 989 F.2d 255, 260 (7th Cir. 1993); *In re Extradition of Burt*, 737 F.2d 1477, 1480–81 (7th Cir. 1984); *In re Extradition of Velasco Hernandez*, No. 07mj833, 2008 WL 4567108, at *9 (S.D. Cal. Oct. 7, 2008); *see also Freedman v. United States*, 437 F. Supp. 1252, 1264 (N.D. Ga. 1977); *cf. In re Extradition of Ribaldo*, No. 00 Crim. Misc. 1PG.KN, 2004 WL 213021, at *11 (S.D.N.Y. Feb. 3, 2010).

225. *See Murphy v. United States*, 199 F.3d 599, 603 (2d Cir. 1999); *In re Extradition of Kraiselburd*, 786 F.2d 1395, 1398 (9th Cir. 1986); *Martin v. Warden*, 993 F.2d 824, 829 (11th Cir. 1993); *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir. 1984).

226. U.S. Const. amend. VI.

227. *See In re Extradition of Chavez*, 408 F. Supp. 2d 908, 911 (N.D. Cal. 2005); *In re Extradition of Mainero*, 990 F. Supp. 1208, 1218 (S.D. Cal. 1997).

held that the Sixth Amendment's protections concerning the right to a speedy trial simply have no application in international extradition proceedings, either on the force of the Sixth Amendment alone,²²⁸ or through a "lapse of time" provision in a treaty.²²⁹ Concerns regarding any delay in the submission of the extradition request, and how that delay may affect the fugitive's opportunity to defend himself against the charges which await him, should be presented to the Secretary of State. In the exercise of her broad discretion, she ultimately will determine whether or not to issue a surrender warrant for the fugitive.²³⁰

With respect to domestic prosecutions raising a Sixth Amendment challenge, the second *Barker* factor focuses on "whether the government or the criminal defendant is more to blame" for an "uncommonly long" delay before the start of the trial.²³¹ In assessing the reason for pretrial delay, insofar as the government's conduct is concerned, the developing case law reveals that if a defendant is incarcerated abroad, and if he requests his return to the U.S. so that he can address charges pending here, the government's failure to request his extradition—if there is a possibility that such a request would be granted by the foreign country—may not be considered a diligent, good faith effort to secure defendant's presence, and thus, be weighed against the government under the *Barker* analysis.²³² If the defendant is incar-

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228. See *Martin*, 993 F.2d at 829; *Sabatier v. Dabrowski*, 586 F.2d 866, 869 (1st Cir. 1978); *In re Extradition of Sainez*, No. 07-MJ-0177-JMA, 2008 WL 366135, at *19 (S.D. Cal. Feb. 8, 2008); *Freedman*, 437 F. Supp. at 1265; see also *Jhirad v. Ferandina*, 536 F.2d 478, 485 n.9 (2d Cir. 1976); cf. *McDonald v. Burrows*, 731 F.2d 294, 297 (5th Cir. 1984). The Sixth Amendment also provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. amend. VI. In *DeSilva v. Dileonardi*, 181 F.3d 865 (7th Cir. 1999), the Seventh Circuit held "there is no Sixth Amendment right to counsel in extradition proceedings." *Id.* at 868–69. See *Taylor v. Jackson*, 470 F. Supp. 1290, 1292 (S.D.N.Y. 1979) ("Neither the extradition court [in Canada] nor the State of New York was obligated to provide petitioner with counsel, and the failure to do so violated none of his rights under federal law or the Extradition Treaty.").
229. See *Yapp v. Reno*, 26 F.3d 1562, 1568 (11th Cir. 1994); accord *In re Extradition of Salazar*, No. 09MJ2545-BLM, 2010 WL 2925444, at *6–7 (S.D. Cal. July 23, 2010); *United States v. Garfias*, No. CR-09-xr-90128 EMC, 2009 WL 2580641, at *2–3 (N.D. Cal. Aug. 29, 2009).
230. See *Yapp*, 26 F.3d at 1568; *Martin*, 993 F.2d at 830; *In re Extradition of Artukovic*, 628 F. Supp. 1370, 1375–76 (C.D. Cal. 1986); see also *Man-Seok Choe v. Torres*, 525 F.3d 733, 741–42 (9th Cir. 2008) (finding that the four-year delay between the discovery by Korea of the petitioner's application for U.S. citizenship and Korea's request for his extradition was a matter for the Secretary of State's consideration).
231. *Doggett v. United States*, 505 U.S. 647, 651 (1992); *United States v. Fernandes*, 618 F. Supp. 2d 62, 70 (D.D.C. 2009).
232. See *United States v. Pomeroy*, 822 F.2d 718 (8th Cir. 1987); *United States v. Raffone*, 405 F. Supp. 549, 550 (S.D. Fla. 1975); see also *United States v.*

cerated on foreign charges but has not requested his return, inquiries from U.S. to foreign government officials about the viability of extradition, or other contacts or agreements involving foreign officials, may be found to constitute diligent efforts to justify delay in bringing a defendant to trial under the second *Barker* factor.²³³

Where the defendant is present in a foreign country, but not serving a sentence, reasonable diligence does not require that the government submit a request for his extradition if it can demonstrate the extradition request would have been futile.²³⁴ If the defendant is aware of the charges against him and resists efforts to get him back, short of the filing of an extradition request, he may be deemed to have waived his right to a speedy trial.²³⁵ Furthermore, delay in the for-

Rowbothan, 430 F. Supp. 1254–58 (D. Mass. 1977) (holding that charges against the defendant should be dismissed in part because the U.S. government had not made a “diligent good faith effort” in seeking to extradite him from Canada and because he had asserted his right to a speedy trial through negotiations to allow him to be arraigned in Massachusetts.).

233. See *United States v. Valencia-Quintana*, No. 02-21225, 2005 WL 1526134 (5th Cir. June 29, 2005); *Garcia Montalvo v. United States*, 862 F.2d 425, 426 (2d Cir. 1988); *United States v. Walton*, 814 F.2d 376, 379 (7th Cir. 1987); see also *United States v. Mitchell*, 957 F.2d 465, 467–69 (7th Cir. 1992) (finding that the U.S. government’s request for the extradition of a defendant, who himself did not request extradition, and later request for accelerated extradition represented due diligence and good faith on its part, despite the delay in the defendant being brought to trial.).
234. See *United States v. Corona-Verbera*, 509 F.3d 1105, 1115–16 (9th Cir. 2007); *United States v. Mitchell*, 957 F.2d 465, 469 (7th Cir. 1992); *United States v. Blanco*, 861 F.2d 773, 776–78 (2d Cir. 1988); *United States v. Bagga*, 782 F.2d 1541, 1543 (11th Cir. 1986); *United States v. Chaudhry*, No. 00 Cr. 152(DLC), 2010 WL 4118071, at *3, 7 (S.D.N.Y. Oct. 19, 2010); *United States v. Payan-Baez*, No. 8:05-CR-492, 2010 WL 3608049, at *1 (M.D. Fla. Sept. 9, 2010); *United States v. Barraza-Lopez*, No. 04CR1962, 2009 WL 5091913, at *3 (S.D. Cal. Dec. 17, 2009); *United States v. Ramos*, 420 F. Supp. 2d 241, 247 (S.D.N.Y. 2006); *United States v. Escamilla*, 244 F. Supp. 2d 760, 766 (S.D. Tex. 2003); *United States v. Marquez-Charry*, No. 85 CR 764-16, 1997 WL 208403, at *2 (N.D. Ill. Apr. 22, 1997); *United States v. McGeough*, No. CR-82-00327-11, 1992 WL 390234, at *3–4 (E.D.N.Y. Dec. 8, 1992); *United States v. Perez-Cestero*, 737 F. Supp. 752 (S.D.N.Y. 1990); see also *United States v. Wathne*, No. CR 05-0594, 2008 WL 4344112, at *5–6 (N.D. Cal. Sept. 22, 2008) (noting that “where [the U.S.] government has a good faith belief supported by substantial evidence that seeking extradition from a foreign country would be futile, due diligence does not require [it] to do so” and finding that the U.S. government had a good faith belief that an attempt to extradite the defendant from Russia would fail). *But see* *United States v. Ebanks*, No. 03-20954-CR, 2009 WL 2852737, at *5 (S.D. Fla. Sept. 2, 2009); *United States v. Fernandes*, 618 F. Supp. 2d 62, 69 (D.D.C. 2009); *United States v. Dionisio*, No.04-Cr-30-bbc, 2008 WL 4949914, at *3 (W.D. Wis. Nov. 17, 2008); *United States v. McDonald*, 172 F. Supp. 2d 941, 949 (W.D. Mich. 2001).
235. See *United States v. Manning*, 56 F.3d 1188 (9th Cir. 1995); cf. *McDonald*, 172 F. Supp. 2d at 950.

eign country associated with the prosecution of an extradition request generally is attributable to the defendant.²³⁶

Lastly, the Second and Ninth Circuits have ruled that when a defendant is in a foreign country and extradition under the treaty is not viable, reasonable diligence does not require that the government engage in diplomatic negotiations with the foreign country to secure the defendant's return.²³⁷ The Seventh Circuit has held that if an incarcerated defendant abroad requests his extradition, even though the treaty does not allow it, reasonable diligence may, depending on the facts, require that the government undertake some diplomatic effort to secure his presence.²³⁸

236. See *United States v. Thirion*, 813 F.2d 146, 154 (8th Cir. 1987); *United States v. Reumayr*, 530 F. Supp. 2d 1200, 1206 (D.N.M. 2007); see also *In re Bramson*, No. 96-622, 1997 WL 65499, at *1 (4th Cir. Feb. 18, 1997) (finding that the delay in bringing the defendant to trial was attributable to the fact that he fled from the U.S.); *United States v. Stone*, 510 F. Supp. 2d 338, 343 (S.D.N.Y. 2007) (denying the defendant's motion to dismiss the indictment in part because the defendant was responsible for at least part, and likely all, of the delay). See generally *United States v. Asiegbu*, No. CR 02-00673 MMM, 2009 WL 413132, at *4 (C.D. Cal. Feb. 17, 2009).

237. See *United States v. Diacolios*, 837 F.2d 79, 84 (2d Cir.1988); *United States v. Hooker*, 607 F.2d 286, 289 (9th Cir. 1979); *United States v. Salzmann*, 548 F.2d 395, 402 (2d Cir. 1976); see also *United States v. Tchibassa*, 452 F.3d 918, 925 n.6 (D.C. Cir. 2006) (noting Second Circuit authority that "there is persuasive authority that the government need not take extraordinary measures in order to satisfy the reasonable diligence standard").

238. See *United States v. McConahy*, 505 F.2d 770, 772-74 (7th Cir. 1975).