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New International Focus on Prosecution of White-Collar Crime

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The use of aggressive techniques such as wiretaps in the pursuit of white-collar criminals has greatly expanded the scope of white-collar investigations. U.S. Attorney for the Southern District of New York, Preet Bharara, commonsensically noted that insider trading is a "crime of communication…[and] it doesn't take a rocket scientist to appreciate that if you actually have the communication, you're more able to prove the conduct." ("Bharara Sees Schemes Grow as White Collar Unit Turns 50," Bloomberg, Sept. 13, 2012). Moreover, in today's business world, these "crime[s] of communication" often cross international lines.

Obviously, any prosecution under the Foreign Corrupt Practices Act is international by definition, and the number of prosecutions with a focus on such foreign corrupt practices continues to grow. However, insider trading and other types of white-collar crime have followed suit. As a recent example, U.S. citizen Kareem Serageldin was arrested in London on Sept. 27 for his alleged participation in a reported $3 billion fraud involving subprime mortgage bonds. He is reportedly fighting extradition. ("Ex-Credit Suisse Trader to Fight U.S. Extradition," Reuters, Sept. 27, 2012, available at http://www.reuters.com/article/2012/09/27/us-creditsuisse-serageldin-idUSBRE88Q16420120927).

And in the LIBOR investigations, U.S. law enforcement officials are reportedly seeking to interview "dozens of bankers" in the United Kingdom, which will likely lead to rampant extradition requests should these investigations lead to charges. ("U.S. Libor Probers Said to Seek London Trader Interviews," Bloomberg, Sept. 27, 2012, available at http://www.bloomberg.com/news/2012-09-27/u-s-libor-probers-said-to-seek-london-trader-interviews.html).

The international nature of these cases adds legal complexities not present in traditional domestic cases. Attorneys confront different standards before U.S. courts in their efforts to contest evidence or protect a defendant's constitutional rights, which have largely been shaped by terrorism and drug trafficking cases.

Extradition and Investigation

The legal complexities particular to international white-collar cases begin with the extradition request itself. Fighting extradition is an extremely complex and difficult prospect. Challenging extradition in the United States before an individual has been extradited is almost a non-starter, and once an individual has been extradited, U.S. courts are reluctant to second-guess a foreign court's determinations. See, e.g., *United States v. Campbell*, 300 F.3d 202, 209 (2d Cir. 2002). Thus, if an extradition challenge is to be successful, it normally must be brought in the foreign court with the aid of local counsel. Typically such challenges focus on whether the crime fits the treaty definition of what is an extraditable offense, whether the prosecution may be politically motivated (especially in the case of export violations, for example), and whether whatever rights the individual has in the foreign country will be protected in the United States.

Once a defendant is successfully extradited (or voluntarily waives extradition), attorneys challenging the evidence against a defendant such as their interrogations, searches, or wiretap evidence, may face additional hurdles. For interrogations conducted by U.S. law enforcement abroad, the U.S. Court of Appeals for the Second Circuit has held that while a *Miranda* "framework" is applicable, it necessarily differs "depending on local circumstances." *In re Terrorist Bombings of United States Embassies in East Africa* (Fifth Amendment Challenges), 552 F.3d 177, 202 (2d Cir. 2008). For example, although a defendant has a right to an attorney in the United States, the availability of a licensed U.S. attorney in a foreign country may pragmatically curtail that right leading to a modification of that particular *Miranda* warning. And when being questioned solely by foreign law enforcement, courts have ruled that defendants have no specific *Miranda* protection, although the admissibility of a defendant's statements will still be judged for voluntariness. Id. It gets even more complicated if the defendant is questioned by both foreign and U.S. law enforcement, in which a determination will be made if the interrogation was a "joint venture." See *United States v. Yousef*, 327 F.3d 56, 146 (2d Cir. 2003).

Searches and Wiretaps

Similarly, although U.S. citizens living abroad still have a constitutional Fourth Amendment right against unreasonable searches by U.S. law enforcement, the Second Circuit has ruled that the warrant requirement "has no extraterritorial application." *In re Terrorist Bombings of U.S. Embassies in East Afric*a (Fourth Amendment Challenges), 552 F.3d 157, 171 (2d Cir. 2008).

While in the United States "it is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable," *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006), warrantless searches of an individual's home in a foreign country will be subjected only to a reasonableness test that balances factors such as an individual's expectation of privacy, which may vary depending on the country in which he or she lives. In countries where such expectations of privacy are already low due to overbearing regimes, challenges to extraterritorial searches by U.S. law enforcement may be even more difficult. Moreover, the Fourth Amendment will afford absolutely no protection to aliens searched by U.S. law enforcement outside of this country. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990).

Challenges to wiretaps may also face higher hurdles for the defendant who was living and allegedly conducting his crime abroad. Although domestic and international wiretap interceptions made by U.S. law enforcement both must meet the same probable cause standard in U.S. courts, prosecutors will already have a leg up in fulfilling the additional requirements that must be present in all wire intercept applications, namely, 1) that the wiretap was necessary to the investigation; and 2) that law enforcement did everything possible to minimize their interceptions to only relevant calls.

Typically, challenges based on necessity would entail an analysis of whether law enforcement could have met their investigative goals through other means such as issuing subpoenas or conducting undercover operations. However, in an international investigation, because the investigative resources in a foreign country are much more limited, the ability to show that wiretaps were necessary is that much easier. Similarly, challenges to the length of the wiretap or number of intercepted calls will face a predictable response that international prosecutions take longer and are harder to complete due to a combination of resources, geographic limitations, and in many cases foreign languages. To best face these arguments, one must have a detailed knowledge of the relevant treaties and working relationships between the United States and foreign countries.

Conclusion

As the number of international white-collar cases grow, the contours of a defendant's rights abroad will likely continue to develop. It is unclear how the case law will evolve as courts increasingly are pressed to apply what is predominantly terrorism and drug trafficking precedents to challenges now made by white-collar defendants. What is clear at this point is that a defendant living abroad contesting the circumstances of his arrest, his extradition, or the evidence against him faces an uphill legal battle not present in domestic cases that necessitates a nuanced understanding of not only U.S. law but also the foreign jurisdiction.

–By Michael M. Rosensaft, Katten Muchin Rosenman LLP