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Case Digest

Journal Staff

CASE DIGEST

This Case Digest provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. The cases are grouped in topical categories and references are given for further research.

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I. EXTRADITION

NO FIFTH AMENDMENT DUE PROCESS RIGHT TO A SPEEDY EXTRADITION. *Martin v. Warden, Atl. Penitentiary,* 993 F.2d 824 (11th Cir. 1993).

On December 13, 1974, as Thomas James Martin was driving to his Canadian home, he ran over a seven-year old boy. Not knowing that he had struck the child, Martin left the scene of the accident. Martin had planned to return to the United States on January 1, 1975, as part of the amnesty program for those who had fled the United States to avoid the Vietnam draft. When he realized what he had done, Martin and his family immediately left Canada for the United States. Two days later, the Canadian authorities charged him with criminal negligence causing death and leaving the scene of an accident.

At that time, the extradition treaty between the United States and Canada did not reference either of these offenses.[1] In 1988 Canada and the United States amended their treaty and deleted the schedule of extra-

1. Extradition Treaty, Dec. 3, 1971, U.S.-Can., art. 2, 27 U.S.T. 985.

ditable offenses.[2] The new treaty, which went into effect in November 1991, permits extradition for any conduct that constitutes an offense punishable under the laws of both states by imprisonment of one year or more.

In June 1992 the Canadian government sought to extradite Martin under the new treaty. Police in the United States arrested him in July. A magistrate ruled that Martin was not eligible for bail and could be extradited. The United States District Court for the Northern District of Georgia denied Martin's writ of habeas corpus and upheld the magistrate's order.[3] Martin appealed, complaining that the extradition seventeen years after the accident constituted a denial of due process. On appeal, the United States Court of Appeals for the Eleventh Circuit *Held*: *Affirmed.* There exists no Fifth Amendment due process right to speedy extradition.

The court noted that constitutional guarantees take precedence over treaty provisions. By their nature, however, constitutional procedural protections do not apply in extradition proceedings. An extradition magistrate holds a hearing simply to determine whether deportation comports with the provisions of the proper treaty or convention. As a result, no Sixth Amendment right exists to a speedy trial in extradition cases.

The court held that the Fifth Amendment would not afford rights indirectly that the Sixth Amendment would not confer directly. Further, the court recognized that granting a right to a speedy extradition would force a treaty partner to adhere to the speedy trial rights of the United States Constitution. To grant this right would violate the noninquiry rule, which prohibits extradition courts from assessing the judicial system in the requesting state.

Finally, the court noted that to try Martin in Canada according to Canadian law and procedure would not violate due process. Martin could raise any further objection to extradition with the attorney general, who makes the final decision on extradition.

The concurring judge agreed that delay alone does not violate Fifth Amendment due process in extradition cases, but in some cases delay in addition to other factors could implicate the Fifth Amendment.

Significance: Fifth Amendment due process protections do not guarantee a speedy extradition.

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2. Protocol Amending the Extradition Treaty, Jan. 11, 1988, U.S.-Can., 27 I.L.M. 423.

3. 804 F. Supp. 1530 (N.D. Ga. 1992).

THE SUPPLEMENTAL TREATY BETWEEN THE UNITED STATES AND THE UNITED KINGDOM ALTERS TRADITIONAL EXTRADITION PROCEDURES. *In re Extradition of Howard*, 996 F.2d 1320 (1st Cir. 1993).

On June 1, 1991, police in the United Kingdom found the body of a murdered white female in the truck of an abandoned car at Gatwick Airport. Evidence led the police to suspect that the murderer was Curtis Andrew Howard, an African-American man. Howard returned to the United States, and authorities in the United Kingdom sought to extradite him.

Before a United States Magistrate, Howard did not refute the evidence that suggested that he had committed the murder. Instead, Howard argued that he could not be extradited because he would not receive a fair trial in the United Kingdom. He claimed that British people were prejudiced against African-Americans and that the British judicial system did not provide for voir dire of prospective jurors. The magistrate ruled that Howard could be extradited and on appeal, the District Court for the District of Massachusetts agreed.[4] On appeal, the United States Court of Appeals for the First Circuit *Held: Affirmed.* The Supplemental Extradition Treaty between the United Kingdom and the United States[5] represents a clean break from the prohibition on direct appeals in extradition and from the traditional noninquiry rule on extradition.

Intepreting the plain language of the Supplemental Treaty between the United States and the United Kingdom, the First Circuit found that the treaty permitted successive appeals. The treaty expressly provides that an accused may appeal an extradition decision to a district court or a court of appeals. This provision contravenes the traditional rule that an accused cannot directly appeal an extradition decision. The court, however, found that the treaty specifically provides for at least one appeal as of right. The court further ruled that, in the absence of language to the contrary, an accused is entitled to successive appeals under the treaty. Thus, Howard had the right to appeal to the First Circuit, despite the fact that he had already appealed the magistrate's findings to the district court.

The First Circuit applied the "clearly erroneous" standard of review to the factual issues. In contrast, the court applied a de novo standard of review to the legal questions, including the treaty interpretations.

Finally, the court addressed the noninquiry doctrine. Ordinarily in ex-

4. 791 F. Supp. 31 (D. Mass. 1992).

5. Supplemental Extradition Treaty, June 25, 1985, U.S.-U.K., *reprinted in* S.Exec. Rep. No. 17, 99th Cong., 2d Sess. 15-17 (1986).

tradition proceedings, courts may not consider a requesting state's judicial system. The Supplemental Treaty contains a provision that permits a country to deny extradition when the accused proves that the requesting party will punish on an improper basis.[6] The court interpreted this provision as congressional authorization to inquire into how a requesting state's judicial system would treat a defendant.

Despite these departures from the traditional rules of extradition proceedings, the court ruled that the United Kingdom could extradite Howard. The accused did not meet his burden of proving actual prejudice against him by a preponderance of the evidence.

The concurrence expressed concern that in permitting successive appeals, the court was injecting too much delay into the extradition process.

Significance: Parties subject to extradition under the Supplemental Treaty between the United Kingdom and the United States have the right to successive appeals. Courts ruling on extradition under this treaty have the right to consider how the requesting state's judicial system will treat a particular defendant.

II. REFUGEES

THE PRESIDENT HAS THE POWER TO ORDER THE INTERCEPTION OF SHIPS ON THE HIGH SEAS AND THE FORCIBLE REPATRIATION OF THE PASSENGERS. *Sale v. Haitian Centers Council, Inc.*, _____ U.S. _____, 113 S.Ct. 2549 (1993).

The United States has had a long standing policy that authorizes the United States Coast Guard to intercept vessels illegally transporting Haitians to the United States in international waters. Under this policy, the Coast Guard has the power to return these intercepted vessels to Haiti. After taking office, President Bill Clinton issued an executive order continuing this policy.

Groups representing the intercepted Haitians brought suit in the United States District Court for the Eastern District of New York, complaining that the policy violates Section 243(h)(1) of the Immigration and Nationality Act of 1952[7] (INA) and Article 33 of the United Nations Protocol Relating to the Status of Refugees[8] (Protocol). Both of these provisions prohibit the deportation or return of an alien to a state in which the alien's life or freedom would be threatened on the basis of

6. Punishment based upon race, religion, nationality, or political belief is improper.

7. 8 U.S.C. § 1253(h)(1) (Supp. IV 1988).

8. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 33, 19 U.S.T. 6223.

race, religion, nationality, or politics.

The Eastern District of New York denied the plaintiffs' motion to enjoin the Coast Guard from returning these passengers to Haiti.[9] The United States Court of Appeals for the Second Circuit reversed, finding that these provisions did not apply exclusively to aliens already within the United States.[10] On appeal, the United States Supreme Court *Held: Reversed.*

The Court focused on the precise language in both the INA and the Protocol. In the absence of specific language indicating otherwise, acts of Congress have no application outside the United States. The Court determined that the language of the INA did not suggest that Congress intended the statute to have extraterritorial application. The statute expressly prohibits the attorney general from deporting political refugees. The Court found that the United States authority extends only over aliens within the borders of the United States. The Coast Guard does not act as an agent of the United States in international waters. As a result, the INA does not apply to the Coast Guard's actions outside of the United States.

The Court found the word choice in the statute to be particularly persuasive. The INA refers to "deport" or "return." The Coast Guard neither deports nor returns intercepted Haitians because these Haitians have not yet reached the United States. "Deport" applies to aliens officially within the United States, and "return" applies to aliens who may be within the territory of the United States but are not there legally.

The Court used the same analysis on the language of Article 33 of the Protocol. The Protocol is silent regarding any action a state may take beyond its borders. The Supreme Court found that even if the spirit of the Protocol would prohibit the Coast Guard's actions, the Protocol could not impose restrictions upon a member state that were not contemplated when the state signed the Protocol. The Court concluded that the Protocol was never intended to regulate a state's extraterritorial behavior.

In dissent, Justice Blackmun rejected the majority's detailed scrutiny of the language. He noted that the Court decided that "return" does not mean return. Blackmun further noted that the convention had always applied on the high seas before, and nonreturn had always been the norm under the Protocol.

Significance: Neither the INA nor the United Nations Protocol Relating to the Status of Refugees prohibits the President from ordering the

9. Haitian Centers Council, Inc. v. McNary, 807 F.Supp. 928 (E.D.N.Y. 1992).
10. Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir. 1992).

return of refugees who are intercepted outside of the United States borders.

III. TRADE/ENVIRONMENT

THE OFFICE OF THE TRADE REPRESENTATIVE MUST PREPARE AN ENVIRONMENTAL IMPACT STATEMENT FOR THE NORTH AMERICAN FREE TRADE AGREEMENT. *Public Citizen v. Office of United States Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993).

On October 7, 1992, the leaders of Mexico, the United States, and Canada signed a final draft of the North American Free Trade Agreement (NAFTA).[11] The President of the United States agreed to put the treaty on the "fast track" in Congress. When a treaty is placed on the fast track, Congress has sixty legislative days to approve or reject the treaty in its entirety. Neither the President nor Congress can make any further changes to the document.

Three nonprofit groups with special interests in the environment sued to compel the Office of the United States Trade Representative (OTR) to prepare an environmental impact statement (EIS) on NAFTA. The United States District Court for the District of Columbia *Held: Granted.*

The National Environmental Policy Act (NEPA)[12] requires that all federal agencies prepare an EIS for every major legislative proposal and for any other federal action that would have a significant impact on the quality of the environment. The OTR argued that NEPA did not apply to NAFTA.

The court found that it had jurisdiction over the matter based upon the Administrative Procedures Act (APA),[13] which grants judicial review of any final action of a federal agency. The court found that the NAFTA draft constituted a final action of the OTR. NAFTA became final when the leaders of the three countries signed the agreement. Neither the President nor Congress could make any revisions.

The court was equally unimpressed with the OTR's argument that the treaty represented a presidential action rather than an agency act. The OTR played a major role in negotiating and drafting the final agreement. Based on that involvement, the court found that the OTR

11. The agreement is a comprehensive document signed to create a free trading bloc among Mexico, the United States, and Canada. NAFTA affects every aspect of trade among these three countries.

12. 42 U.S.C. § 421 et. seq. (1982).

13. 5 U.S.C. § 701 et. seq. (1982).

had a duty to prepare the EIS.

The court order requiring the OTR to prepare an EIS did not violate the separation of powers. Congress enacted NEPA, and the United States Constitution endows Congress with the foreign trade powers.

The court held that the plaintiffs had standing to seek declaratory relief because NAFTA poses environmental harm to certain members of the organizations. The court cited *United States v. SCRAP* [14] to support its decision. Accordingly, the plaintiff did not need a geographic nexus, as the allegation of possible environmental harm from NAFTA was enough to confer standing.

Significance: A plaintiff who might suffer from environmental harm that may result from a federal agency act will have standing to seek a motion to compel the agency to prepare an EIS. A final draft of a treaty on the fast track through Congress is a completed act of the agency that helped the President negotiate the treaty. Before Congress votes on the treaty, the agency is responsible for preparing an EIS.

Editor's Note: Just as this issue of the *Vanderbilt Journal of Transnational Law* was going to press, the United States Court of Appeals for the District of Columbia Circuit reversed the district court decision in this case. *Public Citizen v. United States Trade Representative*, 1993 WL 371802 (D.C. Cir. Sept. 24, 1993). The D.C. Circuit found that any effect NAFTA could have on Public Citizen would result from an act of the President. OTR actions would not affect Public Citizen. Consequently, the final draft of NAFTA, prepared without an EIS, did not constitute a final agency action for which Public Citizen could seek judicial review. The court noted that until Congress votes on NAFTA, Public Citizen remains unaffected. The President, not OTR, will submit NAFTA to Congress. Until then, the President has the ability to renegotiate the agreement or to decline to submit it to Congress. Only a presidential act can adversely affect Public Citizen, and such an act is not subject to judicial review.

14. 412 U.S. 669 (1973).