

TESTIMONY

OF

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AND

VICE PRESIDENT
NATIONAL DISTRICT ATTORNEYS ASSOCIATION

BEFORE A HEARING
OF THE
CRIMINAL JUSTICE, DRUG POLICY
AND
HUMAN RESOURCES SUBCOMMITTEE

ON

INTERNATIONAL EXTRADITION

OCTOBER 1, 2003

My name is Jim Fox. I am the elected prosecuting attorney in San Mateo County, California, and am honored to serve as vice president of the National District Attorneys Association. I want to thank you, on behalf of the National District Attorneys Association, for the opportunity to present our concerns on international extradition.

Before I begin my remarks I would ask that my complete testimony be included in the record.

To place my remarks in context – let me briefly tell you about my office and jurisdiction.

The District Attorney's Office is the largest legal office in San Mateo County. I have a staff of 123 including attorneys, investigators, program administrators and support staff. We prosecute felony and misdemeanor crimes committed in San Mateo County as well as traffic infractions, county ordinance violations, and juvenile cases. The office advises and conducts investigations for the Grand Jury. It also conducts investigations on welfare fraud, theft, embezzlement and other cases pending trial. During 2000 there were 2,856 felony case filings, 12,180 misdemeanor filings and 2,190 juvenile filings in the county. The office also acts as Public Administrator to oversee the probate of estates.

My county is as diverse as any in this nation. We have a population of 720,000 representing every culture and ethnic group imaginable. The 2000 Census shows that San Mateo has a white population of 49.8%; Hispanic or Latino of 21.8; African-American of 3.3%; Asian of 19.8% and Pacific Islander of 1.2%.

OUR DIVERSE CULTURE

The people in San Mateo County represent that diverse pattern that we frequently refer to as the "melting pot" or "rainbow" that brings strength to the United States through the continual addition of new talents, cultures, and even cuisines. Every county and community in the United States is under going this continual transformation to one degree or another. This is important for this Committee to recognize, as I'm sure you do, for the issues we want to discuss are about those that break the law - regardless of their heritage or culture - not the hundreds of thousands, or even millions of those who reach our shores as they seek the very thing you are examining today - justice.

Thus in the observations that follow, references to any specific people or ethnic group are by no means meant to disparage those who have willingly elected to leave their birth land to begin a new life here. I use these cases only to illustrate the difficulties facing law enforcement in today's international arena. Criminals are people not ethnic or racial groups and we must be overly cautious of labeling any segment of our population because of the criminal acts of the few.

TRAIN AND BUS STATIONS

We've all see the old grade B movie in which the police chief at a crime scene directs patrolmen to check the bus and train stations to prevent the escape of the obvious suspect.

Perhaps in a more international vein they might wire ahead to the police in England to meet the ocean liner and apprehend the fleeing jewel thief or murderer. If they ever really existed those were truly the "good old days."

Until late in the last century the notion of international issues and the criminal justice system were alien to most of us unless we were one of the major population centers. Perhaps New York or Los Angeles might have cases dealing with "foreign" criminals but the problems associated with bringing back criminals from other countries wasn't something that most of us ever had to deal with - that has changed as our country and the world have changed. A number of things have contributed to this and increased the complexity bringing fugitives to justice.

PROXIMITY OF INTERNATIONAL BORDERS: The availability of international travel has expanded dramatically. There are very few places within the United States from which international flights are not readily available to those that seek them. Most of us can be at an airport with international connections within an hour or two drive. There are 3 international airports within 25 miles of my office. I suspect that with a little planning a criminal could be easily winging his or her way out of the country before the police tape is up at a crime scene.

Additionally we have lengthy international borders with Mexico and Canada that are relatively accessible for many who want to flee and are also relatively easy to cross given both the nature of our relationship with these neighbors and the thousands of miles of minimally controlled borders.

DEMOGRAPHIC CHANGES: The second observation I would offer is the demographic shift in where our immigrant population resides. Where once our immigrant communities were in our largest cities now they can be found in even our smallest counties as they seek the very same things in life that we all seek. From the local law enforcement perspective this growing cultural diversity presents new challenges in providing safety to these new residents.

I do not mean to imply that the presence of these new residents increases criminal activity -only that this added international dimension to almost every community in the nation also creates new issues of international law that many local prosecutors and police have not faced before. Reading consular rights under the Vienna Convention; understanding cultural differences in dealing with conflict and violence; and trying to get witnesses, evidence and suspects from other countries is a growing problem for many of us.

CHANGING MEANING OF CITIZENSHIP: Next I must mention the changes that have occurred to the idea of "citizenship" - changes at least from the perspective of our nation. In the United States we view citizenship in a very "black-and-white" manner that is not necessarily viewed in the same concrete fashion by many other nations. I think we view our citizenship - whether by birth or having earned it through immigration - as a singular honor that renounces all other ties and heritage. A growing number of nations have

adopted a more flexible idea of citizenship that permits, and even encourages, dual citizenship. On a personal note, I am a first generation American and because of this my youngest son has dual citizenship with Ireland.

As we try to protect our citizens, so too, do other nations. Unfortunately because of this dual citizenship can clash with extradition as we try to have a suspect returned from their birth land. Other nations may be willing to try the suspect under their own laws but this neither brings justice to the victims in the United States and, in some cases, can make a mockery of justice.

INCREASING INTERNATIONAL CRIMINAL TIES: We must also realize the intentional criminal tentacles that are present in a "day-to-day" sense in many of the criminal acts that are carried on in the United States and these have an apparent impact on our international presence. You are familiar with the drug gangs that work internationally but may not realize that many of our youth gangs have international "chapters" that support their activities both within the United States and elsewhere.

Today we also recognize that terrorist links - such as those that collect and launder funds for international terrorist groups are international issues that local law enforcement must learn to recognize and work to the end.

The increasing ties to international criminal groups means that those who commit crimes in the United States have a group willing to harbor them outside the United States and, most likely, methods of providing transportation for them.

JUSTICE CONFUSED: A fifth impact on our international problem are the differing ideas of what constitutes "justice." In the United States our people, through their legislative bodies, have determined what actions constitute criminal offenses and what measures are appropriate punishments. Not every nation shares these concerns and we do not try and force our values on them nor should they try to force theirs on ours.

There are differences in criminal offenses like the use of illegal drugs or telemarketing fraud and in beliefs on capital punishment that complicate our legal relationships with other nations and impact dramatically on issues involving extradition. As the debate on the appropriateness of capital punishment intensifies, the number of nations that will not extradite an individual facing the death sentence has grown significantly. Even more problematic is the nations that will not extradite an individual facing a sentence, such as life, that they find inhumane.

NEW CONCEPTS OF JURISDICTION: Lastly, I must mention a dynamic change in our idea of criminal jurisdiction. One that provides a growing impact on not only our system of justice but also that of every nation in the world that adheres to the Rule of Law. With the advent of computers and the Internet it is becoming more common for criminal offenses to be committed by individuals who never set "physical" foot in the jurisdiction where the victim or victims reside.

You can steal from banks in St Petersburg, Russia, and St Petersburg, Florida, and never physically be in either Russia or the United States; you can send child porn anywhere in the world but stay in a county that does not recognize its danger; you can defraud elder citizens of their life savings with the push of a computer key or phone button. The idea of extraditing an individual based on their “electronic” presence in committing a criminal act will be a very challenging growth to the traditional notion of jurisdiction.

To illustrate some of these problems I would like to provide details on some cases of notoriety to the Committee.

DIFFERING IDEAS ON CITIZENSHIP

On February 25, 1999, the Supreme Court of Israel ruled that it would not extradite Samuel Sheinbein to Maryland to face murder charges. This culminated a two-year effort to have him returned to Maryland to be held accountable for his criminal acts. As a minor at the time of the offense he was not eligible for a sentence of death and faced, at the maximum, a life sentence

He had fled to Israel on Sept. 21, 1997, two days after the mutilated and burned body of an acquaintance, Alfredo Tello Jr., was discovered in the garage of a house in Montgomery County, Maryland.

The United States had requested that he be returned to stand trial based on an extradition agreement between the two countries. The agreement does not protect citizens of either country from being extradited to the other. A subsequent amendment to the Israeli Extradition Law, approved after the agreement with Washington was signed, prevented the extradition of Israeli citizens to other countries, including the United States.

In addition to the formal request the Attorney General of the United States and the Secretary of State, as well as numerous members of the Congress supported the request with personal pleas.

The rationale for the decision of the Israeli Supreme Court was that because his father was born in Israel (before it even became a nation) it qualified Sheinbein for Israeli citizenship. This determination triggered the Israeli law forbidding the extradition of its citizens, in turn leading to the high court's decision to not send Sheinbein back to stand trial.

It must be noted that Samuel Sheinbein was born in the United States and, prior to his flight, had, apparently, never expressed any intent in being a citizen of Israel.

Tried by an Israeli court he was eventually sentenced to 24 years in prison.

A similar fact pattern comes out of a case from California. On August 29, 1998, 12-year-old Steven Morales was playing baseball out in front of his home when he was caught in the crossfire of gang warfare and shot in the head. His mother witnessed the murder. As

the suspect car approached, Steven dove for cover, pulling a younger child to safety. He survived for 24 hours and the family donated his organs to save several other lives.

The shooter, Alvaro Jara, fled to a remote area in Mexico where he has continued the family drug trade. His brother, Oscar Jara, committed a similar gang style murder and joined Alvaro in Mexico.

Alvaro Jara is a US citizen of Hispanic descent and extradition was sought shortly after the murder. Mexico denied the request based on nationality.

DIFFERING CONCEPTS OF JUSTICE

Deputy David March, Los Angeles County Sheriff's Department, was murdered during a traffic stop on April 29, 2002. The suspect had been deported three times, was a convicted methamphetamine dealer and weapon's offender and at the time of the murder was wanted on two unrelated counts of attempted murder. He fled to Mexico within hours of the murder.

The punishment in California for the murder of a police officer is death or life without the possibility of parole. Even if it were possible to dismiss the "special circumstance" of murdering a police officer, and thus eliminate the punishments of either life without parole or the death sentence, the suspect he would still be charged with an offense bearing a "life" sentence. First-degree murder in California is punishable by 25 years - to- life and second-degree murder is 15 years- to-life. Neither the judge nor the prosecutor can give any assurances about the eligibility for parole.

Mexican law, as interpreted by their court system, does not recognize either capital punishment or a "life" sentence as legitimate punishments. Therefore, the only way to gain extradition would be to reduce the charges to an assault with a deadly weapon or manslaughter or some other charge that carries a determinate sentence with a guarantee of parole. To do would violate notions of equal protection and send a message that if you kill a police officer and can flee the jurisdiction, you will get more favorable treatment.

Los Angeles has not submitted an extradition request nor do they plan to until the "life assurances" issue has been resolved.

DISAGREEMENT WITH CAPITAL PUNISHMENT

Another case involving extraordinary efforts to extradite a criminal made national and even international headlines. A true counter culture leader of the '60's, Ira Einhorn jumped bail and fled the United States in 1981 shortly before he was to be tried for the death of his former girl friend, Holly Maddux. He did escape justice for the next two decades, fleeing through Ireland and Sweden, before assuming an identity and life in France.

In 1993, Ira Einhorn was tried in absentia in Philadelphia – a perfectly acceptable practice after an initial appearance... The trial was held as a normal murder trial, with a judge, a full jury, witnesses, evidence and a legal team -- but without the suspect or a defense counsel. At its conclusion, Einhorn was convicted and given the death sentence for the murder of Holly Maddux,

In 1997, U.S. authorities discovered Einhorn was living in France but bringing him to justice would prove to be more difficult than could be imagined.

French authorities balked at extraditing Einhorn, saying they could not hand over a man who had been convicted without the chance to defend himself. According to established rules of the European Convention on Human Rights, no alleged criminal was ever to be tried in absentia, that is, without his or her actual presence in court. French officials found such a process unconscionable. Additionally, the imposition of a death sentence without legal representation was considered inhumane; particularly since France opposes capital punishment.

In setting the terms to return Einhorn, France required both that he be retried for the murder offense and that he not face a death sentence.

A major problem in obtaining Einhorn's return was that none of the judicial authorities in Pennsylvania, who might normally ask for a new trial, had the legal authority to do so since he had already been convicted.

"They couldn't do it through the legal system," says James Beasley, a Philadelphia lawyer who represented the Maddux family in a 1999 wrongful death suit against Einhorn. "A court couldn't do it. A district attorney couldn't do it. He got a conviction, he can't file for a new trial — that would be absurd. The only possible way to satisfy the French was through the legislature."

In 1998, the Pennsylvania legislature responded by passing a new and controversial law granting fugitives in Einhorn's situation the option of a new trial if they request one.

In fighting his extradition, Einhorn argued that the statute was unconstitutional because it violated a separation of powers between the judicial and legislative branches of Pennsylvania's government. Einhorn insisted that the law had been rigged, solely to ensure his extradition back to the U.S.

THE HOBBSIAN CHOICE

I recently had to make a decision that more and more prosecutors are, unfortunately, having to make. When four people were killed in San Mateo over an apparent drug debt, our police arrested two of four suspects. The other two, including the man we believed was the main instigator, fled to Mexico.

Interestingly, the four victims were citizens of Mexico, as are the two suspects in Mexico. The two defendants in our custody are US citizens of Mexican decent.

As the district attorney I had to decide on how to proceed with my case to serve the interest of justice both for the victims and for those in custody. I could have requested extradition by invoking a 1978 U.S.-Mexico treaty that would limit the punishment the two fugitives would face or I could have allowed Mexican authorities to bring the men to trial, risking acquittal, under the same sentencing restrictions. I would note that Arizona has apparently had some success with the latter method but having to absorb the costs for the trials through the state attorney general's office.

My dilemma was in dealing with the two men already in our custody so I did not take either of these steps. To get the fugitives back, or to have them tried in Mexico, I would have to agree to terms that I am not willing to offer the two suspects in our custody. Justice is supposed to mete out impartially not based on luck and refuge in a sympathetic jurisdiction.

Moreover, under the extradition treaty if the Mexican courts had denied extradition on the basis of nationality then they would have to be tried by their courts. In California, and several other states, once the suspect is tried by a foreign court the rules of double jeopardy apply and I could never try them no matter the outcome in the foreign court.

I am hoping that the two men will either return to the United States and be apprehended or be taken into custody in another jurisdiction with more favorable extradition laws. I realize that neither may ever appear in a California courtroom but am willing to take that chance rather than see injustice done.

DEPARTMENTS OF STATE AND JUSTICE

Working in the international arena is a challenging effort. National sovereignty and recognition of the Rule of Law as a guiding democratic principle make resolution of issues, such as international extradition, increasingly difficult among peers. We recognize that both the Departments of Justice and State have been working on the problems of international extradition and hope that they will continue to take into great consideration the requirements of the local system of criminal justice as they pursue efforts to bring those who seek haven internationally to justice

The Departments of State and Justice approached the National District Attorneys Association in 1996 in regard to a blanket waiver provision to be added to newly negotiated or renegotiated extradition treaties.

Our Board of Directors, after reviewing the options, adopted a policy stating:

“WHEREAS, prosecutors make no more difficult or important decision than to seek, if appropriate, the death penalty; and

WHEREAS, the decision to seek the death penalty is based upon legal standards and factual circumstances unique to each case and to each defendant; and

WHEREAS, request for extradition from another country, in capital cases, will contain variable facts and legal principles that cannot be addressed unilaterally; and

WHEREAS, prosecutors, in any case, must make decisions in the best interest of the people that he or she represents;

THEREFORE, BE IT RESOLVED, THAT the National District Attorneys Association strongly opposes any attempt by the Department of State, on behalf of the United States, to enter into any extradition treaty that unilaterally waives the right of the local prosecutor from seeking the death penalty in any or all cases.”

To the best of our knowledge the State Department has adhered to our position.

For several years there was, within the Department of Justice, a liaison position (funded by the Department, but staffed by local prosecutors and state attorneys general) that was to coordinate extradition efforts by local prosecutors. The concept had been developed by the international law division within the department and was a very valuable effort. Unfortunately, it ran afoul of budget cuts and was discontinued several years ago.

WHAT CAN WE DO ABOUT INTERNATIONAL EXTRADITION

Recognizing that many of the nations with whom we have issues arising over extradition live under the Rule of Law we must be cognizant of, and respect, their sovereignty. But getting changes to these systems is not impossible and we must make every effort to accomplish this.

It is my understanding that after the Sheinbein case Israel, at least in part based on United State efforts, changed its laws to require a declaration of citizenship *before* the commission of a criminal offense and not after seeking a haven.

We have also just seen in Belgium the application of diplomacy to change laws in regard to international war criminals and the lessons learned from that effort must be examined and applied, as appropriate, to the problem of international extradition.

Here at home there are a number of things that we – both the Congress and the justice community – can accomplish to help in this effort.

First, the Departments of State and Justice can continue to make every effort to have extradition laws and agreements changed to reflect “full faith and credit” to the legal systems of other nations. They can also have the United States represented, as

appropriate, in foreign appellate cases impacting on extradition. For instance, if the Mexican courts have the opportunity to revisit their decision of life sentences the United States should be represented in that effort.

At the state and local level efforts must be made to provide training for prosecutors in the growing international aspects of their responsibilities. Additionally re-establishing the liaison position within DOJ to provide assistance to local law enforcement would be a big step in helping with international law problems. Both these, would, however, require Congressional interest and funding to become a reality.

On behalf of all the local prosecutors of the United States I want to thank you again for recognizing the increasing problem we are facing with international extraditions. We promise to continue to work with you, the Department of Justice and the State Department to do everything in our power to overcome these problems

Against this array of challenges we have to use our skills, and our laws, to ensure that our citizens are protected and that those that would do them harm are brought to justice.

JAMES P. FOX

James P. Fox is currently the District Attorney for the County of San Mateo, a position he has held since first elected to office in 1983. He has also served as County Counsel from 1983 to 1988. From 1974 to 1983, Mr. Fox was a partner in the law firm of Haning, Fox, and Guheen, and was the City Attorney for Half Moon Bay. He served as the Deputy District Attorney for the Criminal Division at the San Mateo County District Attorney's Office from 1970 to 1973.

Mr. Fox has been a member of both the California Peace Officers' Association and the California District Attorneys' Association since 1983; and he has been a member of the San Mateo County Bar Association since 1973. He has been on the Board of Directors of the National District Attorney Association since 1995 and has been a vice president since 2001

He earned a Bachelor of Science and Juris Doctorate degrees from the University of San Francisco.