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## **A forgotten instrument: the 1887 U.S. Russia Extradition Treaty**

**Samuel Jason D.**

Juris Doctorate Candidate,  
Bachelor of Science in Paralegal Studies,  
Student Bar Association President,  
Pennsylvania State University, Dickinson School of Law,  
P.O. Box 16802, University Park, Lewis Katz Building, Pennsylvania, USA;  
e-mail: [jds543@psu.edu](mailto:jds543@psu.edu)

### **Abstract**

The Edward Snowden saga was easily the most compelling story of 2013. The validity of 1887 extradition treaty between the United States and Russia adds to the intrigue. The 1887 extradition was literally a forgotten instrument. While many aspects of the legal complications surrounding Snowden were covered ad nauseam by the international press, not much was mentioned about the 1887 extradition treaty between the United States and Russia. After 1941, the United States Treaties in Force no longer listed the 1887 extradition treaty. Although the 1887 treaty was never formally abrogated, the United States State Department does not recognize the 1887 treaty as valid. This paper will give a basic history behind the treaty, abrogation methods as related to the treaty, and examine the rationale behind why the United States refuses to recognize the treaty. It will ultimately show why the United States' rationale for refusing to acknowledge the treaty is legally invalid. Because of the failure of the United States to abrogate the treaty in accordance with customary international law, the 1887 extradition treaty is still in legal effect.

### **Keywords**

Extradition, Snowden, Abrogation, United States, Russia, Treaty.

## Introduction

On 1 December 2012, *The Guardian* journalist and blogger, Glenn Greenwald, received an email asking for his public encryption key.<sup>1</sup> Greenwald did not have one, so the anonymous emailer sent him a step-by-step video on how to set one up. Frustrated by Greenwald's lack of action, the anonymous emailer disappeared; Greenwald resumed his normal activities. But this was not the end of their interaction. Six months and countless thousands of classified documents later, the "most serious compromise of classified information in the history of the U.S. intelligence community" had occurred.<sup>2</sup>

The anonymous emailer was Edward Snowden. Snowden was a contractor with the management consulting, technology, and engineering services firm, Booz Allen Hamilton (Booz Allen). Snowden had come to work at Booz Allen after he found an information technology job with the Central Intelligence Agency (CIA).<sup>3</sup>

While with Booz Allen, Snowden worked in the National Security Agency (NSA) office in Oahu, Hawaii.<sup>4</sup> That was where Snowden came across the highly classified material that he would soon expose. Snowden gathered the material and traveled to Hong Kong, where he turned it over to Glenn Greenwald for world-wide publication. Snowden's documents contained detailed information on the vast and comprehensive NSA surveillance programs that target American citizens living within the United States.

After Snowden's information was published, he requested that his name be revealed. Once his name was made public, he had to go flee the United States. Because of the nature of the materials that he published, many countries would not permit Snowden to enter their territory or transit their airspace. Further complicating matters, the United States revoked Snowden's passport. To the chagrin of the United States, Hong Kong allowed Snowden to board a flight to Moscow, even with a revoked passport, and in spite of the fact that the United States had asked the Hong Kong authorities to detain him.<sup>5</sup> The revocation of his passport effectively ended his abil-

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1 Reitman, J. (2013), "Snowden and Greenwald: The Men Who Leaked the Secrets", *Rolling Stone Magazine*, available at: <http://www.rollingstone.com/politics/news/snowden-and-greenwald-the-men-who-leaked-the-secrets-20131204>

2 Ibid.

3 "Edward Snowden Biography", available at: <http://www.biography.com/people/edward-snowden-21262897>

4 Ibid.

5 Brown, S. (2013), "Russia to U.S.: Edward Snowden extradition request 'unacceptable'", *New York Daily News*, available at: <http://www.nydailynews.com/news/world/>

ity to travel any farther. This left Snowden stranded in the Moscow Sheremetevo airport transit zone; unable to officially enter Russia, and unable to return to where he came from. Snowden would remain in that transit zone for over a month before being able to enter Russia.

The United States aggressively sought Snowden's repatriation. A spokeswoman for the National Security Council, Caitlin Hayden, said that the United States asked "... the Russian government to take action to expel Mr. Snowden without delay and to build upon the strong law enforcement cooperation we have had, particularly since the Boston Marathon bombing".<sup>6</sup> United States Secretary of State John Kerry said "I'm not going to get in to the details of what I think is going on, but we hope that the Russians will do the right thing. We think it is very important in terms of our relationship. We think it is very important in terms of rule of law".<sup>7</sup> Kerry's remarks earned a sharp rebuke from Russia Foreign Min-

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russia-slams-u-s-unacceptable-demand-extradite-edward-snowden-article-1.1381671

6 Ibid.

7 Nemtsova, A., Bruton, B.F. (2013), "Kerry to Russia: 'Do the right thing' and return NSA leaker", *NBC News*, available at: [http://worldnews.nbcnews.com/\\_news/2013/06/24/19110438-kerry-to-russia-do-the-right-thing-and-return-nsa-leaker](http://worldnews.nbcnews.com/_news/2013/06/24/19110438-kerry-to-russia-do-the-right-thing-and-return-nsa-leaker)

ister, Sergey Lavrov, who said that: "We consider the attempts to accuse Russia of a violation of U.S. laws and even some sort of conspiracy, which on top of all that are accompanied by threats, as absolutely ungrounded and unacceptable. There are no legal grounds for such conduct of U.S. officials".<sup>8</sup> As to the requests by the United States Government, President Vladimir Putin said that his hands were tied because Russia could "...only hand over foreign citizens to states with which it has an extradition treaty".<sup>9</sup>

According to the United States Department of State, it is "the longstanding position of the United States that there is no extradition treaty in force" between the United States and Russia.<sup>10</sup> But in 1887, a formal extradition treaty was signed between the United States and the Russian Empire. This treaty, according to Saak Karapetyan, head of in-

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8 Brown, S. (2013), "Russia to U.S.: Edward Snowden extradition request 'unacceptable'", *New York Daily News*, available at: <http://www.nydailynews.com/news/world/russia-slams-u-s-unacceptable-demand-extradite-edward-snowden-article-1.1381671>

9 Ibid.

10 Schreck, C. (2013), "From Tsar to Snowden, US-Russian Extradition Deal Saw Quiet Demise", *Ria Novosti*, available at: <http://en.ria.ru/world/20130629/181944016-print/From-Tsar-to-Snowden-US-Russian-Extradition-Deal-Saw-Quiet-Demise.html>

ternational legal cooperation at Office of the Procurator General of the Russian Federation, may still be in force: "The Russian Empire signed a convention on extradition with the United States in 1887. No one ever canceled it and no one ever renounced it," Karapetyan said.<sup>11</sup>

For Edward Snowden, the 1887 treaty could end up being a point of vulnerability. If the treaty is still in force, the ramifications for Snowden are significant. His escape to Russia may have resulted in more than he bargained for in among the most compelling events of 2013. The overall saga and the revelations that Snowden produced nearly earned him the *Time Magazine* "Man of the Year" award.<sup>12</sup>

## Snowden Background

Edward Snowden, born on 21 June 1983, was raised in Elizabeth City, North Carolina.<sup>13</sup> His mother, Elizabeth Barrett

Snowden, works as the chief deputy clerk for administration and information technology at the United States District Court in Baltimore, Maryland.<sup>14</sup> His father, Lon Snowden, is a retired United States Coast Guard officer.<sup>15</sup> Snowden dropped out of high school and earned his General Education Diploma through self-study.<sup>16</sup> He attended Anne Arundel Community College in Arnold, Maryland off and on for several years but never graduated.<sup>17</sup> After an attempt to enlist in the United States Army Reserves failed, and Snowden again dropped out of Anne Arundel, he ended up working for the NSA as a security guard.<sup>18</sup> Shortly thereafter he was hired by the CIA for an information technology position.<sup>19</sup> In 2009 Snowden left

<sup>11</sup> Ibid.

<sup>12</sup> Mirkinson, J. (2013), "Time Criticized For Choosing Pope Francis Over Edward Snowden As Person Of The Year", *Huffington Post*, available at: [http://www.huffingtonpost.com/2013/12/11/time-edward-snowden-person-of-the-year-pope-francis\\_n\\_4424890.html](http://www.huffingtonpost.com/2013/12/11/time-edward-snowden-person-of-the-year-pope-francis_n_4424890.html)

<sup>13</sup> "Edward Snowden Biography", available at: <http://www.biography.com/people/edward-snowden-21262897>

<sup>14</sup> Marbella, J., Bengali, S., Cloud, D. (2013), "Details about Edward Snowden's life in Maryland emerge", *Baltimore Sun*, available at: [http://articles.baltimoresun.com/2013-06-10/news/bs-md-snowden-profile-20130610\\_1\\_anne-arundel-county-arundel-high-the-guardian](http://articles.baltimoresun.com/2013-06-10/news/bs-md-snowden-profile-20130610_1_anne-arundel-county-arundel-high-the-guardian)

<sup>15</sup> Maceda, J. (2013), "Snowden's father: Edward is 'a whistleblower in the best sense'", *NBC News*, available at: [http://worldnews.nbcnews.com/\\_news/2013/10/11/20924309-snowdens-father-edward-is-a-whistleblower-in-the-best-sense](http://worldnews.nbcnews.com/_news/2013/10/11/20924309-snowdens-father-edward-is-a-whistleblower-in-the-best-sense)

<sup>16</sup> "Edward Snowden Biography", available at: <http://www.biography.com/people/edward-snowden-21262897>

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

his job with the CIA and began working for Booz Allen. There he began collecting documents that contained detailed information on practices that he found "disturbing and invasive".<sup>20</sup>

On 20 May 2013, Edward Snowden took leave from his job at Booz Allen and traveled to Hong Kong.<sup>21</sup> There he met with Glenn Greenwald and Laura Poitras and handed over thousands of highly classified documents he had gathered while working for Booz Allen.<sup>22</sup> On 5 June 2013, the *Guardian* published documents obtained from Snowden that revealed massive spying programs on United States citizens by the NSA.<sup>23</sup> Edward Snowden was revealed as the source behind the leaks on 9 June.<sup>24</sup> Once it was known the Snowden was in Hong Kong, he most likely sought to leave that

country because of the 1996 Agreement for the Surrender of Fugitive Offenders (extradition treaty) between the United States and Hong Kong.

Other nations were quick to react to Edward Snowden. The British authorities warned airlines to prevent Snowden from boarding any flights that were bound for the United Kingdom.<sup>25</sup> The Home Office sent multiple airlines a document which "... had a photograph of Mr. Snowden, gave his date of birth and passport number and carried the words: 'If this individual attempts to travel to the UK: Carriers should deny boarding'".<sup>26</sup> The Home Office warned that airlines may be held "... liable to costs relating to the individual's detention and removal" should they allow him to travel to the United Kingdom.<sup>27</sup> Great Britain was determined to cooperate with the United States Government to the fullest extent possible. This contrasted with the authorities in Hong Kong, who did not honor the requests from the United States to detain Snowden.<sup>28</sup>

<sup>20</sup> Ibid.

<sup>21</sup> "Edward Snowden timeline of events", *Politico*, available at: <http://www.politico.com/story/2013/08/edward-snowden-timeline-of-events-95057.html>

<sup>22</sup> Reitman, J. (2013), "Snowden and Greenwald: The Men Who Leaked the Secrets", *Rolling Stone Magazine*, available at: <http://www.rollingstone.com/politics/news/snowden-and-greenwald-the-men-who-leaked-the-secrets-20131204>

<sup>23</sup> "Edward Snowden timeline of events", *Politico*, available at: <http://www.politico.com/story/2013/08/edward-snowden-timeline-of-events-95057.html>

<sup>24</sup> Ibid.

<sup>25</sup> "Edward Snowden: UK warning aims to keep away US leaker", *BBC News*, available at: <http://www.bbc.co.uk/news/uk-22902098>

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Brown, S. (2013), "Russia to U.S.: Edward Snowden extradition request 'unaccept-

On 22 June 2013 Snowden was charged by the United States with espionage and theft.<sup>29</sup> One day later he departed Hong Kong on a flight bound for Moscow. It was believed that Snowden would seek to go Iceland or Ecuador and request asylum there based on information obtained from Wikileaks officials.<sup>30</sup> Iceland and Ecuador have extradition treaties with the United States according to the 2012 Treaties in Force, but are seen as receptive to applications for political asylum.<sup>31</sup> Snowden never arrived in any of those countries though, and his whereabouts were unknown.

On 25 June it was revealed by President Putin that Snowden was in the transit zone of the Sheremetievo airport and would not be extradited to the United States.<sup>32</sup> This announcement came despite

United States protestations that Russia "... has a 'clear legal basis' to expel the leaker".<sup>33</sup> President Obama said that he was not going to participate in any "wheeling, dealing and trading" to get Snowden extradited from Russia to the United States: "I'm not going to be scrambling jets to get to a 29-year-old hacker".<sup>34</sup> Putin said that for Snowden to receive asylum in Russia, he must agree to stop leaking secrets.<sup>35</sup> Despite his initial refusal, Snowden eventually agreed to President Putin's conditions. So after a little more than a month in Moscow's Sheremetievo airport, on 1 August 2013 Snowden was granted temporary asylum for one year.

### 1887 Extradition Treaty

The 1887 extradition treaty between the United States and Russia

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able", *New York Daily News*, available at: <http://www.nydailynews.com/news/world/russia-slams-u-s-unacceptable-demand-extradite-edward-snowden-article-1.1381671>

29 "Edward Snowden timeline of events", *Politico*, available at: <http://www.politico.com/story/2013/08/edward-snowden-timeline-of-events-95057.html>

30 Ibid.

31 Yanofsky, D. (2013), "Map: How to stay out of reach of US extradition treaties", *Quartz*, available at: <http://qz.com/97428/map-how-to-stay-out-of-reach-of-us-extradition-treaties/>

32 "Edward Snowden timeline of events", *Politico*, available at: <http://www.politico.com/story/2013/08/edward-snowden-timeline-of-events-95057.html>

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[com/story/2013/08/edward-snowden-timeline-of-events-95057.html](http://www.politico.com/story/2013/08/edward-snowden-timeline-of-events-95057.html)

33 Ibid.

34 Warren, L. (2013), "Obama says he won't engage in 'wheeling, dealing and trading' to get Edward Snowden extradited to the U.S.", *Daily Mail*, available at: <http://www.dailymail.co.uk/news/article-2349744/Obama-says-wont-engage-wheeling-dealing-trading-Edward-Snowden-extradited-U-S.html>

35 "Edward Snowden timeline of events", *Politico*, available at: <http://www.politico.com/story/2013/08/edward-snowden-timeline-of-events-95057.html>

could have obliged Russia to repatriate Snowden. However, Russian Foreign Minister Sergey Lavrov says that the Russian Federation never signed an extradition treaty with the United States.<sup>36</sup> United States Secretary of State John Kerry also said that there is no extradition treaty with Russia.<sup>37</sup> The head of international legal cooperation at the Office of the Procurator General of the Russian Federation, Saak Karapetyan, would say that both are wrong. Karapetyan is correct. The 1887 convention between the United States of America and the Empire of Russia for the extradition of criminals had been formally recognized by the United States as recently as the 1941 *Treaties in Force* published by the Department of State. No record of the 1887 extradition convention being formally abrogated, by either Russia or the United States, has been found.

The 1887 treaty was concluded on 28 March 1887. Its ratification was

advised by the Senate with amendments on 6 February 1893. It was later ratified by the President Grover Cleveland on 14 February 1893. The instruments of ratification were exchanged between the two countries on 21 April 1893; and the treaty was proclaimed on 5 June 1893. It is possible that the reason that the treaty was not ratified until 1893 was because President Cleveland served two non-consecutive terms in office. The treaty was signed near the end of his first term, and he ratified the treaty as soon as he began his second term. The signatories to the treaty were: President Cleveland's first Secretary of State, Thomas Bayard; Russia's Minister to the United States, Karl de Struve; and Russia's Chargé d'Affaires, Roman Rosen.

The treaty contained eleven articles and listed twelve crimes that would be extraditable offenses. Snowden was charged with theft in the United States. Article II section 4 of the treaty details some of the possible crimes that warrant extradition that Snowden could be charged with. "Burglary, defined to be the act of breaking, and entering by night, into the dwelling-house of another, with intent to commit felony; robbery, defined to be the act of feloniously and forcibly taking from the person of another money or goods, by violence or putting him in

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36 Chichakyan, G. (2013), "Russia says 'no Cold War' with US but Obama wants to 'pause and reassess ties'", *RT*, available at: <http://rt.com/news/lavrov-kerry-snowden-syria-303/>

37 "US officials challenge Putin over Snowden claims, push for extradition", *Fox News*, available at: <http://www.foxnews.com/politics/2013/06/25/russian-official-balks-at-us-extradition-demand-for-snowden/>

fear; larceny, when the value of the property stolen shall exceed two hundred dollars, or three hundred (rubles)".<sup>38</sup> Article XI of the treaty provides that: "[The treaty] shall take effect on the twentieth day after its promulgation in the manner prescribed by the laws in force in the territories of the contracting parties. It shall remain in force for six months after notice of its termination shall have been given by either of the contracting parties." Thus, once promulgated, the treaty remains in force until formal notice of termination has been given to the other party.

The treaty was not without its share of controversy when it was first announced. The American explorer George Kennan's (cousin of diplomat and historian George F. Kennan) opinions were published in the *Los Angeles Herald*. The editor noted that Kennan was opposed to the treaty because he felt that the treaty violated the "...well established principle of international policy that [a]n extradition treaty ought not to be concluded between two nations whose systems of criminal jurisprudence are not in accord, and whose political institutions are based upon mutually con-

tradictory and (antagonistic) conceptions of the (citizen's) relation to the state".<sup>39</sup> The treaty also was the subject of a formal protest by the Polish community in Chicago, who organized five thousand people for "...the purpose of instituting a protest against the proposed extradition treaty between the United States and Russia ...".<sup>40</sup> One reason for their anger was that the "...proposed treaty with the base Russian government is entirely opposed to American ideals ...".<sup>41</sup> Most of the opposition to the treaty was based on its provision concerning the crime of assassination: "Interest centered on the sections making attempts upon the heads of Governments, or accessoryship to such attempts, extraditable".<sup>42</sup>

No notice of termination has ever been discovered by the United States, the Russian Federation, or the United Nations. The treaty was last acknowledged by the United States in the 1941

39 "The Russian Extradition Treaty", *Los Angeles Herald*, available at: <http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=LAH18930508.2.25#>

40 Chicagoski, D. (1893), "Protest against the American Extradition Treaty with Russia 5,000 Poles Attend Mass Meeting", available at: [http://flps.newberry.org/article/5423968\\_8\\_0800](http://flps.newberry.org/article/5423968_8_0800)

41 Ibid.

42 "Russian Extradition Treaty – It is at last made law of the land", *Record-Union* [Sacramento], 7 June 1893.

38 *Extradition Convention (1893)*. 28 Stat. 1071. Treaty Series 305. II Treaties (Malloy) 1527.

*Treaties in Force.* In 1947, when the Soviet Union requested the extradition of Kirill Alekseev, the State Department told Alekseev's lawyer that they did not know whether an extradition agreement was in place and would check to see.<sup>43</sup> The State Department returned with their answer, "It is a well-established principle of international law that no right to extradition exists apart from treaty. No extradition treaty exists between the United States and the Soviet Union".<sup>44</sup> It is not clear how the State Department came to that conclusion. No records can be found during that six year span that would support the United States' claim to the non-existence of an extradition treaty. Article 65 of the 1969 Vienna Convention on the Law of Treaties states that: "A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for...terminating it...*must* notify the other parties of its claim" (emphasis added). The State Department has never furnished an answer on how the 1887 treaty was abrogated.

43 "Russia Seeks to Enlist US Help to Return Citizen", *Times Record* [Troy], 6 Jan 1947.

44 Peralta, E. (2013), "3 Extradition Cases That Help Explain U.S.-Russia Relations", *NPR*, available at: <http://www.npr.org/blogs/thetwo-way/2013/08/07/209846990/3-extradition-cases-that-help-explain-u-s-russia-relations>

## Treaty Abrogation

Fundamentally, abrogation of United States treaties can occur in six different ways: 1) Abrogation by Act of Congress; 2) Abrogation By President Following Joint Resolution of Congress; 3) Abrogation By Concurrent Resolution; 4) Abrogation By President Following Approval by Senate; 5) Abrogation By President Preceding Congressional Approval; 6) Abrogation by President Alone. Of the six possible abrogation methods, five have been used in American history. No single abrogation method has ever been endorsed by Congress or by the State Department as the official treaty abrogation policy of the United States. All six are considered potentially legitimate ways for the United States to abrogate a treaty.<sup>45</sup>

Abrogation by Act of Congress first occurred in 1798. Congress passed legislation declaring that all treaties entered into with France from 1778 to 1789 were no longer valid.<sup>46</sup> "Serious differences about the interpretation and application of certain sections of the Franco-American

45 Bite, Vita (1974), "Precedents for U.S. Abrogation of Treaties".

46 Schnitzer, D. (2012), "Into Justice Jackson's Twilight: A Constitutional and Historical Analysis of Treaty Termination", *Georgetown Law Journal*, November, p. 253.

treaties arose soon after the treaties came into effect. France regarded the Jay Treaty as incompatible with the earlier Franco-American treaties. The United States refused to accept this view and accused France of clear and repeated breaches of their treaties".<sup>47</sup> President John Adams signed the treaty but did not appear to give formal notice to France of the treaty abrogation.<sup>48</sup> France claimed that because the treaties were not "properly abrogated," they continued in force.<sup>49</sup> The resulting confusion and controversy was not settled until 1800 when the United States "... abandoned certain claims against France in exchange for renunciation by France of her rights under the treaties abrogated by the Act of 7 July 1798.<sup>50</sup> The United States Supreme Court in *Hooper v. United States* affirmed Congress, saying that: "We are of opinion that the circumstances justified the United States in annulling the treaties of 1778; that the act was a valid one, not only as a municipal statute but as between the nations; and that thereafter the compacts were ended".<sup>51</sup> No record

of an act of Congress that abrogated the 1887 treaty is known to exist.

The second treaty abrogation method, Abrogation By President Following Joint Resolution of Congress, has occurred numerous times in American history. One of the more notable occasions occurred in 1845 under President James Polk. In 1845, the House of Representatives passed a bill setting up a territorial government in the state of Oregon. This bill required the President to "... cause due notice to be given to the British Government of the desire and intention of the United States Government to annul and abrogate the convention with Great Britain relative to territory on the northwest coast of America".<sup>52</sup> The prevailing view at that time was "... while the power to make treaties clearly belong to the President and Senate jointly; the power to abrogate treaties belonged to both houses of Congress".<sup>53</sup> The rationale for this line of thought being that, "... a treaty is the supreme law of the land. The power to annul a treaty was, therefore, the power to annul a law. This clearly was not an executive power, which is a power to execute the laws, but not to make or repeal them. It was clearly a legislative power,

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47 Bite, Vita (1974), "Precedents for U.S. Abrogation of Treaties".

48 Ibid.

49 Ibid.

50 Ibid.

51 *Hooper v. United States*, 22 Ct. Cl. 408, 425 (Ct. Cl. 1887).

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52 Bite, Vita (1974), "Precedents for U.S. Abrogation of Treaties".

53 Ibid.

'...and therefore vested in Congress'''.<sup>54</sup> This method of abrogating a treaty was not employed in the case of the 1887 extradition treaty.

The third method, Abrogation By Concurrent Resolution, has never been utilized by Congress. This method involves Congress passing a concurrent resolution, one that is not signed by the President, and having it abrogate the United States treaty obligations. Likely this method has never been tried because it would violate the constitutional principle of bicameralism and presentment. The importance of that principle was re-emphasized in *INS v. Chadha*, when the Supreme Court declared that there are certain areas where "... congressional authority is not to be implied ...".<sup>55</sup> Because the President is solely charged with foreign affairs and enforcing the law, it remains to be seen how a President would react to being left out of the treaty process altogether. This method has never been tried before, and the 1887 treaty is no exception to that rule.

Abrogation By President Following Approval by Senate is the fourth way that treaties have been abrogated by the United States. This method has been

used twice: first, in 1854 by President Franklin Pierce, and second by President Woodrow Wilson in 1920. President Pierce abrogated the 1826 Treaty of Friendship, Commerce, and Navigation with Denmark. When Senator Charles Sumner challenged the constitutionality of abrogating the treaty using this method, the Senate Committee on Foreign Relations produced a report which "... maintained that the right to give notice of treaty abrogation resides in the treaty-making power – that is the President with the advice and consent of the Senate".<sup>56</sup> Subsequently, notice of termination was given, and the treaty was terminated. President Wilson followed this precedent in 1920 when he abrogated the International Sanitary Convention of 1903. As with the other previous methods, there is no record of this having been done with the 1887 extradition treaty.

A fifth way to abrogate a treaty is Abrogation By President Preceding Congressional Approval. This was done by President Abraham Lincoln in 1864, and then by President William Howard Taft in 1911. President Taft's abrogation is significant because he abrogated the 1832 Treaty of Commerce and Navigation with the Russian Empire. The sig-

<sup>54</sup> Ibid.

<sup>55</sup> *Ins v. Chadha*, 462 U.S. 919, 956 (U.S. 1983).

<sup>56</sup> Bite, Vita (1974), "Precedents for U.S. Abrogation of Treaties".

nificance being that an older treaty with Imperial Russia was abrogated in the proper formal manner. President Taft initiated this treaty abrogation to stave off an "inflammatory" resolution from being considered by Congress.<sup>57</sup> This resolution called for the United States to only enter into treaties with nations that did not discriminate on the basis of race or religion. After President Taft provided notification, Congress then approved the resolution abrogating the treaty without including the "inflammatory" preamble. In the case of the 1887 extradition treaty, no such Presidential declarations were ever made.

This leads us to the final method of treaty abrogation, Abrogation by President Alone. There are a few instances of this happening in American history. President William McKinley in 1899 abrogating the 1850 Convention of Friendship, Commerce, and Extradition with Switzerland; President Calvin Coolidge in 1927 abrogating the 1925 Convention for the Prevention of Smuggling in Mexico; and President Franklin Roosevelt in 1933 abrogating the Multilateral Convention on Abolition of Import and Export Prohibitions and Restrictions of 1927. These abrogations fall precisely into Justice Jackson's "twilight zone"

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<sup>57</sup> Ibid.

where Congress acquiesces and does not challenge the Presidential action.<sup>58</sup> In all of these circumstances, Congress failed to act, and the President's actions were upheld. Were the constitutionality of this method of abrogation challenged, the Supreme Court may have declared it illegitimate. But since Congress acquiesced, historical precedent now gives the President this authority; an authority not used with respect to the 1887 treaty.

Despite having the ability to choose from five different methods of treaty abrogation, none of these have ever been used to abrogate the 1887 extradition treaty. It would be hard to fathom that, "Oops, we forgot about that one," would be officially acceptable to Congress or the White House as a seventh method of treaty abrogation. But yet, that is what appears to have happened to the 1887 treaty. It was never formally abrogated and was simply left off the books for reasons unknown. And since the treaty has been considered non-existent for some time, no one in the State Department or White House has risked the embarrassment of complying with the required formalities to actually dispense with the treaty. Indeed, it seems that as long as the White House and Russia are

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<sup>58</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

complicit in the denial of the existence and legality of the treaty, that denial avoids the issue. Politically, that may be a plausible option, legally, it is not.

### **Arguments For Abrogation**

There are unique circumstances that the United States could use to explain the disappearance of the 1887 treaty from the current treaties in force. Since the treaty was first signed in 1887, three Russian governments have existed: the Russian Empire, which was disestablished in 1917; the Russian Soviet Federated Socialist Republic, which in 1922 joined the Union of Soviet Socialist Republics (USSR or Soviet Union) that was dissolved in 1991; and the current government, the Russian Federation. Because of the changes in governments, the United States could maintain that none of these treaties had been renewed by the new government; therefore, the treaties fell into limbo. But the United States, as of the 2012 *Treaties in Force*, maintains treaties originally concluded with each of those three governments: The 1824 convention with Imperial Russia regarding navigation, fishing, and trading on the Pacific Ocean and along the northwest coast of America; 1976 treaty with the Soviet Union on underground

nuclear explosions for peaceful purposes; the 1992 convention with the Russian Federation for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital. This eliminates the argument that the United States considered treaties with prior Russian governments to be automatically abrogated upon the succession of a new government.

The Russian Federation is still legally bound to the 1887 treaty. On 21 December 1991 the Alma-Ata Protocols were signed. This declaration formally created the Commonwealth of Independent States. The countries that were a parties to this declaration were all members of the dissolving Soviet Union. The Republic of Armenia, the Republic of Azerbaijan, the Republic of Belarus, the Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Moldova, the Russian Federation, the Republic of Tajikistan, the Republic of Turkmenistan, the Republic of Ukraine and the Republic of Uzbekistan. In this declaration, the former Soviet states agreed to cooperate with one another as "democratic law-governed States," with "... respect for human rights and freedoms, including the rights of national minorities, a conscientious fulfillment of commitments and other generally recognized

principles and standards of international law." One of the key planks in this declaration was the agreement to honor soviet-era treaties. The declaration states, "Member states of the Commonwealth guarantee, in accordance with their constitutional procedures, *the fulfillment of international obligations, stemming from the treaties and agreements of the former USSR*" (emphasis added).<sup>59</sup>

Once the Soviet Union had been dissolved and the Russian Federation took its place, the new Russian government maintained the position that they were the legal "continuer" of the USSR. This term should not be confused or conflated with legal "successor." Being a legal continuer meant that the new government could not pick and choose which things of the old government they wanted to keep. The Russian Federation's Federal Law on International Treaties adopted by the State Duma in 1995 replaced the Law on the Procedure for Conclusion, Execution, and Denunciation of International Treaties of the U.S.S.R. that was adopted in 1978 by the Soviet Union. According to Professor William Butler: "The 1995 Law is the first full-fledged attempt to give effect to the 1969 Vienna

59 Brzezinski, Z., Sullivan, P. (1997), *Russia and the Commonwealth of Independent States: Documents, Data, and Analysis*, M. E. Sharpe, Armonk, NY, p. 48.

Convention on the Law of Treaties in Soviet or Russian Law. The 1978 USSR Law had gone some distances towards doing so, but at the time it was enacted the USSR had not acceded to the 1969 Vienna Convention. Such accession was completed in 1986, with reservations, and in its capacity as the "legal continuer" of the former Soviet Union, the Russian Federation is therefore a party to the 1969 Vienna Convention".<sup>60</sup> Because Russia is now a party to the 1969 Vienna Convention, as legal "continuer" to the treaties of the Soviet Union, the 1887 extradition treaty is still in legal effect.

The Provisional Government did not announce a formal policy of treaty revocation or continuation when Czarist government was replaced in February 1917. The Bolshevik Government which came to power in October 1918 did not regard itself as bound by all of the Imperial Russian treaties. They dispensed with they did not like, and kept the ones that they did. The default status of treaties was that the treaties were still in force until notice was given otherwise. According to the 1973 U.S. *Treaties in Force*, several czarist era treaties with

60 Müllerson, Rejn Avovič, Malgosia Fitzmaurice, Mads Tønnesson Andenæs (1997), *Constitutional Reforms and International Law in Central and Eastern Europe. 1 ed.*, Springer, N.Y., 295 p.

the United States remained in force. This would seem to indicate that the United States and Russia maintained that the treaties still left were legally binding. In diplomatic correspondence with President Franklin Roosevelt, the People's Commissar for Foreign Affairs, Union of Soviet Socialist Republics, Maxim Litvinov, made reference to that fact that government of the Soviet Union considered itself to be a "successor" to prior Russian governments.<sup>61</sup> While the term "legal continuer" was not coined until 1991, it would seem that the same principle guided the soviets in their interpretation of their legal obligations stemming from czarist era treaties. No blanket revocation of czarist treaties was ever issued by the soviet government; therefore, no legally effective revocation of the 1887 extradition treaty ever occurred.

The United States also did not do a blanket revocation of czarist era treaties when the new Soviet government came to power. It appears that the United States merely waited for the Soviets to act in order to determine the status of international agreements. The United States has kept on its books several agreements that date back to the Imperial Russian govern-

ment. And as had been the past practice, they revoked those treaties they believed were valid by following the proper treaty abrogation procedures established by the treaty itself, or according to international law. In the 1941 U.S. *Treaties in Force*, the United States categorized the 1887 extradition treaty under the Soviet Union heading. This means that prior to 1941 the treaty was considered legally in force and continued by the Soviet Union. Why that decision was made, and why a potential reversal was done, is a question that cannot be answered. No documentation exists to explain the absence of the 1887 treaty from future *Treaties in Force* documents.

In the history of the United States, there are clear standards on how treaties must be abrogated. In 1979, the United States Senate Foreign Relations Committee held a hearing on treaty termination. In his opening remarks, Senator Barry Goldwater discussed how treaties are revoked in congressional practice. In his remarks, Senator Goldwater ran through a comprehensive list of how treaties had been terminated in past American practice. In his descriptions, not once did he mention a treaty being terminated by anything less than Congressional or Presidential action.<sup>62</sup> On his list of terminated treaties

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61 "U.S. Recognition of Soviet Union", available at: <http://www.fransamaltngvongeu-sau.com/documents/dl1/h3/1.3.4.pdf>.

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62 *United States. Senate Foreign Relations Committee. Treaty Termination – Hearings*

was the 1832 Treaty of Commerce and Navigation with Russia, notably missing from his list was the 1887 Extradition Convention with Russia.<sup>63</sup> In his remarks, Senator Goldwater outlined the standard denunciation practices of the United States. He entered into the congressional record his analysis disputing the State Department's proffered twelve examples of Presidential power to abrogate treaties. Senator Goldwater mentions that of the twelve treaties the State Department mentioned, only one of them had "... expired because the country with whom we had entered into the treaty lost its existence and disappeared as a nation".<sup>64</sup> This was the 1920 Treaty of Amity, Commerce, and Navigation with the Congo. Senator Goldwater noted in his analysis that this treaty was terminated at the behest of the foreign government, not the United States. This treaty's uncertainty for the United States originated in the fact that the Independent State of Congo was annexed by Belgium in 1908. Thus, when the United States Government asked for

clarity on the treaty, the Belgian reply was that they wished to abrogate the treaty. As Senator Goldwater's analysis noted, the Belgian request for termination "weakens" any attempt by the State Department to use this case for precedential value.<sup>65</sup> It is quite clear from the congressional record and practice that regime change does not automatically abrogate old treaties.

The United States has always followed the proper procedures for abrogating treaties. These procedures are either spelled out in the treaties themselves, or they are consistent with the 1969 Vienna Convention on the Law of Treaties. The convention requires that in order to abrogate a treaty, notice must be given to the other party. Article 65 is quite clear that the terminating party "...*must* notify the other parties of its claim".<sup>66</sup> (emphasis added) The United States signed the Vienna Convention on 26 May 1971, but the Senate has never given advice and consent to it. Regardless, the United States still considers itself bound to the convention by customary international law.<sup>67</sup>

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*before the Committee on Foreign Relations United States Senate Ninety-Sixth Congress First Session on S. Res. 15 Resolution Concerning Mutual Defense Treaties*, U.S. Govt. Print. Off., Washington, 1979, 20 p.

63 Ibid. P. 15.

64 Ibid. P. 16.

65 Ibid. P. 18.

66 "Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 65", available at: [https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en)

67 *Chubb & Son, Inc. v. Asiana Airlines*, 214 F. 3d 301, 308 (2d Cir. N.Y. 2000).

The United States cannot selectively dismiss a treaty and absolve itself of its legal obligations under the treaty without following the proper abrogation procedures. The Constitution of the United States does not specifically mention treaty termination procedures, but as the Constitution has been interpreted, treaty termination is done at the direction of Congress with the President giving notice to the other party.<sup>68</sup> For an otherwise valid treaty to be abrogated, Congress and the President must explicitly do so. In the case of the 1887 treaty, this did not happen. Thus, the obligations of the United States under the 1887 treaty are still in legal effect.

### Conclusion

Connecting the dots back to Edward Snowden, the United States and Russia *have* an extradition agreement. While neither country may wish to resurrect this agreement in their foreign policy practice, the treaty is legally valid. The treaty remains in force until the United States or the Russian Federation give notice of their abrogation of the treaty.

<sup>68</sup> Schnitzer, D. (2012), "Into Justice Jackson's Twilight: A Constitutional and Historical Analysis of Treaty Termination", *Georgetown Law Journal*, November, p. 280.

However, while Snowden is a political asylee, no extradition is possible. According to the Chairman of the Presidential Council for Civil Society and Human Rights, Mikhail Fedotov, "The practice of the European Council on Human Rights emphasizes this duty of the society and the state. It is important to take into account the fact that Russia is a member of the Geneva Convention on Refugees and other European human rights instruments. It requires us not to extradite a refugee while in the process of the application for political asylum."<sup>69</sup> Article 33 of the Convention and Protocol Relating to the Status of Refugees provides that "No contracting state should expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his ... political opinion".<sup>70</sup> Deputy Secretary of the Public Chamber of the Russian Federation, Vladislav Grib, said that: "From a legal point of view, we have the right to give

<sup>69</sup> Artyukov, O. (2013), "What will happen if Russia grants political asylum to Snowden?", *Pravda*, available at: [http://english.pravda.ru/russia/politics/02-07-2013/125004-snowden\\_russia-0/](http://english.pravda.ru/russia/politics/02-07-2013/125004-snowden_russia-0/)

<sup>70</sup> "Convention and Protocol Relating to the Status of Refugees", available at: <http://www.unhcr.org/3b66c2aa10.html>

him political asylum. We have the legal, ethical and the moral right to do so".<sup>71</sup> Since Snowden was eventually granted asylum, it is not likely that Russia will extradite him.<sup>72</sup> But should Snowden's asylum request fail be renewed in August of 2014, he may then be eligible for extradition back to the United States.

Despite the presence of the extradition treaty, certain provisions contained therein may hinder the ability of the United States to extradite Snowden. Article III of the treaty provides that, "If it be made to appear that extradition is sought with a view to try or punish the person demanded for an offense of a political character, surrender shall not take place".<sup>73</sup> Judging from Snowden's statements to Glenn Greenwald, it is certain that he believes that his actions were

political. "I don't want to live in a society that does these sort of things ... I do not want to live in a world where everything I do and say is recorded. That is not something I am willing to support or live under".<sup>74</sup> Snowden believes that his punishment would be political, rather than criminal. Many in the international community may tend to agree with him.

Extradition of Snowden would need to follow the formalities proscribed by the treaty. Should the United States ever acknowledge the existence and validity of the 1887 convention, according to Article VI they would need to submit a formal request for extradition, which they have "not yet found time" to do.<sup>75</sup> Snowden has been charged with Theft of Government Property under 18 USCS § 641. The closest identical provision in Article II of the treaty is Larceny. Article II, Section 4 of the treaty says, "(L) arceny, when the value of the property

71 Artyukov, O. (2013), "What will happen if Russia grants political asylum to Snowden?", *Pravda*, available at: [http://english.pravda.ru/russia/politics/02-07-2013/125004-snowden\\_russia-0/](http://english.pravda.ru/russia/politics/02-07-2013/125004-snowden_russia-0/)

72 Myers, S., Kramer, A. (2013), "Defiant Russia Grants Snowden Year's Asylum", *New York Times*, available at: [http://www.nytimes.com/2013/08/02/world/europe/edward-snowden-russia.html?\\_r=0](http://www.nytimes.com/2013/08/02/world/europe/edward-snowden-russia.html?_r=0)

73 *Extradition Convention (1893)*. 28 Stat. 1071. Treaty Series 305. II Treaties (Malloy) 1527.

74 MacAskill, E. (2013), "Edward Snowden, NSA files source: 'If they want to get you, in time they will'", *Guardian*, available at: <http://www.theguardian.com/world/2013/jun/09/nsa-whistleblower-edward-snowden-why>

75 Artyukov, O. (2013), "What will happen if Russia grants political asylum to Snowden?", *Pravda*, available at: [http://english.pravda.ru/russia/politics/02-07-2013/125004-snowden\\_russia-0/](http://english.pravda.ru/russia/politics/02-07-2013/125004-snowden_russia-0/)

stolen shall exceed two hundred dollars, or three hundred roubles".<sup>76</sup> Because the details of the United States' charges against Snowden's are presently unknown, it would be impossible to speculate on whether or not the United States would be able to satisfy the treaty terms. (The affidavit attached to the criminal complaint describing Snowden's charges is still under seal).<sup>77</sup>

The 1887 treaty provides the United States a legally valid solution to attempt to retrieve Edward Snowden. It is doubtful that the United States would ever pursue using the treaty. Nevertheless, the treaty was never abrogated by an act of Congress, or by the President of the United States. The Russian Federation has also never formally denounced or abrogated the treaty according to the requirements of the 1969 Vienna Convention. Therefore, the 1887 Convention between the United States of America and the Russian Empire for the extradition of criminals is still legally binding and should be promptly added to the next edition of U.S. *Treaties in Force*.

76 *Extradition Convention (1893)*. 28 Stat. 1071. Treaty Series 305. II Treaties (Malloy) 1527.

77 Perez, E. (2013), "U.S. Charges Snowden in Security-Leak Case", *Wall Street Journal*, available at: <http://online.wsj.com/news/articles/SB10001424127887323893504578560071189477346>

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## Позабытый нормативный документ: Конвенция о выдаче преступников между Россией и США 1887 года

**Сэмюэл Джейсон Д.**

Кандидат юридических наук,

Бакалавр наук в области права,

Президент студенческой адвокатской коллегии,

Университет штата Пенсильвания, Юридическая школа им. Дикинсона,

16802, США, Пенсильвания, Университи-Парк, Корпус Любиса Каца;

e-mail: [jds543@psu.edu](mailto:jds543@psu.edu)

### Аннотация

Соединенные Штаты не смогли применить все средства правовой защиты для того, чтобы вернуть Эдварда Сноудена обратно в Соединенные Штаты.

В 1887 году Соединенные Штаты и Россия подписали соглашение в виде Конвенции о выдаче преступников. Ни США, ни Россия за все время истории никогда не аннулировали соглашения царской эпохи, поэтому юридически данное соглашение остается в силе. По неизвестной причине, соглашение 1887 года было позабыто среди действующих международных договоров США после 1941, но данная техническая ошибка не может служить юридическим доказательством аннулирования соглашения. В данной статье автор рассматривает и обсуждает все шесть возможных способов аннулирования в соответствии с тем, как они относятся к соглашению о выдаче преступников 1887 года. Посредством анализа данных методов продемонстрировано, как Соединенные Штаты не последовали обычному международному праву в соответствии с Венской конвенцией о праве международных договоров по отношению к аннулированию соглашения 1887 года. Это приведет к выводу, что позабытый инструмент, Конвенция 1887 года о выдаче преступников между Соединенными Штатами и Россией, все еще имеет законную силу.

#### **Ключевые слова**

Выдача преступников, Сноуден, аннулирование действия соглашения, США, Россия, соглашение.

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