Backgrounder

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The U.S.–U.K. Extradition Treaty: In the Interest of Both Nations

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Abstract: *Extradition treaties serve an essential function in cases that cross international borders. When the United States delayed ratification of the 2003 extradition treaty between the United States and Great Britain, the delay was heavily criticized in Britain. More recently, the ratified treaty has come under intense criticism in Britain. But the perceived problems are not inherent in the treaty or the fault of the U.S.; they stem from the fact that the past Labour government deliberately set out to make it easier, both bilaterally and through use of the European arrest warrants (EAWs), for foreign nations to extradite individuals from Britain. At the same time, Britain's acceptance of EU judicial supremacy and the consequent erosion of British sovereignty mean that it is now harder to extradite a terrorist than it is to extradite individuals accused of less serious offenses. The new British government should defend British liberties and put an end to privileges for accused terrorists by asserting its sovereignty and creating a "reasonable basis" minimum standard for all extraditions—a standard that, though incompatible with the EAWs, is compatible with the 2003 treaty.*

The extradition treaty between the United States and Great Britain was concluded in 2003 and ratified by the United States in 2007. The treaty has been strongly criticized in Britain since the U.S. requested the extradition of Gary McKinnon, accused of hacking into U.S. government computers to confirm his belief that Washington was withholding information that proves, among other things, the existence of unidenti-

Talking Points

- The 2003 extradition treaty between the U.S. and Britain has been wrongly blamed for making it too easy to extradite individuals from Britain.
- Britain's Labour government created the domestic legal basis for the treaty: the 2003 Extradition Act. The act applied this legal basis to many countries, including the U.S.
- It is the Extradition Act, not the treaty, that made it easier to extradite suspects from Britain. The treaty is compatible with higher standards for extradition should Britain decide to adopt them.
- The 2003 act also created the domestic legal basis for the European Union's arrest warrants, which the EU itself has acknowledged are frequently abused.
- The result of Britain's concession of legal supremacy to the EU is that it is now easier to extradite Britons on frivolous charges within the EU than it is to extradite terrorists outside of it.

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fied flying objects, the U.S.'s refusal to publicize the antigravity technology it acquired from the UFOs, and a 9/11 conspiracy.[1] McKinnon has been diagnosed with Asperger's syndrome, a mental condition on the autism spectrum.

Extradition treaties serve an essential function in the international state system. When the U.S. delayed ratification from 2003 to 2007, it was rightly criticized by British politicians who argued that the treaty was essential to prevent pedophiles from evading British justice. More recently, British commentators have alleged that the 2003 treaty is unfairly biased in favor of the United States. This claim is based on a misapprehension.

The standards of proof on which the 2003 treaty is based are the result, first, of the desire of the Labour Government to make it easier to extradite individuals from Britain and, second, of the process that ultimately led to the creation of the European Union's European arrest warrants (EAWs). It is now easier to extradite British subjects, both on more serious charges like those facing McKinnon and on the frivolous charges that often result in the issuance of an EAW, but thanks to Labour's acceptance of the jurisdiction of European courts, it is now *harder* to extradite accused terrorists, as illustrated by the continued delay in the extradition to the U.S. of radical Egyptian cleric Abu Hamza al-Masri, currently in a British prison on various terrorism-related charges.

The 2003 treaty is not directly relevant to any of these serious concerns because it is compatible with higher standards of proof if Britain enacts them through domestic legislation. The treaty serves the interests of both nations in creating a system of extradition that respects their sovereignty and their mutual need to ensure that those accused of serious crimes in one country do not find refuge in the other. Britain's problem rests in the ways in which the erosion of parliamentary sovereignty, which is inherent in both the creation of the EAWs and the acceptance of European jurisdiction, has reduced Britain's ability to protect both the rights and the security of its subjects. The new British government should restore this ability.

The Flawed 1972 Treaty

Before 2007, extraditions between the United States and Great Britain were governed by a treaty signed in 1972, as modified by a supplementary protocol concluded in 1986. By the start of the 21st century, this treaty system was outdated. Its most serious flaw from the British perspective was that its schedule of extraditable offenses was drawn up before the era of the Internet. As a result, Britain was unable to extradite U.S.-based suppliers of online child pornography. Because of differences in the British and American legal systems, the 1972 treaty also required the U.S. to present a *prima facie* case to British authorities, a higher standard than that required of British requests to the U.S., which only had to meet the "probable cause" standard.[2]

In spite of the fact that U.S. authorities had to meet a higher standard, British authorities extra-

1. In his July 13, 2005, interview with CNET News, McKinnon stated that he began to hack into U.S. government computers "to screw the Americans" and to find proof of the existence of extraterrestrial life, but his motive "then grew into suspicions about 9/11, because there are hundreds of unanswered questions about 9/11…. The issues around the UFO thing, as I discovered more and learned more, became much more serious. Eventually it became all about the issue of suppressed technology. I know for a fact that they have antigravity. And the basic quantum-physical mechanics of having antigravity imply a free source of energy, getting energy direct from the vacuum. Now to me, that would stop all the wars over oil. It would help fight famine and [help] with irrigation. It would be free energy, and that is a huge thing." See Colin Barker, "Newsmaker: Gary McKinnon: Scapegoat or Public Enemy?" CNET News, July 13, 2005, at *http://news.cnet.com/Gary-McKinnon-Scapegoat-or-public-enemy/2008-7350_3-5786782.html* (August 23, 2010).
2. U.K. Foreign and Commonwealth Office, "Explanatory Memorandum on a Bilateral Extradition Treaty Between the United Kingdom and the United States of America," May 2003, at *http://www.fco.gov.uk/en/about-us/publications-and-documents/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2003/usaextrad* (August 23, 2010). See also Tom Baldwin, "U.S. Snubs Britain Over Sex Criminals," *The Times* (London), March 7, 2006, at *http://business.timesonline.co.uk/tol/business/law/article738215.ece* (August 23, 2010), and *Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland*, S. 109-19, 109th Cong., 2nd Sess., September 20, 2006, p. 3, at *http://ftp.resource.org/gpo.gov/reports/109/er019.109.txt* (August 23, 2010).

dited few alleged offenders from the United States. In the three years after 2003, for example, Britain extradited only five suspects from the U.S., while the U.S. secured the extradition of 12 suspects from Great Britain.[3] Britain's inability to secure extradition for Internet-based offenses caused considerable political controversy in Britain.

Even more controversial was the fact that, before 9/11, U.S. lawmakers were reluctant to ratify any treaty authorizing extradition in the case of so-called political offenses, in particular cases of terrorism arising from the conflicts between Catholics and Protestants in Northern Ireland. The 1986 supplementary protocol reduced but did not eliminate the 1972 treaty's political offenses exception. After the Good Friday Agreement of April 10, 1998, which was the culmination of the Irish peace process, and especially after 9/11, the U.S. correctly moved toward the British position on the extradition of alleged terrorists.[4] Before 2006, the most common British criticism of the U.S. was that the U.S. made extraditions to Britain too difficult.

The 2003 Treaty: Fixing Old Flaws

In 2003, the U.S. and Britain concluded a new extradition treaty. This treaty does not contain a schedule of extraditable offenses. Rather, it defines extraditable offenses as those that are "punishable under the laws in both States by deprivation of liberty for a period of one year or more." The application of the 2003 treaty will therefore change as British and American laws do, obviating the need for the regular updating of the treaty text itself.[5] The requirement that the offense in question be punishable by both states means that Americans cannot be extradited to Britain for actions that in the U.S. would be protected under the Bill of Rights. Similarly, this requirement protects Britons whose actions are not subject to prosecution in the United Kingdom.

The 2003 treaty retains the exemption for politically motivated offenses, but in the U.S., it makes the executive branch, not the courts, responsible for deciding whether the exemption should be invoked in a particular case. This change reduces the likelihood that a future British request for the extradition of terrorist suspects from the U.S. would be refused.[6]

Finally, the 2003 treaty addresses the imbalanced evidentiary standards that the U.S. had previously faced for its extradition requests from Britain. This anomaly had already been eased by Britain's 2003 Extradition Act and by the British action under that act in 2004 in designating the U.S.—along with 23 other countries as of February 2009—as a state that is not required to supply *prima facie* evidence for extradition requests. Instead, the U.S. must only meet the less demanding test of providing "information which would justify the issue of a warrant." Other states so designated include democracies such as Australia and Israel, states where the rule of law is fragile such as Azerbaijan, and non-democracies such as the Russian Federation and Ukraine. Nothing prohibits Britain from designating more states on the same basis.[7]

The 2003 treaty adopts this new standard, created by British law, as its basic standard for U.S. requests for extradition from Britain while also allowing either state to require additional informa-

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3. Baldwin, "U.S. Snubs Britain Over Sex Criminals."
4. *Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland*, pp. 2–3. See also Charles Doyle, "Extradition Between the United States and Great Britain: The 2003 Treaty," Congressional Research Service *Report for Congress*, October 10, 2006, p. 4, at *http://www.fas.org/sgp/crs/misc/RL32096.pdf* (August 23, 2010).
5. "Extradition Treaty Between the Government of the United Kingdom and Northern Ireland and the Government of the United States of America with Exchange of Notes," Washington, D.C., March 31, 2003, pp. 3–4, at *http://www.statewatch.org/news/2007/jun/uk-usa-extradition-treaty.pdf* (August 23, 2010).
6. *Ibid.*, p. 5.
7. *Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland*, p. 3. See also Sally Broadbridge, "The UK/US Extradition Treaty," House of Commons Library, February 23, 2009, p. 1, at *http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-02204.pdf* (August 23, 2010), and press release, "UK/U.S. Extradition Treaty Ratified," Embassy of the United States, London, April 26, 2007, at *http://london.usembassy.gov/ukpapress48.html* (August 23, 2010).

tion from the other should the second state find this necessary "to enable a decision to be taken on the request for extradition."[8] In short, the U.S. has been placed, first by British law and then by treaty, on the same basis as the 23 other states designated by Britain.

Current Criticisms of 2003 Treaty Misguided

At first, British politicians rightly condemned the U.S. Senate's delay in ratifying the treaty. By March 2006, 145 Labour backbenchers had signed a Commons motion demanding that extraditions to the U.S. be halted until the Senate ratified the treaty, and in July 2006, Conservatives in the House of Lords successfully blocked the U.S.'s designation under the 2003 act until the 2003 treaty was formally ratified.[9]

As the Senate moved toward ratification of the treaty in 2007, some Britons complained that the treaty was unbalanced in favor of the U.S. These complaints began in 2003 and grew in volume in 2006 because of the "NatWest Three" businessmen who were accused of, and later pleaded guilty in U.S. courts to, fraud related to the Enron case. In 2009, British complaints reached a fever pitch with the case of McKinnon, who became the object of a journalistic and political crusade.[10] In July 2010, British Prime Minister David Cameron raised the issue personally with President Barack Obama.[11]

Critics of the 2003 treaty make four claims.

First, critics argue that the treaty is unbalanced because the U.S. extradites more individuals from the U.K. than the U.K. does from the U.S. This has been true in recent years, but it is also irrelevant because there is no inherent reason to expect that extraditions will exactly balance out. The U.K. tends to extradite more people from Spain, for example, than Spain does from the U.K., but there is no criticism of extradition arrangements between the U.K. and Spain on that basis.[12] Moreover, the 2003 treaty has increased British extraditions from the U.S. from their previously low level.[13]

Second, critics allege that the treaty "allow[s] vulnerable people [such as McKinnon] to be shipped off around the world when they should be tried here at home."[14] It is important to point out that McKinnon has admitted his guilt, so the evidentiary threshold of the 2003 treaty is not at issue. While McKinnon is alleged to be "vulnerable," this is not because of his eccentric beliefs or because he is claiming diminished responsibility: It is because the experience of being deported and convicted would supposedly be particularly unpleasant for him because of his mental condition.

It should be evident that allowing claims that extradition is unduly stressful, that stress may lead to a mental breakdown, and that such a breakdown would be a violation of human rights will only give all those subject to extradition yet another way to delay their cases. In this particular case, the U.S. has given assurances that McKinnon will receive "appropriate medical care and treatment."

Britain's Conservatives argue that British law should be amended to give courts the power to block extraditions in certain cases, including this

8. "Extradition Treaty Between the Government of the United Kingdom and Northern Ireland and the Government of the United States of America with Exchange of Notes," p. 8.
9. "One-Way Street," *The Times* (London), July 13, 2006, at *http://www.timesonline.co.uk/tol/comment/leading_article/article1072764.ece* (August 23, 2010). See also Broadbridge, "The UK/US Extradition Treaty," pp. 5–6.
10. "One-Way Street." See also Andrew Clark, "NatWest Three Plead Guilty to Wire Fraud," *The Guardian*, November 28, 2007, at *http://www.guardian.co.uk/business/2007/nov/28/2* (August 23, 2010).
11. Jo Adetunji and Matthew Weaver, "Gary McKinnon May Avoid U.S. Extradition, David Cameron Suggests," *The Guardian*, July 21, 2010, at *http://www.guardian.co.uk/world/2010/jul/21/gary-mckinnon-extradition-david-cameron* (August 23, 2010).
12. Alan West, "Facts About US–UK Extradition Requests," *The Guardian*, August 12, 2009, at *http://www.guardian.co.uk/world/2009/aug/12/extradition-requests-us-uk-statistics* (August 23, 2010).
13. Baldwin, "U.S. Snubs Britain Over Sex Criminals," and West, "Facts about US–UK Extradition Requests."
14. Afua Hirsch, "Gary McKinnon Should be Extradited, Court Rules," *The Guardian*, July 31, 2009, at *http://www.guardian.co.uk/world/2009/jul/31/gary-mckinnon-hacker-aspergers-us* (August 23, 2010).

one. While British law is a matter for British judgment, it should be pointed out that, under the extradition arrangements in place before the 2003 treaty, U.S. courts had a similar blocking power, which caused much dissatisfaction in Britain. The 2003 treaty moved this power to the executive branch, which is the system that exists in Britain today. In short, British critics are now demanding for Britain a system that they condemned when it operated in the U.S. and which the U.S. gave up in favor of the British system at the behest of Britain.[15]

As for the question of trying McKinnon in Britain, the treaty states that extraditions will be refused if the individual sought has been convicted or acquitted in the state from which his extradition is requested. If authorities in either state do not carry through with a trial, the other state then has the right to request extradition.[16] It is, of course, up to British authorities to bring a case under British law. In the case of McKinnon, they have declined to do so.

The obligation not to harbor individuals accused of crimes in another state is not merely a treaty obligation: It is a basic principle of international relations between law-abiding states. If British authorities or British law allow individuals in Britain (such as McKinnon) to commit crimes that affect other states and to escape prosecution in Britain, the judgment of British authorities, or British law itself, is defective. If Britain does not want to deport individuals such as McKinnon, it should amend its judgment or its law and try them at home. If it does so, the U.S. will have no grounds for requesting extradition.

Third, critics allege that the treaty was created in the wake of 9/11 to make it easier to deport terrorists but that it is now being misapplied with malice by the United States to extradite individuals accused of lesser crimes. This claim is simply false. The 2003 treaty is a comprehensive treaty, not related exclusively to terrorist offenses. To the extent that its negotiation was motivated by concerns about terrorism, these concerns were British and related to Britain's difficulties under the previous arrangements in securing the extradition from the U.S. of suspects accused of supporting terrorism in Northern Ireland. Britain's reassessment of its extradition procedures began in 1997, and the report on this reassessment—which led to the changes in British law that undergird the 2003 treaty—was published in March 2001, before the 9/11 attacks.[17]

Fourth, and most seriously, critics charge that the treaty requires a lower standard for U.S. requests of the U.K. than for U.K. requests of the U.S. This charge is often coupled with the claim that the treaty reflected "the U.S. Administration's indifference to its Iraq ally's concerns," or, more forthrightly, that the treaty is an instance of "lapdog politicians kowtowing to the U.S."[18] This assertion is false, but the simple argument that the standard for U.S. claims is lower is true: The British government has acknowledged that the standard required under British law (not by the treaty) of U.S. requests ("information which would justify the issue of a warrant") to Britain is slightly lower than that required by the treaty of U.K. requests ("such information as would provide a reasonable basis to believe that the person sought committed the offense") to the U.S. The U.S. Constitution prevents the U.S. from accepting the lower British standard.[19]

But there is nothing in the treaty that prohibits Britain from applying a higher standard to the U.S. than it currently does. Indeed, in Article 10, the treaty allows either state to "requir[e] additional information." The question, therefore, is why Brit-

15. *Ibid.*
16. "Extradition Treaty between the Government of the United Kingdom and Northern Ireland and the Government of the United States of America with Exchange of Notes."
17. Broadbridge, "The UK/US Extradition Treaty," p. 3.
18. Michael Binyon, "One-Sided Treaty Was Meant To Handle Terrorist Suspects," *The Times*, June 28, 2006, at *http://business.timesonline.co.uk/tol/business/law/article680281.ece* (August 23, 2010), and Richi Jennings, "Gary McKinnon's Fight with U.S. Extradition," *Computerworld*, May 29, 2010, at *http://blogs.computerworld.com/16215/gary_mckinnons_fight_against_u_s_extradition_freegary* (August 23, 2010).
19. Press release, "UK/US Extradition Treaty Ratified," and Broadbridge, "The UK/US Extradition Treaty," pp. 4, 10.

ain decided to create a lower standard in its own domestic law in 2003, a standard that it applied to the U.S. and 23 other states.

Europe and the Labour Government: Sources of Extradition Problem

Britain created this lower standard as a result of a lengthy process that was shaped in part by concerns expressed by the Labour Government that it was too difficult to extradite individuals from Britain and in part by the European Union. The process began in 1997 as a result of the U.K.'s signature of two EU conventions on extradition that required domestic legislation to be brought into effect. The purpose of these conventions was to make it easier to extradite individuals between states inside the EU. The need to pass legislation in turn necessitated a review of existing British law. This process stopped in 1998 while a Spanish request to extradite former Chilean president General Augusto Pinochet from Britain proceeded through British courts.

By 2000, when the process restarted, the British government, as a result of the Pinochet case, was even more eager to make it easy for other states to extradite individuals from Britain. The review, published for comment in March 2001, stated that "the [Pinochet] case threw into high relief many of the problems of U.K. extradition law, most notably the lengthy delays which can occur in complex, contested extradition cases." A draft bill based on this desire to make extraditions easier—which stemmed, it is important to note, from events before 9/11 that are unrelated to the terrorist attacks—was published for consultation in June 2002, and the bill became law in 2003.[20]

In the interim, the EU had moved on. In 1999, the European Council recommended the creation of the European arrest warrants, which would "make the principle of mutual recognition the cornerstone of a true European law-enforcement area."[21] For states in the EU, the EAWs for the most part rendered obsolete the EU conventions that had necessitated the review of British law that began in 1997. But like those conventions, the EAWs also made extraditions easier: Indeed, because they sought to create a single judicial area within the EU, they went beyond the traditional conception of extradition, which is essentially a procedure for transferring individuals between judicial jurisdictions.

A principle of "mutual recognition" among all EU member states implied that there would be low standards for the arrest and removal of individuals from Britain to other EU states precisely because not all the states would in practice hold themselves to high standards in the issuance of arrest warrants. The EU wanted to make it easy for any EU member state to extradite individuals from any other member state, including Britain. Prime Minister Tony Blair participated in the 1999 European Council and thereby endorsed this goal.

Thus, the Labour government's desire to make it easier to extradite individuals from Britain—based on its experience with the Pinochet case—and its wish to accommodate the earlier EU conventions and the EAWs shaped the drafting of the necessary British implementing legislation, which resulted in the 2003 act. This act has two categories. The first applies in practice to EU states operating the EAWs, while the second applies to more than a hundred other states, including the United States. States in the second category must supply "evidence" to satisfy the test for issuing an arrest warrant.

But the act also allows states in this second category to be designated as such that they must provide only "information" to satisfy this test. Britain designated the U.S. and 23 other states on this basis in February 2009.[22] Britain, therefore, created the

20. Broadbridge, "The U.S./U.K. Extradition Treaty," p. 3.

21. *Ibid.*, p. 9. See also European Council, "European Arrest Warrant," January 8, 2010, at *http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33167_en.htm* (August 23, 2010). The older agreements that, by and large, have been replaced by the EAWs include the Council of Europe's European Convention on Extradition 1957, the European Convention on the Suppression of Terrorism 1977, the European Union Convention on Simplified Extradition Procedure 1995, and the Convention on Extradition Between Member States 1996. See "Convention on Extradition Between Member States," Europa, October 25, 2005, at *http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l14015b_en.htm* (August 23, 2010).

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lower "information" standard, included it in the 2003 act, applied it to the U.S. and 23 other states, and negotiated the 2003 treaty with the knowledge that it would have to meet a more demanding standard derived from the Constitution in its applications for extraditions from the U.S. If British critics are unhappy with this "information" standard, they should not blame the United States, which did nothing more in its negotiation of the 2003 treaty than uphold its Constitution.

While the 2003 treaty, the 2003 act, and Britain's implementation of the EAWs all stem from the same review of existing law launched by Britain in 1997, there are important differences between these legal instruments.

First, the least restrictive category of the 2003 act has been applied not only to the U.S., but also to states, such as Russia, that are not democracies. It is curious and regrettable that, unlike the arrangements with the U.S., this development has caused no concern in Britain.

Second, unlike the 2003 treaty, EAWs are used routinely. In 2008 alone, 351 people were extradited under EAWs from Britain. Jago Russell, chief executive of the human rights group Fair Trials International, notes that, "Although designed to deal with serious crime, EAWs are often issued for minor crimes. This puts huge pressure on the police and courts, and shipping people across Europe for petty crimes is, in itself, grossly disproportionate."[23]

The European Union agrees with this assessment. A memorandum to the EU Working Party on Cooperation in Criminal Matters in 2007 noted that "in some Member States judicial authorities issued EAWs for what was perceived as very minor offences," including the theft of two car tires and the "theft of a piglet."

The European Council was unable to resolve the contradiction between its ideal that there should be "a single European judicial area" and the reality that the European states have different legal traditions and practices.[24] Instead, it fell back on the argument that "it is true that the objective should be that a wanted person is treated in the same way irrespective of his location in the EU territory, [but] it should also be accepted that it might not be possible to accept this goal entirely in the immediate future." In short, the EU's system does not work, but according to the council, it must nonetheless remain a legal requirement until an undetermined point in the future when it will somehow start to work.

This claim sums up a common criticism of the EU: that under it, law is law only to the extent that it serves the political objectives of the EU. It also demonstrates that reducing the sovereignty of the states of Europe by placing them under a single judicial jurisdiction will result in extraditions that are arbitrary, disproportionate, and unfair precisely because the EAW system departs so radically from the traditional concept of extraditions.

Thus, a combination of EU-led and Labour-endorsed erosion of British sovereignty and liberal enthusiasm for making extraditions easy on supposed human rights grounds led Britain to adopt the lower standard that many on the Left and Right now condemn. The U.S. was simply one of many countries—including the other English-speaking democracies, Israel, and non-democracies like Russia and Ukraine—to which Britain applied this new standard. In the case of the EU member states, this new, lower standard was lowered even further and institutionalized with the creation of the EAWs.

Critics of the 2003 treaty between the U.S. and Britain would therefore be well advised to focus

22. The states designated by Britain on this basis as of February 2009, are Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Canada, Croatia, Georgia, Iceland, Israel, Liechtenstein, Macedonia, the F.Y.R. Macedonia, Moldova, New Zealand, Norway, the Russian Federation, Serbia and Montenegro, South Africa, Switzerland, Turkey, Ukraine, and the U.S. See Broadbridge, "The UK/US Extradition Treaty," p. 5.

23. Jago Russell, "Fast-Track Extradition: The European Arrest Warrant Is Being Routinely Misused," *Law Society Gazette*, January 14, 2010, at *http://www.lawgazette.co.uk/opinion/comment/fast-track-extradition-european-arrest-warrant-being-misused* (August 23, 2010).

24. Council of the European Union, "Note from Presidency to Working Party on Cooperation in Criminal Matters," EU Document No. 10975/07, July 9, 2007, at *http://www.statewatch.org/news/2007/jul/eu-eaw-evaluation.pdf* (August 23, 2010).

their ire not on it, but on the previous revision of British law that had the express intent of simplifying extraditions from Britain and on Britain's broader loss of sovereignty implied by its acceptance of European judicial jurisdiction through the creation of the EAWs. The 2003 treaty is compatible with a higher standard for U.S. requests for extraditions from the U.K. The problem is that the U.K., under Labour, has deliberately adopted lower standards.

Fewer Protections for Britons, More for Terrorists

The long-running case of Abu Hamza demonstrates the perversity in the current British—and, *de facto*, the European—system of extraditions, as well as the danger inherent in allowing claims of mental anguish, akin to those made by McKinnon, to become a factor in cases of this nature.

On June 8, 2010, the European Court of Human Rights again delayed a ruling on whether Hamza can be extradited to the United States, where he would stand trial on terrorism charges. Hamza's case has already been before the European Court for three years.

His claim—like that of three other British subjects whose extradition is also sought by the United States—is that because, if convicted, he might be held without parole in isolation in a supermax prison, he would suffer damage to his mental health, which would be a violation of his human rights under Article 3 of the European Convention on Human Rights, which prohibits "inhuman or degrading treatment or punishment."

The U.S. has already gone to extraordinary lengths to satisfy European requirements on this account, giving written assurances that it will not impose the death penalty or place the suspects before a military tribunal, but this is still not enough. The question now at stake is whether the U.S. Constitution's ban on "cruel and unusual" punishment is good enough for European courts. As an attorney for one of the accused put it, "It's a very important test of whether the way the U.S. treats its prisoners meets international standards." Or, as journalist Vikram Dodd wrote in *The Guardian*, the decision means that the European court "will in effect sit in judgment on parts of the U.S.'s criminal justice system."[25]

In the context of the 2003 treaty, this delayed decision raises three basic points.

First, Hamza and his co-defendants have been able to string out their appeal for three years and counting. Precisely because they are accused of extremely serious offenses, they will, if convicted, be punished with long sentences. In turn, because these sentences are long, they might violate the human rights of the defendants. In other words, because the offenses are serious, the accused are protected from extradition. This is simply perverse and means that terrorists receive more protection under the existing system for extraditions than those accused of financial fraud or most other criminal offenses receive.

Second, Hamza and his co-defendants are playing the same card as McKinnon: the claim that they will suffer mental anguish if extradited to and convicted in the U.S. They do not even have McKinnon's diagnosis of mental illness to assist them in making this case; their claim rests simply and solely on the claim that being in solitary confinement for life in a prison is unpleasant.

If imprisonment for life is an offense against human dignity, then long sentences are similarly suspect. That, in fact, is exactly what the European Court of Human Rights has ruled. One of the co-defendants, if found guilty, could be given a sentence of up to 50 years. The court ruled that this, too, would potentially be a violation of his human rights. The European enthusiasm for allowing claims of mental anguish is a farce that gives terrorists and criminals unlimited rights to resist extradition, or even imprisonment, of any kind.

Third, the ruling demonstrates that the British government—which has tried to cooperate with the U.S. government in securing Hamza's extradition—is far too heavily restrained by the European courts

25. Vikram Dodd, "Abu Hamza Extradition to U.S. Blocked by European Court," *The Guardian*, July 8, 2010, at *http://www.guardian.co.uk/uk/2010/jul/08/abu-hamza-human-rights-ruling* (August 22, 2010).

to which it has unwisely made itself subject. Indeed, the development of British extradition policy since 1997 has been perverse.

By Europeanizing its policy, Britain has secured the worst of all possible worlds: extra protections for terrorists, no protections at all for British subjects inside the EU, and domestic legislation that places the U.S. and Australia on the same level as Russia and Ukraine—legislation that has been used both ignorantly and maliciously to discredit the 2003 treaty, the U.S. ratification of which was vociferously demanded by Britain for years after its negotiation. The time has come for a simpler, more coherent system that restores British sovereignty, offers a reasonable minimum of protection to all, and does no favors for those accused of terrorism.

What the United States and Great Britain Should Do

The duty of the U.S. is to continue to apply the 2003 treaty conscientiously, to react quickly and responsibly to British requests for extradition, and to explain to critics of the treaty that the problems they see with it are the result of the actions of the EU and the Labour government, not the treaty or the United States.

The new British government should recognize that the standard for extraditions from the U.K. for most offenses, and in particular through the EAWs, is too low. This problem is not connected with the U.S.–U.K. treaty. It is the result of Britain's 2003 Extradition Act. This act, in turn, is centrally connected to Britain's decision to implement the 1999 European Council's decision to create the EAWs, which stems ultimately from Britain's membership in the EU. Amending the 2003 act to require a "reasonable basis" minimum standard for extraditions from Britain in all cases would create a conflict between the EU's Framework Decision on the EAWs and British law, because the framework decision would impose higher standards on extradition requests by other EU members from Britain than Britain would have to meet in its requests to them.

Any British action that limits the use of EAWs will undoubtedly result in an action being lodged against Britain in the European Court of Justice on the grounds that Britain is failing to fulfill its obligations under EU law. But given the EU's admission that the EAW system does not work, and given the basic unfairness of the EAWs, the British government has an excellent reason to act. The new British government should therefore exercise its sovereignty and defend British liberties by creating such a "reasonable basis" minimum standard for all extraditions—a standard that, though incompatible with the EU's framework and with the EAW, is compatible with the 2003 treaty.

The British government should couple this step with a wide-ranging parliamentary debate on the advisability of reversing the incorporation into British law of the European Convention on Human Rights. This convention, which derives from the Council of Europe, not the EU, has in practice given terrorist suspects and those who are illegally in Britain protections against deportation or extradition that are greater than those enjoyed by British subjects. By doing so, the government will provide a minimum level of protection to everyone in Britain while not discriminating against British subjects through the EAWs or in favor of terrorist suspects through the British and European courts, whether the latter are derived from the EU or the Council of Europe.

In the interim, British commentators should recognize that blaming the United States or the 2003 treaty for a situation that was created by the deliberate actions of the Labour government as a result of its desire to make it easier to extradite individuals from Britain on human rights grounds and within the EU is nothing more than exploitation of misinformed anti-American sentiment.

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