The Heritage Foundation
LEADERSHIP FOR AMERICA

BACKGROUNDER

No. 2723 | SEPTEMBER 4, 2012

The U.S.–U.K. Extradition Treaty: Fair, Balanced, and Worth Defending

Ted R. Bromund, PhD, and Andrew Robert James Southam

Abstract

The 2003 Extradition Treaty between the United States and Great Britain is intensely controversial in the United Kingdom. The treaty resulted from a British process and is a modern and praiseworthy approach to extradition that is based on an objective evidentiary test, requires dual criminality in all cases, and has a proportionality standard. The European Union's European Arrest Warrant does not have these virtues and therefore urgently needs reform, as does Britain's participation in the Council of Europe's European Convention on Extradition and acceptance of the jurisdiction of the supranational European Court of Human Rights. While Anglo–American cooperation on the treaty and on extradition and international criminal justice can be improved, the 2003 U.S.–U.K. Extradition Treaty is fair, balanced, and worth defending.

This paper, in its entirety, can be found at **http://report.heritage.org/bg2723**

Produced by the Margaret Thatcher Center for Freedom

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

The 2003 U.S.–U.K. Extradition Treaty is the subject of considerable controversy in Britain because of claims that it is unfair to British subjects and biased against Britain. This controversy is unwarranted, and the critics' claims are incorrect.

Ironically, Britain negotiated the treaty as part of a wider effort, dating from 1989, to revise its extradition system and thereby simplify and speed the process of extradition from Britain. While the treaty contains adequate safeguards against abuse, the same cannot be said of the wider effort, centered on the 2003 Extradition Act, which has made it too easy to extradite individuals accused of minor offenses to countries that do not reliably respect the rule of law.

Britain should first reform its extradition system so that, in cases with a creditable charge to answer, extradition proceeds with deliberate speed to countries that reliably respect the rule of law. Britain should allow extradition only on an ad hoc and limited basis to countries that are not reliably subject to the rule of law.

Second, British authorities should cease equivocating about the treaty's value and fairness and about the U.S. justice system in general. Instead,

Key Points

- The 2003 U.S.–U.K. Extradition Treaty is controversial in Britain because of organized media campaigns around high-profile extradition cases and the reluctance of British political leaders to defend the treaty on its merits.
- The treaty embodies a modern, praiseworthy approach to extradition and is not biased against Britain.
- Unlike the European Union's European Arrest Warrant, the treaty is based on an objective evidentiary test, dual criminality, and a proportionality standard.
- The U.S. and Britain should exchange notes formalizing their shared understanding of the treaty and take other measures to improve cooperation on extradition and matters of international criminal justice.
- As a sovereign country and working within the context of the Council of Europe and the EU, Britain should establish a single, uniform standard for efficient extradition with all trusted democracies.

they should plainly state and regularly reaffirm both that the treaty works and that the U.S. is a valued and trusted extradition partner and a law-abiding democracy.

Third, British and American authorities should recognize that Internet-based crime and sophisticated international financial fraud-based crime will likely increase in the coming years. They should therefore work together to improve the handling of complex crimes that cross national borders. These improvements are compatible with the treaty.

Together, these steps will ensure that the British public understands that the treaty is balanced and recognizes the benefits that flow from a safe and mutually trusted system of extradition. This will create a common standard within the British system for extradition to trusted democracies and quiet a controversy that is unfairly damaging the Anglo–American alliance.

Britain's Revision of Its Extradition System

The basic principle underlying extradition is simple: Out of respect for other sovereign states with trusted legal and criminal justice systems and to advance the wider interests of justice, nations have an obligation not to harbor fugitives from justice. Thus, extradition is based on the principles of comity and fairness to all trusted, cooperating nations.

Since the end of the Cold War, extradition has relied increasingly on mutual recognition of the fairness of the legal and judicial systems of these cooperating nations. Nations have been increasingly willing to extradite their own citizens and to recognize that offenses such as international terrorism deserve to be treated as criminal offenses, not political acts. As a result, they have lowered the evidentiary threshold for extradition, thereby increasing its frequency.

NATIONS HAVE BEEN INCREASINGLY WILLING TO EXTRADITE THEIR OWN CITIZENS AND TO RECOGNIZE THAT OFFENSES SUCH AS INTERNATIONAL TERRORISM DESERVE TO BE TREATED AS CRIMINAL OFFENSES, NOT POLITICAL ACTS.

Today, extradition is controversial in Britain largely because Britain has revised its extradition system over the past 30 years to reflect these broader trends. The 1989 Extradition Act consolidated all previous legislation on the subject.[1] One goal of the 1989 act was to facilitate Britain's adherence to the European Convention on Extradition (ECE), which was created by the Council of Europe in 1957. The convention sought to achieve uniform extradition rules among member states.[2]

The convention contains many features that have since become increasingly common to the extradition systems of democratic states. It allows—but does not require—states to reserve the right to require a submission of *prima facie* evidence in particular extradition cases. By default, however, the convention set out lower evidentiary standards: a written request, the warrant from the issuing state, a statement of the offenses for which extradition is sought and the time and place of their commission, and a statement of relevant law.[3] The United Nations adopted a similar approach in 1990 in its Model Treaty on Extradition.[4]

As foreshadowed by the 1989 Extradition Act, Britain adopted the ECE in 1990, thereby accepting the ECE's default standard and moving away from its former *prima facie* standard. Nor did it reserve the right to require *prima facie* evidence to support requests in particular cases made by other ECE signatories. Some nations, including Norway and Denmark, did reserve the right to require *prima facie* evidence in a given case.[5] Britain's decision not to make such a reservation shaped the evolution of its extradition system and committed Britain to the principle that it would apply the

1. Extradition Act 1989, c. 33, http://www.legislation.gov.uk/ukpga/1989/33 (accessed August 9, 2012).
2. Scott Baker, David Perry, and Anand Doobay, *A Review of the United Kingdom's Extradition Arrangements*, U.K. Secretary of State for the Home Department, September 30, 2011, para. 3.71, http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review (accessed April 5, 2012).
3. European Convention on Extradition, art. 12, December 13, 1957, http://www.homeoffice.gov.uk/publications/police/operational-policing/european-convention-extradition (accessed April 5, 2012).
4. U.N. General Assembly, "Model Treaty on Extradition," A/RES/45/116, December 14, 1990, http://www.un.org/documents/ga/res/45/a45r116.htm (accessed May 15, 2012).
5. Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, para. 3.71, note 133.

ECE's default evidentiary standard to requests from all ECE signatories and, by implication, from other mature democracies.

This principle grew in importance after the end of the Cold War. In 1990, the Council of Europe had only 23 members, but it had gained another 25 members by 2007, including Russia and Ukraine. The number of ECE signatories grew apace.

Thus, in Britain, the ECE's default evidentiary standard began to apply to a number of nations that are Council of Europe members and therefore deemed to be modern democracies, even though in practice they are nothing of the sort. Britain could have blocked the council's admission of some or all of these new members but for broader reasons of foreign policy chose not to do so. As a result, while understandable in the context of 1990, Britain's failure to enter a *prima facie* reservation on the ECE has placed it in the awkward position of treating the genuine democracies (such as Switzerland) and the pseudo-democracies (such as Russia) as legal equals and of treating other genuine democracies around the world (such as Australia) as no better than the pseudo-democracies.

The situation became even more complicated in the 1990s, when the European Union entered the picture. In 1999, the EU went beyond several previous conventions by recommending the creation of a European Arrest Warrant (EAW) based on the principle of "mutual recognition," the principle that all states in the European Union have reached common acceptable standards in their criminal justice systems that allow for the automatic recognition and enforcement of each other's laws. The EAW was intended to be a move toward the creation a single judicial area within the EU.[6]

For Britain, the EAW's significance should not be exaggerated. Because almost all EU member states were signatories of the ECE, the EAW did not eliminate the *prima facie* standard in Britain.[7] Because of its acceptance of the ECE, Britain was processing extradition requests without the *prima facie* test for nearly a decade before the EAW. Nevertheless, the move toward the EAW has had five important consequences:

1. By placing extraditions within the EU on an institutional EU basis instead of the Council of Europe's ECE, the EAW locked Britain even more firmly into an extradition system with a lower evidentiary standard than *prima facie* for participating nations.

2. Because the EAW is based on mutual recognition, it made extradition for the list of agreed-upon offenses an automatic procedure. Indeed, the EAW, properly speaking, is not an extradition system at all because it treats the EU as a single judicial area.

3. The introduction of the EAW implied that it would make removals from Britain a routine affair. This has happened: Arrests and surrenders under the EAW have increased every year in Britain, rising from 24 surrenders in 2004 to 1,068 surrenders in 2010.[8]

4. While the EAW is based on mutual recognition, it is far from clear that all EU members have legal and judicial systems that warrant this recognition. For example, a recent report from Transparency International Greece referred to that country's "broad scale acceptance of and participation in corruption."[9] Many EU countries are recent democracies that do not consistently provide the accused with free legal assistance or access to an interpreter. Accordingly, the EU Commission has expressed "some doubts about standards being similar across the EU."[10] Many countries also zealously initiate criminal proceedings for conduct that in Britain might result in a misdemeanor charge or civil proceedings.[11]

5. The EU's actions since the mid-1990s further encouraged Britain—already dissatisfied with

6. Ibid., paras. 3.75–3.78 and 4.49–4.51.
7. Ibid., para. 8.40.
8. Ibid., p. 462.
9. Transparency International Greece, "National Integrity System Assessment Greece," April 3, 2012, p. 4, http://www.transparency.org/content/download/66415/1064947 (accessed April 5, 2012).
10. European Commission, "On the Implementation Since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States," COM(2011) 175 final, April 11, 2011, p. 6, http://ec.europa.eu/justice/criminal/files/eaw_implementation_report_2011_en.pdf (accessed June 21, 2012).
11. Alan Hirsh, "Door Thief, Piglet Rustler, Pudding Snatcher: British Courts Despair at Extradition Requests," *The Guardian*, October 19, 2008, http://www.guardian.co.uk/uk/2008/oct/20/immigration-extradition-poland-lithuania-law (accessed June 21, 2012).

the extended appeals allowed under the 1989 Extradition Act, among other issues—to conduct a full review of its extradition system. The review found that extradition procedures under the Extradition Act were "cumbersome, beset by technicality and blighted by delay."[12] The review was put on hold until 2000 by the 1998 Spanish request to extradite former Chilean President General Augusto Pinochet.[13] When the review was finally published for comment in March 2001, it found:

> [T]he [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.... [T]he inordinate length of time it can take for a person to be extradited, even to another EU member state, and the multiple avenues for appeal, form a major motivator for radical reform [of Britain's extradition system].[14]

Thus, the Labour government concluded that both the delays in the extradition process, as evidenced by the Pinochet case, and the creation of an EAW, which it supported, necessitated a revision of the British extradition system to bring it in line with the EAW within the EU and with the broader international move toward relying on mutual recognition of the fairness of the legal and judicial systems of all cooperating democratic nations as a way to speed up extradition.

This desire to revise the system produced the 2003 Extradition Act, which today, as amended, governs extraditions from Britain.[15] The act defines two categories of nations. Category 1 applies almost exclusively to the EU states that are operating the EAW. Category 2 applies to 92 other nations, most of which are required to submit *prima facie* evidence. But 20 of these nations are ECE signatories and thus are not required to submit *prima facie* evidence in support of extradition requests.[16]

Because Britain has confidence in the overall fairness of their judicial systems, and in the case of the U.S. because of the 2003 treaty, it has designated four nations—Australia, Canada, New Zealand, and the United States—as states that are also not required to submit *prima facie* evidence in support of extradition requests.[17] Instead, these four nations, like the 20 non-EU signatories of the ECE, are required to provide "information" that justifies the issuance of an arrest warrant. In Britain, this is known as the "reasonable suspicion" test. The difference between "evidence" and "information" is that evidence would be admissible in court proceedings, whereas information is material in any form.[18]

Thus, in layman's terms, neither the U.S. nor any other non-EAW country can extradite an individual from Britain without providing evidence that meets—at a minimum—the well-understood and traditional British test of "reasonable suspicion" as applied by a British judge.[19] This is exactly the same standard required for the arrest of a person under criminal proceedings in Britain. In contrast, countries under Category 2 of the 2003 Extradition Act must provide "evidence" that meets the higher *prima facie* standard.

These 24 nations that have been designated as "reasonable suspicion" states under the act's second category are a mixed bag. They include mature democracies, such as Australia and the United States; smaller European democracies that are not in the EU but have ratified the ECE, such as Liechtenstein and Switzerland; and states that have ratified the ECE but have weak rule of law, such as Azerbaijan, Russia, and Ukraine. Britain had designated the U.S. as

12. Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, para. 3.97.
13. Sally Broadbridge, "The UK/US Extradition Treaty," U.K. House of Commons Library, *Standard Note* SN/HA/2204, February 23, 2009, p. 3, http://www.parliament.uk/briefing-papers/SN02204 (accessed April 5, 2012).
14. U.K. Home Office, *The Law on Extradition: A Review*, March 2001, quoted in Broadbridge, "The UK/US Extradition Treaty," p. 3.
15. Extradition Act 2003, c. 41, http://www.legislation.gov.uk/ukpga/2003/41/contents (accessed August 9, 2012).
16. For a complete list of Category 2 states, see Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, pp. 474–476.
17. Ibid., paras. 8.45–8.46.
18. Ibid., para. 7.29 and note 17.
19. Technically, the United States does not extradite individuals from Britain; it is Britain that extradites individuals from Britain to other national jurisdictions. This is significant because it places the responsibility for controlling extradition on the nation to which the request is made, sometimes referred to as the "requested" state, and thereby confirms that extradition is ultimately subject to the requested state's sovereign judgment and control.

a state that did not need to submit *prima facie* evidence before the U.S. ratified the U.S.–U.K. Extradition Treaty in 2007 but in the expectation that it would ratify the treaty.

In other words, the U.S. has exactly the same status under British extradition law as Australia and Russia. The only difference is that Russia has its status because it is a member of the Council of Europe and has adopted the ECE, while the U.S. has its status by virtue of the 2003 treaty, and Australia has its by virtue of the decision of the British government.[20]

If this aspect of the British extradition system has a fault, it is that Britain has designated too many nations under the second category of the Extradition Act and does not regularly review the list of designated nations.[21] For example, Russia is not a law-abiding nation, whereas Australia is. But, more broadly, Britain's entire extradition structure is a result of obligations that Britain accepted under the ECE and as an EU member. From 1990 through 2006, Britain at no stage demonstrated any desire to reject these obligations. Indeed, it embraced them. The extradition system was the result of a review that Britain conducted before 9/11 because Britain had concluded that it needed to revise its extradition system.

To the relatively minor extent that Britain acted under pressure from abroad, the pressure came from the EU, not the United States. The U.S. played no role in any of these developments. It entered the picture only because the British review that was published for comment in March 2001 recommended that the United Kingdom renegotiate its major bilateral extradition treaties, and these negotiations led to the 2003 treaty.

THE EXTRADITION SYSTEM WAS THE RESULT OF A REVIEW THAT BRITAIN CONDUCTED BEFORE 9/11 BECAUSE BRITAIN HAD CONCLUDED THAT IT NEEDED TO REVISE ITS EXTRADITION SYSTEM.

The United States Enters the Picture

Treaties have governed extraditions between the United States and Britain since the Jay Treaty of 1794. In 1842, the Webster–Ashburton Treaty replaced the Jay Treaty, and further replacement treaties followed in 1889, 1931, and 1972. A 1985 treaty supplemented the 1972 treaty and was in turn amended by an exchange of notes between the governments in 1986.[22]

By the early 2000s, when Britain was revising its extradition system, the 1972 treaty was out of date, primarily because it relied on an explicit list of extraditable offenses. List systems are increasingly regarded as an outdated approach to extradition because they require constant updating as new crimes are defined and because even mature democracies can categorize and describe the same offenses in different ways, making the treaty hard to apply.

By contrast, the 2003 treaty relies exclusively on the concept of "dual criminality," meaning that it allows extradition for offenses punishable "under the laws of both States by deprivation of liberty for a period of one year or more."[23] In other words, the 2003 treaty allows the offenses subject to extradition to change as both American and British laws change, obviating the need for the regular updating of a list of extraditable offenses in the treaty itself. Thus, neither the U.S. nor Britain can expect the other country to honor an extradition request based on a newly defined offense that the other country does not recognize as a serious offense. Furthermore, the treaty's "one year or more" requirement sets a proportionality standard, ensuring that no one can be extradited from Britain to the U.S. or from the U.S. to Britain for a minor offense.

Given its reliance on dual criminality and a proportionality standard, the 2003 treaty is similar to the ECE and is a logical application of the principles underlying the ECE (which by 2003 had been U.K. law for more than a decade) to the Anglo–American relationship. This is no surprise because the ECE, the 2003 Extradition Act, the 2003 treaty, and even to some extent the EAW are part of the same underlying trend that democracies should base their extradition arrangements on mutual trust and respect.

However, the EAW is badly flawed because, like the 1972 treaty, it relies on an explicit list of offenses but, unlike that treaty, lacks a

20. Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, para. 8.47.
21. Ibid., para. 8.92.
22. Ibid., para. 7.3.
23. 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, art. 2(1), March 31, 2003, http://www.statewatch.org/news/2007/jun/uk-usa-extradition-treaty.pdf (accessed April 5, 2012).

dual-criminality provision, has no evidentiary standard, allows extradition for even minor offenses, and makes the process automatic and thus not subject to control by democratic legislatures. For these reasons, the EAW, as an arrest procedure, differs fundamentally from the extradition arrangements under the ECE and the 2003 treaty.

Although based on principles common to modern extradition systems, the 2003 treaty was particularly significant in the Anglo–American context because Britain's media and vocal elements of its political class have long believed that the U.S. was reluctant to extradite individuals accused of supporting terrorism in Northern Ireland. The U.S. legal system was indeed in the wrong on this issue, but the British impression that the executive branch of the U.S. government was reluctant to extradite was based on a misunderstanding. Britain's extradition requests were rejected by U.S. courts, not the executive branch, on the grounds that the offenses in question were political and thus exempt from extradition under the 1972 treaty. The U.S. government did not agree with the courts' decisions. On the contrary, it vigorously pursued Britain's applications through the court system and went so far as to use deportation proceedings, when possible, to return individuals to Britain whom it could not extradite.[24]

The Supplementary Treaty of 1985 eased the situation by repealing the political offense exception in the 1972 Treaty. Securing ratification of this treaty became a particular priority for President Ronald Reagan after British Prime Minister Margaret Thatcher's staunch support of the U.S. raid on Libya in April 1986. In his diary, Reagan noted on July 17, 1986, that he had "Got a call that the Sen[ate] had ratified the extradition treaty with Eng[land] 87 to 10. This will stop the U.S. from being a shelter for Irish terrorists. I called Margaret Thatcher—tracked her down at a dinner party. She's delighted."[25]

NOW THAT THE 2003 TREATY IS CONTROVERSIAL IN BRITAIN, BRITISH POLITICIANS APPARENTLY WISH TO FORGET THAT BRITAIN REGULARLY CRITICIZED THE U.S. FOR NOT RATIFYING THE TREATY QUICKLY ENOUGH.

After the conclusion of the Good Friday Agreement in 1998, and especially after 9/11, American opinion moved even more decisively toward the British position on the extradition of alleged terrorists.[26] The 2003 treaty, while it retains an exception for political offenses, makes it clear that terrorism is not political and is an extraditable offense. In short, Britain valued the 2003 treaty in part because it contained this valuable American acceptance that the British position on the extradition of terrorists had been correct all along.

Now that the 2003 treaty is controversial in Britain, British politicians apparently wish to forget that Britain regularly criticized the U.S. for not ratifying the treaty quickly enough. The treaty was signed on March 31, 2003, but was not ratified by the U.S. Senate and signed by President George W. Bush until December 6, 2006. During the intervening years, politicians and the British media frequently and intensely—and rightly—criticized the U.S. delay, which they sometimes attributed to the lingering suspicions of the Irish–American community in the United States.[27] For example, in May 2005, Conservative Member of Parliament (MP) Boris Johnson tabled an Early Day Motion calling, in part, upon the British government to defer all extraditions to the U.S. until the Senate ratified the 2003 treaty. A large number of MPs from all parties signed the motion.[28] This criticism continued until the U.S. overcame its domestic concerns and ratified the treaty.

While criticizing the U.S. for acting too slowly, British politicians also argued with increasing intensity that the treaty was biased against Britain. Curiously, the claim that the 2003 treaty made extraditions to the U.S. too easy sometimes accompanied the

24. Kathleen A. Basso, "The 1985 U.S.–U.K. Supplementary Extradition Treaty: A Superfluous Effort?" *Boston College International and Comparative Law Review*, Vol. 12, No. 1 (1989), p. 303, http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1382&context=iclr (accessed May 15, 2012).
25. Ibid., p. 313, and Ronald Reagan, *The Reagan Diaries*, ed. Douglas Brinkley (New York: HarperCollins, 2007), p. 425.
26. On U.S. criticisms of the 2003 treaty, which revolved around concerns about the treaty's treatment of the "political offense" exemption, see Charles Doyle, "Extradition Between the United States and Great Britain: The 2003 Treaty," Congressional Research Service *Report for Congress*, October 10, 2006, http://www.fas.org/sgp/crs/misc/RL32096.pdf (accessed April 5, 2012).
27. Tom Baldwin, "U.S. Snubs Britain over Sex Criminals," *The Times* (London), March 7, 2006. For an example of this criticism, which describes the 2003 treaty as "a British dagger pointed at the heart of Irish America," see Francis A. Boyle, "Proposed United States–United Kingdom Extradition Treaty," letter to Senators Richard G. Lugar and Joseph A. Biden, March 4, 2004, http://www.irishfreedomcommittee.net/IFC_INFO/CAMPAIGNS/USUK_EXTRADITIONTREATY/lugar_letter.pdf (accessed May 15, 2012). For a more balanced assessment of the criticisms, see Doyle, "Extradition Between the United States and Great Britain."

claim that the U.S. was wrongly delaying ratification. For example, the May 2005 Early Day Motion simultaneously urged U.S. ratification of the treaty and alleged that the treaty unfairly failed to require the U.S. to provide *prima facie* evidence to Britain to justify its extradition requests.

Since 2006, the British campaign to encourage U.S. ratification of the treaty has been forgotten, and British criticism has grown in volume. Yet these contradictions are the root of the current controversy.

First, the underlying argument for the changes in the British extradition system from the early 1990s was that making extradition easier would be good for human rights and would help to build closer relations with other democracies. Now these changes are condemned as bad for human rights and as destructive to British relations with other democracies.

Second, before 2006, the 2003 treaty was frequently understood as part of and compatible with the broader changes in Britain's extradition system. It is now frequently condemned as an exceptional and undesirable part of that system.

Third, before 2006, Britain criticized the U.S. as a reluctant extradition partner and for taking too long to ratify the 2003 treaty, but it now complains that the U.S. is too demanding and that the treaty is unfair to Britain.

These contradictions suggest that British criticisms of the treaty should be assessed with care and not simply accepted at face value.

Assessing British Criticisms of the 2003 Extradition Treaty

Through the 2003 Extradition Act, the 2003 treaty has been British law for almost a decade, allowing critics ample opportunity to make their case. Criticism has focused on a series of high-profile cases, including the extradition of three former NatWest bankers who later pled guilty to fraud charges related to the collapse of Enron in 2006; the pending extradition of Gary McKinnon, a computer hacker and 9/11 conspiracy theorist, in a case that began in 2009;[29] and the 2012 extradition of Christopher Tappin, a British businessman accused of attempting to sell components of a U.S. missile system to Iran.[30]

These cases and several others have generated a series of British debates, reviews, and reports, including *The Human Rights Implications of UK Extradition Policy*, a report published by the Parliamentary Human Rights Joint Committee on June 7, 2011; "UK Extradition Arrangements," a backbench debate in the House of Commons on December 5, 2011; and *The US–UK Extradition Treaty*, a March 27, 2012, report by the Parliamentary Home Affairs Committee. These reports and debates have tended to strongly criticize the 2003 treaty.[31]

The exception to this tendency was a comprehensive review of the U.K.'s extradition arrangements by Sir Scott Baker, a distinguished British judge, which was published on September 30, 2011. Evidently believing that the Baker Review was insufficient—or that it reached an inconvenient conclusion—Deputy Prime Minister Nick Clegg ordered a Liberal Democratic review in November 2011. In February 2012, Prime Minister David Cameron

28. Broadbridge, "The UK/US Extradition Treaty," p. 16.

29. McKinnon is commonly described as a confused young man who was simply searching for evidence of the existence of UFOs, but in his own statements, he acknowledges a somewhat different set of motives. 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, http://news.cnet.com/Gary-McKinnon-Scapegoat-or-public-enemy/2008-7350_3-5786782.html (accessed May 22, 2012).

30. For commentary on the Tappin case, see Ted R. Bromund, "A Few Home Truths About Extradition from the United Kingdom," *The Commentator*, March 2, 2012, http://www.thecommentator.com/article/953/a_few_home_truths_about_extradition_from_the_united_kingdom/page/1 (accessed April 5, 2012), and "Answers to Questions on the Tappin Extradition Case," *http://www.thecommentator.com/article/1020/answers_to_questions_on_the_tappin_extradition_case* (accessed April 5, 2012).

31. U.K. Parliament, Human Rights Joint Committee, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report, June 7, 2011, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/15602.htm (accessed April 6, 2012); U.K. House of Commons, "UK Extradition Arrangements," December 5, 2011, http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111205/debtext/111205-0002.htm#11120526000001 (accessed April 6, 2012); and U.K. Parliament, Home Affairs Committee, *The US–UK Extradition Treaty*, Twentieth Report, March 27, 2012, http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/644/64402.htm (accessed April 6, 2012).

promised a further official review of the treaty by Home Secretary Theresa May.[32]

It is convenient to group the British criticisms of the 2003 treaty by the major themes on which they are based while noting that the volume of commentary in Parliament and the British media makes it impossible to categorize and assess the validity of every assertion.

Claim #1: Extradition from Britain to the U.S. is automatic and lacks safeguards, whereas U.S. citizens enjoy the protection of a judicial examination of evidence. The 2003 Extradition Treaty is therefore imbalanced against Britain.

Examples: In the debate on December 5, 2011, the lead speaker, Conservative MP Dominic Raab, stated that "an American citizen who is subject to an extradition warrant in the US has the constitutional safeguard that a judge must examine the evidence. In this country, a short recitation of the allegations suffices. That is a very real and important imbalance."[33] *The Human Rights Implications of UK Extradition Policy* cites a similar claim made by David Bermingham in his testimony.[34]

Response: Mr. Raab's claim is incorrect for three reasons.

- Sections 71 (2) and (3) of the Extradition Act 2003 state that a British judge must have "reasonable grounds" for believing that there is information "that would justify the issue of a warrant for the arrest of a person accused of the offence within the judge's jurisdiction." In other words, every successful U.S. extradition request must meet an objective legal test, decided by a British judge. This test includes not only the information that justifies the issue of a warrant, but also whether the offense meets the treaty's dual-criminality requirement and whether the person sought has been appropriately identified.

EVERY SUCCESSFUL U.S. EXTRADITION REQUEST MUST MEET AN OBJECTIVE LEGAL TEST, DECIDED BY A BRITISH JUDGE.

- A substantial portion of the 2003 act details the appeals process for extradition decisions involving Category 2 countries. The act provides for the right to appeal to the High Court both the decision of the presiding judge and any subsequent decision by the Home Secretary to order extradition.[35] Therefore, it is false to say that British subjects can be extradited after "a short recitation of the allegations." The lengthy appeals in the cases of McKinnon, Tappin, and others prove clearly that extradition from Britain is subject to elaborate and time-consuming safeguards. Far from being too fast, a speedier British extradition process would certainly be in the interests of victims.

  Those who assert that they are concerned with the length of time consumed by extradition appeals should also support a speedier process. Indeed, Babar Ahmad, accused of providing material support to terrorism, has become a cause célèbre in large part because he has been held in a British jail fighting his extradition to the U.S. since 2004, a length of time that some consider unacceptable.[36] In other words, the legal protections surrounding extradition are so extensive that accused individuals such as Mr. Ahmad can generate political support by claiming that the very protections that they are using to appeal their case are oppressive.

- One of Britain's goals in revising its extradition system was to reduce political input into extradition proceedings and make them judicial-only proceedings as far as possible. Thus, far from the judiciary having no real role in the British extradition system, the U.K. has sought to *increase* its role over the past two decades.

Claim #2: Because the U.S. standard of "probable cause" is higher than the U.K. standard of "reasonable suspicion," the 2003 Extradition Treaty is imbalanced against Britain. The standards

32. Tom Whitehead, "Fresh Review of Extradition Laws Ordered by Clegg," *The Telegraph*, November 18, 2011, http://www.telegraph.co.uk/news/politics/8900059/Fresh-review-of-extradition-laws-ordered-by-Clegg.html (accessed April 6, 2012), and Nicholas Watt, "Theresa May to Review UK Extradition Treaty with US," *The Guardian*, February 22, 2012, http://www.guardian.co.uk/politics/2012/feb/22/theresa-may-extradition-treaty-us (accessed April 6, 2012).
33. Dominic Raab, opening statement, in U.K. House of Commons, "UK Extradition Arrangements," column 82.
34. U.K. Parliament, *The Human Rights Implications of UK Extradition Policy*, paras. 189–190.
35. Extradition Act 2003, §§ 103–116.
36. Andrew Smith, statement, in U.K. House of Commons, "UK Extradition Arrangements," column 96.

of evidence should be equal, or Britain should reintroduce the *prima facie* standard either for the U.S. or for all countries.

Examples: In September 2010, *The Daily Mail* quoted former British Home Secretary David Blunkett, who was responsible for negotiating the 2003 treaty: "I'm being perfectly honest about looking at something seven years on and saying it wasn't perfect.... In theoretical terms, I think there is still a debate...about whether we gave away too much."[37] The Parliamentary Human Rights Joint Committee concluded in 2011 that the British government "should increase the proof required for the extradition of British citizens.... This will require renegotiation of the UK–US Extradition Treaty."[38] In the 2011 debate, Mr. Raab stated that the "fundamental question is the difference between reasonable suspicion and probable cause." In the same debate, Michael Crockart, a Liberal Democrat MP, referred to "the lopsided extradition arrangements between Britain and the US" and criticized "the lack of a prima facie safeguard."[39]

Response: This claim combines two distinct arguments. The first argument—that Britain should use a *prima facie* standard for extraditions—is plausible on its surface, but Britain abandoned this standard for trusted democracies when it adopted the ECE and then, even more definitively, with the EAW. The U.S. is simply one of many countries for which the U.K. uses a "reasonable suspicion" standard.

The U.K. could return to the *prima facie* standard for extraditions, which is the standard used for most countries before it adopted the ECE in 1990, but it would require renegotiation of most if not all of its major extradition arrangements. In its extradition arrangements with trusted democracies, Britain moved away from the *prima facie* standard after long and careful deliberation, and it would be contrary to Britain's extradition structure and the evolution of extradition practice among mature democracies to revert to the *prima facie* standard.

The second argument is more complex. Before the Baker Review, it was widely accepted that the U.S. "probable cause" standard, which was incorporated in the treaty, was slightly higher than Britain's "reasonable suspicion" standard, which was incorporated in the 2003 act.[40] Yet after careful consideration, the Baker Review concluded that these standards were equivalent and that both British and American authorities intended and understood them to be as nearly identical as two national legal systems would allow. Sir Scott's forthright conclusion on this point is significant:

> We believe that any difference between the two tests is semantic rather than substantive, and the challenge to those who suggest that the tests are in some way different is to articulate precisely what the difference is and how the difference would apply in any particular case.[41]

This conclusion has changed the balance of informed opinion. For example, in the 2011 debate, in spite of his prior assertion of a difference between the two tests, Mr. Raab conceded, "I do not think there is an enormous amount of difference between them." The 2012 Parliamentary Home Affairs Committee report similarly acknowledged "a body of respectable legal opinion which suggests that there is little or no distinction in practice" between the standards.[42]

In short, the critics are falling back, as Mr. Raab was forced to do, to the assertion that, while the tests are legally equivalent, they do not work equivalently in practice because of the supposed "imbalance" in judicial proceedings. Since this imbalance does not exist, claims related to problems with the treaty's evidentiary standards have almost no merit.

The only real problem with the treaty's evidentiary standards is that the U.S. standard is embodied in the 2003 treaty, while Britain's is

37. James Slack, "'I Gave Too Much Away': David Plunkett's Startling Admission on UK–U.S. Extradition Treaty," *Mail Online*, September 3, 2010, http://www.dailymail.co.uk/news/article-1308478/David-Blunketts-startling-admission-UK-US-extradition-treaty.html (accessed May 16, 2012); Raab, opening statement, column 82; and Michael Crockart, statement, in U.K. House of Commons, "UK Extradition Arrangements," column 98.
38. U.K. Parliament, *The Human Rights Implications of UK Extradition Policy*, para. 192.
39. Raab, opening statement, column 84, and Crockart, statement, column 98.
40. For a statement by a responsible British minister to this effect, see ibid., para. 187. The statement in question was made before the publication of the Baker Review.
41. Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, para. 7.43.
42. Broadbridge, "The US–UK Extradition Treaty," p. 7.

embodied in the 2003 Extradition Act. As David Blunkett noted during the December 2011 debate, a casual reading of the treaty does create the impression of unfairness.[43] This problem can and should be remedied by a formal exchange of notes between the British and American governments.

Claim #3: The United Kingdom should introduce a "forum bar" to ensure that British subjects are tried in the United Kingdom; that the U.K. has the right of "first refusal" in filing charges; and that British subjects, once convicted, are imprisoned in the United Kingdom. In this context, a forum bar prevents or limits the extradition of individuals from one nation to another. The United Kingdom did not implement a forum bar in the 2003 Extradition Act, although the Police and Criminal Justice Act of 2006 amended the 2003 act to give British authorities the power to introduce a forum bar.

Examples: When he was Leader of the Opposition, Prime Minister David Cameron voiced support for McKinnon, stating that he "is a vulnerable and young man and I see no compassion in sending him thousands of miles away from his home and loved ones to face trial. If he has questions to answer, there is a clear argument to be made that he should answer them in a British court."[44] The December 2011 debate indicated substantial support for a forum bar. Mr. Crockart and Conservative MPs David Davis and Stephen Phillips, among others, voiced support. David Burrowes (Conservative) requested that McKinnon be allowed "to stand trial via a TV link from this country and, if convicted, to serve his sentence here."[45] Finally, the 2012 report on *The US–UK Extradition Treaty* by the Parliamentary Home Affairs Committee concluded that "The Committee...recommends that the Government introduce a 'forum bar' as soon as possible."[46]

THE U.S. HAS WILLINGLY PARTICIPATED IN PRISONER REPATRIATION PROGRAMS WITH BRITAIN.

Response: On the question of the location of imprisonment, the U.S. has willingly participated in prisoner repatriation programs with Britain, and while these programs should be better publicized and should work more efficiently, the core of the system that the British critics demand is already in place and operated with demonstrated goodwill by American authorities. The U.S. (or Britain in the reverse case) is unlikely to accept a general requirement to repatriate prisoners to Britain but is clearly willing to act sympathetically on a case-by-case basis.

On the question of the "right of first refusal," the U.K. (and the U.S. in reverse cases) already has this right under the terms of the 2003 treaty. If the U.K. wishes to try Gary McKinnon in Britain, nothing stops British authorities from charging him with a crime and bringing the case to trial if prosecutors decide that British laws have been broken and prosecution would serve the public interest. They are also free to interrupt extradition proceedings at any time to proceed with a domestic trial for the same crime or for another alleged crime. Whatever the outcome of any domestic trial, no U.S. extradition request would be permitted if it entailed double jeopardy in any location, such as trying McKinnon or any other individual again for the same offense in the United States.[47]

More broadly, no forum bar could operate in all cases.[48] If the offense in question takes place completely in the other nation—for example, if an American commits a murder in London—then extradition to the country where the offense occurred should proceed. Similarly, the international trend is toward countries dropping any absolute bar to the extradition of their nationals, following the practice long established by the U.K. and the U.S.

In short, the demand for a forum bar is mostly an illusion, both because Britain already has the right to try crimes committed partly in the U.K. in British courts and because it likely will not completely bar extradition of British subjects for crimes committed entirely in the U.S., just as the U.S. is willing to extradite its citizens for crimes committed

43. David Blunkett, statement, in U.K. House of Commons, "UK Extradition Arrangements," column 88.
44. Broadbridge, "The US–UK Extradition Treaty," para. 3.
45. David Davis, statement, in U.K. House of Commons, "UK Extradition Arrangements," column 92; Crockart, statement, column 97; and Stephen Phillips, statement, in U.K. House of Commons, "UK Extradition Arrangements," column 102.
46. Broadbridge, "The US–UK Extradition Treaty," para. 33.
47. Extradition Treaty, art. 5.
48. For a review of the arguments for and against a forum bar, see Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, paras. 6.52–6.76.

entirely in Britain. The real question is how British and American authorities handle complex cross-border crimes, either crimes that occur in both nations simultaneously or those that occur entirely in the territory of one nation but have an effect in the other.

Claim #4: Judges should decide the appropriate forum for a trial, or prosecutors should make the decision using clear and publicly applied rules.

Examples: The demand for a forum bar really amounts to a demand that a judge—not a prosecutor—should decide where a trial should proceed or that a prosecutor should publicly apply clear and objective standards to make that determination. The December 2011 debate contained many calls for action along these lines, such as Mr. Raab's claim that "we ought to have some discretion in this country to prosecute such cross-border cases here. Jurisdiction ought to be decided transparently, by independent courts, according to clear legal rules, not by prosecutors haggling behind closed doors."[49] The 2011 Parliamentary Human Rights Joint Committee report went even further, concluding that Britain should renegotiate the 2003 treaty to preclude extradition in cases where British authorities "have already made a decision not to charge or prosecute an individual on the same evidence adduced by US authorities."[50]

Response: First, the arguments advanced by Mr. Raab and the Parliamentary Human Rights Joint Committee are unrelated to the 2003 treaty. Their arguments are about the actions of the Crown Prosecution Service (CPS). If Britain wishes to exercise its discretion and press charges through British courts against British subjects accused of complex cross-border crimes, it has the undoubted right to do this.

Indeed, much of the friction around extradition in the Anglo–American relationship would disappear if British authorities prosecuted more of the controversial cases domestically. From a conservative perspective, nations should always prefer, if possible, trying their own nationals to extraditing them to a foreign nation, even if that nation is another democracy.[51]

More broadly, the idea of guidelines to assist in determining the appropriate forum for a case has merit, but setting fixed rules in advance to deal with this problem is not possible. The complex cross-border crimes that raise the thorniest jurisdiction issues are the least amenable to clear-cut rules on jurisdiction. Mr. Raab's call for "clear legal rules" also ignores the reality that, even in the decision to charge an individual with a purely domestic crime, the Anglo–American system always includes an element of prosecutorial judgment and discretion. Prosecutors always must decide, given the circumstances of the case, what best serves the public interest.

It is therefore unclear how Mr. Raab can reconcile his call for "clear legal rules" with his argument that there is a proclaimed need for "some discretion" in deciding where cases should be prosecuted. If the government has discretion on where to prosecute, this would seem to preclude firm, clear legal rules dictating the selection of one forum over another.

Similarly, the Parliamentary Human Rights Joint Committee implies that a decision by the Crown Prosecution Service to decline to prosecute means that there is no legal case to answer. That is not necessarily true. It could mean that the CPS decided that the case falls more properly under U.S. jurisdiction or that prosecution in the U.S. would better serve the wider interests of justice.

The argument that a British decision not to prosecute should preclude extradition to the U.S. denies the reality that some crimes occur in both nations simultaneously and that both nations may have full and proper jurisdiction to prosecute. In the reverse case, if the U.S. decided not to prosecute an American fundraiser for the Irish Republican Army on the grounds that it lacked jurisdiction and then refused extradition to Britain on the grounds that it had decided not to prosecute, British opinion would be rightfully enraged.

In short, in both the British and American legal systems, the prosecutors decide whether to press charges, which charges to press, and in which jurisdiction to file the case. By contrast, the treaty's critics are advocating a system that is closer to the French magistrate model, in which judges decide whether to prosecute.

49. Raab, opening statement, column 84.
50. U.K. Parliament, *The Human Rights Implications of UK Extradition Policy*, paras. 194–196.
51. There are indications that the U.S. and Britain are arriving at this conclusion. For example, see the case of Gareth Crosskey, who was convicted in May 2012 for hacking into Selena Gomez's Facebook page. Emily Sheridan, "British Hacker, 21, Jailed for Infiltrating Selena Gomez's Facebook page...and Reading Personal Emails to Boyfriend Justin Bieber," *Mail Online*, May 21, 2012, http://www.dailymail.co.uk/tvshowbiz/article-2147556/Selena-Gomez-Jailed-Facebook-hacker-Gareth-Crosskey-21-read-emails-Justin-Bieber.html (accessed June 18, 2012).

In the Anglo–American legal system, when a complex cross-border crime is concerned, it is sensible for British and American prosecutors to gather information from all sources, including foreign prosecutors, to inform their independent decision on whether to press charges in their home country. There is value in setting guidelines for prosecutors in making these decisions, but the decisions should remain a matter of judgment, not rote application of clear-cut rules. If British politicians are unwilling to defend the current extradition system, it is not clear how they can continue to support their domestic judicial system, which rests on exactly the same kind of prosecutorial discretion.

IN BOTH THE BRITISH AND AMERICAN LEGAL SYSTEMS, THE PROSECUTORS DECIDE WHETHER TO PRESS CHARGES, WHICH CHARGES TO PRESS, AND IN WHICH JURISDICTION TO FILE THE CASE.

Claim #5: Because the U.S. overreaches in its treatment of extraterritorial offenses, the 2003 treaty affects Britain disproportionately and unfairly.

Examples: In *The US-UK Extradition Treaty*, the Parliamentary Home Affairs Committee states:

> [It] appears to be very easy to engage the jurisdiction of the US courts without ever entering the country, since activity on the internet, including sending and receiving e-mails, can involve the use of communications systems based in the United States, as can use of the US banking system.[52]

This was one of the major reasons why the committee recommended the introduction of a forum bar.

Response: The 2003 Extradition Act allows extradition "to take place if the conduct takes place outside the requesting country, but partly in the United Kingdom, only if the United Kingdom would exercise extra territorial jurisdiction in equivalent circumstances."[53] Article 2(4) of the 2003 treaty applies this same standard to the U.S.–U.K. extradition system. In other words, regardless of one's opinions of the U.S. judicial system or U.S. prosecutors, the U.S. can claim no more rights under the 2003 treaty than Britain claims for itself in similar circumstances.

Claim #6: The 2003 treaty was intended only to deal with terrorists and should not be applied to white-collar crime, cybercrime, or other varieties of criminal behavior that are not related to 9/11 or terrorism.

Examples: During the December 2011 debate, Conservative MP Charlie Elphicke stated that "the original arrangements with the United States were entered into under the cloud of the history of 9/11 and terrorism, and now we are hearing cybercrime as the latest excuse." Mr. Davis stated that "The EAW, the extradition treaty and the 2003 Act were all aimed at dealing with terrorism."[54]

Response: These claims are becoming less common because they are impossible to entertain seriously. The 2003 treaty replaced the 1972 and 1985 treaties, both of which were comprehensive. The 2003 treaty was self-evidently also intended to be comprehensive. It was the result of a British process that began in 1989 and the comprehensive March 2001 review of the British extradition system, which recommended the negotiation of what became the 2003 treaty. If not for the important points raised by Spain's request to extradite former Chilean President Augusto Pinochet that the Home Office wanted to consider, the review might have been published in the late 1990s.

Finally, one purpose of the 2003 treaty was to eliminate the list system so that the treaty would not need to be updated as new crimes emerged, including cybercrime and online child pornography. Far from applying only to terrorism, the treaty was also intended to allow both Britain and the U.S. to prosecute white-collar crime and crimes committed over the Internet more effectively.

Claim #7: The 2003 Extradition Treaty is imbalanced and biased against Britain because Britain extradites more individuals to the U.S. than the U.S. does to Britain.

Example: During the December 2011 debate, Mr. Crockart stated that several high-profile cases demonstrated the potential for abuse in the U.K.'s extradition arrangements and that this "add[s] to the feeling that there is no reciprocal arrangement in practice." He also stated that "We

52. Extradition Treaty, para. 32.
53. Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, paras. 6.50–6.51.
54. Charlie Elphicke, statement, in U.K. House of Commons, "UK Extradition Arrangements," column 122, and Davis, statement, column 91.

have surrendered 50% more of our citizens than the US."[55]

Response: Mr. Crockart was correct to claim that Britain extradites more individuals to the U.S. than the U.S. does to Britain. The Parliamentary Human Rights Joint Committee noted in 2011 that Britain surrendered 56 individuals to the U.S. from 2006 to 2010, while the U.S. surrendered 33 individuals to Britain.[56] But as Labour MP Chris Bryant pointed out during the December 2011 debate, this owes something to the fact that 4.5 million Britons visit the U.S. every year, whereas only 2 million Americans visit Britain.[57]

THE U.S. HAS NOT REFUSED A SINGLE EXTRADITION REQUEST FROM BRITAIN SINCE THE 2003 TREATY CAME INTO FORCE.

Moreover, the U.S. economy is more than six times larger than the British economy, and the U.S. population is approximately five times larger than Britain's. Assuming similar crime rates, one would expect much more total crime in the U.S. than in Britain. Thus, U.S. authorities would have jurisdiction over more cases, including cases that require extradition. Finally, as Conservative MP Richard Ottaway noted during the December debate, the U.S. has not refused a single extradition request from Britain since the 2003 treaty came into force.

There are thus three responses to this charge.

1. The total number of extraditions in one direction or the other is irrelevant. The question is whether the U.S. and British governments are operating the system created by the 2003 treaty fairly and with goodwill toward each other and whether extradited individuals are being charged appropriately. Since only a few extraditions from Britain to the U.S. and none from the U.S. to Britain have been controversial—as the alleged offense is commonplace and there is no media campaign—it appears that there is no systematic cause for concern on grounds of numbers alone.

2. The numerical imbalance in extraditions primarily reflects the differences in size and the number of visits between the U.S. and Britain.

3. Since the U.S. has refused no British requests, the imbalance reflects, to a lesser extent, the fact that Britain seeks to extradite fewer individuals. That is its right, but it does not mean the U.S. is acting wrongly.

Claim #8: Britain should not extradite individuals who (supposedly) are suffering from mental illness.

Examples: This claim derives largely from the case of Gary McKinnon, who has been diagnosed with Asperger's syndrome and whom David Cameron described as "a vulnerable and young man." In the December 2011 debate, Conservative MP Phillips asserted that one of the problems with the McKinnon case is "that there is nothing in the 2003 Act to enable to the Home Secretary to take into account either mental or physical illness."[58]

Response: Both the U.S. and Britain have good reason to be extremely cautious about this argument. Claims of mental illness are easy to make but difficult to verify.[59] If the British extradition system further privileges mental illness by making those who suffer from it immune from extradition, those who are subject to extradition have every reason to claim to be mentally ill.

One troubling sign of this practice is that Ryan Cleary, a teenage hacker arrested on June 21, 2011, claimed the next day to suffer from attention deficit hyperactivity disorder (ADHD), a diagnosis that

55. Crockart, statement, column 97.

56. U.K. Parliament, *The Human Rights Implications of UK Extradition Policy*, chap. 5, Box 5. Not all U.S. surrenders to Britain are U.S. citizens. In fact, a majority of individuals returned by the U.S. are British nationals. See Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, para. 7.78. In the December 2011 debate, Raab, citing a reply by the Immigration Minister, noted that 29 U.K. or dual nationals have been extradited from the U.K. to the U.S. since 2004, whereas five Americans have been extradited to Britain. Raab, opening statement, column 83. In 2010, Britain surrendered 10 individuals to the U.S. Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, p. 472.

57. Chris Bryant, statement, in U.K. House of Commons, "UK Extradition Arrangements," column 121.

58. Phillips, statement, column 105.

59. A recent study by the European College of Neuropsychopharmacology found that 38.2 percent of the EU's population suffers from a mental disorder every year. This improbably high rate raises the serious question of whether the standard for mental illness has been lowered too far, thus making the diagnoses too easy to obtain. See PsyPost, "The Size and Burden of Mental Disorders in Europe," September 5, 2011, http://www.psypost.org/2011/09/the-size-and-burden-of-mental-disorders-in-europe-6831 (accessed June 18, 2012).

was immediately cited in the press as raising concerns about possible extradition to the United States.[60] Moreover, many kinds of mental illness, such as ADHD, should not necessarily prevent extradition any more than they should prevent the individual from being tried, convicted, and jailed in Britain.

As the 2003 act notes, the mere existence of a mental illness does not bar extradition. In Part 2, Section 91, the act provides that, if a judge finds that "the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him," the judge must either order the individual's release or adjourn the extradition hearing until the individual's condition has improved. In addition to this provision, individuals have the further rights of appeal set out in the 2003 act. In other words, the standard is not the existence of an illness, but the effect of the illness as determined by a judge.

In short, the British system makes sensible accommodations for individuals who are mentally ill. Applying those provisions requires judgment, and exercise of that judgment invariably will not please everybody, but that does not mean that the system is broken.

Claim #9: The U.S. judicial system is unfair because U.S. states have different standards, U.S. sentences are too long or even amount to torture, the U.S. has the death penalty, the U.S. use of plea bargaining is unfair, or U.S. prisons are inhumane or conditions in them amount to torture.

Examples: The December 2011 debate contained a number of these allegations. Mr. Elphicke referred to the concerns he would have if he faced "a Texas jury," implying that justice in Texas is particularly deficient. Mr. Davis referred to "the plea-bargaining system in America" as "a predatory process" and described his abhorrence of "this nasty Texan jail," which, in addition to advancing Mr. Elphicke's line of argument, added the assertion that prison conditions in the U.S. (or at least in Texas) are unacceptable. Green Party MP Caroline Lucas described "the prospect of solitary confinement for life in [U.S.] super-max [prison] conditions" as "arguably amount[ing] to torture."[61] The popular press is an even more fruitful source of such allegations. For example, in resisting extradition from Britain to Sweden, WikiLeaks founder Julian Assange argued that, if extradited to Sweden, he might then be extradited to the U.S., put in Guantanamo Bay, and executed.[62]

Response: Rebutting these allegations in full would require a comprehensive assessment of the entire U.S. federal, state, and local police, legal, and justice system. These claims are obviously entirely political and unrelated to the 2003 treaty. They are intended to appeal to or stir up prejudice against the United States on the grounds that it is less than fully civilized. Taking the allegations singly:

1. The U.S. is a federal system. Even if state systems differ, there is no reason to believe that the differences are depriving individuals of justice The states provide full access to legal representation and free access if the accused cannot afford an attorney, trial by jury where relevant, a legal standard that guilt must be determined beyond a reasonable doubt, evidentiary standards comparable to U.K. standards, and full transparency. There is also a well-established system of state and federal appeals courts, including the U.S. Supreme Court. Anyone found guilty in a U.S. court, including an individual extradited from Britain, has the right of appeal in this system.

2. The 2003 treaty bars extradition from Britain to the U.S. unless U.S. authorities pledge not to impose or carry out the death penalty. Therefore, the most severe penalty that any extradited individual can face in the U.S. is life imprisonment. Britain itself has life imprisonment for a number of offenses, and the British Ministry of Justice "argu[es] vigorously that there are certain prisoners whose crimes are so appalling that they should never be eligible for parole." The European Court of Human Rights

60. Gordon Rayner, "'Hacker' Ryan Cleary Could Be Extradited to US to Face Court over CIA Computer Attacks," *The Telegraph*, June 22, 2011, http://www.telegraph.co.uk/technology/8591416/Hacker-Ryan-Cleary-could-be-extradited-to-US-to-face-court-over-CIA-computer-attacks.html (accessed May 17, 2012). Like McKinnon, Cleary has reportedly been diagnosed with Asperger's syndrome. "LulzSec 'Hacker' Ryan Cleary Unlikely to Be Extradited to U.S. Because He Has Asperger's Syndrome," *The Telegraph*, June 15, 2012, http://www.telegraph.co.uk/news/uknews/law-and-order/9334419/LulzSec-hacker-Ryan-Cleary-unlikely-to-be-extradited-to-US-because-he-has-Aspergers-syndrome.html (accessed June 18, 2012).

61. Elphicke, statement, column 114; Davis, statement, column 90; and Caroline Lucas, statement, in U.K. House of Commons, "UK Extradition Arrangements," column 100.

62. BBC News, "Wikileaks' Julian Assange 'Fears US Death Penalty,'" January 11, 2011, http://www.bbc.co.uk/news/uk-12159198 (accessed May 17, 2012).

(ECHR) has accepted this argument and has rejected the contention that life sentences amount to "inhuman or degrading treatment."[63]

3. While Britain does not formally use plea bargaining, MP Michael Ellis noted during the December 2011 debate that "there are also pressures on defendants in the British system. We do not refer to them as plea-bargaining, but defendants know that if they plead guilty they are likely to receive a lesser sentence."[64] In short, the U.S. and British systems differ more widely in terminology than in actual practice.

4. The criticism of American prison conditions implies that conditions in British prisons are demonstrably superior. This is not necessarily true. An assessment of the entire British prison system is well beyond the scope of this paper, but the report of an unannounced inspection of Her Majesty's Prison Liverpool on December 8–16, 2011, by HM Chief Inspector of Prisons makes interesting reading. Although conditions have improved, the report found that the prison has "deep-rooted problems" and that the buildings were "old and sometimes literally crumbling."[65] Asserting that one prison is representative of the entire British system would be unfair, just as stereotypes about the U.S. prison system are equally unfair. The claim that the British prison system is demonstrably superior to the American system is best regarded as unproven.

More broadly, in an April 2012 decision allowing the extradition of five terrorist suspects from Britain to the U.S., the ECHR found that inmates in U.S. supermax prisons, "although confined to their cells for the vast majority of the time," were "provided with services and activities (television, radio, newspapers, books, hobby and craft items, telephone calls, social visits, correspondence with families, group prayer) which went beyond what was provided in most prisons in Europe."[66]

Claim #10: Britain signed the 2003 Extradition Treaty only because then-Prime Minister Tony Blair was America's lapdog.

Examples: MPs rarely make this claim, but it is common in the press and even more common on Internet message boards. The allegation is sometimes stated with a degree of politeness, as with the contention that the alleged imbalance of the treaty reflected "the U.S. Administration's indifference to its Iraq ally's concerns," but it is more often stated bluntly, as in the claim that the treaty is an instance of "lapdog politicians kowtowing to the U.S."[67]

Response: Claims of this sort are blatantly political and unrelated to the actual treaty. They are informed by ignorance, prejudice, or both. The process that produced the 2003 treaty began in Britain long before 9/11 and before Tony Blair became Prime Minister in 1997.

The Labour Government led by Blair believed that a revision of the extradition system was necessary, but it believed this because the old system, including Britain's bilateral extradition treaties, was out of date in many ways, and this judgment was widely accepted and supported by an extensive review. The U.S. had nothing to do with this review process, and the U.S.–U.K. Treaty, which the U.S. delayed in ratifying and which was the subject of a lengthy British campaign urging U.S. ratification, is a modern treaty that reflects precedents established in Britain through the ECE and in other democracies.

Improving the Handling of Complex Cross-Border Crimes

As noted in Claim #4, multijurisdictional crimes, particularly those involving the Internet, would benefit from review and improvement of Anglo–American extradition practice. These types of cross-border

63. BBC News, "Murderers Lose Appeal Against Whole Life Tariffs," January 17, 2012, http://www.bbc.co.uk/news/uk-16591164 (accessed May 17, 2012).
64. Michael Ellis, statement, in U.K. House of Commons, "UK Extradition Arrangements," column 115.
65. HM Chief Inspector of Prisons, *Report on an Unannounced Full Follow-Up Inspection of HMP Liverpool, 8–16 December 2011*, U.K. Ministry of Justice, 2012, http://www.justice.gov.uk/downloads/publications/hmipris/prison-and-yoi-inspections/liverpool/liverpool-2011.pdf (accessed May 17, 2012).
66. Michael Holehouse, "Extradition of Abu Hamza and Four Others for Terrorism Offences Can Go Ahead, European Court Rules," *The Telegraph*, April 10, 2012, http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/9195024/Extradition-of-Abu-Hamza-and-four-others-for-terrorism-offences-can-go-ahead-European-court-rules.html (accessed May 17, 2012).
67. Michael Binyon, "One-Sided Treaty Was Meant to Handle Terrorist Suspects," *The Times* (London), June 28, 2006, and Richi Jennings, "Gary McKinnon's Fight with U.S. Extradition," *Computerworld*, May 29, 2010, http://blogs.computerworld.com/16215/gary_mckinnons_fight_against_u_s_extradition_freegary (accessed May 17, 2012).

crimes will likely grow in number and sophistication as technology evolves.

Extradition from the U.S. to Britain raises no controversy in the United States, and most extraditions from Britain to the U.S. are similarly noncontroversial. All of the controversy has been caused by two kinds of cross-border crimes.

First, there are offenses that allegedly have been perpetrated remotely against the U.S., such as Mr. McKinnon's hacking case, Richard O'Dwyer's copyright infringement case, and the charge against Mr. Ahmad of providing material assistance to terrorists. Second, some offenses, such as sophisticated fraud, are committed from within one country against the other, but the law is broken in both jurisdictions, as in the case of the NatWest Three bankers who were extradited to the U.S. and convicted of fraud for acts carried out mainly in Britain. What these offenses have in common is that they are "remote control crimes," in which the accused committed the alleged crime without ever leaving the United Kingdom.

Not surprisingly, these cross-border cases have been particularly controversial. They give the appearance that the United States is seeking to impose its laws on individuals who have never visited the U.S. and who should be tried in the United Kingdom, if tried at all. However, as noted under Claim #5, the 2003 treaty anticipated this problem. Article 2(4) states:

> If the offense has been committed outside the territory of the Requesting State, extradition shall be granted in accordance with the provisions of the Treaty if the laws in the Requested State provide for the punishment of such conduct committed outside its territory in similar circumstances.

In other words, the U.S. can request the extradition of an individual from Britain for conduct committed in Britain only if British law allows for the extradition of an individual in a similar case from the United States. Thus, there is no basis for any claim that the U.S. is unfairly imposing jurisdiction on individuals in Britain. The U.S. is doing exactly what the treaty allows it to do, and Britain has exactly the same right for offenses committed against its laws inside the United States.

THE U.S. CAN REQUEST THE EXTRADITION OF AN INDIVIDUAL FROM BRITAIN FOR CONDUCT COMMITTED IN BRITAIN ONLY IF BRITISH LAW ALLOWS FOR THE EXTRADITION OF AN INDIVIDUAL IN A SIMILAR CASE FROM THE UNITED STATES.

The fact that a crime has been committed from one jurisdiction should not bar extradition to and a trial in another jurisdiction where the laws were broken. The principle that Britain, like the U.S., will prosecute those who commit crimes against it, no matter where they are resident, is a clear one. Abdel Basset al-Megrahi, the sole individual convicted for the 1988 bombing of Pan Am Flight 103 that killed 270 people, commissioned his crime from Libya and other countries but was tried under Scottish law by a Scottish court sitting in the Netherlands, and he served his sentence in a Scottish jail. Similarly, under the terms of the 2003 treaty, a hacker who breaks British laws from the United States should be extradited to the U.K. for prosecution.

Furthermore, the victims of crimes—whether individuals, organizations, or governments—also have rights, a fact that is often lost in the fog of campaigns against specific extradition requests. In particular, victims have the right to expect other nations not to allow extraterritorial criminals to use them as a safe haven.

In a second kind of case, laws are broken in both the U.S. and Britain. In such cases, British prosecutors have the clear and unquestioned right under the treaty to prosecute ahead of an American request for extradition, and vice versa. The 2003 treaty explicitly recognizes the preeminence of each side's domestic criminal justice jurisdictions over extradition requests.[68] Public prosecutors in both jurisdictions are also entitled at any time to prosecute an individual who is already subject to an extradition request if, in their judgment, doing so would serve the public interest.

In short, the problem with the current extradition system between the U.S. and Britain is not the 2003 treaty, but a crisis of public confidence. The 2003 treaty treats extraterritorial and cross-border crimes in a fair and sensible way. Regrettably, the British political class has failed to rebut the treaty's critics and to promote a system that, unlike the EAW, requires an objective evidentiary base for extradition requests. No improvements in the

68. Extradition Treaty, art. 14(2).

Anglo–American extradition system can resolve this crisis of public confidence if British politicians refuse to defend the merits of the system to the British people.

However, if British politicians are willing to invest the necessary domestic political capital, Anglo–American extradition practice can and should be improved in two ways.

First, the U.S. and Britain should conduct a joint expert study into the feasibility of local prosecution in the U.K. when a crime was committed from within the United Kingdom against an individual, organization, or government in the U.S., or vice versa. This study should examine the case for local prosecution, bearing in mind the problems inherent in transposing legal systems, witnesses, and evidence between jurisdictions. The study might conclude that local prosecutions are too costly and impractical and that victims should not be denied justice in their own country, in which case both the study and its evidence should be published as the mutual and shared conclusions of the British and American governments.

Alternatively, the study might find that local prosecution is possible in some instances. One benefit of local prosecution would be to reduce the delays introduced by the extradition process. In any event, local prosecution should remain discretionary and not be embodied in a forum bar. There will always be circumstances in which it is best to prosecute the crime in the location that suffered the consequences of the crime, as in the case of the Libyan bomber al-Megrahi.

Second, while the U.S. Attorney General and the U.K. Attorney General and Lord Advocate have already drawn up guidelines for consultations, the sharing of information, and the resolution of issues arising between prosecutors in the two countries in cases with concurrent jurisdiction, they have not publicly shared the criteria that prosecutors use when deciding whether to prosecute locally or to allow extradition.[69] Such criteria might include the seriousness of the crime's consequences; where the majority of the consequences occurred; the criminal intent; the location and status of any alleged co-offenders; the prospects for a successful prosecution in either jurisdiction, taking into account the strength of the investigation(s), evidence, witnesses, legal tests, and case law or other legal precedents; the prospects of extradition delays, which in Britain can last from one to three years and sometimes longer; the administrative suitability of the possible locations, taking into account the location of evidence and witnesses; and any unique or special factors.

The U.S. and Britain should consult together to draw up these criteria, which should then be formalized in a public exchange of notes between the governments. Such criteria should remain as guidance only. While prosecutors should retain discretion to determine what is in the public's interest in extradition determinations, neither country should prescribe a formal, rigid test that the accused person facing extradition could use as the basis of a legal challenge against extradition.

The U.S. executive branch and the British Crown have the constitutional and legal responsibility to bring charges against an individual. If an individual is accused of a crime in both jurisdictions, their prosecutors must decide which jurisdiction will try the crime. This decision is not amenable to any set of hard-and-fast rules. As with the decision to prosecute an individual in a domestic court, prosecutorial discretion is essential and inescapable.

Nonetheless, a formal statement of the criteria that British and American prosecutors will use to inform their judgment would serve a valuable purpose. For all the controversy over extraditions from the U.S. to Britain, the number of contentious cases is small, and all of them involve extraterritorial or cross-border offenses. In the current controversy, the damage results from the public belief in Britain that the U.S. is seeking to impose its law on Britain and insisting on higher standards to protect American citizens from British justice. The problem of the treatment of cross-border offenses is one side of this coin. The other side is the treaty's evidentiary standard and the "right of first refusal" on prosecution.

Thus, an exchange of notes setting out guidance criteria for the treatment of extraterritorial and cross-border offenses would also provide Britain an opportunity to state—and the U.S. to accept—that both sides have the right of first refusal on domestic prosecutions and that the 2003 Extradition Act as amended governs extradition from Britain to the United States according to the "reasonable suspicion" evidentiary standard, which is understood and intended to be equivalent in effect to the "probable cause" standard in the U.S. as required by the 2003 treaty.

In short, while these notes would change little if anything in the conduct of U.S. and British prosecutors and change nothing in the evidentiary standards of the 2003 treaty and Act, they would provide

69. See Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, paras. 6.37–6.43.

an opportunity to restate truths that have largely been evaded in the current controversy.

What the United States Should Do

The United States should:

Continue to fulfill—in practice, overfulfill—the treaty requirements. The United States should continue to live up to the obligations of the 2003 treaty. As a matter of practice, it should also continue with its helpful approach in extradition cases, in which it regularly presents British authorities with information that is above requirements of the treaty and the 2003 act.[70] The U.S, like the U.K. in the reverse case, also complies with British requests for supplementary information. This is a sensible reflection of the fact that there is normally no good reason for the U.S. not to cooperate to the fullest possible extent with Britain in extradition matters and that both countries want to serve the interests of justice.

What the U.S. and the U.K. Should Do

The U.S. and the U.K. should:

- **Negotiate and exchange notes formalizing a shared understanding of the 2003 Extradition Treaty.** The notes should first state that both sides have the "right of first refusal" (the right to subordinate extradition requests to domestic prosecutions) and that extradition from Britain to the United States is governed by British law (currently, the 2003 Extradition Act, as amended), which sets out a "reasonable suspicion" evidentiary standard that is understood and intended by both nations to be equivalent in effect to the "probable cause" evidentiary standard that is required for extraditions from the U.S. to Britain. The notes should also set out guidelines that prosecutors in both countries will use to inform their judgment on where to try a case when both nations could claim jurisdiction while making it clear that this decision remains a matter for independent decision by authorities of both nations.

  The March 2012 report that Prime Minister Cameron and President Barack Obama have agreed on high-level talks to improve "how [the treaty] is implemented in practice" is welcome, although it would be wise to do more than offer "new guidance for courts" by officially and publicly recording a shared Anglo–American understanding of the treaty.[71]

- **Improve cooperation on cross-border crime.** The U.S. and Britain should continue to improve their cooperation on requests under the 1994 bilateral Mutual Legal Assistance Treaty, whether for extradition or for normal domestic criminal prosecutions. This cooperation includes timely responses to requests for evidence, including the seizure of goods and the processing of witness statements. Britain and the U.S. should further develop this cooperation by building on the strategic alliance between Britain's Serious Organised Crime Agency and the Federal Bureau of Investigation and other agencies in the United States.[72] Finally, the U.S. and Britain should conduct a joint expert study into the feasibility of local prosecutions of crimes committed from within the United Kingdom against an individual, organization, or government in the U.S., or vice versa.

- **Improve prisoner repatriation programs.** The U.S. and Britain are both parties to the 1983 Council of Europe Convention on the Transfer of Sentenced Persons.[73] Domestic legislation in both countries allows judicial authorities to decide whether and when to transfer prisoners to their home countries after conviction and sentencing. The U.S. and Britain should improve these arrangements in two ways.

  First, they should better publicize both the existence of this program and the frequency with which

70. Private information. See also the statement from the U.S. Embassy in London that the U.S. provides "significant evidence to British authorities to back up" a request. Embassy of the United States, London, "Frequently Asked Questions on the US–UK Extradition Relationship," March 30, 2012, http://london.usembassy.gov/gb176.html (accessed June 21, 2012).
71. James Chapman, "Obama Agrees to Top-Level Talks on Extradition Law After Gary McKinnon Case Is Raised by Cameron," *Mail Online*, March 14, 2012, http://www.dailymail.co.uk/news/article-2115155/Obama-agrees-talks-extradition-law-Gary-McKinnon-case-raised.html (accessed May 22, 2012).
72. The Strategic Alliance Group is a formal partnership among law enforcement organizations in the U.S., the U.K., Canada, Australia, and New Zealand. See U.S. Federal Bureau of Investigation, "Cyber Solidarity," March 2008, http://www.fbi.gov/news/stories/2008/march/cybergroup_031708 (accessed June 18, 2012).
73. Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, paras. 4.26–4.33.

U.S. penal authorities repatriate prisoners to Britain.[74] For example, the NatWest Three have been repatriated to serve their sentences in Britain.[75]

Second, while repatriation should not be mandatory, both nations should seek to improve the speed of prisoner processing when repatriation has been granted. National authorities should rightfully retain discretion on repatriation decisions because an overriding public interest reason may dictate that an individual serve his sentence in the country where he was convicted. The intentions of the sentencing court must also be taken into account. However, both countries should improve the time taken to process repatriation applications—the complex process usually takes between 12 and 18 months[76]—with the goal of processing applications and repatriating the selected prisoners within six months.

What the United Kingdom Should Do

The United Kingdom should:

- **Positively promote the 2003 U.S.–U.K. Extradition Treaty.** The treaty sets a praiseworthy standard for modern extradition treaties. Through the 2003 Extradition Act, it is based on the objective evidentiary standard of reasonable suspicion, which is the same test that is used in England and Wales to issue warrants in domestic proceedings. It requires dual criminality and has a proportionality standard. In all of these respects, it is superior to the EAW. Much of the criticism of the 2003 treaty has gained force in Britain because government ministers have not forcefully countered the often invidious claims made by those who oppose extraditing particular individuals to the United States.

- **Renounce the European Convention on Extradition.** The ECE is not a bad convention, but when Britain ratified the ECE, it regrettably did not reserve the right to apply a *prima facie* standard in individual cases. In 1989, this was not problematic because the ECE signatories were all Western democracies, with Cyprus and Turkey the two marginal cases. Yet after the end of the Cold War, the number of ECE signatories—and members of the Council of Europe—expanded to include non-democracies, such as Ukraine and Russia. Britain's failure to reserve the *prima facie* right meant that it was committed to applying the same standard to these non-democracies as it applied to non-EU European democracies, such as Switzerland. This is not reasonable.

  Renouncing the ECE will have only a limited effect because it will affect only ECE signatories that are not in the EU. Nonetheless, it is the first step toward a uniform system based on reasonable suspicion for extraditions to all democracies while making—as the current system allows—only ad hoc provision for extradition to all non-democracies based on a *prima facie* evidentiary basis.

- **Negotiate new extradition treaties based on a reasonable suspicion standard with trusted democracies that are party to the ECE.** This would take a second step toward creating a uniform British extradition standard. After Croatia joins the EU in 2013, Iceland, Israel, Norway, and Switzerland will be the only trusted democratic countries that are party to the ECE but not participants in the EAW. Britain should inform these four nations of its plans before it renounces the ECE and assure them that its renunciation does not in any way indicate a lack of friendly intentions toward them or any desire to interrupt or cease extraditions with them. Britain only desires to establish a single, uniform standard for extradition arrangements with all democracies, and too many ECE signatories are not reliably democratic.

  Britain should offer to negotiate new extradition treaties with these four nations based on reasonable suspicion, a dual-criminality requirement, and a proportionality standard, like the 2003 treaty. Britain also should express similar sentiments to Georgia,

74. For details of the program, see U.S. Department of Justice, "International Prisoner Transfer Programme," http://www.justice.gov/criminal/oeo/iptu/lists.html (accessed August 3, 2012).
75. Nick Goodway, "NatWest Three Banker Returned," *Evening Standard*, November 25, 2008, http://www.standard.co.uk/business/natwest-three-banker-returned-6934033.html (accessed June 21, 2012).
76. Prisoners Abroad, "Prisoner Transfer to the UK," January 2010, http://www.prisonersabroad.org.uk/uploads/documents/prisoners/Prison%20transfer.pdf (accessed June 21, 2012).

Turkey, and South Africa, which are parties to the ECE. While it assesses their standing as democracies, Britain should sympathetically consider concluding bilateral extradition treaties with these countries.[77]

- **Not negotiate an extradition treaty with a non-democratic party to the ECE until that party is reliably democratic.** These nations include Ukraine and Russia. The status of a number of other nations—including Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Macedonia, Moldova, Montenegro, and Serbia—is doubtful. Because the Home Secretary has the power to conduct extraditions on an ad hoc basis, the United Kingdom should scrutinize these nations with a skeptical eye and not hurry to conclude extradition treaties with them.[78] Given the limited number of extradition cases involved—the Baker Review noted that Britain has made only 16 surrenders to all of these countries from 2004 through 2010 and received only one surrender from them—placing extradition arrangements on an ad hoc basis will result in an average of less than three cases a year.[79]

- **Publicly set a deadline for the EAW to include a proportionality test, a dual-criminality requirement, and a nationally defined evidentiary test.** The EAW's underlying assumption is that all EU member states have achieved reasonable and comparable standards of justice. The EAW allows British subjects—and citizens of all EU member states—to be put before a court in another EU member state on a trivial offense because the EAW, unlike the 2003 treaty, does not have a proportionality test, a dual-criminality requirement, and a nationally defined evidentiary test. Thus, the EAW, not the U.S.–U.K. Treaty, makes removal from Britain to a foreign court venue far easier than it should be.

  The British government should publicly set a date by which the EAW must be reformed to introduce a proportionality test, a dual-criminality requirement, and a nationally defined evidentiary test, which in Britain's case should be that of "reasonable suspicion." The British government should state that, if the EU fails to act on all three reforms, it will introduce legislation in Parliament that, for human rights reasons, unilaterally imposes such tests on all EAWs executed in the United Kingdom. That would place all democratic states party to the ECE, all EU members, and the U.S., Canada, Australia, and New Zealand on the same footing in that Britain would conduct its extraditions with all of them on the basis of a proportionality test, dual criminality, and reasonable suspicion.

- **Limit the right of appeal to the European Court of Human Rights or withdraw entirely from its jurisdiction.** Part of the discontent surrounding extradition from Britain to the U.S. arises from the fact that, despite British efforts to speed up and simplify extraditions, extradition from Britain remains a long, involved process. Indeed, Britain now has the worst of all worlds: a slow extradition process for non-EU nations and an excessively fast removal process inside the EU.

  The speed of the British process, as several U.S.–U.K. cases have highlighted, is partly governed by the European Court of Human Rights. The Human Rights Act 1998 incorporated the supremacy of the ECHR and the European

77. The Baker Review notes that Britain has bilateral extradition arrangements with 25 nations and conducts the London Scheme for Extradition within the Commonwealth with a further 44 nations. Most of the bilateral extradition agreements date from the late 19th to early 20th centuries, although a few (India, Algeria, the United Arab Emirates, and Libya) are more recent. The London Scheme derives from a 1966 agreement and is based on a *habeas corpus* standard, an agreed list of offenses, a proportionality bar, and dual criminality, with a political offenses exception. These 69 nations generate relatively little extradition traffic. From 2004 to 2010, there were eight outbound surrenders—six to Hong Kong and two to Trinidad and Tobago—and 34 inbound surrenders from 14 nations, with only Thailand, Iraq, Jamaica, Mauritius, and India having more than a single case. There is a case for re-examining these arrangements and applying the modern principles underlying the 2003 treaty, but given the lack of controversy and the fact that many of the cases fall under the London Scheme—which, though outdated, remains serviceable—the need to do so is not urgent. Baker et al., *A Review of the United Kingdom's Extradition Arrangements*, pp. 268–270 and 464–471 and paras. 3.38–3.41.

78. Ibid., p. 455.

79. Ibid., pp. 464–471. Albania accounted for 15 of the U.K.'s 16 outbound surrenders, while Serbia accounted for the U.K.'s only inbound surrender. Most of the ECE non-democracies generate no cases, and the U.K. already refuses to extradite to Russia on the grounds that its extradition requests are made for political reasons. See Bryant, statement, column 121.

Convention on Human Rights into British law. The ECHR has a backlog of more than 150,000 cases, with appeals in British extradition cases having to take their place in the queue. The court—against the express intention of a majority of British MPs—also has sought to give murderers the right to vote and has blocked the deportation of Islamist cleric Abu Qatada to Jordan.[80] In January 2012, Prime Minister Cameron criticized the ECHR by pointing out that it too often gives "an extra bite of the cherry to anyone who is dissatisfied with a domestic ruling" and that "not enough account is being taken [by the Court] of democratic decisions by national parliaments."[81]

In April 2012, Britain sought to address some of these concerns with the Brighton Declaration, which resulted from a Council of Europe conference held in Brighton. Regrettably, the reforms were modest, and the ECHR chairman has already downplayed the declaration, stating that he does not "expect the dramatic changes that some have anticipated."[82]

The simplest way for Britain to resolve this problem would be to withdraw completely from ECHR jurisdiction by amending the Human Rights Act. This is the preferable course of action for four fundamental reasons.

1. The court does not function effectively, which imposes further significant delays on an extradition system that already proceeds so slowly as to raise concerns about whether it is denying effective justice to victims.

2. As President of the Court Sir Nicolas Bratza has acknowledged, half of the court's justices have no judicial experience before they take their seats. Sir Nicholas himself illustrates this failing. His own judicial experience was limited to serving as a court recorder until he was appointed a High Court judge so that he could take his seat on the ECHR.[83] There is no reason why the U.K.'s elected Parliament, elected government, Home Office, and Supreme Court should be subject to decisions by a body of inexperienced European jurists.

3. More broadly, the ECHR has a track record of deciding cases against the U.K., and the trend is getting worse. In the 1980s, the ECHR decided an average of 2.6 cases per year against the U.K. In the 1990s, the average tripled to 7.8 per year, and in the 2000s, it more than tripled again to 29.3 cases. It defies common sense to believe that that the U.K. committed more than 10 times as many offenses against human rights in the 2000s than it committed in the 1980s.[84] The U.K. is not getting worse; the court is simply deciding to interfere more often.

4. As Daniel Hannan points out, even "if the ECHR were staffed by the wisest and most disinterested judges in Christendom, rather than by activists and autocrats' placemen; even if we applauded all its decisions; even if it were a British rather than a supranational body, it would *still* be objectionable." The court is making political,

80. BBC News, "Q&A: Reforming European Court of Human Rights," April 23, 2012, http://www.bbc.co.uk/news/world-europe-17748313 (accessed May 22, 2012).

81. David Cameron, "Speech on the European Court of Human Rights," transcript, *New Statesman*, January 25, 2012, http://www.newstatesman.com/politics/2012/01/human-rights-court-national (accessed May 22, 2012).

82. "The Brighton Declaration will amend the European Convention, to give prominence to the principles of 'subsidiarity' [respect for national courts and institutions] and 'margin of appreciation' [recognition of a degree of national discretion in interpreting obligations under the convention]." BBC News, "Q&A: Reforming European Court of Human Rights."

83. Jason Groves, "Euro Judges Have No Judicial Experience, Admits Head of Court That Said Qatada Must Stay in UK," *Mail Online*, March 13, 2012, http://www.dailymail.co.uk/news/article-2114652/ECHR-president-Sir-Nicolas-Bratza-admits-euro-judges-judicial-experience.html (accessed June 11, 2012).

84. James Slack, "Europe's War on British Justice: UK Loses Three out of Four Human Rights Cases, Damning Report Reveals," *Mail Online*, January 11, 2012, http://www.dailymail.co.uk/news/article-2085420/Europes-war-British-justice-UK-loses-human-rights-cases-damning-report-reveals.html (accessed June 11, 2012).

not legal, decisions, and political decisions that "ought to be taken by elected representatives whom the rest of us can hire and fire. We have contracted out the defence of our essential freedoms."[85]

Britain should not contract out its freedom to anyone, but if Britain is unwilling to withdraw from the ECHR, it should at least reassert its sovereignty in restoring an element of sanity to the court, which is swamped by cases. It should do this in three steps.

1. Britain should restrict applications made to the ECHR. At present, an individual may apply directly to the ECHR when domestic appeals have been exhausted. On receipt of this request, the ECHR can, under Rule 39 of its Rules of Court, "indicate" to the U.K. that the extradition process should be stayed pending a fuller examination of the case—a preliminary decision that is binding on the British government. This happened, for example, in the extradition proceedings against Abu Hamza.[86]

   Instead of this process, a Home Office and Ministry of Justice panel should draw up criteria to determine whether a case can be appealed from Britain to the ECHR. Only cases that clearly raise a fundamental and novel legal question should be allowed to go to the ECHR. If there is any doubt, the right of appeal should be denied.

2. Parliament should embody these criteria in law, thereby reasserting its sovereignty over this vital issue.

3. This would empower the U.K. High Court, within a limited period set by law and employing the criteria established by law, to decide whether to grant leave to appeal to the ECHR. In order to allow the judicial system to cope with the resulting increased caseload, the government should provide adequate funding to the High Court. The decision of the High Court should be final, with no right of appeal.

Conclusion

Underneath the complaints surrounding extraditions from Britain to the U.S. is a pervasive British belief that a different—supposedly better—process will produce results that those making the complaints will find more to their liking, but a different extradition process guarantees nothing. There are no grounds for arguing that those who have been extradited from Britain to the U.S. have not been properly charged.

Those who are subsequently convicted in the U.S. will have been found guilty by a properly constituted court applying proper legal rules, high and well-defined evidentiary standards, and due process for the accused. Unless Britain simply refuses to extradite anyone to the United States, a different extradition system would likely produce the same result. The great majority of extradition requests from the U.S. will be granted, so that those persons accused of nontrivial crimes will still need to stand trial in a court of law under due process in the United States. Moreover, the needs of the victim must not be ignored.

The European Arrest Warrant has been the subject of much critical attention in Britain. Given the wildly disproportionate number of cases involved—1,068 surrenders under the EAW in 2010, compared to 10 under the 2003 treaty in the same year—the U.S.–U.K. Treaty has attracted undue attention. The EAW has led to the removal of more than 100 times as many people from Britain every year. Furthermore, while the number of individuals extradited under the treaty has remained reasonably stable—between three to 16 surrenders by Britain per year—the number of individuals surrendered under the EAW is rising rapidly.

Finally, the most controversial cases under the 2003 treaty—ranging from fraudulent bankers (the NatWest Three) to hackers (McKinnon) to those accused of copyright infringement (O'Dwyer), material support for terrorism (Ahmad), and weapons smuggling to Iran (Tappin)—appear to attract advocates who are less concerned with the merits of particular legal cases than they are with pursuing opportunities to score political points and exercise their long-standing prejudices. These advocates

85. Daniel Hannan, "Even If Euro-Judges Were Minimally Competent, There Would Be No Reason to Accept Their Jurisdiction," *The Telegraph*, May 22, 2012, http://blogs.telegraph.co.uk/news/danielhannan/100159909/even-if-the-european-court-were-minimally-competent-there-would-be-no-reason-to-accept-its-jurisdiction/ (accessed June 11, 2012).

86. Sally Broadbridge, "The US/UK Extradition Treaty: Requests by US," U.K. House of Commons Library, *Standard Note* SN/HA/4980, July 31, 2009, p. 4, http://www.parliament.uk/Templates/BriefingPapers/Pages/BPPdfDownload.aspx?bp-id=SN04980 (accessed June 21, 2012).

choose to champion erroneous and misleading criticisms in U.K.–U.S. extradition cases, to center their claims on these types of cases, and to make factually inaccurate assertions about the 2003 Extradition Treaty.

This leads to the regrettable conclusion that this issue has seen more than its fair share of playing to the gallery, both in Parliament and outside of it. In both the Conservative and Liberal Democratic parties, a group finds it useful to advance the political narrative of British oppression at the hands of the U.S. For this group, extradition is a convenient pretext for pursuing their agenda. Achieving the results that the critics of the 2003 treaty would find personally satisfactory is not the same as obtaining justice.

It is past time for the United Kingdom to accept responsibility for its own actions and for elements within the Conservative Party, in particular, to stop playing the card of anti-Americanism. There are many reasons to dislike transnational law and to be concerned about its threatened loss of sovereignty, both in U.S. and in Britain, especially in the context of the EU. However, Britain has not lost its sovereignty through its extradition treaty with the U.S. It has not been coerced. It made its own decisions and supported policies that it believed were wise. If it is now unhappy with the treaty, it should not express its unhappiness by arguing that it was tricked or cheated by the United States.

Moreover, Britain has no reason to be dissatisfied with the treaty. The operation of the treaty can be improved in a number of ways, but in its essence, it is a modern and sensible approach to extradition, and it embodies standards that Britain should seek to apply to its entire extradition system.

—***Ted R. Bromund, PhD,*** *is Senior Research Fellow in Anglo–American Relations in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.*
Andrew Robert James Southam *is a former extradition case officer in the International Criminal Policy Directorate of the U.K. Home Office.*