

that a more pragmatic approach to reconciling rights and security issues—not an unyielding, dogmatic attitude that existing rules are all we need . . . —will produce the best results⁴

Senate Approves UK Extradition Treaty and Other Bilateral and Multilateral Treaties, Attaches Reservations and Understandings

During the fall of 2006, the U.S. Senate approved several pending treaties.

New UK-U.S. Extradition Treaty. In late September, the Senate unanimously consented to a new extradition treaty with the United Kingdom that was signed in 2003.¹ The treaty adopts a dual criminality standard for extradition in lieu of listing extraditable offenses, allowing extradition for offenses punishable by one year or more in both countries. It revises the evidentiary standard for extradition requests, and permits the temporary surrender for trial of fugitives serving sentences in the requested state.

Under Article 8(2), extradition requests under the treaty must include various supporting materials, including “a statement of the facts of the offense(s).” Under Article 8(3), requests addressed to the United States must also include “such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested.” (This provision was reportedly added to reflect U.S. constitutional requirements precluding arrest without probable cause.) Some U.S. human rights and Irish-American groups opposed the treaty,² and it remains controversial in the United Kingdom, where critics object to the lack of symmetry in the parties’ obligations.³ Controversy about the treaty in the United Kingdom was heightened in connection with the extradition of three British bankers (the so-called Natwest Three) to the United States to face multiple counts of wire fraud in connection with transactions involving Enron. The three were finally extradited in July 2006, following a three-year court battle.⁴ In October, the House of Lords passed amendments to the Extradition Act of 2003 aimed at preventing extraditions to the United States based on the lesser factual predicate for extraditions to the United States provided in Article 8(2), but the government majority in the House of Commons blocked the amendments.⁵

⁴ Department of State Legal Adviser John B. Bellinger III, Fifth Anniversary of September 11th Attacks, Rome, Italy (Sept. 11, 2006), at <<http://www.state.gov/s/l/rls/73082.htm>>. In a September interview, Bellinger again called for greater engagement between the United States and European countries. Michael Peel & Guy Dinmore, *US Needs ‘Advice Not Criticism’ on Terror Suspects*, FINANCIAL TIMES, Sept. 21, 2006, at <<http://www.ft.com/cms/s/be41c318-490d-11db-a996-0000779e2340.html>>.

¹ Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, and Related Exchanges of Letters, Mar. 31, 2003; see Sean D. Murphy, *Contemporary Practice of the United States*, 98 AJIL 845 (2004).

² See U.S. Dep’t of State Fact Sheet, U.S.-U.K. Extradition Treaty (Aug. 3, 2004), at <<http://www.state.gov/p/eur/rls/fs/34885.htm>>; <http://www.irishfreedomcommittee.net/IFC_INFO/CAMPAIGNS/USUK_EXTRADITIONTREATY/extradition_treaty_ACTION.htm> (“Please CALL, WRITE, or VISIT your US Senator as soon as possible to ask them to oppose the draconian and un-American UK/US Extradition Treaty which is now before the Senate for ratification.”).

³ See *The Long Arm of American Law*, ECONOMIST, May 14, 2006, at 67; New UK-US Extradition Treaty (n.d.), at <<http://www.statewatch.org/news/2003/jul/25ukus.htm>>.

⁴ See Heather Timmons, *Man Tied to Enron Case Found Dead in London Park*, N.Y. TIMES, July 13, 2006, at C3; *Profile: The ‘NatWest Three,’* BBC NEWS, July 13, 2006, at <http://news.bbc.co.uk/2/hi/uk_news/5176456.stm>; James Westhead, *NatWest Three ‘To Get Fair Trial,’* BBC NEWS, July 21, 2006, at <<http://news.bbc.co.uk/2/hi/business/5202172.stm>>.

⁵ *Britain: Extraditions Challenged*, N.Y. TIMES, Nov. 7, 2006, at A8.

New U.S./EU and U.S./UK Extradition Treaties

Extradition refers to the formal process by which an individual is delivered from the state where he is located to a requesting state in order to face prosecution, or if already convicted, to serve a sentence.¹ For the United States, an extradition from the United States normally may proceed only when there is a treaty in force between the United States and the requesting state.² The United States currently has extradition treaties with more than one hundred foreign states.³

¹⁶ *Id.* at 2764–65 (footnote omitted). The legislation referred to by the Court is the Torture Victim Protection Act, 28 U.S.C. §1350 note (2000), a law enacted by Congress in 1992 in order to provide a cause of action in U.S. courts for all persons (including U.S. nationals) subject to extrajudicial killing or torture by foreign government officials.

¹⁷ *Sosa v. Alvarez-Machain*, 124 S.Ct. at 2765.

¹⁸ *Id.* at 2767.

¹⁹ *Id.* at 2768.

²⁰ *Id.* at 2769.

²¹ *Id.* at 2776 (Scalia, J., dissenting).

¹ For general background, see GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW* (1998).

² See 18 U.S.C. §§3181(a), 3184 (2000). In a limited class of cases relating to terrorism, extradition may occur in the absence of an extradition treaty. See 18 U.S.C. §§3181(b) (2000). For extradition under U.S. law, see MICHAEL ABBELL, *EXTRADITION TO AND FROM THE UNITED STATES* (2002) (looseleaf); M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (2002).

³ For current U.S. bilateral and multilateral extradition treaties, see U.S. DEP'T OF STATE, *TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2003* (2003).

On June 25, 2003, the United States signed an extradition treaty with the European Union.⁴ The treaty is designed not to eliminate bilateral agreements between the United States and EU member states, but to supplement them. For example, the U.S./EU treaty sets forth a detailed list of criteria that a requested state must take into account when faced with competing extradition requests from several states.⁵ Further, the treaty broadens the range of extraditable offenses, requiring extradition for every offense punishable in both the requesting and requested state by more than one year in prison.⁶

In 2003, the United States and the United Kingdom negotiated a new extradition treaty designed, in part, to bring their bilateral relationship in line with the U.S./EU extradition treaty. Thus, under the 1972 U.S./UK extradition treaty, each state was obligated to extradite only persons who were accused or convicted of offenses listed on a schedule annexed to the treaty, as well as other offenses that were listed in relevant UK extradition law and also considered felonies under U.S. law.⁷ Under the 2003 treaty, the parties agree to extradite for any “extraditable offense,” defined as an offense “punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty.”⁸ When transmitting the treaty to the Senate in April 2004, the U.S. government asserted that the use of such a pure “dual criminality” clause “obviates the need to renegotiate or supplement the Treaty as additional offenses become punishable under the laws in both States.”⁹

Article 4 of the treaty establishes bases for denial of extradition, including on the ground that extradition is sought for a political offense. Article 4(2) sets forth seven categories of offenses that shall not be considered political offenses, including “an offense for which both Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution.”¹⁰

Article 7 on capital punishment provides:

When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out.¹¹

Article 18(2) of the treaty states that an extradited person “may not be the subject of onward extradition *or surrender* for any offense committed prior to extradition to the Requesting State unless the Requested State consents.”¹² In his transmittal to the Senate, the president explained:

The Treaty’s use of the term “surrender” (the operable term in the Rome Statute of the International Criminal Court) makes explicit that the United Kingdom will not surrender to the ICC any person extradited by the United States. The United Kingdom has recorded in a separate letter its understanding that the Treaty continues the protection implicit in the current treaty against surrender to the ICC of fugitives extradited by the United States

⁴ Agreement on Extradition, June 25, 2003, U.S.-EU, 2003 O.J. (L 181) 27.

⁵ *Id.*, Art. 10.

⁶ *Id.*, Art. 4(1).

⁷ See Extradition Treaty, June 8, 1972, U.S.-UK, Arts. I, III, 28 UST 227, 229, 30 UNTS 167, 168–69. This Treaty was supplemented in 1985. See Supplementary Treaty, June 25, 1985, U.S.-UK, TIAS 12050, 1556 UNTS 369.

⁸ Extradition Treaty, Mar. 31, 2003, U.S.-UK, Arts. 1, 2(1), S. TREATY DOC. NO. 108-23, at 1, 4 (2003) [hereinafter 2003 Extradition Treaty].

⁹ Extradition Treaty with Great Britain and Northern Ireland, S. TREATY DOC. NO. 108-23, at V (2003) (secretary of state’s letter of submittal to the president).

¹⁰ 2003 Extradition Treaty, *supra* note 8, Art. 4(2)(a). There are presently numerous multilateral conventions containing a “prosecute or surrender” obligation addressing terrorist acts.

¹¹ *Id.*, Art. 7. Similar formulations may be seen in recent U.S. extradition treaties with Argentina, France, India, Republic of Korea, Peru, and Poland.

¹² *Id.*, Art. 18(2) (emphasis added).

and states in its letter that it will contest any request from the ICC for such surrender as being inconsistent with Article 98(2) of the Rome Statute.¹³

As of October 2004, the Senate had not yet provided consent to ratification.