

### ***Extradition and the NatWest Three: Unintended consequences***

**Economist**, July 15, 2006

Reciprocity is not the issue; safeguarding the right to a fair trial is

THEY weren't dragged away in leg-irons, but the dispatch by air on July 13th of three British bankers to America to stand trial was as dramatic as legal spectacles get. David Bermingham, Gary Mulgrew and Giles Darby--the so-called NatWest Three--are charged with helping to pull off a £11m (\$20m) fraud linked to the collapsed energy giant, Enron. The suspects are British; their victim is British; virtually all the alleged wrongful dealing was carried out in Britain. Their trial, however, like that of Enron's executives, will be in Houston.

Outrage over their plight, and the flawed fast-track bilateral extradition treaty that produced it, has united left and right, law lords and NGOs, businessmen and civil-liberties activists (see page 34). Most of the fuss has been about reciprocity--or the lack of it. The three were handed over under the terms of a treaty signed by Britain and America in March 2003 and broadly enshrined in Britain's omnibus Extradition Act later that year. The treaty and the act reduced the supporting material that America must provide in requesting extradition from Britain. But America (which had a lousy record of surrendering Irish terrorists to Britain) has yet to ratify the treaty.

Under the old rules America had to present "prima facie" evidence of guilt on the basis of which a jury, in the absence of a defence, could have convicted somebody. That burden of proof was rather higher than the "probable cause" that Britain had to show when requesting extradition from America. Now, although both countries have to produce factual information when they request extradition, only Britain has also to provide assessable evidence that there is a "reasonable basis to believe" a crime was committed and an identified person did it.

British ministers maintain that the burdens of proof are now roughly equivalent. Few expert lawyers on either side of the Atlantic agree. And there is another imbalance over who controls the gateway. American courts decide whether there is sufficient evidence before requesting extradition from Britain; and America again decides whether the evidence submitted by Britain in support of a British request for extradition is sufficient to justify compliance with it. The perceived unfairness of this asymmetry is linked to yet another grievance: although America has yet to ratify the treaty, it is indirectly benefiting from its looser evidentiary requirements.

In fact, both ratification and reciprocity are red herrings. Even if the Senate were to yield to Britain's pleadings and ratify the treaty tomorrow, it would not affect either the relative burdens of evidence or the fate of the NatWest Three. As for the lack of reciprocity embedded in the treaty itself, Britain has never insisted on exact parity when extraditing its citizens, nor is exact parity always possible. If justice can best be served elsewhere, so be it. The law is not a "zero-sum" game.

In friendship we trust

That does not mean that any government--in this case Britain's--should outsource the job of determining whether a citizen should stand trial, especially in a foreign country where he is likely to be at a disadvantage and particularly when the alleged offence was committed at home. America's bill of rights protects its people from search and seizure without demonstration of probable cause; Britain should do no less. It is a fundamental duty of

governments ancient and modern to provide their citizens with due process and a fair trial.

Sadly, Britain's government has already sold this pass, and not only to America. The treaty is part of a worldwide network of extradition arrangements, tightened to combat globalised crime and terrorism. In pursuit of these laudable goals, Britain has agreed, among other things, to extradition without prima facie evidence among 44 signatories of the Council of Europe's Convention on Extradition. America, with three Commonwealth countries, is now included in the list.

This was to compound one mistake with another. It is a principle of British law that the prosecution has to establish a case or see it chucked out. By agreeing to extradite without proper evidence--to America or to Azerbaijan--Britain has surrendered a safeguard on which its citizens have every right to rely. That is the real tragedy of the NatWest Three.