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Extradition Between the United States and Great Britain: The 2003 Treaty

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Summary

Federal court denial of British extradition requests in the cases of four fugitives from Northern Ireland led to the Supplementary Extradition Treaty. The Treaty proved controversial, and before the Senate would give its consent, it insisted upon modifications, some quite unusual. Those modifications have been eliminated in a newly negotiated treaty to which the Senate has recently given its advice and consent and which incorporates features often more characteristic of contemporary extradition treaties with other countries.

There was initial criticism of the new Treaty's

- exemptions to the political offense bar to extradition;
- elimination of judicial inquiry into politically motivated extradition request;
- treatment of probable cause;
- clause relating to extradition for crimes committed overseas;
- dropping the statute of limitations defense;
- discretionary authority for provisional arrest and detention;
- language relating to the seizure of assets;
- exceptions to the rule of speciality (permitting prosecution for crimes other than those for which extradition was granted); and retroactive application.

The Treaty also contains articles relating to capital punishment, waiver of extradition, extradition involving third countries, double jeopardy, the elimination of nationality as a bar to extradition, translations, and deferred prosecution.

The Senate conditioned its approval of the Treaty upon an understanding, two declarations and three provisos which relate to the Treaty's treatment of the exception for politically motivated requests and the role of the courts, its changes in the double jeopardy clause, assurances that the Treaty is not designed to accomplish the extradition of fugitives from Northern Ireland covered by the Belfast/Good Friday Agreement, and reporting requirements concerning the disposition of requests under the Treaty.

This report is available in an abridged form as CRS Report RS21633, *Extradition Between the United States and Great Britain: A Sketch of the 2003 Treaty*, by Charles Doyle; also see CRS Report 98-958, *Extradition To and From the United States: Overview of the Law and Recent Treaties*, by Charles Doyle.

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Introduction

"One of the most divisive and contentious issues the committee has faced...." So the Senate Foreign Relations Committee described its consideration and subsequent approval of the 1985 Supplementary Treaty to the 1972 extradition treaty between Great Britain and the United States, S.Ex.Rept. 99-17, at 6 (1986).[1] The Supplementary Treaty limits the political offense bar to extradition; it authorizes judicial inquiry into the motives behind an extradition request; and it allows an individual sought by the British to be heard by the court on the issues of probable cause and dual criminality. On March 31, 2003, Attorney General John Ashcroft and United Kingdom Home Secretary David Blunkett announced the signing of a new extradition treaty that reopened the matter.[2] The Senate gave its advice and consent to the 2003 Treaty on September 29, 2006, subject to an understanding, two declarations, and three provisos, 152 *Cong. Rec.* S10766-767 (daily ed. Sept. 29, 2006).[3]

The understanding, declarations and provisos confirm that (1) federal courts will retain the authority to bar extradition when a request fails to meet the demands of 2003 Treaty; (2) the 2003 Treaty does not obligate the United States to take any action proscribed by the Constitution; (3) the parties have disclaimed any interest in prosecuting offenses committed in Northern Ireland prior to and addressed in the Belfast/Good Friday Agreement. It also urges the Secretary of State to consider carefully any requests for the extradition of a fugitive who was previous acquitted, and after the Treaty becomes effective it requires annual reports from the Secretary on the number and disposition of extradition requests under the Treaty.

Background

Extradition is the process by which one country formally surrenders a person to another country for criminal prosecution or punishment.[4] Ordinarily, extradition is governed by a treaty which operates in the nature of a contract and by implementing statutory provisions.[5] The United States has extradition treaties in force with most of the countries of the world and under most circumstances will extradite an individual to another country only pursuant to a treaty of extradition.[6]

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[1] *Supplementary Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland*, T.I.A.S. 12050, 1556 U.N.T.S. 369 (eff. Dec. 23, 1986) (*Supplementary Treaty*).

[2] Department of Justice Press Release dated Mar. 31, 2003, available on May 6, 2004 at http://www.usdoj.gov/opa/pr/2003/March/03_ag_196.htm; *see also*, S. Treaty Doc. 108-23 (2004). Early on a group of Irish-Americans objected to its provisions, Boyle, *A Threat to Irish-Americans: The New U.S./U.K. Extradition Treaty*, available on May 6, 2004 at http://www.irishfreedomcommittee.net.

[3] *See also*, S.Ex.Rept. 109-91. The text of the resolution of approval and related documents from the report are appended.

[4] *See generally, Extradition To and From the United States: Overview of the Law and Recent Treaties*, CRS Rept. 98-958 (2003); Abbell, EXTRADITION TO AND FROM THE UNITED STATES (2002)(*Abbell*); Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (4th ed. 2002)(*Bassiouni*); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Subch.7B (1986 & 2003 Supp.)(RESTATEMENT). Interstate rendition, the surrender of a person by one of the states of the United States to another and sometimes also referred to as extradition, is beyond the scope of this report.

[5] In the case of the United States, 18 U.S.C. 3181-3196.

[6] 18 U.S.C. 3181, 3184. A somewhat dated list appears following in 18 U.S.C. 3181; *see also, United States Department of State: Treaties in Force—January 1, 2003* (2003). In the absence of a treaty, the United States may only honor extradition requests under two circumstances: (1) when foreign nationals accused or convicted of committing crimes of violence against Americans overseas are sought, 18 U.S.C. 3181(b), or (2) in response to extradition requests

Supplementary Treaty

The 2003 Treaty is the latest in a long line of extradition pacts with Great Britain.[7] The difficulties that led to the Supplementary Treaty arose from judicial application of the "political offense exception" found in the 1977 Treaty.[8] The federal courts in this country had held that the political offense exception found in most of our extradition treaties precluded extradition on the basis of criminal charges growing out of conduct "committed in the course of and incidental to a violent political disturbance, such as a war, revolution or rebellion."[9] Shortly after the 1977 Treaty became effective, federal courts denied extradition requests on the basis of the political offense exception in four instances growing out of the unrest in Northern Ireland.[10] The two countries responded by negotiating a Supplementary Treaty, S.Treaty Doc. 99-8 (1985).[11] As transmitted to the Senate, the Supplementary Treaty curtailed the political offense exception, and also eased the statute of limitations bar, extended the permissible duration of provisional arrest pending the formal submission of evidence sufficient to support an extradition request, and made its changes retroactively applicable, S.Treaty Doc. 99-8 (1985).

Exemptions to the political offense exception were the most controversial aspect of the treaty offered to the Senate. The Administration argued that the political offense exception should not be

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from the international tribunals for Yugoslavia and Rwanda, P.L. 104-132, §443, 110 Stat. 1280 (1996), 18 U.S.C. 3181 note.

[7] In fact, the extradition provision of Jay's Treaty with Great Britain was our first extradition treaty, 8 Stat. 116, 129 (1794).

[8] "Extradition shall not be granted if . . . (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character," *Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Norther Ireland*, Art.V(1), 28 U.S.T. 227, 230 (1977) (*1977 Treaty*). The 1977 Treaty, with the modifications found in the Supplementary Treaty, is still in effect.

[9] *Eain v. Wilkes*, 641 F.2d 504, 518 (7th Cir. 1981); *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir.1980); *Sindona v. Grant*, 619 F.2d 167, 173 (2d Cir. 1980); *cf., Ornelas v. Ruiz*, 161 U.S. 502, 511-12 (1896)("Can it be said that the commissioner had no choice on the evidence but to hold, in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed, that this was a movement in aid of a political revolt, an insurrection or a civil war, and that acts which contained all the characteristics of crimes under the ordinary law were exempt from extradition because of the political intentions of those who committed them? In our opinion this inquiry must be answered in the negative").

[10] *In re McMullen*, Magistrate No. 3-78-1099 MG (N.D.Cal. May 11, 1979), *printed in*, 132 *Cong.Rec.* 16585 (1986); *In re Mackin*, 80 Cr.Misc. 1 (S.D.N.Y. Aug. 13, 1981), *appeal dism'd, pets. for mand. & hab.corp. den'd*, 668 F.2d 122 (2d Cir. 1981); *Quinn v. Robinson*, No. C-82-668 RDA (N.D.Cal. 1983), *rev'd*, 783 F.2d 776 (9th Cir. 1986); *In re Doherty*, 599 F.Supp. 270 (S.D.N.Y. 1984).

[11] 132 *Cong.Rec.* 16586 (1986)(remarks of Sen. Lugar)("it was because of these cases that on June 25, 1985, the United States and the United Kingdom signed the Supplementary Extradition. Its purpose is to reverse the three cases where extradition was denied and put an end to this development in the law"); *see generally, United States and United Kingdom Supplementary Extradition Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. (1985)(*Hearings*); *id.* at 4 (testimony of Department of State Legal Adviser Abraham D. Sofaer)(". . .United States courts have refused to extradite to the United Kingdom four members of the Provisional Irish Republican Army [PIRA] who are accused, or convicted of violent terrorist crimes. In each case, extradition was denied because the terrorist crimes were committed as part of a political struggle. These decisions direct a blow to the rule of law. . ."); *id.* at 7-8 (testimony of Dep.Att'y Gen. D. Lowell Jensen)("In recent years, there have been four cases involving request by the United Kingdom for the extradition of Irish Republican Army members charged or convicted of terrorist crimes. . . . In each of the four cases described, the fugitive claimed that the unsettled political situation in Northern Ireland constituted a war, revolution, or rebellion and that his offenses qualified for treatment as political offenses. The U.S. courts have accepted this argument in all but one case. . . . The British Government has concurred in our view that it is unacceptable that a criminal may commit a heinous offense which shocks the sensibilities of all decent people, flee the country which he has terrorized, and find safe haven in another country by labeling his crime a political offense").

available for crimes of violence committed in a nation open to nonviolent resolution of political differences, and that contrary to critics' suggestions the treaty posed no threat to civil liberties.[12] Critics, on the other hand, argued that the repudiated political offense exception reflected a long-held reluctance to deny refuge to the opponents of repressive governments ,[13] lest we be forced to extradite the overseas equivalents of the farmers and other minutemen at Lexington and Concord.[14] In addition, some suggested that adjustments in the political offense exception might best be addressed uniformly in statute rather than on an ad hoc treaty by treaty basis;[15] while others questioned the wisdom of endorsing some aspects of criminal justice system in Northern Ireland.[16]

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[12] E.g., *Hearings* at 3-5 (testimony of State Department Legal Adviser Abraham D. Sofaer) ("The political offense doctrine is an exception to the general principle of extradition. This exception arose in the 18th century, as revolutionaries struggled for freedom against despotic regimes. When revolutionaries fled to the fledgling democracies of Western Europe, those governments sheltered them from political persecution. They refused to extradite fugitives whom requesting states sought to punish for engaging political activities. . . . In recent years, the exception has resulted in refusals of U.S. courts to extradite persons suspected or convicted of committing heinous crimes that are not, by their nature, political acts.... This supplementary treaty ... narrows the political offense exception as applied to United Kingdom requests to pure political and nonviolent crimes. It reflects the basic principle that terrorist violence should not be tolerated against stable democracies in which the political process is available to redress legitimate grievances and in which the judicial system provides fair treatment. Moreover, by using a bilateral treaty to implement this principle, we would not alter our extradition laws across the board. Instead, we are abler to decide whether to limit the exception on a nation-by-nation basis.... [T]he United Kingdom is also an ideal nation with whom to begin this process from the moral and political point of view. It is our longest and closest ally ... [and] one of the most open political systems in the world.... Some opponents have condemned this supplementary treaty as an assault upon civil liberties. They claim it will destroy the political offense exception, will facilitate repression of dissent, and will abolish judicial review of extradition decisions. These criticisms are unfounded. The treaty does not eliminate the political offense exception, but only removes from its scope certain specified violent crimes.... Moreover, the exception will continue in full force with respect to all nations other than the United Kingdom, and will never be revised with respect to repressive regimes").

[13] E.g., *Hearings* at 99 (statement of Professor Christopher H. Pyle) ("The political crimes defense has been part of Anglo-American extradition practice since the American Civil War, when Britain refused to surrender gunmen for the Southern cause who had sought refuge in Canada. It is a standard provision of nearly 90 treaties of extradition that the United States has concluded with other nations, and is common to the extradition treaties of most western nations. The defense has survived for more than a century, despite periodic bouts with political assassinations, kidnappings, and bombings, for two reasons. First, western nations have found it prudent not to commit themselves, by treaty, to use their legal systems to help other nations suppress any and all rebellions. Second, they have not wanted to be complicit in victors' justice, particularly where that complicity would outrage sympathetic nationality groups within their own borders"); *id.* at 51 (statement of Rep. Biaggi).

[14] E.g., S.Ex.Rep.No,. 99-17, at 12 (additional views of Sen. Helms)("If this treaty had been in effect in 1776 ... this language would have labeled the boys who fought at Lexington and Concord as terrorists. There is no question that the British authorities in 1776 would have considered the guerilla operations of the Americans to be murder and assault ... there is no doubt whatsoever that such a treaty would have required us to extradite the patriots who fired the shot heard 'round the world to swing on a British gallows"); *cf*., *id*. at 491 (statement of Professor Keara M. O'Dempsey)("In the first ten Congresses of the United States, a total of 56 senators would probably have been extraditable under a treaty such as this, for they 'maliciously wounded and killed' British soldiers and possessed firearms with the intent 'to endanger life'").

[15] E.g., *Hearings* at 71 (testimony of Rep. Hughes) ("The principal effect of the supplementary treaty would be the derogation of over 100 years of American extradition practice and case law by virtually destroying the so-called political offense exception to extradition law.... Moreover, the legal adviser to the State Department admitted ... that the United Kingdom is 'an ideal nation from a moral and political point of view' to begin a process of exempting 'stable democracies' with fair legal systems from the restrictions of the political crimes defense. I strongly oppose this treaty-by-treaty stratagem, which I believe would effectively preempt the legislative process. As a result, our extradition laws will not be consistently applied, but will depend upon the status of the requesting nation as a friend or ally"); *id.* at 407-9 (statement of Rep. Rodino).

[16] E.g., *Hearings* at 143 (testimony of Rep. Hamilton Fish, Jr.) ("I ask that you take a long look at the presumption underlying this treaty; namely, that the judicial process in Northern Ireland provides fair treatment. The Emergency

Apart from the political offense question, opponents also protested that the Supplementary Treaty as transmitted eliminated the statute of limitations defense to any British request and made its alternations retroactively applicable.[17] The Administration pointed out that the treatment of retroactivity and the lapse of time issues were standard features of "our newer treaties."[18]

After consulting with the Administration and the British Government, the Senate produced a compromise. First, the Supplementary Treaty that entered into force after Senate amendment limits the political offense exception to permit the extradition of terrorists in most cases.[19] Second, in such purported terrorist extradition cases, it creates a defense to extradition where the fugitive can establish that extradition has been sought or would result in his trial or punishment because of his race, religion, nationality or political opinions. And it establishes a procedure for appellate review in such cases.[20] Third, it makes it clear that the federal courts may deny

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Powers Act now in effect in Northern Ireland was originally instituted by the British for the same reasons given for the institution of the treaty: As a response to the terrorism and violence in Northern Ireland. But it has become an instrument of oppression against fair and moral political opposition. The heritage of law, a precious gift of England to so many English-speaking judicial systems throughout the world, has apparently been set aside by Great Britain in Northern Ireland. . . . I visited the north of Ireland. I was appalled. . . and offended at the abuses that I saw in the legal system. In the Diplock courts, there were wide powers of arrest, detention, search and seizure. The right to a trial by jury had been abolished as cases were heard by a single judge; accused persons often faced physical and psychological coercion; and a person charged with an offense had no right to bail and could be detained indefinitely. In the last few years, there have been mass trials of up to 75 defendants at a time, in which one or more supergrasses, or informants, figured prominently. In these cases, the work of one informant, protected by Government immunity was enough to convict without further evidence. In the United States, this would amount, Mr. Chairman, to a loss of constitutional rights under the 1st, 4th, 5th, 6th, 8th and 14th amendments. I ask, can we willingly be a party to the enforcement of these laws under these conditions"); *id.* at 65-6 (statement of Sen. DeConcini).

[17] E.g., *Hearings* at 52 (statement of Rep. Biaggi) ("Sam O'Reilly lives in upstate New York. He is 89 years old. In 1916 he fought against the British in the so-called Easter Rebellion. If this treaty were passed Great Britain could extradite Sam O'Reilly to face charges relating to his activities almost 70 years ago"). Other commentators asked whether these features might raise ex post facto or bill of attainder issues, *id.* at 305 (statement of Professor M. Cherif Bassiouni); *id.* at 528 (statement of Professor Francis A. Boyle).

[18] *Hearings* at 8 (statement of Dep.Att'y Gen. D. Lowell Jensen).

[19] "For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character: (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution; (b) murder, voluntary manslaughter, and assault causing grievous bodily harm; (c) kidnaping, abduction, or serious unlawful detention, including taking a hostage; (d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; and (e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense," *Supplementary Treaty*, Art. 1.

The agreements mentioned in (a) above appear to include the: *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 22 U.S.T. 1641 (eff. Oct. 14, 1977); *Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 24 U.S.T. 564 (eff. Jan. 26, 1973); *United Nations Convention Against Illicit Traffick in Narcotic Drugs and Psychotropic Substances*, S.Treaty Doc. 101-4 (eff. Nov. 11, 1990); *Protocol Amending the Single Convention on Narcotic Drugs, 1961*, 26 U.S.T. 1439 (eff. Aug. 8, 1975); *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons*, 28 U.S.T. 1975 (eff. Feb. 20, 1977); *International Convention Against the Taking of Hostages*, T.I.A.S. 11081 (eff. Jan. 6, 1985); *Convention on the Physical Protection of Nuclear Material*, T.I.A.S. 11080 (Feb. 8, 1987); *Convention Against Torture and Other Cruel, Inhuman,or Degrading Treatment or Punishment*, S.Treaty Doc. 100-20 (eff. Nov. 20, 1994); *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, S.Treaty Doc. 100-19 (eff. Nov. 18, 1994); *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, S.Treaty Doc. 101-1 (eff. Mar. 6, 1995); *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, S.Treaty Doc. 105-43 (eff. Feb. 15, 1997). Here and elsewhere treaties are referred to by their Senate Treaty Document number if an official citation is unavailable. The text of Senate Treaty Documents beginning with the 104th Congress are available at http://www.gpoaccess.gov.

[20] "(a) Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person

extradition in the absence of probable cause and in response to evidence presented by the individual sought.[21] Finally, it drops the proposed revision of the statute of limitations clause, so that extradition must be denied if prosecution would be barred under the laws of either country.[22]

Since the Supplementary Treaty

Of the four men whose extradition cases served as a catalyst for the Supplementary Treaty, Desmond Mackin returned to Ireland;[23] William Quinn was extradited;[24] and Peter McMullen was deported,[25] as was Joseph Doherty.[26] Others appear to have found little refuge in the Supplementary Treaty.[27] Commentary on the Supplementary Treaty and on the cases that

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sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

"(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for offenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process," *Supplementary Treaty*, Art.3.

[21] "Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party.

"In determining whether an individual is extraditable from the United States, the judicial authority of the United States shall permit the individual sought to present evidence on the questions of whether: (1) there is probable cause; (2) a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the courts, exists; and (3) the act upon which the request for extradition is based would constitute an offense punishable under the laws of the United States.

"Probable cause means whether there is sufficient evidence to warrant a man of reasonable caution in the belief that: (1) the person arrested or summoned to appear is the person sought; (2) in the case of a person accused of having committed a crime, an offense has been committed by the accused; and (3) in the case of a person alleged to have been convicted of an offense, a certificate of conviction or other evidence of conviction or criminality exists," *Supplementary Treaty*, Art.2.

[22] The treaty offered to the Senate would have permitted extradition as long as the laws of the requesting nation did not bar prosecution because of the lapse of time (S.Treaty Doc. 99-8, at 2)—a change thought disadvantageous to fugitives in this country, *Hearings* at 312-13 (statement of Professor Charles Rice).

[23] Marshall, *Extradited American Gets Life Sentence in IRA Killing*, LOS ANGELES TIMES 7 (Feb. 17, 1988).

[24] *Id*.

[25] *Extradition and the Conflict in Norther Ireland: The Past, the Present and Future of an Intractable Problem*, 25 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 169, 182 n.104 (2002). McMullen's initially successful contention, that the Supplementary Treaty applied to him would constitute a bill of attainder, ultimately failed, *In re Extradition of McMullen*, 769 F.Supp. 1278 (S.D.N.Y. 1991), *aff'd*, 953 F.2d 761 (2d Cir. 1992), *aff'd in part and rev'd in part en banc*, 989 F.2d 603 (2d Cir. 1993).

[26] 138 *Cong.Rec.* 2639 (1992) (remarks of Rep.Gilman); *see also*, Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM LAW REVIEW 317 (1992); 138 *Cong.Rec.* 1421, 4027, 23160 (1992)(remarks of Sen. Specter, Rep. Neal, and Rep. Engel, respectively); *INS v. Doherty*, 502 U.S. 314 (1992).

[27] *See e.g.*, *In re Extradition of Howard*, 791 F.Supp. 31 (D.Mass. 1992), *aff'd*, 996 F.2d 1320, 1332 (1st Cir. 1993) (magistrate did not err in concluding that a black murder suspect had failure to show that he would be prejudiced on account of his race if extradited); *In re Extradition of Smyth*, 61 F.3d 711, 713 (9th Cir. 1995)(escaped prisoner failed to establish that he would be discriminatorily punished); *In re Extradition of Artt*, 972 F.Supp.1253 (N.D.Cal. 1997), *rev'd*, 158 F.3d 462 (9th Cir. 1998), *op. withdrawn*, 183 F.3d 944 (9th Cir. 1999)(requests for extradition were withdrawn following the Belfast/Good Friday Agreement under which the contemporaries of those sought had been

followed has been mixed, often depending upon whether the author's focus was terrorism,[28] intervention in foreign civil conflicts,[29] or inquiry into foreign judicial systems.[30] Finally, the conditions in Northern Ireland that rested at the heart of the extradition controversy seem to have improved somewhat. Under the Belfast/Good Friday Agreement violence subsided, and those held under the Diplock and similar procedures have been released.[31]

While they lack the more individualist attributes of the Supplementary Treaty, the extradition treaties with other nations transmitted to the Senate since then have generally featured a more modest series of exemptions to the political offense bar. Most would permit extradition for a political offense that involves a crime of violence against a head of state or his family, or a crime covered by a treaty obligation to extradite, or attempt or conspiracy to commit either of these types of crimes.[32] A few, however, do contain exemptions to the political offense ban reminiscent

released), *reinstated*, 248 F.3d 1197 (9th Cir. 2001).

[28] Hannay, *An Analysis of the U.S.-U.K. Supplementary Extradition Treaty*, 21 INTERNATIONAL LAWYER 925, 937 (1987)("The Supplementary Treaty's restriction of the political offense exception represents a substantial improvement in the ability of the United States and the United Kingdom to fight the rising tide of international political violence and is a good model for similar treaties with other democracies"); Sofaer, *The Political Offense Exception and Terrorism*, 15 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY 125 (1986); Lubet, *Taking the Terror Out of Political Terrorism: The Supplementary Treaty of Extradition Between the United States and the United Kingdom*, 19 CONNECTICUT LAW REVIEW 862, 892-93 (1987).

[29] Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY 255 (1987)("The Supplementary Treaty reverses a historical trend in the U.S.... Such a reversal ... means only that the U.S. has taken sides in an internal political conflict, which it had carefully avoided doing in the past. A policy of neutrality toward foreign internal civil strife is wisest in light of the many ongoing civil conflicts occurring all over the world"); *Extradition and the Conflict in Northern Ireland: The Past, Present and Future of an Intractable Problem*, 25 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 169, 197 (2002)("The Northern Ireland peace process has created a landscape where the Supplementary Treaty is no longer necessary or desirable as a means of effecting extradition.... Elimination of the Supplementary Treaty ... eliminate many of the problems identified above that can flow from using a treaty-by-treaty approach to extradition, such as eliminating the appearance of U.S. involvement in the U.K.'s policies in Northern Ireland").

[30] *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STANFORD JOURNAL OF INTERNATIONAL LAW 257, 288 (1988)("If application of the traditional political offense exception strained relations between the United States and United Kingdom, the result of a judicial determination that the United Kingdom's request was made in bad faith or that its court system is unfair will have even more disastrous consequences on U.S. foreign policy"); *but see, Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1515, 1545 (1988)("The problem with this new treaty is that, although it remedies certain problems that existed under the old regime, it still does not resolve adequately the problem of how to deal fairly with alleged political offenders. Article 1, for example, sweeps too broadly in its denial of the political offense exception to those who commit acts of political violence. It ignores the possibility that there may be some circumstances under which a person committing such act deserves protection").

[31] *Reconciliation of the Penitent: Sectarian Violence, Prisoner Release, and Justice Under the Good Friday Peace Accord*, 26 JOURNAL OF LEGISLATION 163, 175-75 (2002); *The Legality of the Pardoning of Paramilitaries Under the Early Release Provisions of Northern Ireland's Good Friday Agreement*, 34 CORNELL INTERNATIONAL LAW JOURNAL 227 (2001); Bell, *Dealing With the Past in Northern Ireland*, 26 FORDHAM INTERNATIONAL LAW JOURNAL 1095, 1111-115 (2003).

[32] "1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

"2. For the purposes of this Treaty, the following offenses shall not be considered to be political offenses: (a) a murder or other willful crime against the person of a Head of State of one of the Contracting States, or of a member of the Head of State's family; (b) an offense for which both Contracting States 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; and (c) a conspiracy or attempt to commit any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses.

"3. Notwithstanding the terms of paragraph 2 of this Article, extradition shall not be granted if the executive authority

of the Supplementary Treaty.[33] "3. Notwithstanding the terms of paragraph 2 of this Article, extradition shall not be granted if the executive authority of the Requested State determines that the request was politically motivated," *Extradition Treaty with Luxembourg*, Art.4(1)-(3) (S.Treaty Doc. 105-10); *see also*, *Supplementary Extradition Treaty with Germany*, Art.4 (1)-(3) (S.Treaty Doc. 100-6); *Second Supplementary Extradition Treaty with Spain*, Art.4, (1)-(3) (S.Treaty Doc. 102-24); *Extradition Treaty with Hungary*, Art.4, (1)-(3) (S.Treaty Doc. 104-5); *Supplementary Extradition Treaty with Belgium*, Art.2, (S.Treaty Doc. 104-8); *Extradition Treaty with Poland*, Art.4, (1)-(3) (S.Treaty Doc. 105-14); *Extradition Treaty with South Africa*, Art.4, (1)-(3) (S.Treaty Doc. 106-24); *Extradition Treaty with Lithuania*, Art.4, (1)-(3) (S.Treaty Doc. 107-4).

Initial Objections to 2003 Treaty

At least one early critic of the 2003 Treaty contended that it:

> 1. Eliminates the political offense for any offense allegedly involving violence or weapons, including any solicitation, conspiracy or attempt to commit such crimes;

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of the Requested State determines that the request was politically motivated,"*Extradition Treaty with Belize*, Art.4 (1)-(3) (S.Treaty Doc. 106-38); *see also, Extradition Treaty with the Bahamas*, Art.3 (1)-(3) (S.Treaty Doc. 102-17); *Extradition Treaty with Jordan*, Art.4 (1)-(3) (S.Treaty Doc. 104-3); *Extradition Treaty with the Philippines*, Art.3 (1)-(3) (S.Treaty Doc. 104-16); *Extradition Treaty with Bolivia*, Art.5 (1) (S.Treaty Doc. 104-22); *Extradition Treaty with Malaysia*, Art.4 (1)-(3) (S.Treaty Doc. 104-26); *Extradition Treaty with Cyprus*, Art.4 (1)-(3) (S.Treaty Doc. 105-16); *Extradition Treaty with Argentina*, Art.4 (1)-(3) (S.Treaty Doc. 105-18); *Extradition Treaty with Antigua and Barbuda*, Art.4 (1)-(3) (S.Treaty Doc. 105-19); *Extradition Treaty with Dominica*, Art.4 (1)-(3) (S.Treaty Doc. 105-19); *Extradition Treaty with Grenada*, Art.4 (1)-(3) (S.Treaty Doc. 105-19); *Extradition Treaty with St. Lucia*, Art.4 (1)-(3) (S.Treaty Doc. 105-19); *Extradition Treaty with St. Kitts and Nevis*, Art.4 (1)-(3) (S.Treaty Doc. 105-19); *Extradition Treaty with St. Vincent and the Grenadines*, Art.4 (1)-(3) (S.Treaty Doc. 105-19); *Extradition Treaty with Barbados*, Art.4 (1)-(3) (S.Treaty Doc. 105-20); *Extradition Treaty with Trinidad and Tobago*, Art.4 (1)-(3) (S.Treaty Doc. 105-21); *Extradition Treaty with Korea*, Art.4 (1)-(3) (S.Treaty Doc. 106-2); *Extradition Treaty with Austria*, Art.4 (1)-(3) (and murder)(S.Treaty Doc. 105-50); *Extradition Treaty with Paraguay*, Art.4 (1)-(3) (S.Treaty Doc. 106-4). Four others list treaty obligations under specific treaties rather than providing a general provision as in Art.4, subpara.2(b) of the Treaty with Belize: *Extradition Treaty with France*, Art.4 (1)-(4) (S.Treaty Doc. 105-13); *Extradition Treaty with India*, Art.4 (1)-(3) (S.Treaty Doc. 105-30); *Extradition Treaty with Sri Lanka*, Art.4 (1)-(3) (S.Treaty Doc. 106-34); *Extradition Treaty with Peru*, Art.4 (1)-(3) (S.Treaty Doc. 107-6). The *Extradition Treaty with Switzerland*, Art.3 (S.Treaty Doc. 104-9) has no exceptions to the political offense bar.

[33] "1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

"2. for the purposes of this Treaty, the following offenses shall not be considered to be political offenses: (a) a murder or other willful crime against the person of a Head of State of one of the Contracting States, or of a member of the Head of State's family; (b) an offense for which both Contracting States 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; (c) murder, manslaughter, malicious wounding or inflicting grievous bodily harm; (d) an offense involving kidnaping, abduction, or any form of unlawful detention, including the taking of a hostage; (e) placing or using an explosive, incendiary or destructive device or substance capable of endangering life or causing grievous bodily harm; (f) an attempt to commit, or participation or complicity in the commission of, any of the foregoing offenses; and (g) an "association of wrongdoers" as provided by the laws of Luxembourg, or a "conspiracy" as provided by the laws of the United States, to commit any of the foregoing offenses.

"3. Notwithstanding the terms of paragraph 2 of this Article, extradition shall not be granted if the executive authority of the Requested State determines that the request was politically motivated," *Extradition Treaty with Luxembourg*, Art.4(1)-(3) (S.Treaty Doc. 105-10); *see also, Supplementary Extradition Treaty with Germany*, Art.4 (1)-(3) (S.Treaty Doc. 100-6); *Second Supplementary Extradition Treaty with Spain*, Art.4, (1)-(3) (S.Treaty Doc. 102-24); *Extradition Treaty with Hungary*, Art.4, (1)-(3) (S.Treaty Doc. 104-5); *Supplementary Extradition Treaty with Belgium*, Art.2, (S.Treaty Doc. 104-8); *Extradition Treaty with Poland*, Art.4, (1)-(3) (S.Treaty Doc. 105-14); *Extradition Treaty with South Africa*, Art.4, (1)-(3) (S.Treaty Doc. 106-24); *Extradition Treaty with Lithuania*, Art.4, (1)-(3) (S.Treaty Doc. 107-4).

2. Transfers responsibility for determining whether the extradition request is politically-motivated from the courts to the executive;

3. Allows for extradition even if no U.S. federal law is violated;

4. Eliminates any statute of limitations;

5. Eliminates the need for any showing by the United Kingdom of facts sufficient to show the person requested is guilty of the crime charged—mere unsupported allegations are sufficient;

6. Allows for "provisional arrest" and detention for 60 days upon request by the United Kingdom;

7. Allows for seizure of assets by the United Kingdom;

8. Allows for extradition for one offense, and then subsequent prosecution in the UK for an unrelated offense (thus eliminating the time-honored "rule of speciality"); and

9. Applies retroactively, for offenses allegedly committed even before the ratification of the treaty. Boyle, *supra* footnote 2.

The understanding, declarations, and provisos that accompany the Senate's approval of the 2003 Treaty seem to reflect its concerns over some of these objections.

Exemptions to the Political Offense Exception

Eliminates the political offense for any offense allegedly involving violence or weapons, including any solicitation, conspiracy or attempt to commit such crimes

It does and more. There is likely to be little consensus over whether this is objectionable. It is the issue that dominated debate over the Supplementary Treaty. There is little disagreement over the origins or original rationale of the exception. As one court has explained:

> The political offense exception is premised on a number of justifications. First, its historical development suggests that it is grounded on the belief that individuals have a "right to resort to political activism to foster political change." This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes. Second, the exception reflects a concern that individuals—particularly unsuccessful rebels—should not be returned to countries where they may be subjected to unfair trial and punishments because of their political opinions. Third, the exception comports with the notion that governments—and certainly their non-political branches—should not intervene in the internal political struggles of other nations. *Quinn v. Robinson*, 783 F.2d 776, 792-93 (9th Cir. 1986).

The difficulty comes in defining the exception's proper scope. Should it protect fleeing insurgents from prosecution and punishment for acts of violence they committed against the military forces of the government they sought to overthrow? Absent a treaty bar, United States courts have held that it should apply to crimes committed incidental to and in furtherance of rebellion or similar political disturbance, *Id.* at 797-78. Reliance upon the exception led to the exemptions to the exception found in the proposed Supplementary Treaty. The Senate accepted a somewhat reduced list of exemptions to the political offense exception in exchange for expanded judicial authority to verify probable cause and the bona fides of a request.

The 2003 Treaty undoes the Senate changes in the Supplementary Treaty and enlarges its list of exemptions from the political offense exception (noted in the italics below):

1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

> 2. For the purposes of this Treaty, the following offenses shall not be considered political offenses:
>
> (a) 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;
>
> (b) *a murder or other violent crime against the person of a Head of State or one of the Parties, or of a member of the Head of State's family*;
>
> (c) murder, manslaughter, malicious wounding, or inflicting grievous bodily harm;
>
> (d) an offense involving kidnaping, abduction, or any form of unlawful detention, including the taking of a hostage;
>
> (e) *placing or* using, or *threatening the placement or use of*, an explosive, incendiary, *or destructive device or firearm* capable of endangering life, of causing grievous bodily harm, *or of causing substantial property damage*;
>
> (f) *possession of an explosive, incendiary, or destructive device capable of endangering life, or causing grievous bodily harm, or of causing substantial property damage*;
>
> (g) an attempt or *a conspiracy* to commit, participation in the commission of, *aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to* any of the foregoing offenses. *2003 Treaty*, Art.4(1),(2)(emphasis added).

The new head of state exemption is a standard feature of our recent treaties, even those with comparatively modest exemptions. At first blush, it seems unlikely to arise with any great frequency. Its actual reach, nevertheless, may increase slightly depending upon the Parties' understandings of the meaning of "family" and the new breadth of subparagraph 4(2)(g) relating to accessories. It might, for example, embrace anyone who harbored or otherwise afterwards assisted those who assassinated Lord Mountbatten, assuming the underlying offense were found to be a political offense.[34]

Several of the enlargements—those dealing with possession, conspiracy, property damage, expanding voluntary manslaughter to include involuntary, and reaching unlawful detention (serious or otherwise)—repeal specific Senate amendments to the Supplementary Treaty as originally transmitted to the Senate.[35] The inclusion of threats, firearms, possession of explosives, property damage (independent of bodily injury), and accessories after the fact appears to carry the provision well beyond the coverage of even the more ambitious of such provisions in our other recent extradition treaties. Its sweep is made all the more dramatic by removal of the judicial safety valve found in the Supplementary Treaty's "improper motives" Article.

The Senate responded with the explicit understanding that as part of the extradition process normally conducted under the laws of the United States, "a United States judge makes determinations regarding the application of the political offense exception."[36] The understanding

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[34] Lord Mountbatten, the Queen's cousin, was killed in a bomb blast aboard his yacht while sailing off the coast of Ireland. The man convicted of his murder was released pursuant to the Good Friday Agreement, *On This Day: August 27*, BBC NEWS, available at http:\news.bbc.co.uk.

[35] S.Ex.Rept.99-17 (1986)("The essence of the committee's compromise is found in what are now Articles 1 and 3 of the Supplementary Treaty. Article 1 narrows the list of offenses which a court may treat as political offenses. However, references in the original Supplementary Treaty to property damage, possession, intent, and conspiracy were deleted; manslaughter was qualified by 'voluntary', and unlawful detention was qualified by 'serious'").

[36] "The advice and consent of the Senate under section 1 is subject to the following understanding: Under United States

is reenforced by the second declaration confirming the role of the courts in the extradition process and by the provisos indicating that the 2003 Treaty is not designed to permit the prosecution of fugitives from Northern Ireland for offenses committed prior to the Good Friday Agreement.[37]

The Courts, Improper Motives, and Probable Cause

> *Transfers responsibility for determining whether the extradition request is politically-motivated from the courts to the executive*

It does. Again whether this is objectionable may depend upon perspective. Born of a concern for fairness, the features of the Supplementary Treaty are nonetheless unique. Of course, the question—of whether the crime upon which an extradition request rests is political crime—is closely related to the question of whether an extradition request is grounded in improper political motives. The 2003 Treaty strikes or at least extensively prunes perhaps the most individualistic features of the existing treaty—the treatment of improperly motivated requests and the specifics concerning the existence of probable cause. Article 3 of the Supplementary Treaty establishes a judicial procedure replete with appellate rights to bar extradition based on trumped-up charges or improperly motivated requests.[38]

The Senate Foreign Relations Committee which added Article 3 to the Supplementary Treaty explained its extraordinary dimensions:

> Article 3, part (a) contains two distinct concepts, First, it authorizes a court to deny extradition based upon a persuasive factual showing that the requesting party has trumped-up charges against a dissident in order to obtain his extradition for trial or punishment. Second, it authorizes a court to deny extradition if the person sought for extradition can establish by a preponderance of the evidence that he would be prejudiced at this trial, or punished, detained or restricted in his personal liberty because of his race, religion, nationality or political opinions.
>
> Article 3(a) adapts language found in Article 5 of the European Convention on the Suppression of terrorism to which the United Kingdom is a party....
>
> During the June 12 business meeting the following colloquy with respect to article 3(a) took place:

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law, a United States judge makes a certification of extraditability of a fugitive to the Secretary of State. In the process of making such certification, a United States judge also makes determinations regarding the application of the political offense exception. Accordingly, the United States of America understands that the statement in paragraphs 3 [relating to political motivation] and 4 [relating to military offenses] of Article 4 that "in the United States, the executive branch is the competent authority for the purposes of this Article" applies only to those specific paragraphs of Article 4, and does not alter or affect the role of the United States judiciary in making certifications of extraditability or determinations of the application of the political offense exception."

[37] 152 *Cong. Rec.* S10767 (daily ed. Sept. 29, 2006); S. Ex. Rept. 109-19, at 8-10 (2006).

[38] "(a) Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

"(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for offenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process," *Supplementary Treaty*, Art.3.

> Senator Kerry. Mr. Chairman, as part of that report language I would ask you if it is your understanding and intention ... that an individual, as part of showing that he would ... if surrendered be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinion, would that individual be able to challenge the fairness of the judicial system to which he would be returned and thereby raise a right of inquiry into the fairness of that system?
>
> The Chairman. Yes.
>
> * * *
>
> Article 3(b) applies only to the United States. It does two things. First, it limits the scope of article 3(a) in U.S. extradition proceedings to offenses listed in Article 1 of the Supplementary Treaty, In other words, if an individual is wanted for extradition to the United Kingdom for fraud, drug smuggling or some other offense not listed in article 1, that individual may not involve article 3(a) before a Federal magistrate or judge. Article 3(b) also gives either party to the extradition proceeding the right to appeal a finding under article 3(a). S.Ex.Rept. 99-17, at 4-5 (1986).

The 2003 Treaty's pruning of the improper motivation clause leaves only political motives suspect and expressly removes the issue from the courts.[39] More broadly drafted clauses—proscribing racial, religious or other improperly motivated extradition requests—are not uncommon elsewhere.[40] The 2003 Treaty's repeal of the judicial authority to inquiry into extradition motivation, however, comports with treatment of the issue diplomatically[41] and judicially.[42] Moreover as noted above, the understandings, declarations and provisos, upon which the Senate insisted, emphasize that whether a particular extradition request satisfies treaty requirements remains an initial judicial determination and disclaim any intent to reopen the Good Friday Agreement.

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[39] "Notwithstanding the terms of paragraph 2 of this Article, extradition shall not be granted if the competent authority of the Requested State determines that the request was politically motivated. In the United States, the executive branch is the competent authority for the purpose of this Article," Art.4(3).

It likewise withdraws authority to pass on the military offense defense from the courts, "The competent authority of the Requested State may refuse extradition for offenses under military law that are not offenses under ordinary criminal law. In the United States, the executive branch is the competent authority for the purpose of this Article," Art.4(4).

[40] *See e.g., Jamaican Extradition Treaty*, Art.3(2), S.Treaty Doc. 98-18 (eff. July 7, 1991); *French Extradition Treaty*, Art.4(4), S.Treaty Doc. 105-13 (eff. Feb.1, 2002).

[41] *Abbell*, at 4-60 to 4-61 ("[W]ere it not for the substantial role played by the Senate Foreign Relations Committee in revising the supplementary extradition treaty between the United States and the United Kingdom, in the course of which it delegated responsibility to the courts to decide matters of this nature that would otherwise fall within the Rule of Non-Inquiry, there would be no question that the determination of a requesting country's motives in requesting extradition from the United States would continue to be a matter within the exclusive purview of the Executive.... Nevertheless, except with respect to the application of the supplementary extradition treaty with the United Kingdom itself, the federal courts have continued to apply, if not strengthen, the Rule of Non-Inquiry in this and other areas. Moreover, most United States extradition treaties negotiated subsequent to 1986 expressly leave the determination of the requesting country's motive for requesting extradition to the executive authority of the requested country, or do not specify the manner in which the requested country is to make this determination").

[42] Hannay, *Analysis of the U.S.-U.K. Supplementary Treaty*, 21 INTERNATIONAL LAWYER 925, 926 (1987)("Under present case law in the United States, it is within the jurisdiction of the courts to decide whether the crime for which extradition has been requested is a political offense. By contrast, the Secretary of State has sole discretion to determine whether an extradition request should be denied because it is a subterfuge, and accordingly, courts traditionally have declined to consider whether the requesting country's motives in seeking extradition are political").

Eliminates the need for any showing by the United Kingdom of facts sufficient to show the person requested is guilty of the crime charged—mere unsupported allegations are sufficient

The Supplementary Treaty's probable cause article reenforces the benefits of article 3.[43] Again the Senate Executive Report is instructive:

> The committee has made a second major change in the Supplementary Treaty as submitted. It has included, as article 2 of the amended treaty, a restatement of the procedures that have traditionally governed the consideration of an extradition request in U.S. courts. This article reaffirms that the magistrate or Federal judge is to permit the individual to present evidence in connection with the request. It insures that no individual is to be extradited without a fair hearing. It is designed to lay to rest any assumption that extradition under this Supplementary Treaty will be automatic or that Federal magistrates and judges will not carefully evaluate the evidence presented in support of extradition. Id. at 5-6.

While the 2003 Treaty strikes (1) the Supplementary Treaty language insuring an individual the right to contest the existence of probable cause to justify extradition, and (2) the original treaty language on the weight of evidence required for extradition,[44] it does insist that the documentation accompanying a request include "such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested," *2003 Treaty*, Art.8(3)(c).

Extraterritorial Crimes

Allows for extradition even if no U.S. federal law is violated

It does, but in a less dramatic manner than the objection might imply. As a general rule, the 2003 Treaty, like its predecessor, limits extradition to misconduct outlawed in both countries. The exception is found in cases of extraterritoriality. The existing treaty obligates the Parties to extradite with respect to crimes committed within the jurisdiction of the requesting country, *1977 Treaty*, Art.I. Historically, the United States has construed this language to mean offenses committed within the territory of the requesting country.[45] As the United States began to assert its criminal extraterritorial jurisdiction more regularly, it began to negotiate extradition treaties that

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[43] "Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party.

"In determining whether an individual is extraditable from the United States, the judicial authority of the United States shall permit the individual sought to present evidence on the questions of whether: (1) there is probable cause; (2) a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the courts, exists; and (3) the act upon which the request for extradition is based would constitute an offense punishable under the laws of the United States.

"Probable cause means whether there is sufficient evidence to warrant a man of reasonable caution in the belief that: (1) the person arrested or summoned to appear is the person sought; (2) in the case of a person accused of having committed a crime, an offense has been committed by the accused; and (3) in the case of a person alleged to have been convicted of an offense, a certificate of conviction or other evidence of conviction or criminality exists," *Supplementary Treaty*, Art.2.

[44] "Extradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party," *1977 Treaty*, Art. IX(1).

[45] *Abbell*, at §3-2(5), *citing inter alia*, 14 Op.Att'y Gen. 281 (1873).

either permitted or required extradition to the United States with respect to crimes committed outside this country.

Our present treaty favors the historical model ("Each Contracting Party undertakes to extradite to the other ... any person found in its territory who has been accused or convicted of any offense ... committed within the jurisdiction of the other Party," *1977 Treaty*, Art.I). The 2003 Treaty requires extradition in extraterritorial cases where the law of the two countries would apply comparably; but permits extradition in other cases:

> 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 the territory in similar circumstances. If the laws of the Requested State do not provide for the punishment of such conduct committed outside of its territory in similar circumstances, the executive authority of the Requested State, in its discretion, may grant extradition provided that all other requirements of this Treaty are met. *2003 Treaty*, Art. 2(4).

Thus, the United States would be permitted to honor a British extradition request for an individual charged with a violation of British law on the basis of conduct committed entirely within this country (even if the conduct were completely lawful under our laws). And it would be required to honor a request based upon conduct here but in violation of a British version of a statute like 18 U.S.C. 2339B (providing material support to terrorist organizations) or 18 U.S.C. 956 (conspiracy to commit various acts of violence or property damage overseas).

Statute of Limitations

Eliminates any statute of limitations

It does, as do several of our more recent extradition treaties. The vast majority of the extradition treaties to which the United States is a party contain a statute of limitations bar of some kind. In some instances the bar is triggered by the law of the requesting country; in some by the law of the requested country; and in others by the law in either country.[46] The rationale is presumably the same as in other contexts: that at least in some instances it is unfair to require individuals to defend themselves against stale charges after memories have faded, evidence has disappeared, and witnesses have died.[47]

Our existing treaty with the United Kingdom bars extradition if trial would be barred by the lapse of time under the laws of either country.[48] The Supplementary Treaty submitted to the Senate contained an amendment which would have limited this clause to instances barred by the laws of the requesting country. The change was thought to benefit the United Kingdom in terrorism cases which were not subject to a statute of limitations.[49] The Senate dropped the amendment from the Supplementary Treaty, S.Ex.Rept. 99-17, at 6 (1986).

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[46] *Abbell*, at §3-2(18).

[47] *See*, *Stogner v. California*, 123 S.Ct. 2446, 2452 (2003).

[48] "Extradition shall not be granted if . . . (b) the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requesting or requested Party," *1977 Treaty*, Art. 5(1)(b).

[49] *Hearings*, at 312-13 (statement of Professor Charles Rice). Under American law, there is generally no statute of limitations for murder, e.g., 18 U.S.C. 3281, or for certain federal terrorist crimes, 18 U.S.C. 3286(b). The general period of limitation for other federal crimes is five years, 18 U.S.C. 3282.

Since then, a number of the treaties submitted to the Senate continue to contain a statute of limitations clause,[50] but perhaps an equal number of others either silently omit the clause[51] or include a clause specifically declaring that the expiration of a period of limitation is no bar to extradition.[52] The 2003 Treaty eliminates the passage of time as a defense altogether regardless of the nature of the crime, "The decision by the Requested State whether to grant the request for extradition shall be made without regard to any statute of limitations in either State," *2003 Treaty*, Art.6.

Provisional arrest

> *Allows for "provisional arrest" and detention for 60 days upon request by the United Kingdom*

It does, but so does the existing treaty.[53] Provisional arrest refers to the authority to arrest the individual sought for extradition before receiving the full documentation required to initiate extradition proceedings. The 2003 Treaty is more precise than the existing treaty in its description of the information that must accompany a request for provisional arrest. The 2003 Treaty also affords the Parties great flexibility as to the permissible recipients of requests and documentation, but the most substantial change seems to be that under the existing treaty the individual must be released after 60 days if the necessary documentation has not arrived while under the 2003 Treaty release is discretionary.[54]

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[50] E.g., Extradition Treaty with Peru, Art.IV(1)(b), S.Treaty Doc.107-6 (2002); *Extradition Treaty with South Africa*, Art. 8, S.Treaty Doc. 106-24 (2000); *Extradition Treaty with Luxembourg*, Art.2(6), S.Treaty Doc. 105-10 (1997).

[51] E.g., *Extradition Treaty with Paraguay*, S.Treaty Doc. 106-4 (1999); *Extradition Treaty with Zimbabwe*, S.Treaty Doc. 105-33 (1998); *Extradition Treaty with the Philippines*, S.Treaty Doc. 104-16 (1995).

[52] E.g., *Extradition Treaty with Lithuania*, Art.6, S.Treaty Doc. 107-4 (2002); *Extradition Treaty with Belize*, Art.8, S.Treaty Doc. 106-38 (2000); *Extradition Treaty with Argentina*, Art. 7, S.Treaty Doc. 105-18 (1997).

[53] "(1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on application through the diplomatic channel by the competent authorities of the requesting Party. The application shall contain an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a conviction against that person, and, if available, a description of the person sought, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party.

"(2) A person arrested upon such an application *shall* be set at liberty upon the expiration of sixty days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of the person sought if a request is subsequently received," *1977 Treaty*, Art. VIII (emphasis added). The Supplementary Treaty extended the permissible period of detention from 45 to 60 days.

[54] "1. In an urgent situation, the Requesting State may request the provisional arrested of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel or directly between the United States Department of Justice and such competent authority as the United Kingdom may designate for the purpose of this Article.

"2. The application for provisional arrest shall contain: a description of the person sought; (b) the location of the person sought; (c)a brief statement of the facts including, if possible, the date and location of the offense; (d) a description of the law(s) violated; (e) a statement of the existence of a warrant or order of arrest or a finding of guilt or judgment of conviction against the person sought; and (f) a statement that the supporting documents for the person sought will follow within the time specified in this Treaty.

"3. The Requesting State shall be notified without delay of the disposition of its request for provisional arrest and the reasons for any inability to proceed with the request.

"4. A person who is provisionally arrested *may* be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the documents supporting the extradition request as required in Article 8. For this purpose, receipt of the formal request for extradition and supporting documents by the Embassy of the Requested State

Evidence and Forfeitable Property

Allows for seizure of assets by the United Kingdom

Crime-related assets are subject to seizure under the laws of the United Kingdom and of the United States under various circumstances, some of which implement or supplement our treaty obligations. The existing treaty permits the transfer of evidence and assets from one country to the another.[55] Facially, the 2003 Treaty's treatment of forfeitable property differs from its predecessor in two respects. It describes the property subject to confiscation more broadly and it omits any reference to the rights of claimants:

> To the extent permitted under its law, the Requested State may seize and surrender to the Requesting State all items in whatever form, and assets, including proceeds, that are connected with the offense in respect of which extradition is granted. The items and assets mentioned in this Article may be surrendered even when the extradition cannot be effected due to the death, disappearance, or escape of the person sought. *2003 Treaty*, Art. 16(1).

The existing treaty provision is limited to proceeds rather than items "connected with the offense," and only extends to items in the actual possession of the individual to be extradited. The changes reflect a greater federal emphasis on forfeiture as a law enforcement tool than was the case when the existing treaty was negotiated. Federal law now authorizes confiscation of property derived from, or in some instances used to facilitate, any number of federal crimes including terrorism,[56] organized crime,[57] drug trafficking,[58] and other profit generating crimes.[59] When they are involved in financial transactions in this country, it permits the confiscation of the proceeds from drug trafficking, crimes of violence, fraud, public corruption or smuggling in violation of the laws of other countries.[60]

Federal law also provides for federal court orders freezing property located in this country but subject to confiscation under foreign forfeiture laws comparable to our own,[61] and for enforcement of foreign forfeiture orders by federal courts under some circumstances.[62] Moreover, it vests the Attorney General with the power to share the proceedings from federal confiscations with foreign countries pursuant to an international agreement to do so.[63] The innocent claimant

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in the Requesting State shall constitute receipt by the executive authority of the Requested State.

"5. The fact that the person has been discharged from custody pursuant to paragraph 4 of this article shall not prejudice the subsequent re-arrest and extradition of that person if the extradition request and supporting documents are delivered at a later date, *2003 Treaty*, Art. 12 (emphasis added).

[55] "When a request for extradition is granted, the requested Party shall, so far as its laws allows and subject to such conditions as it may impose having regard to the rights of other claimants, furnish the requesting Party with all sums of money and other articles . . .(b) which may have been acquired by the person sought as a result of the offense and are in his possession," Art. XIII.

[56] 18 U.S.C. 981(a)(1)(G).

[57] 18 U.S.C. 1963.

[58] 21 U.S.C. 881, 853.

[59] 18 U.S.C. 981, 982.

[60] 18 U.S.C. 1956(a),(c)(7)(B); 1957(a),(f)(3); 981(a)(1); 982(a)(1).

[61] 18 U.S.C. 981(b)(4).

[62] 28 U.S.C. 2467.

[63] 18 U.S.C. 981(i)(1).

protections of these statutes[64] would seem to mitigate any adverse consequences attributable to the omission of any reference to the rights of claimants in the 2003 Treaty.

Rule of Specialty

Allows for extradition for one offense, and then subsequent prosecution in the UK for an unrelated offense (thus eliminating the time-honored "rule of speciality")

The 2003 Treaty continues the rule in effect, but allows the United States to consent to deviation by the Great Britain and vice versa. The rule of specialty permits individuals to be tried and/or punished only for the crimes for which they are extradited.[65] The rule is designed to ensure that an individual is not tried or punished for a crime for which he would not have been extradited.[66] And the elimination of the rule might be particularly unfair where the individual sought has waived extradition.

For purposes of American law, the rule is a matter of statutory construction,[67] and consequently can be overcome by a provision in a later treaty.[68] Most recent treaties permit the requested country to consent to trial or punishment for offenses other than those for which the individual was extradited.[69] Even without a specific treaty clause, federal courts have held that the requested country may consent to trial or punishment for offenses other than those for which extradition was granted.[70] Federal courts are divided, however, over the question of whether an individual may successfully raise the rule on behalf of the country of refuge.[71]

Our existing treaty with Great Britain codifies the rule and has no consent exception.[72] The 2003 Treaty preserves the rule but contains an explicit consent exception: "A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for ... (c) any offense for which the executive authority of the Requested State waives the rule of specialty and thereby consents to the person's detention, trial, or prosecution...." *2003 Treaty*, Art.18(1).

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[64] 18 U.S.C. 983(d), 1963(*l*); 21 U.S.C. 853(n); 28 U.S.C. 2467(b)(1)(C).

[65] *United States v. Antonakeas*, 255 F.3d 714, (9th Cir. 2001), *citing*, *United States v. Rauscher*, 119 U.S. 407, 409-10 (1886) and *United States v. Alvarez-Machain*, 504 U.S. 655, 659-60 (1992); *Gallo-Chamorro v. United States*, 233 F.3d 1298, 1305 (11th Cir. 2000).

[66] RESTATEMENT, §477, *Comment b*.

[67] *United States v. Rauscher*, 119 U.S. at 423, 433; *cf.*, *United States v. Alvarez-Machain*, 504 U.S. at 659-60. *Abbell*, at §3-2(11).

[68] *Abbell*, at 3-3, *citing*, *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936) and *Charlton v. Kelly*, 229 U.S. 447, 463 (1913), respectively ("In analyzing any possible inconsistencies between the federal extradition statutes and United States extradition treaties, it should be borne in mind that: (1) to the extent that provisions of extradition treaties are self-executing, they have the equivalent status of legislation; [and] (2) a later treaty supersedes an earlier statute to the extent they are inconsistent. . .").

[69] *Abbell*, at 3-33.

[70] *United States v. Tse*, 135 F.3d 200, 206 (1st Cir. 1998); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994); *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir. 1989).

[71] *Compare*, *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995); *United States v. Levy*, 905 F.2d 326, 328 (10th Cir. 1990); *United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986); *with*, *United States v. Kaufman*, 874 F.2d 242, 243 (5th Cir. 1989); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-84 (6th Cir. 1985).

[72] "A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect to which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State. . . ." *1977 Treaty*, Art. XII.

Retroactivity

Applies retroactively, for offenses allegedly committed even before the ratification of the treaty

It does;[73] most extradition treaties do.[74] The significance of the clause in the 2003 Treaty may be what it does not do. The Supplementary Treaty endorses the general rule but makes it applicable to earlier offenses only if the offense was proscribed by the laws of both countries at the time of its commission.[75] The 2003 Treaty clause has no such reservation. The omission may be significant when read in conjunction with the extraterritorial clause to permit extradition for earlier misconduct committed outside the territory of the requesting country under circumstances where the misconduct is not proscribed by the laws of the country of refuge.

Other Treaty Clauses

The 2003 Treaty has other clauses, some of them a departure from our earlier benefits and obligations.

Extradition to Third Countries or Entities

As in the case with our existing treaty with Great Britain, the specialty ban on prosecution of additional crimes often includes a ban on re-extradition to a third country, *1977 Treaty*, Art.XII. Beginning in the 106th Congress, several extradition treaties submitted to the Senate bar re-extradition to international tribunals without consent.[76] This may have been done at our behest with an eye to the International Criminal Court; or at the behest of our treaty partners with an eye to our statutory provisions relating to the Yugoslav and Rwandan tribunals, 18 U.S.C. 3181 note; or both; or for some other reason.

In any event, the 2003 Treaty may yield the same result through its more cryptic reference to "onward extradition"—"A person extradited under this Treaty 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," *2003 Treaty*, Art. 18(2). At this juncture it is not completely clear what the Parties understand "onward extradition" to mean.[77]

In the case of multiple extradition requests, the 2003 Treaty maintains essentially the same standards for dealing with requests from a third country that elects to submit a contemporaneous

[73] "This Treaty shall apply to offenses committed before as well as after the date it enters into force," *2003 Treaty*, Art.22(1).

[74] E.g., *Extradition Treaty with Lithuania*, Art. 21, S.Treaty Doc. 107-4 (2002); *Extradition Treaty with Sri Lanka*, Art.21, S.Treaty Doc. 106-34 (2000); *Extradition Treaty with Korea*, Art.20, S.Treaty Doc. 106-2 (1999).

[75] "This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission," *Supplementary Treaty*, Art.5.

[76] E.g., *Extradition Treaty with Lithuania*, Art.16(2), S.Treaty Doc.107-4 (2002)("A person extradited under this Treaty may not be extradited to a third State or extradited or surrendered to an international tribunal for an offense committed prior to extradition unless the Requested State consents"); *see also*, *Extradition Treaty with Sri Lanka*, Art.16(2), S.Treaty Doc. 106-34 (2000); *Extradition Treaty with South Africa*, Art.18, S.Treaty Doc. 106-24 (2000).

[77] An exchange of notes has made it clear, however, that the ban on onward extradition at least "applies to preclude in accordance with that provision the onward surrender to the International Criminal Court (ICC) of a person extradited from the United States," S. Treaty Doc. at 17, 19.

request to the country of refuge rather than submitting a subsequent request to the country to whom extradition has been granted:

> If the Requested State receives requests form two or more States for the extradition of the same person, either for the same offense or for different offenses, the executive authority of the Requested State shall consider all relevant factors, including but not limited to: (a) whether the requests were made pursuant to a treaty; (b) the place where each offense was committed; (c) the gravity of the offenses; (d) the possibility of any subsequent extradition between the respective Requesting States; and (e) the chronological order in which the requests were received from the respective Requesting States. *2003 Treaty*, Art. 15.

The only real difference is that the existing treaty specifically mentions the nationality of the individual sought as a factor to be considered, *1977 Treaty*, Art.X, while the Parties may count nationality among the unmentioned "relevant factors" that the 2003 Treaty considers in play. It may be, however, that the Parties have rejected nationality as a relevant extradition factor under any circumstances. After all, elsewhere in the 2003 Treaty they have denied themselves the right to refuse to extradite on the basis of nationality, Art. 3, and have removed the identification of the nationality of the person sought from the information that must be provided with an extradition request, Art.8(2).

Double Jeopardy

Ordinarily, an individual cannot be extradited on the basis of conduct for which he has already been tried.[78] Implementation of this principle takes several forms in our various extradition treaties. Our existing treaty with Great Britain bars extradition if prosecution would be precluded in the country of refuge by virtue of any earlier trial there, or in the requesting country, or in a third country.[79] Thus, the United States may not extradite an individual tried here for the same misconduct. The United States may, however, honor requests where the individual has previously been tried in Great Britain or in a third country, because double jeopardy in the United States only proscribes trial by the same sovereign.[80] The 2003 Treaty prohibits extradition where the individual has been tried in the country of refuge, and allows a country of refuge to deny a request for an individual tried in a third country, *2003 Treaty*, Art.5. A Senate proviso addresses the question of extradition following acquittal in the requesting country:

> The Senate notes that, as in other recent United States extradition treaties, the Treaty does not address the situation where the fugitive is sought for trial on an offense for which he had previously been acquitted in the Requesting State. The Senate further notes that a United Kingdom domestic law may allow for the retrial in the United Kingdom, in certain limited circumstances, of an individual who has previously been tried and acquitted in that country. In this regard, the Senate understands that under U.S. law and practice a person sought for extradition can present a claim to the Secretary of State that an aspect of foreign law that may permit retrial may result in an unfairness that the Secretary could conclude warrants denial of the extradition request. The Senate urges the Secretary of State to review

[78] RESTATEMENT §476, *Comment c.*

[79] "Extradition shall not be granted if: (a) the person sought would, if proceeded against in the territory of the requested Party for the offense for which his extradition is requested, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third State," *1977 Treaty*, Art.V(1)(a).

[80] *Abbell* at §3-2(22), *citing*, *Abbate v. United States*, 359 U.S. 187 (1959).

carefully any such claims made involving a request for extradition that implicates this provision of United Kingdom domestic law.[81]

Nationality

Some nations prefer not to extradite their own citizens and have insisted that their extradition treaties preserve their right to decline requests to extradite their own nationals.[82] The United States opposes his view.[83] Our existing treaty with Great Britain does not address the issue directly, *1977 Treaty*, and as a consequence the United States may not decline to extradite an American to Great Britain solely on the grounds of citizenship.[84] Like several of our more recent extradition agreements with common law countries,[85] the 2003 Treaty makes this result explicit, "Extradition shall not be refused based on the nationality of the person sought," *2003 Treaty*, Art.3.

Waiver

Neither federal law nor most early treaties provide any obvious mechanism under which an individual might waive extradition proceedings in this country.[86] This can work to the inconvenience of both countries involved in cases where the delay is of no real benefit to the individual sought. The present treaty does not address the issue, but like most modern treaties,[87] the 2003 Treaty has a waiver clause: "If the person sought waives extradition and agrees to be surrendered to the Requesting State, the requested State may surrender the person as expeditiously as possible without further proceedings," *2003 Treaty*, Art.17.

Translations

Our extradition agreements with English-speaking countries do not ordinarily include a translation clause. The 2003 Treaty requires documentation in English, *2003 Treaty*, Art.11, with the cost of any translation to be borne by the requesting country as is ordinarily the case in our extradition relations with non-English-speaking countries.[88]

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[81] 152 *Cong. Rec.* S10767 (daily ed. Sept. 29, 2006); S.Ex.Rept. 109-19, at 9 (2006).

[82] *Bassiouni*, 682-84; RESTATEMENT §475, *Comment f.*

[83] There may be some dispute as to the vintage of our policy, *compare, Abbell* §2-2(18)("it has consistently been the policy of the United States that all nations should extradite their own nationals"); *with, Bassiouni* at 684 ("The official policy of the United States in treaty negotiations has been, until lately, to prevent when possible the surrender of nationals, but this is no longer the case").

[84] *Charlton v. Kelly*, 229 U.S. 447, 466-76 (1913); *Abbell*, 3-23 to 3-24.

[85] E.g., Extradition Treaty with Belize, Art.3, S.Treaty Doc.106-38 (2000); *Extradition Treaty with South Africa*, Art. 3, S.Treaty Doc. 106-24 (2000); *Extradition Treaty with Grenada*, Art.3, S.Treaty Doc. 105-19(1997).

[86] Abbell, at §3-3(8).

[87] E.g., *Extradition Treaty with Korea*, Art. 16, S.Treaty Doc. 106-2 (1999); *Extradition Treaty with Luxembourg*, Art. 18, S.Treaty Doc.105-10 (1997); *Extradition Treaty with Jamaica*, Art. XV, S.Treaty Doc. 98-18 (1984).

[88] *2003 Treaty*, Art. 20(2); *see e.g., Extradition Treaty with Argentina*, Arts.9, 19(2), S.Treaty Doc. 105-18 (1997) ("All documents submitted by the Requesting State pursuant to this Treaty shall be accompanied by a translation into the language of the Requested State. . . . The Requesting State shall bear the expenses relating to the translation of documents. . ."); *Extradition Treaty with Korea*, Arts. 8(6), 18(2), S.Treaty Doc.106-2 (1999); *Extradition Treaty with Austria*, Arts. 12, 22(2), S.Treaty Doc. 105-50 (1998).

Deferred Prosecution or Punishment

Our existing treaty with Great Britain requires deferral of an extradition request for an individual being tried or serving a sentence in the requested country for another offense, *1977 Treaty*, Art. VI. The *2003 Treaty* affords the requested country greater flexibility; it may defer the extradition request, the trial, or service of the sentence.[89] In the case of the United States, one commentator has suggested that because of constraints on stale prosecutions, the United States may be willing to postpone service of sentence but is not likely to surrender an individual pending trial unless it is willing to abandon the prospect of future prosecution.[90]

Transit

Although the present treaty is silent on the matter, most modern extradition treaties to which the United States is a party contain a transit clause that allows each country to effectuate its extradition relations with third nations by transporting individuals across each other's territory.[91] The 2003 Treaty clause grants federal and British authorities discretionary authority to approve transfers through their respective countries,[92] with exceptions for transportation through a Party's air space and procedures in the case of unscheduled aircraft landings.[93]

Capital Crimes

The existing extradition treaty makes special provision for capital cases, Art.IV. The 2003 Treaty makes essentially the same accommodation: "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," *2003 Treaty*, Art.7.

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[89] "1. If the extradition request is granted for a person who is being proceeded against or is serving a sentence in the Requested State, the Requested State may temporarily surrender the person sought to the Requesting State for the purpose of prosecution. If the Requested States requests, the Requesting State shall keep the person so surrendered in custody and shall return that person to the Requested State after the conclusion of the proceedings against that person, in accordance with conditions to be determined by mutual agreement of the States.

"2. The Requested State may postpone the extradition proceedings against a person who is being prosecuted or who is serving a sentence in that State. The postponement may continue until the prosecution of the person sought has been concluded or until such person has served any sentence imposed," *2003 Treaty*, Art.14.

[90] "In view of the United States confrontation and speedy trial requirements in criminal cases, it is unlikely that the United States would, except in exceptional circumstances, temporarily surrender a requested person whom it wished to prosecute for an offense other than that for which his extradition has been requested because temporary surrender might preclude subsequent prosecution in the United States. . . . [T]he United States can be expected frequently to exercise its prerogative to temporarily surrender persons serving sentences for different offenses in the United States," *Abbell* at 3-30 to 3-31.

[91] E.g., *Extradition Treaty with France*, Art. 21, S.Treaty Doc. 105-13 (1997); *Extradition Treaty with Bolivia*, Art. XV, S.Treaty Doc. 104-22 (1995); *Extradition Treaty with Costa Rica*, Art. 19, S.Treaty Doc. 98-17 (1984).

[92] "Either State may authorize transportation through its territory of a person surrendered to the other State by a third State or from the other State to a third State. A request for transit shall contain a description of the person being transported and brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit," *2003 Treaty*, Art. 19(1).

[93] "Authorization is not required when air transportation is used by one State and no landing is scheduled on the territory of the other State. If an unscheduled landing does occur, the state in which the unscheduled landing occurs may require a request for transit pursuant to paragraph 1 of this Article, and it may detain the person until the request for transit is received and the transit is effected, as long as the request is received within 96 hours of the unscheduled landing," *2003 Treaty*, Art. 19(2)

Appendix. [94]

RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO UNDERSTANDING, DECLARATIONS, AND PROVISOS

The Senate advises and consents to the ratification of the Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, and related exchanges of letters, signed at Washington on March 31, 2003 (hereinafter in this resolution referred to as the "Treaty") (Treaty Doc. 108-23), subject to the understanding in section 2, the declarations in section 3, and the provisos in section 4.

SECTION 2. UNDERSTANDING

The advice and consent of the Senate under section 1 is subject to the following understanding:

> Under United States law, a United States judge makes a certification of extraditability of a fugitive to the Secretary of State. In the process of making such certification, a United States judge also makes determinations regarding the application of the political offense exception. Accordingly, the United States of America understands that the statement in paragraphs 3 and 4 of Article 4 that "in the United States, the executive branch is the competent authority for the purposes of this Article" applies only to those specific paragraphs of Article 4, and does not alter or affect the role of the United States judiciary in making certifications of extraditability or determinations of the application of the political offense exception.

SECTION 3. DECLARATIONS

The advice and consent of the Senate under section 1 is subject to the following declarations:

(1) Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States.

(2) The Treaty shall be implemented by the United States in accordance with the Constitution of the United States and relevant federal law, including the requirement of a judicial determination of extraditability that is set forth in Title 18 of the United States Code.

SECTION 4. PROVISOS

The advice and consent of the Senate under section 1 is subject to the following provisos:

(1)(A) The Senate is aware that concerns have been expressed that the purpose of the Treaty is to seek the extradition of individuals involved in offenses relating to the conflict in Northern Ireland prior to the Belfast Agreement of April 10, 1998. The Senate understands that the purpose of the Treaty is to strengthen law enforcement cooperation between the United States and the United Kingdom by modernizing the extradition process for all serious offenses and that the Treaty is not intended to reopen issues addressed in the Belfast Agreement, or to impede any further efforts to resolve the conflict in Northern Ireland.

(B) Accordingly, the Senate notes with approval—

[94] The bold emphasis found in the correspondence, which follows the resolution of approval below, appears in the original, see S.Ex.Rept. 109-19, at 12-3 (2006).

(i) the statement of the United Kingdom Secretary of State for Northern Ireland, made on September 29, 2000, that the United Kingdom does not intend to seek the extradition of individuals who appear to qualify for early release under the Belfast Agreement;

(ii) the letter from the United Kingdom Home Secretary to the United States Attorney General in March 2006, emphasizing that the "new treaty does not change this position in any way," and making clear that the United Kingdom "want[s] to address the anomalous position of those suspected but not yet convicted of terrorism-related offences committed before the Belfast Agreement"; and

(iii) that these policies were reconfirmed in an exchange of letters between the United Kingdom Secretary of State for Northern Ireland and the United States Attorney General in September 2006.

(2) The Senate notes that, as in other recent United States extradition treaties, the Treaty does not address the situation where the fugitive is sought for trial on an offense for which he had previously been acquitted in the Requesting State. The Senate further notes that a United Kingdom domestic law may allow for the retrial in the United Kingdom, in certain limited circumstances, of an individual who has previously been tried and acquitted in that country. In this regard, the Senate understands that under U.S. law and practice a person sought for extradition can present a claim to the Secretary of State that an aspect of foreign law that may permit retrial may result in an unfairness that the Secretary could conclude warrants denial of the extradition request. The Senate urges the Secretary of State to review carefully any such claims made involving a request for extradition that implicates this provision of United Kingdom domestic law.

(3) Not later than one year after entry into force of the Treaty, and annually thereafter for a period of four additional years, the Secretary of State shall submit to the Committee on Foreign Relations of the Senate a report setting forth the following information with respect to the implementation of the Treaty in the previous twelve months:

(A) the number of persons arrested in the United States pursuant to requests from the United Kingdom under the Treaty, including the number of persons subject to provisional arrest; and a summary description of the alleged conduct for which the United Kingdom is seeking extradition;
(B) the number of extradition requests granted; and the number of extradition requests denied, including whether the request was denied as a result of a judicial decision or a decision of the Secretary of State;
(C) the number of instances the person sought for extradition made a claim to the Secretary of State of political motivation, unjustifiable delay, or retrial after acquittal and whether such extradition requests were denied or granted; and
(D) the number of instances the Secretary granted a request under Article 18(1)(c).

APPENDIX

HOME OFFICE,

London SW1P 4DF, March 31, 2006.

ALBERTO GONZALES,

Attorney General, U.S. Department of Justice,

Washington, DC.

DEAR AL: At our meeting on 6 March I said that I would write to clarify the UK Government's position relating to the extradition of individuals wanted or convicted of terrorist offences associated with the Troubles in Northern Ireland who are currently in the United States.

In September 2000 the Government decided that it was no longer proportionate or in the public interest to seek the extradition of individuals convicted of terrorist offences committed prior to 10th April 1998, the date of the Belfast Agreement. The new treaty does not change this position in any way.

We have also made it clear that we want to address the anomalous position of those suspected but not yet convicted of terrorism-related offences committed before then. Had these individuals been convicted at the time of their offences they would, by now, have been able to apply for early release and so find themselves in a similar position to those already covered by the Agreement. Unfortunately, the legislation that would have resolved this anomaly had to be withdrawn due to a lack of cross-party support.

However, the British Government remains keen to make progress on this and I can assure you that when the new treaty was being negotiated, there was no intention on our part to make it easier to target these people, whose position we accept to be anomalous.

CHARLES CLARKE,

Home Secretary.

NORTHERN IRELAND OFFICE,

Belfast BT4 3TT, September 4, 2006.

ALBERTO GONZALES,

Attorney General, U.S. Department of Justice,

Washington, DC.

DEAR ATTORNEY GENERAL: I am writing to reiterate the UK Government's position relating to the extradition of individuals from the United States in relation to terrorist offences committed during the Troubles in Northern Ireland.

In September 2000, the Government decided that it was no longer proportionate or in the public interest to seek the extradition of individuals convicted of terrorist offences prior to 10th April 1998, "who appear to qualify for early release under the Good Friday Agreement scheme, and who would, on making a successful application to the Sentence Review Commissioners, have little if any of their original prison sentence to serve." I attach a copy of the statement made by the then Secretary of State for Northern Ireland when this decision was announced. I know that the former Home Secretary reiterated this when he wrote to you in March this year. I can confirm, on behalf of the UK Government, that this remains the case.

We have also made it clear that we want to address the anomalous position of those suspected but not yet convicted of terrorism-related offences committed before the Belfast Agreement. Had these individuals been convicted at the time of their offences they would, by now, have been able to apply for early release and so find themselves in a similar position to those already covered by the Agreement. The UK Government introduced legislation to resolve this anomaly last year. Unfortunately, that legislation had to be withdrawn due to a lack of cross-party support. However, the UK Government continues to accept that the position of these people is anomalous and I can assure you, as the former Home Secretary did in March, that when the new treaty was being negotiated there was no intention on our part to make it easier to target them. I attach a short note

which explains in more detail the provisions of the early release scheme and the position of various groups of people.

It remains a matter of great importance to the UK Government that the extradition treaty should be ratified by the United States, so that its benefits can be fully realised. This is not because of any agenda related to Northern Ireland, but because of the improvements that the updated treaty will bring to the extradition process in general in both countries. My colleague, John Reid, the Home Secretary, has seen this letter and agrees fully with its contents.

I am copying this letter to Senator Lugar. Both you and he are welcome to share it with other members of the Senate if that would be helpful.

The Rt. Hon. PETER HAIN MP,

Secretary of State for Northern Ireland.

Enclosures.

US-UK EXTRADITION TREATY—NORTHERN IRELAND ISSUES

Political Background

The political and security situation in Northern Ireland has been transformed following the 1998 Good Friday Agreement. A huge amount of progress has been made since then, including the historic statement from the Provisional IRA in July 2005, in which they made clear that their armed campaign was over. **The focus in Northern Ireland today is on restoring devolved Government and continuing to build a prosperous and peaceful society**.

Good Friday Agreement and Early Release Scheme

As part of the Good Friday Agreement (GFA), **individuals convicted of terrorist-related offences committed before 1998 were able to apply for early release after serving only two years of their sentences.** Over 400 prisoners have been released on license under this scheme. The license requires that individuals do not become re-engaged in terrorism or serious crime. Those released include many members of the Provisional IRA, which has maintained a ceasefire during this time. The Early Release Scheme was a very difficult part of the Good Friday Agreement for many people to accept, but it demonstrated the UK Government's commitment to moving forward with the peace process.

The Early Release Scheme is part of UK law and remains in force. Any individuals who are convicted of qualifying, pre-1998 offences in the future, including any individuals extradited to the UK, will be able to apply for the scheme.

Individuals convicted of pre-GFA offences

In 2000, the UK Government announced that it would **no longer pursue the extradition of individuals convicted of pre-1998 offences who had escaped from prison and who would, if they returned to Northern Ireland and successfully applied for early release, have little if any of their time left to serve**. That remains the position.

Individuals suspected of pre-GFA offences ("on the runs")

Whilst the Early Release Scheme addressed the situation of individuals who had been convicted of past offences, there remained an anomaly in relation to individuals suspected of past offences, who had gone "on the run" before they were tried. **The British Government accepts that these individuals are in an anomalous position since, if they had been convicted before 1998 they could have been released by now under the terms of the Good Friday Agreement**.

In 2003, **the British Government therefore published proposals for a scheme which would have allowed suspects "on the run" to be tried in their absence and to return to Northern Ireland without arrest or imprisonment.** Following the IRA's statement that its armed campaign was over in July 2005, legislation was introduced to implement that commitment.

Agreement could not be reached on that legislation during its passage through Parliament and it was withdrawn in January 2006. **The British Government is currently reflecting on the way forward.** However, as the 2003 proposals and the subsequent legislation demonstrate, the British Government is committed to addressing these cases in a way which resolves the anomaly.

In the absence of any change in the law, **decisions on whether to seek the extradition of suspects "on the run" for pre-1998 offences are still taken by the prosecuting authorities, in line with the legal obligations on them, as part of the normal criminal justice process**. But, as the UK Government's decision in 2000 not to pursue the extradition of convicted fugitives (including in the United States) who would qualify for early release under the GFA illustrates, there is no "political" agenda to pursue the extradition and trial of these people. And any suspects who were extradited and subsequently convicted would be able to apply for early release after two years, under the terms of the Good Friday Agreement.

Other individuals

Anyone convicted of an offence unconnected with terrorism, or an offence committed after the Good Friday Agreement, will not be eligible for the Early Release Scheme. The UK law enforcement authorities continue to seek the extradition of such individuals in line with UK law.

Outstanding warrants

When Home Office Minister Baroness Scotland visited the US, she explained that there were currently **no outstanding warrants for the extradition of individuals from the US to Northern Ireland.**

SECRETARY OF STATE,

NORTHERN IRELAND OFFICE,

September 29, 2000.

STATEMENT BY PETER MANDELSON ON EXTRADITION OF CONVICTED FUGITIVES

On 28 July, all remaining prisoners eligible under the early release scheme who had completed 2 years of their sentences were released as envisaged in the Good Friday Agreement.

The completion of these remaining releases has implications for a number of people who were sentenced to imprisonment for offences committed before the Good Friday Agreement, but who failed to complete these sentences. In most cases those concerned escaped from custody and fled to other countries up to 20 years ago. In many cases, extradition proceedings were initiated and in some of these the government is now being pressed by Court authorities to clarify its position.

Whether to pursue an extradition request depends on the public interest at stake, including the remaining sentence which the fugitive would stand to serve if he or she were returned. It is clearly anomalous to pursue the extradition of people who appear to qualify for early release under the Good Friday Agreement scheme, and who would, on making a successful application to the Sentence Review Commissioners, have little if any of their original prison sentence to serve.

In view of this and the time that has elapsed, I do not believe that it would now be proportionate or in the public interest to continue to pursue such cases.

If these individuals wish to benefit from the early release scheme, they will be able to return to Northern Ireland and make an application to the Sentence Review Commissioners. If this is granted, normal licence conditions, including liability to recall to prison, will apply. The decision has no implications for the prosecution of other offences where sufficient evidence exists. It is not an amnesty.

As with the rest of the early release programme, I do not under-estimate the hurt this decision may cause the victims of those whose extradition will no longer be pursued, and the onus it places on all of us to ensure that the Good Friday Agreement does result in a permanent peace in which there are no more victims.

OFFICE OF THE ATTORNEY GENERAL,

DEPARTMENT OF JUSTICE,

Washington, DC, September 5, 2006.

The Rt. Hon. PETER HAIN,

Secretary of State for Northern Ireland,

Northern Ireland Office, London SW1P 4PN.

DEAR SECRETARY HAIN: I am writing in response to your recent letter regarding the 2003 United States-United Kingdom extradition treaty.

I appreciate your reconfirmation of the position of the Government of the United Kingdom (originally taken in September 2000) that it is "no longer proportionate or in the public interest to seek the extradition of individuals convicted of terrorist offences prior to 10th April 1998, 'who appear to qualify for early release under the Good Friday Agreement scheme, and who would, on making a successful application to the Sentence Review Commissioners, have little if any of their original prison sentence to serve.'" Additionally, you have reconfirmed that it was not the intention of your Government, in negotiating this Treaty, to make it easier for the UK to seek extradition of individuals suspected of committing terrorist offenses in Northern Ireland prior to April 10, 1998.

Please accept this letter as my acknowledgement of your Government's official position and our mutual understanding of these matters. I believe that we share the view that the 2003 Treaty is critical to our mutual security in this age of global terrorism and transnational crime. Accordingly, the Bush Administration has made it a priority to seek the Senate's advice and consent to ratification of this Treaty. To that end, I will ask the Senate Foreign Relations Committee to include your letter, and this reply, in the official record of the Committee's consideration of the Treaty.

Sincerely,

Alberto R. Gonzales,
Attorney General.

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