THE NEW U.S.-U.K. EXTRADITION REGIME: IMPLICATIONS FOR WHITE-COLLAR CRIMINALS

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I. INTRODUCTION

On July 13, 2006, three British citizens, David Bermingham, Giles Darby, and Gary Mulgrew ("the NatWest Three") were flown to Houston, Texas to face fraud charges.[1] The victim of their alleged fraud was a British corporation. Nearly all of the allegedly criminal dealings took place in Great Britain. Yet, the NatWest Three will be tried in the United States.[2] Ian Norris is another British citizen facing extradition to the United States. His alleged crime is price-fixing.[3]

The NatWest Three and Ian Norris were extradited under a new treaty between the United Kingdom and the United States, the 2003 Extradition Treaty,[4] and under a new British statute, the 2003 Extradition Act.[5] Extradition arrangements under the treaty and the statute provoked public outrage in the United Kingdom. A range of public figures have spoken out against the arrangements, from politicians on the left and right, to businessmen, to civil-liberties activists.[6] Much of the uproar was over a lack of reciprocity.[7] When the NatWest Three were extradited in July 2006, the United States had

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1. *Extradition and the NatWest Three: Unintended Consequences*, ECONOMIST, July 15, 2006, at 54.
2. *Id.*
3. *Extraditing Executives: The Long Arm of American Law*, ECONOMIST, May 14, 2005, at 81.
4. Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., Mar. 31, 2003, S. TREATY DOC. NO. 108-23 [hereinafter 2003 Extradition Treaty].
5. Extradition Act 2003, c. 41 (U.K.).
6. *Extradition and the NatWest Three: Unintended Consequences*, *supra* note 1, at 54.
7. *See, e.g.*, *id.*; *Extradition: Quaking in Their Pinstripes*, ECONOMIST, July 8, 2006, at 21.

not yet ratified the 2003 Extradition Treaty despite the United Kingdom's rapid ratification.[8] Opponents of the new extradition arrangements also protested a supposed lack of symmetry.[9] The United States was formerly required to produce prima facie evidence of guilt in order to extradite an individual from the United Kingdom.[10] The United Kingdom had to provide probable cause to extradite an individual from the United States. However, under the new arrangements, the United States' prima facie evidentiary burden is removed, while the United Kingdom must still provide probable cause.[11]

The NatWest Three and Ian Norris are not the only defendants that have been extradited from the United Kingdom to the United States under the new arrangements. Thirteen other individuals were extradited by the time the NatWest Three arrived in Texas on July 13, 2006.[12] Because the 2003 Extradition Treaty's focus was to remove impediments to the prosecution of international terrorists,[13] these particular defendants have received much attention as "white-collar" criminals. But following the public outrage surrounding domestic white-collar crimes such as the Enron scandal, the U.S. government has apparently decided to also pursue white-collar criminals abroad even if their alleged crimes are only tenuously connected to the United States.[14]

The two primary bases for British opposition to the new extradition arrangements—lack of reciprocity and lack of symmetry—

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8. *Extradition and the NatWest Three: Unintended Consequences*, *supra* note 1, at 54; Robert M. Osgood & Nathy J. Dunleavy, *UK-US Extradition for Antitrust Offenses*, 19-SPG INT'L L. PRACTICUM 35, 35 (2006).

9. *Extradition and the NatWest Three: Unintended Consequences*, *supra* note 1, at 54; *Extraditing Bankers: No Place Like Home*, ECONOMIST, Feb. 25, 2006, at 19.

10. Osgood & Dunleavy, *supra* note 8, at 35.

11. *Id*. at 36.

12. *The NatWest Three: America's Long Shadow*, ECONOMIST, July 15, 2006, at 21.

13. *Extraditing Executives: The Long Arm of American Law*, *supra* note 3, at 81.

14. *Id.*; Osgood & Dunleavy, *supra* note 8, at 38-39; Alistair Graham & Sona Ganatra, *Fraud and White Collar Crime: Beyond Borders*, LEGAL WEEK, June 1, 2006, http://www.legalweek.com/Articles/129194/Fraud+and+White+Collar+Crime+Beyond+Borders.html; Justin Williams et al., *Litigation, Arbitration and Dispute Resolution: Judge Dread*, LEGAL WEEK, Oct. 5, 2006, http://www.legalweek.com/Articles/130826/Litigation,+Arbitration+and+Dispute+Resolution+Judge.html.

may actually be red herrings.[15] It may be the relative harshness of legal proceedings in the United States that has opponents worried.[16] Proponents of the new treaty have said that it is eliminating the lack of symmetry that *formerly* existed.[17] Others draw attention to the fact that countries besides the United States have long enjoyed the fast-track extradition process[18] unavailable to the United States before the treaty.[19] Should U.K. citizens be worried about the new extradition arrangements with the United States? Would going back to the old arrangements really help defendants such as the NatWest Three and Ian Norris?

This Note will analyze the potential consequences for British white-collar criminals of the new U.S.-U.K. extradition regime. Part II examines past extradition law in the United Kingdom and past extradition treaties between the United States and the United Kingdom. It then compares them with current extradition law and the latest U.S.-U.K. extradition treaty. Part III discusses the cases of the NatWest Three and Ian Norris. These cases were some of the first under the new extradition regime and presented numerous arguments opposing the United States' new status. Part IV evaluates the arguments against the new extradition regime in an attempt to discover the real implications for British businessmen facing extradition to the United States. This Note concludes that while the NatWest Three and Ian Norris would likely still have been extradited under the old regime, opposition to the new regime raises justifiable concerns as the extradition procedure changes may impact other white-collar defendants in the future.

II. EXTRADITION TREATIES AND STATUTORY LAW

A. The Development of Extradition Law

Extradition is the process by which one nation, "the requesting state," asks another nation, "the requested state," to return a subject to

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15. *Extradition and the NatWest Three: Unintended Consequences*, *supra* note 1, at 54.

16. *Extraditing Bankers: No Place Like Home*, *supra* note 9, at 19; *Extradition: Quaking in Their Pinstripes*, *supra* note 7, at 21.

17. *Extraditing Bankers: No Place Like Home*, *supra* note 9, at 19.

18. *See infra* Part II.B, discussing the new fast-track process.

19. Peter Binning, *Shouldn't Justice Begin at Home?*, 156 N.L.J. 1625, 1625 (2006) (U.K.).

face trial on criminal charges in the requesting state.[20] There is a long history of extradition between the United States and the United Kingdom. In 1794, Great Britain became the first nation to enter into an international extradition treaty with the United States,[21] though "modern" English extradition law dates back only to 1842.[22] Early extradition statutes provided for extradition for a limited number of serious crimes.[23]

In the United Kingdom, extradition is an executive function.[24] Extradition proceedings are brought against a subject in the name of the requesting state; the Crown Prosecution Service represents the requesting state at the proceedings.[25] The Senior District Judge (the Chief Magistrate) or a designated district judge hears extradition cases at the Bow Street Magistrates' Court in London.[26]

Similarly, in the United States, extradition is not a judicial function, but is rather an executive function that stems from the President's authority to manage foreign affairs.[27] The United States Attorney's Office represents the requesting state at proceedings in the United States.[28] International extradition requests between the United States and another nation generally must be based on a treaty.[29] The treaty currently in force between the United States and United Kingdom is the 1972 Extradition Treaty.[30]

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20. CLIVE NICHOLLS ET AL., THE LAW OF EXTRADITION AND MUTUAL ASSISTANCE 4 (2002).

21. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 50 (3d ed. 1996).

22. NICHOLLS, *supra* note 20, at 5.

23. JULIAN B. KNOWLES, BLACKSTONE'S GUIDE TO THE EXTRADITION ACT 2003 2 (2004).

24. NICHOLLS, *supra* note 20, at 16.

25. *Id*. at 17.

26. *Id*.

27. 31A AM. JUR. 2D *Extradition* § 12 (2006); *see* U.S. CONST. art. IV, § 2, cl. 2.

28. John T. Parry, *No Appeal: The U.S.-U.K. Supplementary Extradition Treaty's Effort to Create Federal Jurisdiction*, 25 LOY. L.A. INT'L & COMP. L. REV. 543, 546-47 (2003).

29. 18 U.S.C. §§ 3181, 3184 (2006); 9B FED. PROC. LAW. ED. § 22:2348 (2006); *see* BASSIOUNI, *supra* note 21, at 49.

30. Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., June 8, 1972, 28 U.S.T. 227 [hereinafter 1972 Extradition Treaty].

1. The 1972 U.S.-U.K. Extradition Treaty

The 1972 Extradition Treaty was signed in London in 1972, ratified by the United States Senate and President in 1976, and finally entered into force in 1977. The two nations agreed to extradite a subject only if certain conditions were met. Either the subject had to be accused or convicted of an offense listed in the Schedule annexed to the treaty, or the alleged offense had to (1) satisfy the dual criminality test, (2) be listed as an "extraditable offense" under U.K. law, and (3) constitute a felony under U.S. law.[31]

Extradition is granted under the 1972 Extradition Treaty, "only if the evidence [is] found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought . . . or to prove that he is the identical person convicted by the courts of the requesting Party."[32] Historically, when the United States wanted a subject extradited from the United Kingdom, the United Kingdom required a prima facie showing that the subject committed the alleged offense;[33] when the United Kingdom issued a request, the United States required a showing of probable cause.[34] The evidentiary standard required by the United Kingdom changed when the United Kingdom repealed the 1989 Extradition Act and adopted the 2003 Extradition Act.[35] However, the evidentiary standard required by the United States remains the same under the new treaties. United States federal law requires a showing of probable cause,[36] which is established "when the evidence presented supports a reasonable belief that a fugitive committed the charged offenses."[37] Mere conclusory statements cannot satisfy probable cause; the requesting party must produce actual evidence.[38]

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31. *Id.* at art. III (the dual criminality condition is satisfied when the alleged offense is punishable in both the United States and the United Kingdom by imprisonment for more than one year or by the death penalty).

32. *Id.* at art. IX.

33. NICHOLLS ET AL., *supra* note 20, at 104.

34. BASSIOUNI, *supra* note 21, at 703.

35. Extradition Act 2003, c. 41 (U.K.).

36. 18 U.S.C. § 3184. The statute states that the judge at the extradition proceeding must find "the evidence sufficient to sustain the charge under the provisions of the proper treaty." *Id.* This means that an extradition proceeding is significantly different in nature from a criminal trial, where evidence sufficient to justify a conviction must be found. BASSIOUNI, *supra* note 21, at 703.

37. United States v. Peterka, 307 F. Supp. 2d 1344, 1349 (M.D. Fla. 2003); *see generally* 9B FED. PROC., L. ED. § 22:2376 (2006).

38. *See Peterka*, 307 F. Supp. 2d at 1349-50.

2. The 1986 U.S.-U.K. Supplementary Extradition Treaty

In 1986, the United States and the United Kingdom ratified a Supplementary Extradition Treaty, which altered the 1972 Extradition Treaty.[39] They drafted it in response to a series of court decisions in the United States in which federal judges refused to extradite Irish Republican Army members to the United Kingdom.[40] Each court found that the alleged offense fell within the 1972 Extradition Treaty's political offense exception.[41] The 1986 Supplementary Extradition Treaty narrowed the political offense exception by enumerating crimes to which it did not apply, but relaxed the rule of non-inquiry.[42] A subject could now argue that the requesting state was "going to 'try or punish him on account of his race, religion, nationality or political opinions,' or that he would be prejudiced by those factors at his trial or in connection with his punishment, detention or restrictions on his personal liberty."[43] It also established a new appeals procedure for extradition cases taking place in the United States.[44]

3. The 1989 Extradition Act

Prior to the enactment of the 2003 Extradition Act, extradition requests issued by the United States to the United Kingdom were governed by the United Kingdom's 1989 Extradition Act,[45] read together with the 1972 Extradition Treaty.[46] The 1989 Extradition Act

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39. Supplementary Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., June 25, 1985, T.I.A.S. No. 12050 (1986) [hereinafter 1986 Supplementary Extradition Treaty].

40. Judith Hippler Bello & Valerie Epps, *Treaties – U.S.-U.K. Extradition Treaties – Rule of Expanded Political Offense-Type Exception*, 90 AM. J. INT'L L. 296, 297 (1996); Parry, *supra* note 28, at 551.

41. Under the political offense exception, "either party could refuse extradition if the offense was regarded 'as one of a political character.'" Bello & Epps, *supra* note 40, at 297.

42. Parry, *supra* note 28, at 554.

43. Bello & Epps, *supra* note 40, at 297; 1986 Supplementary Extradition Treaty, T.I.A.S. No. 12050, at art. 3(a).

44. Parry, *supra* note 28, at 554-55; 1986 Supplementary Extradition Treaty, T.I.A.S. No. 12050, at art. 3(b).

45. Extradition Act 1989, c. 33 (U.K.).

46. Osgood & Dunleavy, *supra* note 8, at 35.

served primarily to consolidate and repeal three particular pieces of prior legislation: the 1870 Extradition Act, the 1967 Fugitive Offenders Act, and Part 1 of the 1988 Criminal Justice Act.[47] The 1989 Extradition Act consisted of two completely separate extraditions systems – a system under Part III and a system under Schedule 1.[48] The identity of the requesting state determined whether Part III or Schedule 1 applied.[49] Generally, Part III of the 1989 Extradition Act governed extradition requests by signatories to the 1957 European Convention on Extradition,[50] designated Commonwealth countries, and colonies.[51]

Schedule 1 controlled extradition procedures for any request made by a nation with which an Order in Council under the 1870 Extradition Act[52] remained in force.[53] The 1972 Extradition Treaty was such an order, so Schedule 1 governed extradition requests from the United States.[54] Indeed, extradition requests from the United States comprised the majority of Schedule 1 cases under the 1989 Extradition Act.[55]

a. The Extradition Process Under Schedule 1 of the 1989 Extradition Act

When a Schedule 1 nation, such as the United States, sought to extradite a subject under the 1989 Extradition Act, it would submit an extradition request to the United Kingdom's Secretary of State through diplomatic channels; *i.e.*, through the requesting state's foreign ministry and the United Kingdom's Foreign and Commonwealth Office.[56] The United Kingdom's Secretary of State would then decide whether to issue an "order to proceed;" the Secretary of State has unfettered

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47. KNOWLES, *supra* note 23, at 3.
48. NICHOLLS, *supra* note 20, at 10.
49. *Id.*
50. European Convention on Extradition, Dec. 13, 1957, Europ. T.S. No. 24.
51. KNOWLES, *supra* note 23, at 23.
52. Extradition Act 1870, 33 & 34 Vict., c. 52 (U.K.). Though the 1989 Extradition Act did repeal the 1870 Extradition Act, it did not affect the Orders in Council made under the former extradition legislation. NICHOLLS, *supra* note 20, at 9.
53. NICHOLLS, *supra* note 20, at 14-15.
54. *Id.* at 15.
55. *Id.*
56. *Id.* at 17.

discretion when making this decision.[57] Without such an order, a district judge would not have jurisdiction to arrest the subject for the purpose of committal.[58] Committal is the point at which the requesting state must show that it has met the statutory conditions for extradition and that there are no bars to extradition.[59] If the requesting state satisfied the requirements at the committal proceedings, the district judge had to commit the subject. The subject would then be committed until the Secretary of State decided whether to order the subject's return to the requesting state.[60] If committed, the subject could seek judicial review of the district judge's decision, and if the Secretary of State issued an order to return, the subject could also seek judicial review of that determination.[61] In both instances, the subject would be protected from return until the review was concluded.[62] Some subjects have also contested their extradition from the United Kingdom before the European Court of Human Rights by alleging a violation of the European Convention on Human Rights.[63]

The 1989 Extradition Act implemented a list-based system.[64] Extradition to a state with which the United Kingdom had an extradition treaty was possible only if the alleged offense was an "extraditable offense."[65] When the United States was the requesting state, the list of extraditable offenses could be found in the Schedule to the 1972 Extradition Treaty.[66] The 1972 Extradition Treaty also allowed extradition to the United States when the offense: (1) satisfied the dual criminality test, (2) was listed as an "extraditable offense" under U.K. law, and (3) constituted a felony under U.S. law.[67]

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57. *Id.* at 18.
58. *Id.*
59. NICHOLLS, *supra* note 20, at 104.
60. *Id.* at 19.
61. *Id.* at 20.
62. *Id.*
63. *Id.* at 20.
64. Osgood & Dunleavy, *supra* note 8, at 35.
65. *Id.*
66. *Id.*; Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, U.S.-U.K., 28 U.S.T. 227, sched. (1977) [hereinafter 1972 Extradition Treaty]..
67. 1972 Extradition Treaty, *supra* note 66, at art. III.

b. Evidentiary Requirements Under Schedule 1 of the 1989 Extradition Act

Committal proceedings required a requesting state to satisfy statutory conditions for extradition. Under the 1870 Extradition Act, any nation making an extradition request bore the burden of showing that its evidence established a prima facie case against a subject.[68] The 1989 Extradition Act partly did away with this burden, but committal proceedings governed by Schedule 1 continued to require a prima facie evidentiary showing.[69] Specifically, when the subject was accused, but not yet convicted, of an extraditable offense, Paragraph 7 required that the requesting state show evidence that would "be sufficient to make a case requiring an answer by that person if the proceedings were the summary trial of an information against him."[70]

The court in *R v. Galbraith* developed the sufficiency of evidence test that subsequent English courts have applied.[71] Though

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68. NICHOLLS ET AL., *supra* note 20, at 104.

69. *Id*.

70. *Id*. at 140-41. The relevant provision, in its entirety, stated:

> 7(1) In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provision of the Schedule) would, according to the law of England and Wales, make a case requiring an answer by the prisoner if the proceedings were for the trial in England and Wales of an information for the crime, the metropolitan magistrate shall commit him to prison, but otherwise shall order him to be discharged.

Extradition Act 1989, c. 33, sched. 1 (U.K.).

71. R. v. Galbraith, [1981] 1 W.L.R. 1039 (Crim App.) (Eng.). The Court in *Galbraith* stated:

> How then should the judge approach a submission of 'no case?' (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge come to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it

Galbraith was not an extradition case, the House of Lords held in *R. v. Governor of Pentonville Prison ex parte Alves*[72] that the evidence test outlined in *Galbraith* was the relevant test for extradition cases.[73] Under the *Galbraith* test, a judge should stop a case, or order a subject's discharge, when there is no evidence or when the evidence is so tenuous that when taken at its highest, a jury could not properly convict.[74]

B. Current Extradition Law

1. The 2003 U.S.-U.K. Extradition Treaty

The United Kingdom and the United States signed the 2003 Extradition Treaty on March 31, 2003.[75] The United Kingdom quickly ratified the treaty,[76] but the United States Senate did not ratify it until September 29, 2006.[77] Upon ratification by both nations, the 2003 Extradition Treaty finally replaced the 1972 Extradition Treaty, which thus ceased to be effective.[78] In his letter of submittal to the Senate, the United States Secretary of State asserted that the Treaty's primary aim was to strengthen cooperation in battling terrorism.[79] He also stated

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> is his duty, upon the submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury . . . There will of course, as always in this branch of law, be borderline cases. They can safely be left to the discretion of the judge.

Id. at 1042.

72. R. v. Governor of Pentonville Prison ex parte Alves, [1993] A.C. (HL) 284, 290-92 (Eng.).

73. NICHOLLS, *supra* note 20, at 125-26.

74. 1 W.L.R. at 1042.

75. 2003 Extradition Treaty, *supra* note 4.

76. Osgood & Dunleavy, *supra* note 8, at 36.

77. 2003 Extradition Treaty, *supra* note 4.

78. *Id*. at art. 23.

79. 2003 Extradition Treaty, *supra* note 4 (Secretary of State's Letter of Submittal to the President). Noted as secondary targets were organized crime and money laundering. *Id.*

that the Treaty was "part of a concentrated effort . . . to modernize the legal tools available for the extradition of serious offenders."[80]

The 2003 Extradition Treaty did away with the Schedule of extraditable offenses from the 1972 Extradition Treaty and instead takes on a "pure 'dual criminality' clause."[81] This "obviates the need to renegotiate or supplement the Treaty as additional offenses become punishable under the laws in both States."[82] The 2003 Extradition Treaty also lowered the evidentiary burden that the United States must meet when it submits an extradition request to the United Kingdom. When the United States seeks a subject for extradition, it must furnish "such information as could provide a reasonable basis to believe that the person sought committed the offense."[83] This abolishes the requirement that the United States establish a prima facie case.[84] In contrast, the Treaty does not alter the evidentiary burden that the United Kingdom must meet when it submits an extradition request to the United States; the United Kingdom must still show probable cause.[85]

2. The 2003 Extradition Act

Reform of the United Kingdom's extradition law came in the late 1990s, when Spain attempted to extradite Chile's General Augusto Pinochet from the United Kingdom for crimes against humanity.[86] In March 2001, the government of the United Kingdom detailed proposals aimed at updating the extradition process between the United Kingdom and its extradition partners.[87] The events of September 11, 2001 and the commencement of the war on terror partially altered the goals of the extradition reform. The government began to place an emphasis on creating a quicker process for extradition.[88] The 2003 Extradition Act

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80. *Id.*

81. *Id.* The Treaty states, "[a]n offense shall be an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty." *Id.* at art. 2(1).

82. *Id. (Secretary of State's Letter of Submittal to the President).*

83. *Id. at* art. 8(3)(c).

84. Osgood & Dunleavy, *supra* note 8, at 36.

85. *Id.*; *see also supra* Part II.A.1.

86. KNOWLES, *supra* note 23, at 3-4.

87. *Id.* at 4.

88. *Id.*

was enacted in 2003 and entered into force on January 1, 2004; it repealed the 1989 Extradition Act.[89]

The 2003 Extradition Act eliminates many of the designation complexities of the 1989 Extradition Act.[90] The United Kingdom now designates its extradition partners by placing them in one of two categories.[91] Most European Union member states are designated Category 1 Territories.[92] The United States is designated a Category 2 Territory.[93] Part 2 of the 2003 Extradition Act addresses the extradition procedure for these territories – nations with which the United Kingdom has bilateral treaty arrangements.[94] Depending on negotiated extradition procedures, a nation may move from one category to the other,[95] though a nation whose law includes the death penalty may never be a Category 1 Territory.[96]

Category 1 Territories benefit from "fast-track" extradition arrangements.[97] The 2003 Extradition Act entirely removes the Secretary of State from the process when a request comes from a Category 1 Territory.[98] In addition, at a Part 1 hearing, the judge is never required to assess whether the requesting party proved a prima facie case; rather, he must only assess whether the specified offense is

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89. Extradition Act 2003, c. 41 (U.K.).

90. KNOWLES, *supra* note 23, at 24.

91. *Id*.

92. Extradition Act 2003 (Designation of Part 1 Territories) Order, 2003, S.I. 2003/3333 (U.K.); KNOWLES, *supra* note 23, at 24. The following nations are designated Category 1 Territories under this Order: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. *Id.*

93. Extradition Act 2003 (Designation of Part 2 Territories) Order, 2003, S.I. 2003/3334 (U.K.). The following nations are designated Category 2 Territories under this Order: Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Canada, Croatia, Georgia, Iceland, Israel, Lichtenstein, Macedonia FYR, Moldova, New Zealand, Norway, Russian Federation, Serbia and Montenegro, South Africa, Switzerland, Turkey, Ukraine, The United States of America, and the Hong Kong Special Administrative Region.

94. Extradition Act 2003, c. 41 (U.K.); KNOWLES, *supra* note 23, at 5.

95. KNOWLES, *supra* note 23, at 24.

96. Extradition Act 2003, c. 41, § 1(3) (U.K.).

97. KNOWLES, *supra* note 23, at 5.

98. *Id.* at 46-47.

an extraditable offense.[99] If it is and no bars to extradition apply, then the judge must order the extradition.[100]

In contrast, the Secretary of State still plays a role in Category 2 cases. When a Category 2 Territory submits an extradition request, the Secretary of State, as under the 1989 Extradition Act, receives the request and decides whether to issue an order to the appropriate judge.[101] The district judge then fulfills his more complex Part 2 hearing duties.

a. The Extradition Process Under Part 2 of the 2003 Extradition Act

As under the 1989 Extradition Act, all extradition cases are heard at the Bow Street Magistrates' Court in London.[102] At a Part 2 hearing, the judge first decides if he received all of the appropriate documentation from the Secretary of State.[103] If the documentation is sufficient, the judge verifies the identity of the subject, determines whether the specified offense is an extradition offense, and ensures that the subject was served the proper documentation.[104] The judge then determines if a bar to extradition is applicable.[105] If no bar applies, then in the case of a subject accused of committing the extradition offense, the judge must next analyze the evidence.[106] If at this point the evidence is suitable, and extradition would not violate the subject's human rights, the judge sends the case back to the Secretary of State for the final extradition decision.[107]

Though the Secretary of State does still play a role in the extradition process when a request is received from a Category 2 Territory, his role is quite reduced from what it was under the 1989 Extradition Act.[108] Prior to the enactment of the 2003 Extradition Act,

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99. Extradition Act 2003, c. 41, § 10 (U.K.).

100. *Id.* at c. 41, §§ 11-21.

101. *Id.* at c. 47.

102. Osgood & Dunleavy, *supra* note 8, at 36.

103. KNOWLES, *supra* note 23, at 77-78.

104. *Id.* at 78.

105. *Id.* at 79. The bars to extradition under Part 2 of the 2003 Extradition Act are "the rule against double jeopardy," "extraneous considerations," "the passage of time," and "hostage-taking considerations." Extradition Act 2003, c. 41, § 79.

106. KNOWLES, *supra* note 23, at 76.

107. *Id.* at 76-77.

108. *Id.* at 109.

the Secretary of State could refuse extradition if it was "wrong, unjust, or oppressive."[109] Currently, the Secretary of State decides whether any of three specific restrictions apply,[110] and if none do, he must order extradition.[111] A subject may appeal the Magistrates' Court's or Secretary of State's decision at the Administrative Court, if he files within fourteen days.[112] An appeal to the House of Lords is possible, but only in certain circumstances.[113]

Since a primary goal of the 2003 Extradition Act is to ensure a swift, efficient extradition process, the new legislation adopted a simple dual criminality test.[114] This replaces the list system adopted under the 1989 Extradition Act.

b. Evidentiary Requirements Under Part 2 of the 2003 Extradition Act

The district judge hearing a Part 2 extradition case must consider the evidence. The 1989 Extradition Act required "evidence sufficient to amount to a prima facie case" in a Schedule 1 case.[115] Prima facie evidence[116] is still generally required when the requesting state is a Category 2 Territory; however, the 2003 Extradition Act's

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109. Atkinson v. United States of America Government [1971] A.C. (H.L.) 197, 232 (Eng.); *see* Extradition Act 1989, c. 33, § 12 (U.K.).

110. The Secretary of State may not order the extradition of a subject if barred by the "death penalty," "speciality," or "earlier extradition to the United Kingdom from other territory" sections apply. Extradition Act 2003, c. 41, § 93(2) (U.K.).

111. KNOWLES, *supra* note 23, at 110.

112. Osgood & Dunleavy, *supra* note 8, at 36.

113. *Id.* To appeal to the House of Lords, England's highest court, the Administrative Court must certify that the appeal "involves a point of law of general public importance" and the subject must be granted leave to appeal by either the House of Lords or the Administrative Court. *Id.*

114. *Id.* at 35. When a subject accused of, not convicted for, an offense, and the alleged offense occurred in the Category 2 Territory, the conduct must be an offense under United Kingdom law and punishable with imprisonment for at least twelve months, and must be similarly punishable under the requesting state's law. Extradition Act 2003, c. 41, § 137(2) (U.K.).

115. KNOWLES, *supra* note 23, at 80.

116. As under the 1989 Extradition Act, a judge looking for the existence of prima facie evidence in a case under the 2003 Extradition Act will apply the *Galbraith* test, "namely, whether the prosecution evidence, taken at its highest, is such that no jury properly directed could properly convict upon it." *Id.* at 81; *see Galbraith*, 1 W.L.R. at 1042.

policy is to eliminate such evidentiary requirements where possible.[117] Thus, if the requesting state is designated in an order by the Secretary of State,[118] then under § 84(7), no prima facie showing is required.[119] The relevant provisions state:

> 84. Case where person has not been convicted
> (1) If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trail of an information against him.
> . . . .
> (7) If the judge is required to proceed under this section and the category 2 territory to which extradition is requested is designated for the purposes of this section by order made by the Secretary of State—
> (a) the judge must not decide under subsection (1) . . . .[120]

The United States is designated for the purposes of § 84(7).[121]

Where evidence is required, the district judge must consider evidence produced on behalf of the defendant, and so the defendant may give his own evidence and call his own witnesses.[122]

III. JUDICIAL REVIEW: EXTRADITION CASES

The United States has already initiated a number of extradition proceedings under the new requirements of the 2003 Extradition Act. Two white collar crime cases in particular have garnered significant

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117. KNOWLES, *supra* note 22, at 80.

118. Extradition Act 2003 (Designation of Part 2 Territories) Order, 2003, S.I. 2003/3334, art. 3 (U.K.).

119. Extradition Act 2003, c. 41, § 84 (U.K.).

120. *Id*.

121. Extradition Act 2003 (Designation of Part 2 Territories) Order, 2003, S.I. 2003/3334, art. 3, ¶ 2 (U.K.). Under this Order, the United States is not only exempt from the requirement to prove a prima facie case at the extradition hearing, but it is also "entitled to supply information rather than evidence in support of an application for an arrest warrant." KNOWLES, *supra* note 23, at 377-78.

122. KNOWLES, *supra* note 23, at 81. This is so even though the judge must act as through he were conducting a criminal trial. *Id*.

media attention, both in the United Kingdom and in the United States. One is the case of David Bermingham, Giles Darby, and Gary Mulgrew – the NatWest Three.[123] The other is the case of Ian Norris.[124]

A. The NatWest Three

In July 2006, the NatWest Three – British citizens David Bermingham, Giles Darby, and Gary Mulgrew – arrived in Houston, Texas, having lost their battle against extradition to the United States.[125] The Enron Task Force of the United States Department of Justice ("Enron Task Force") had initiated the extradition request for the defendants after a Grand Jury sitting in the Southern District of Texas returned an indictment[126] on September 12, 2002, charging the three with seven counts of aiding and abetting wire fraud.[127] On February 13, 2004, the Enron Task Force submitted an extradition request to the United Kingdom and extradition proceedings began in earnest.[128] Pursuant to the 2003 Extradition Act, the Secretary of State of the United Kingdom sent the appropriate documentation to the Bow Street Magistrates' Court, and warrants were issued for the arrest of the defendants.[129]

The District Judge delivered his judgment on October 15, 2004.[130] He concluded that no bar to extradition applied in the case of the defendants; accordingly, he sent the case back to the Secretary of State for the final extradition decision, which the Secretary of State ordered on May 24, 2005.[131] The three defendants then appealed, bringing before the High Court two sets of proceedings: an application for judicial review and a statutory appeal.[132] The High Court granted

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123. R. (*In re* Bermingham) v. Director of the Serious Fraud Office [2006] EWHC (Admin.) 200 (Eng.).

124. R. (*In re* Norris) v. The Secretary of State for the Home Department [2006] EWHC (QBD (Admin Ct)) 280 (Eng.).

125. *The NatWest Three: America's Long Shadow*, *supra* note 12, at 21; *see also Extradition and the NatWest Three: Unintended Consequences*, *supra* note 1, at 54.

126. Indictment, United States v. Bermingham, Cr. No. H-02-0597 (S.D. Tex. Sept. 12, 2002).

127. *R. (In re Bermingham)*, EWHC 200, at [37]; Indictment, *supra* note 126, at 1.

128. *R. (In re Bermingham)*, EWHC 200, at [41].

129. *Id*. at [42].

130. *Id*. at [48].

131. *Id*. at [48]-[50], [55].

132. *Id*. at [1].

permission to the defendants to bring the judicial review against the Director of the Serious Fraud Office ("the Director") and his refusal to establish a criminal investigation under the Criminal Justice Act 1987.[133] The defendants brought a statutory appeal against the District Judge's rulings pursuant to § 103 of the 2003 Extradition Act.[134] They also brought a statutory appeal against the Secretary of State's decision to extradite, pursuant to § 108 of the 2003 Extradition Act.[135]

1. The Facts of the Case

The facts presented to the High Court were largely compiled from American prosecutorial sources, with much of the information derived from an affidavit from the Federal Bureau of Investigation ("FBI").[136] The defendants, since the beginning of the extradition proceedings, have vehemently denied committing fraud.[137] They are all British citizens who have consistently resided in the United Kingdom.[138] At the relevant time, the three were employed by Greenwich NatWest ("GNW") in London, a structured finance division of National Westminster Bank Plc, which is now the Royal Bank of Scotland.[139] The defendants were not, at any point in time, employees, shareholders, or officers of Enron, a now-bankrupt American corporation.[140] They were associated with Enron as part of the team responsible for Bank clients, including Enron.[141]

Integral to the history of the charges against the defendants are Michael Kopper and Andrew Fastow, high-level officers at Enron and the only people involved who are offering direct evidence of the scheme to defraud.[142] Kopper and Fastow were associated with LJM, a Cayman Islands limited partnership in which GNW invested $7,500,000.[143] The investment was channeled through Campsie Ltd., another Cayman Islands company and a vehicle of the Bank, on whose

133. *Id.* at [1], [55].
134. *R. (In re Bermingham)*, EWHC 200, at [51].
135. *Id.* at [55].
136. *Id.* at [19].
137. *Id.*
138. *Id.* at [20].
139. *Id*; Indictment, *supra* note 126, at 2, ¶ 2.
140. *R. (In re Bermingham)*, EWHC 200, at [20]; Indictment, *supra* note 126, at 1, ¶ 1.
141. *R. (In re Bermingham)*, EWHC 200, at [20].
142. *Id.* at [20], [66].
143. *Id.* at [21].

Board of Directors the defendant Bermingham sat.[144] LJM created a subsidiary known as Swap Sub, which acted as a vehicle for transactions between Enron and LJM.[145] Through Campsie, GNW came to own a fifty-percent stake in Swap Sub. Swap Sub owned assets including 3.1 million shares of Enron.[146] Enron occasionally invested in start-up ventures, including an Internet company known as Rhythm Net.[147] As part of a "hedging" effort, Swap Sub entered into a series of derivatives transactions with Enron, which included a "put" that afforded Enron the right to sell its Rhythm Net shares for set prices in the future, despite any drops in market value below the set price.[148] Accordingly, due to the potential liability of Swap Sub on the Rhythm Net put, GNW internally valued its interest in Swap Sub at zero.[149]

The Royal Bank of Scotland acquired National Westminster Bank in March 2000.[150] When had made its hostile takeover bid, the Royal Bank of Scotland indicated that if its bid were successful, it would sell GNW.[151] By early 2000, the defendants were aware that their continued employment with GNW was uncertain.[152] During this time, the value of Rhythm Net and the share price of Enron increased.[153] Defendant Bermingham sent an email to defendant Darby on January 20, 2000, in which he commented on the unexpected value increase,[154] and in February 2000, all three defendants traveled to Houston.[155]

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144. *Id*.

145. *Id*. at [22].

146. *Id*.

147. *R. (In re Bermingham)*, EWHC 200, at [22].

148. *Id*; Indictment, *supra* note 126, at 3-4, ¶¶ 11-12.

149. *R. (In re Bermingham)*, EWHC 200, at [22]; Indictment, *supra* note 126, at 4, ¶ 13.

150. *R. (on the application of Bermingham)*, EWHC 200, at [23].

151. *Id*.

152. *Id*.

153. *Id*. at [24].

154. The email sent from defendant Birmingham to defendant Darby included the following:

> One last thing. An unexpected change of circumstances re LJM. We have always assumed that the swap sub assets have nil value, because of the mark to market value of the Rhythm Net Put. This was true up to about 10 days ago, when Enron became a virtual company, and its shares went through $60. I ran the numbers last night, and I would say there is quite some value there now. The trick will be in capturing it. I have a couple of ideas,

On February 22, 2000, a "secret" meeting took place between the defendants and Fastow.[156] Prosecutors alleged that the purpose of the meeting was to devise a way to profit from a restructuring of Swap Sub.[157] Thereafter, Kopper formed a partnership, Southampton LP, to buy GNW's Swap Sub interest, allegedly at the insistence of defendant Mulgrew.[158] On the same day as the Royal Bank of Scotland takeover, March 6, 2000, Kopper conferred with Fastow and defendant Mulgrew and sent a letter to defendant Bermingham offering $1,000,000 for GNW's Swap Sub interest.[159] On the following day, the Campsie Board of Directors, including defendant Bermingham, considered and accepted the offer.[160] Defendant Darby had submitted to the Board a memorandum recommending acceptance of the offer; defendant Birmingham had also advocated for acceptance.[161] The sale was completed on March 17, 2000.[162]

Meanwhile, Kopper formed Southampton K Co., yet another Cayman Islands venture, which obtained a fifty-percent stake in Southampton LP.[163] Defendant Bermingham drew up an option agreement whereby the three defendants were permitted to obtain from Kopper the entire interest in Southampton K Co.[164] On March 22, 2000, Enron, Swap Sub, and Southampton LP entered into an agreement that left Swap Sub with a residual value of over $30,000,000.[165] In April 2000, the defendants exercised their

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> but it may be good if I don't share them with anyone until we know our fate!!!

Id.

155. *Id*. at [24]-[25].

156. The defendants apparently hid the Houston meeting from the manager of National Westminster Bank who was responsible for the Enron account. *See R. (In re Bermingham)*, EWHC 200, at [25].

157. Indictment, *supra* note 126, at 5, ¶ 16; *see R. (In re Bermingham)*, EWHC 200, at [25]. The defendants allegedly presented to Fastow several ideas that if implemented, would harm the interest of National Westminster Bank as a limited partner in LJM,; however, these particular plans were not carried out. *R. (In re Bermingham)*, EWHC 200, at [26].

158. *Id.*

159. *Id*.

160. *Id*.

161. *Id*.

162. *Id*.

163. *R. (In re Bermingham)*, EWHC 200, at [27].

164. *Id*.

165. *Id*.

Southampton K Co. option; Swap Sub also received its money.[166] Approximately $15,000,000 of the sum Swap Sub received was attributable to the interest that GNW previously held.[167] On May 1, 2000, Kopper transferred $7,352,626 to an account held in Southampton K Co.'s name; the defendants split this amount, while Kopper and Fastow divided approximately $12,300,000 between themselves.[168]

Enron announced in late 2001 that the Securities and Exchange Commission of the United States was investigating Enron's accounts and certain transactions, including transactions involving Swap Sub.[169] The defendants assisted the investigation by disclosing documents and participating in interviews with the United Kingdom's Financial Services Authority; they had already reported their investment to their new employer, the Royal Bank of Canada.[170] The Serious Fraud Office of the United Kingdom was first made aware of possible fraudulent activity by the defendants in mid-2002, after the Royal Bank of Scotland presented the National Criminal Intelligence Service with a "money laundering suspicion report," and the National Criminal Intelligence Service forwarded this to the City of London Police.[171] The Financial Services Authority eventually communicated with the police and then wrote to the Serious Fraud Office.[172] One such writing noted that, "[o]n the basis of the information gathered to date it would appear that prima facie there appears to be evidence that the three individuals were subject to a major conflict of interest," though the Financial Services Authority believed that jurisdictional issues possibly stood in the way of continuing investigations.[173]

In August 2002, in the United States, Kopper pleaded guilty to conspiracy charges, and in a plea agreement, stipulated to facts relating to the scheme to defraud NatWest.[174] In September, the three defendants were indicted in Texas.[175] In January 2004, Fastow also pleaded guilty to conspiracy to commit wire fraud, and his plea agreement contained facts similar to those in Kopper's.[176] In February,

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166. *Id.*
167. *Id.*
168. *Id.* at [28].
169. *R.* (*In re Bermingham)*, EWHC 200, at [30].
170. *Id.* at [30].
171. *Id.* at [31]-[32].
172. *Id.* at [32].
173. *Id.*
174. *Id.* at [36].
175. *R.* (*In re Bermingham)*, EWHC 200, at [37].
176. *Id.* at [40].

the Enron Task Force submitted its extradition request for the defendants.[177]

The Senior Counsel for Securities Fraud for the Department of Justice of the United States submitted an affidavit in support of extradition that summarized the alleged fraud scheme and outlined the anticipated details of the defense. The defendants were expected to argue the following: (1) they committed no fraud on their employers; (2) they did receive $7,300,000 and even paid taxes on it in the United Kingdom; (3) the Houston meeting was held for honest corporate restructuring purposes; and (4) GNW's sale of its Swap Sub interest for $1,000,000 was proper.[178] But before fighting the fraud charges, the NatWest Three fought their extradition to the United States.

2. The Defendants' Arguments Against Extradition

Lord Justice Laws, in the judgment issued by the High Court, noted the "overarching theme" of the defendants' case: "It is an insistence on the defendants' behalf . . . that they should not have to face trial in the United States; if they are to be tried at all, it should be in England."[179] In considering this theme, the Lord Justice noted that the 2003 Extradition Act differed from prior legislation, such as the 1989 Extradition Act, in that it is now definitively clear that the Secretary of State does not possess general discretion whether or not to turn a subject over to a requesting state. The Lord Justice wrote: "Under the 2003 [Extradition] Act neither court nor minister possesses any discretion to further the extradition process or not to do so."[180] If the conditions for extradition are met, statute requires the court to send the extradition case to the Secretary of State, and if certain other conditions are met, the Secretary of State must then order extradition of the subject.[181] With that consideration in mind, the Court addressed the particular arguments of the defense.

In their request for judicial review of the decision of the Director of the Serious Fraud Office ("Director"), the defendants claimed that the Director acted irrationally in not opening an investigation in the United Kingdom; specifically, the defendants alleged four errors: (1) the Director wrongly identified the victim; (2) the Director was mistaken as to where the alleged fraud took place; (3)

177. *Id*. at [41].
178. *Id*. at [29].
179. *Id*. at [57].
180. *Id*.
181. *R.* (*In re Bermingham)*, EWHC 200, at [57].

the Director wrongly believed that without the evidence from the United States, no charges could be brought in the United Kingdom; and (4) the Director incorrectly thought that witnesses located in the United States could not give their evidence in the United Kingdom or by video-link.[182] The High Court dismissed the application for judicial review.[183]

In their statutory appeals, the defendants alleged four mistakes by the District Judge and two mistakes by the Secretary of State: (1) the judge failed to recognize that the offences listed in the extradition request were non-extraditable; (2) the judge should have barred the extradition due to "the passage of time;" (3) the judge should have concluded that the proceedings were an abuse of the court, because the United States unfairly delayed the extradition request submission until the 2003 Extradition Act entered into force; (4) the judge should have held that to extradite the defendants would be to violate their rights under the European Convention on Human Rights; (5) the Secretary of State should have found no, or no effective, specialty arrangements; and (6) the Secretary of State should also have held that to extradite the defendants would be to violate their rights under the European Convention on Human Rights.[184] As with the application for judicial review, the High Court dismissed the statutory appeals against the District Judge and the Secretary of State.[185]

3. The Analysis of the High Court

a. Application for Judicial Review

The Court first addressed the NatWest Three's application for judicial review,[186] and its jurisdictional authority to conduct a review of the decisions of the Director.[187] The Court made a comparison to the authority of the judiciary to review decisions to prosecute.[188] Judicial review of a public authority's decision whether or not to prosecute is undoubtedly permissible in the United Kingdom, but such jurisdiction should be used sparingly.[189] Deciding whether to prosecute requires

182. *Id.* at [62].
183. *Id.* at [79].
184. *Id.* at [80].
185. *Id.* at [134], [154].
186. *See generally id.* at [61]-[79].
187. *R.* (*In re Bermingham)*, EWHC 200, at [63]-[64].
188. *Id.* at [63].
189. *Id.*

the public authority to make "expert assessments" using "professional judgment," and so interference by a reviewing court should be uncommon.[190] The Court noted that the authority's discretion "is even more open-ended" when, as in the case of the NatWest Three, the decision being reviewed is a decision whether to investigate, rather than a decision whether to prosecute.[191] Given this implication of deference to the public authority's decision, the Court went on to discuss the four errors argued by the defendants.[192]

In their application for judicial review, the defendants first argued that the Director had identified the wrong victim and that this had contributed to his improper decision to not investigate in the United Kingdom. The Director had apparently believed that the victim of the conspiracy to defraud was Enron, or Enron and the Bank, while in actuality, the accusation named only the Bank as the victim.[193] The Court decided that this argument by the defendants depended on too literal a reading of the indictment.[194] And in any event, the facts provided to the Director by the prosecution in the United States did allege that Enron lost $20,000,000 due to the conspiracy.[195]

The defendants' next argument was that the Director had been mistaken as to where the alleged fraud took place; the Director allegedly thought that Southampton K Co. was an American company, but it was actually a Cayman Islands company.[196] The defendants contended that this led the Director to erroneously believe that the case should be tried in the United States.[197] The Court rejected this argument, noting that such a mistake does not have any bearing on the fact that the Director was justified in believing that the case's critical evidence was in the United States.[198] Kopper and Fastow, who will be providing the direct evidence of the conspiracy, are in the United States, and Kopper can give evidence of the defendants' visits to the United States.[199]

The defendants then argued that the Director incorrectly declared that were it not for the evidence supplied by the United States, "there would be insufficient grounds for an investigation in [the United

190. *Id*. at [63].
191. *Id*. at [64].
192. *See id*. at [66].
193. *R.* (*In re Bermingham)*, EWHC 200, at [62].
194. *Id*. at [66].
195. *Id*.
196. *Id*. at [62].
197. *Id*.
198. *Id*. at [66].
199. *R.* (*In re Bermingham)*, EWHC 200, at [66].

Kingdom]."[200] The defendants claimed that the Director ignored the fact that much of the evidence was only discovered because of the United Kingdom's Financial Services Authority and ignored that the Serious Fraud Office had "powerful investigative tools" at its disposal.[201] The Court, however, noted again that the Director was justified in believing that the case's critical evidence was in the United States.[202]

Finally, the defendants argued that the Director erred in thinking that Kopper and Fastow, who were being tried in the United States, could not give their evidence in the United Kingdom or by video-link.[203] The Court stated that there was evidence suggesting that neither witness could be compelled to testify in the United Kingdom.[204] The Court also noted generally that such matters do not outweigh the discretionary decision of the Director.[205]

The Court next addressed the defendants' "strategic arguments" in their application for judicial review.[206] The defendants attempted to charge the Director with the burden of determining the most appropriate venue for a criminal case, where two jurisdictions may be appropriate.[207] The Court stated that the Director, in making a decision whether to investigate, must "consider the practical prospects of a prosecution here rather than there."[208] Despite this, it would be beyond the Director's duties to make an inquiry into the issue of trial venue.[209] The Court concluded that it would be "wholly implausible and inappropriate that obligations of that kind should be required of [the Director] in the name of a statutory function of investigation."[210] All of the defendants' arguments thus failed, and the Court dismissed their application for judicial review.[211]

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200. *Id.* at [62].
201. *Id.*
202. *Id.* at [66].
203. *Id.* at [62].
204. *Id.* at [66].
205. *R.* (*In re Bermingham)*, EWHC 200, at 66.
206. *Id.* at [67].
207. *Id.* at [68].
208. *Id.* at [73].
209. *Id.* at [72]-[74].
210. *Id.* at [72].
211. *R.* (*In re Bermingham)*, EWHC 200, at [79].

b. Statutory Appeals

The Court next addressed the defendants' six grounds for statutory appeal, including four against the decisions of the District Judge, and two against the decisions of the Secretary of State.[212] The defendants first argued that the District Judge should have held that the offenses listed in the extradition request were not "extradition offenses" under the 2003 Extradition Act.[213] The defendants submitted that the 2003 Extradition Act requires that the whole of the conduct giving rise to the criminal charges must have occurred in the Category 2 Territory in order for the defendants to be extradited to that Territory.[214] The Court concluded that such an interpretation of the Act was unnecessary and that the District Judge was right to hold that the alleged conduct "substantially" took place in the United States, the relevant Category 2 Territory, and so the Act's provisions were satisfied.[215]

The defendants next argued that the District Judge should have barred their extradition due to the passage of time.[216] The Court, however, summarily dismissed this argument, stating that the defendants were really arguing that their extradition was an abuse of the process of the court.[217] Therefore, the Court moved on to the third argument.[218] The defendants' abuse argument was based on the alleged refusal of the United States government to disclose certain evidence and on the United States authorities' alleged delay in seeking

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212. *See generally id.*, at [80]-[154].

213. *Id.* at [80].

214. *See id.* at [81]-[85]. The defendants specifically relied on § 137(2)(a) of the 2003 Extradition Act which states: "The conduct constitutes an extradition offense in relation to the category 2 territory if these conditions are satisfied…(a) the conduct occurs in the category 2 territory." *Id.* at [82] (citing Extradition Act 2003, c. 41, § 137(2)(a) (U.K.)). The defendants proposed that this section of the Act was met only if the alleged conduct was "targeted" at the Category 2 Territory; they submitted that this was not so in this case. *Id.* at [83].

215. *Id.* at [86].

216. *R.* (*In re Bermingham)*, EWHC 200, at [80]. The 2003 Extradition Act requires the absence of delay in the extradition process; the test for delay is whether "it would be unjust or oppressive to extradite . . . by reason of the passage of time since he is alleged to have committed the extradition defense." *Id.* at [87] (citing Extradition Act 2003, c. 41, § 82 (U.K.)). The Court stated that it was more convenient to address the "delay" arguments of the defendants along with their "abuse" arguments. *Id.* at [88].

217. *Id.* at [88], [90].

218. *Id.* at [91]-[105].

extradition of the defendants.[219] The United States, the defendants argued, deliberately delayed seeking extradition in order to wait for the passage of new legislation, the 2003 Extradition Act.[220] It was, they argued, an abuse of the process of the court to conduct extradition proceedings that were initiated in bad faith.[221] Specifically, the United States, by refusing to disclose evidence and by waiting for the passage of the new legislation that denied the defendants the safeguards of the old legislation, had acted in bad faith.[222]

The Court rejected the abuse argument, noting that "the question whether abuse [has been] demonstrated has to be asked and answered in light of the specifics of the statutory scheme."[223] The Court stated that the 2003 Extradition Act does not require the United States' prosecutor to establish a case to answer.[224] Since evidence as to whether there is a case to answer is not needed, the Court reasoned, it is irrelevant if the prosecutor fails to disclose evidence.[225] Therefore, the Court cannot find an abuse of process and punish the prosecutor for not doing something he was never required to do.[226] Additionally, the Court stated that the defendants could not claim abuse by the United States for waiting until the 2003 Extradition Act was enacted.[227] To allow such a claim would presume that if the facts of a case arose while the 1989 Extradition Act was still in force, that case could not be affected by supervening legislation.[228] The Court stated that "[s]uch a presumption would be unconstitutional: it would imply a value judgment by this court that the scheme of the earlier legislation was to be preferred to that of the 2003 Act[; w]e have no authority to propound any such judgment."[229]

Nevertheless, a prosecutor must still act in good faith before a court.[230] For example, if the prosecutor here knew that he could not make a prima facie case and so intentionally waited for the passage of the 2003 Extradition Act, that might indeed be "abusive."[231] In this

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219. *Id.* at [80], [91].
220. *Id.*
221. *R.* (*In re Bermingham)*, EWHC 200, at [80], [91].
222. *Id.*
223. *Id.* at [98].
224. *Id.* at [98].
225. *Id.*
226. *Id.*
227. *R.* (*In re Bermingham)*, EWHC 200, at [99].
228. *Id.*
229. *Id.*
230. *Id.* at [100].
231. *Id.*

case, however, the United States Department of Justice authority managing the defendants' extradition request specifically noted that "the timing of the indictment and the subsequent requests for extradition were dictated by the natural course of the investigation."[232] He also stated: "[I] was instructed to, and did prepare an extradition request which establishes a *prima facie* case . . . . I had no knowledge, nor was I informed, that a new Extradition Act was being contemplated by the United Kingdom."[233] He went on to explain exactly why it took so much time to prepare the request; in fact, the request was prepared within sixteen months of the Texas indictment's return.[234] Given all of these circumstances, the Court concluded that the defendants' abuse arguments were without merit.[235]

Finally, the Court addressed the last of the defendants' arguments against the District Judge.[236] These arguments were founded on human rights concerns, and one portion contended that the defendants would not receive a fair trial in Texas.[237] The contentions were based on the testimony of a United States defense attorney working in the United States federal courts and on a statement by a former federal prosecutor.[238] The District Judge was skeptical of the testimony, and the High Court also found no evidence that suggested its validity.[239] The Court specifically pointed to the United States' fair trial guarantees, outlined in the Sixth Amendment to the Constitution, in denying that a trial conducted in the United States would not be fair.[240]

The defendants also argued against the separation from their families that extradition would cause, citing to their rights under the European Convention on Human Rights.[241] The Court agreed that extradition would interfere with the defendants' family and private

232. *Id*. at [104].

233. *R*. (*In re Bermingham)*, EWHC 200, at [104].

234. *Id*.

235. *Id*. at [105].

236. *See generally id.*, at [106]-[134].

237. *Id*. at [106]. The defendants outlined a number of possible human rights violations that could occur in the United States; for example, they contended that they would be denied bail, that there would be a lengthy delay before their trial started, that legal representation would cost millions of dollars, and that any publicly-assigned attorneys would be inexperienced. *Id*. They were also concerned with the possibility of having an unpleasant journey and with suffering privations at a Federal Detention Center. *Id*. at [107].

238. *Id*. at [106]-[109].

239. *R*. (*In re Bermingham)*, EWHC 200, at [109].

240. *Id*. at [110].

241. *See id.* at [80], [112].

lives,[242] but noted that under the Convention, the issue is one of proportionality—"is the interference with family life proportionate to the legitimate aim of the proposed extradition?"[243] The Court discussed the personal situations of the defendants: each is relatively young and has a family with young children, and defendant Darby has a daughter with a learning disability, which requires her to attend a special school.[244] The Court also discussed the United Kingdom's concerns in honoring its extradition treaty obligations.[245] It noted that while the defendants could be prosecuted in the United Kingdom, it would be unrealistic to ignore the United States dimension of the case.[246] The Court concluded that the defendants lacked any exceptional personal circumstances that would indicate disproportionate interference.[247] The Court, therefore, rejected the defendants' final claim against the District Judge and moved on to address the appeals against the Secretary of State.[248]

The first argument against the Secretary of State was that he should have found no specialty arrangements.[249] The 2003 Extradition Act forbids extradition unless the person extradited is either tried for the same offense listed in the extradition request, or tried for an extradition offense on the same facts listed in the extradition offense.[250] The defendants alleged that the United States has a practice of trying defendants on superseding indictments that assert charges not included in the extradition request.[251] The Court noted that while superseding indictments are deployed in the United States, it does not necessarily mean that such deployment breaches specialty.[252] With regards to the three defendants here, the Court found no indication that the Department of Justice would violate the 2003 Extradition Act requirements.[253] As part of their specialty argument, the defendants also claimed that they were at risk of being sentenced for a crime for which they were not extradited.[254] The Court reviewed the Federal

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242. *Id*. at [112].
243. *Id*. at [118].
244. *Id*. at [112].
245. *R*. (*In re Bermingham)*, EWHC 200, at [126]-[27].
246. *Id*. at [129].
247. *Id*.at [130].
248. *Id*. at [134].
249. *Id*. at [80].
250. *See* Extradition Act 2003, c. 41, § 95 (U.K.).
251. *R. (on the application of Bermingham)*, EWHC 200, at [139].
252. *Id*. at [140].
253. *Id*. at [142]-[43].
254. *Id*. at [145].

Sentencing Guidelines of the United States and noted that "[a]lthough the United States courts appear to take broader considerations into account when sentencing than do the courts here," it does not necessarily indicate any breach of specialty.[255]

The second argument against the Secretary of State also involved the rights of the defendants under the European Convention on Human Rights.[256] The Court stated that under the 2003 Extradition Act, "the Secretary of State has no freestanding duty or discretion to consider the Convention rights and fashion his extradition decision accordingly."[257] The Court reiterated the conclusion that it had drawn in the defendants' appeal against the District Judge, stating that in any event, the defendants do not have a human rights case.[258] The court thereby dismissed the statutory appeals against the Secretary of State and affirmed the extradition of the three defendants.[259]

B. Ian Norris

On January 13, 2005 in England, police arrested Ian Norris, a citizen of the United Kingdom, upon a warrant issued at the request of the United States.[260] The United States sought the extradition of the defendant based on charges of price-fixing and obstruction of justice in a cartel investigation.[261] At the defendant's extradition hearing, the District Judge determined that extradition was proper; subsequently, the Secretary of State also approved the extradition.[262] In early 2006, the defendant's appeal against the extradition order came before the High Court. He brought a statutory appeal against the District Judge under § 103 of the 2003 Extradition Act, and a statutory appeal against the Secretary of State under § 108 of the 2003 Extradition Act.[263] Additionally, with permission of the Court, he sought judicial review of the continued designation of the United States as a Category 2

255. *Id*. at [146]-[49].
256. *Id*. at [80].
257. *R*. (*In re Bermingham*), EWHC 200, at [151].
258. *Id*. at [153].
259. *Id*. at [154].
260. R. (*In re* Norris) v. Sec'y of State for the Home Department [2006] EWHC (Admin.) 280, [16] (Eng.).
261. Osgood & Dunleavy, *supra* note 8, at 35.
262. *R. (In re Norris)*, EWHC 280, at [1].
263. *Id*. at [2].

Territory, particularly for purposes of § 84(7) of the 2003 Extradition Act.[264]

1. The Facts of the Case

Ian Norris was an employee in the carbon division of Morgan Crucible Company Plc until his appointment in 1998 to the position of chief executive officer, where he remained until his retirement in 2002.[265] At the time of the alleged events, Morgan Crucible was a major worldwide carbon manufacturer with a dominant share of the U.S. market.[266] Morgan Crucible was part of a criminal price-fixing cartel, and the United States alleged that the defendant, as chief executive officer overseeing dozens of subsidiaries, was a party to such a conspiracy in violation of the Sherman Act of 1890.[267] The conspiracy included other large European producers of carbon products, as well as two of Morgan Crucible's subsidiaries located in the United States.[268] The conspirators produced a variety of carbon products for transport, industrial, and consumer products markets.[269] The United States' principal contention is that Morgan Crucible and the other conspirators had an agreement "to suppress and eliminate competition by fixing, maintaining and coordinating the prices of certain carbon products sold in the United States."[270] For example, the conspirators coordinated price quotations to prospective customers and submitted rigged collusive bids.[271] As a result of the conspiracy, customers in the United States paid higher prices than they would have in a competitive market.[272] If a conspirator unconsciously offered a lower price than agreed upon, Morgan Crucible would object. Then,

264. *Id*. at [1]. As a Category 2 Territory designated for purposes of § 84(7), the United States is not required to make a prima facie showing of evidence at the extradition hearing of a defendant. The United Kingdom's Secretary of State is responsible for issuing such a designation. *See supra* Part II.B.2.b.

265. *R*. (*In re Norris*), EWHC 280, at [5].

266. *Id*.

267. *Id*.

268. *Id*. The American corporations allegedly participating in the cartel are Morganite Inc. in North Carolina, and Morgan Advanced Materials in Pennsylvania. *Id*.

269. *Id*.

270. *R*. (*In re Norris*), EWHC 280, at [5].

271. *Id*.

272. *Id*.

the conspirator would raise the price, claiming a prior miscalculation.[273] Committees coordinated the cartel activities, and the defendant was purportedly a member of the "Summit Committee" until 1998.[274]

The Antitrust Division of the United States Department of Justice conducted an investigation, and in April 1999, a federal Grand Jury in the Eastern District of Pennsylvania issued subpoenas requiring Morgan Crucible to produce certain business records.[275] The FBI discovered the possible existence of a "task force" assembled by the defendant. This task force sought to remove all documentation relating to Morgan Crucible's participation in a price-fixing arrangement, though certain documents remained in a hidden storage location to allow for continued monitoring of the agreement.[276] In November 1999, the conspirators held a meeting at which they discussed the investigation by the United States and developed a "script."[277] This script contained false information regarding the price-fixing activities, and anyone questioned in the course of the investigation was to use it.[278] The defendant allegedly personally approved the script, and upon its distribution, all involved parties rehearsed in preparation for questioning by the Antitrust Division, the FBI, or the Grand Jury.[279]

In November 2002, Morgan Crucible and one of its subsidiaries pleaded guilty to participation in a price-fixing conspiracy.[280] As part of the plea agreement, most of Morgan Crucible's directors, officers, and employees were granted immunity from prosecution; however, the plea agreement excluded four executives, including the defendant.[281] In September 2003, the Grand Jury indicted the defendant on charges of obstruction of justice.[282] A superseding indictment in October added charges of conspiracy to fix prices.[283]

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273. *Id*. at [7].

274. *Id*. at [5].

275. *Id*. at [8].

276. *R.* (*In re Norris*), EWHC 280, at [8].

277. *Id*. at [9].

278. *Id*.

279. *Id*. at [9]-[10].

280. *Id*. at [11].

281. *Id*. The other three executives pleaded guilty to criminal obstruction of justice and are currently imprisoned in the United States. Norris is the only employee who has refused to admit guilt. Osgood & Dunleavy, *supra* note 8, at 36-37.

282. *R.* (*In re Norris*), EWHC 280, at [11].

283. *Id*. at [13].

The United States alleged that the defendant's participation in criminal activities took place between late 1989 and May 2000.[284] Cartel behavior was not actually a crime in the United Kingdom until June 20, 2003, when the competition provisions of the 2002 Enterprise Act entered into force.[285] The "cartel offense" is set out in §§ 199-202; this "provides for a criminal offense for individuals who dishonestly engage in cartel agreements, whether price-fixing, bid rigging, etc."[286] Thus, where cartel behavior takes place after the 2002 Enterprise Act's entry into force, the United Kingdom's "cartel offense," along with § 1 of the Sherman Act,[287] serves to fulfill the dual criminality requirement for extradition between the two nations.[288] The alleged conduct of the defendant took place before price-fixing was a criminal offense in the United Kingdom.[289] To ensure that the dual criminality requirement was met, the United States used the indictment of September 2003, which included the charges of obstruction of justice as a back-up because, prosecutors argued, the underlying conduct could have been charged in the United Kingdom as common law conspiracy to defraud.[290]

The High Court, in conveying the facts of the defendant's case, noted that although there was no doubt that a price-fixing conspiracy did exist, the defendant did not necessarily participate in it.[291] The Court also emphasized that, at that point in the extradition proceedings, the facts against the defendant were merely "unproved and strongly contested allegations."[292]

2. The Defendant's Arguments Against Extradition

Similar to the NatWest Three, Ian Norris applied for judicial review in addition to bringing a number of statutory appeals.[293] In

284. Osgood & Dunleavy, *supra* note 8, at 37.

285. *Id*. at 36.

286. *Id*.

287. *See* 15 U.S.C. § 1 (2004).

288. Osgood & Dunleavy, *supra* note 8, at 36.

289. *Id*.

290. *Id*.

291. *R. (on the application of Norris)*, EWHC 280, at [11].

292. *Id*. at [4].

293. *Id*. at [2]. The statutory appeals brought by Ian Norris are also substantively similar to the statutory appeals brought by David Bermingham, Giles Darby, and Gary Mulgrew. *See supra* Part III.A.2. In fact, the same barrister, Alun Jones QC, represented both the NatWest Three and Ian Norris in

Norris's case, however, the High Court only considered the defendant's application for judicial review.[294] The statutory appeals are still pending.[295] The High Court stated that to consider Norris's statutory appeals before the availability of the Court's judgment in the Bermingham case would be impracticable.[296] But since the issue of the judicial review was of "practical importance" to other cases, the Court stated that Norris's application for judicial review should quickly be heard and decided.[297]

The application for judicial review contested the continued designation of the United States as a Category 2 Territory[298] for purposes of § 84(7) of the 2003 Extradition Act and contested the Secretary of State's persistent failure to remove the United States from that designation.[299] The High Court dismissed the application for judicial review.[300]

3. The Analysis of the High Court

The Court acknowledged that the 2003 Extradition Treaty cannot come into force until both the United Kingdom and the United States ratify it.[301] Therefore, the 1972 Extradition Treaty, as amended by the 1986 Supplementary Extradition Treaty, remained in force at the

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their extradition appeals before the High Court. *See* R. (*In re* Bermingham), EWHC (Admin); *R.* (*In re Norris*), EWHC 280.

294. *Id.* at [3].

295. *Id.* In his statutory appeal, the defendant made three specific arguments against the judgment of the District Judge: (1) the judge should have identified the offenses listed in the extradition request as non-extraditable offenses; (2) the judge should have barred extradition due to the passage of time; and (3) the judge should have held that to extradite the defendant would be to violate his rights under the European Convention on Human Rights. *Id.* at [2]. In his statutory appeal, the defendant also argued against the decision of the Secretary of State: (1) the Secretary of State should have held that to extradite the defendant would be to violate his rights under the European Convention on Human Rights; and (2) the Secretary of State should have found a lack of specialty arrangements between the United Kingdom and the United States. *Id.*

296. *Id.* at [4].

297. *R.* (*In re Norris*), EWHC 280, at [3].

298. Extradition Act 2003 (Designation of Part 2 Territories) Order, 2003, S.I. 2003/3334, art. 3, ¶ 2 (U.K.); *see also supra* Part II.B.2.b.

299. *R.* (*In re Norris*), EWHC 280, at [2].

300. *Id.* at [53].

301. *Id.* at [21].

time of the *Norris* case.[302] Under the 1972 Extradition Treaty, extradition of a subject was ordered only if the evidence was found "sufficient . . . to justify the committal for trial of the person sought."[303] The defendant argued that the District Judge ignored the requirements of the 1972 Extradition Treaty in his case.[304]

The Court noted that in a case such as this, under the 2003 Extradition Act, where the United States is the requesting state, the judge does not have to determine whether the evidence against the defendant is sufficient to require an answer.[305] This process contradicts the process demanded by the 1972 Extradition Treaty,[306] and the United States has relied on the terms of the new Act since the Act came into force on January 1, 2004.[307] At the time that the Court heard arguments in Norris's case on January 12, 2006, the United States had already *not* produced prima facie evidence – the level of evidence required by the 1972 Extradition Treaty – in forty-three or forty-four cases, including the case of the defendant Norris.[308] Therefore, the Court highlighted the need for a quick resolution to this discrepancy.[309]

The Court then detailed some of the support in the United Kingdom for the defendant's arguments. Opposition to the designation of the United States under the 2003 Extradition Act has been considerable.[310] One outspoken critic has been Lord Goodhart QC, member of the House of Lords and spokesman for the Liberal Democrat Party on legal and constitutional affairs.[311] The Court noted that Lord Goodhart had moved to amend the Extradition Act 2003 (Designation of Part 2 Territories) Order to delete any reference to the United States.[312] The amendment was defeated by a vote of fifty to one-hundred-twenty, however, and the United States remains a Category 2 Territory.[313]

Lord Goodhart has also argued that the 2003 Extradition Treaty was not made available to the public until two months after it

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302. *Id.*

303. *Id.* at [22]; *see* 1972 Extradition Treaty, 28 U.S.T. 227, art. IX; *see also supra* Part II.A.1.

304. *R.* (*In re Norris*), EWHC 280, at [22].

305. *Id.* at [27].

306. *Id.*

307. *Id.* at [29].

308. *Id.*

309. *Id.*

310. *See e.g. R.* (*In re Norris*), EWHC 280, at [30]-[33].

311. *Id.* at [30].

312. *Id.* at [31].

313. *Id.*

was signed by the Home Secretary.[314] The Court quoted Lord Goodhart's accusation that the Treaty was "negotiated in secret and received no Parliamentary scrutiny."[315] The Court rejected such a notion, noting the defeat of Lord Goodhart's proposed amendment, the fact that arguments against designation of the United States were fully heard in the House of Lords,[316] and the fact that the Order submitted by the Secretary of State was confirmed in both Houses of Parliament.[317]

The Court noted the failure of the United States to ratify the treaty and its failure to either provide the United Kingdom with a ratification timetable or to answer the United Kingdom's concerns.[318] The Court also commented on the lack of symmetry between the United Kingdom and the United States. Specifically, only the United Kingdom remained bound by the 1972 Extradition Treaty when it was the requesting state – "the procedure which applies on one side of the Atlantic does not apply on the other."[319]

Despite the arguments of the defendant and the lack of reciprocity and symmetry, the Court held that it would be inappropriate to interfere.[320] The Court stated that it could only consider the narrow issue of whether the Secretary of State's decision to maintain the designation of the United States was lawful.[321] The Court was "not entitled to exercise some kind of broad supervisory oversight of the legislative process which led to the order, or the soundness of the affirmative resolution that the order should be made."[322]

Additionally, the Court stated that the 2003 Extradition Act does not contain anything to imply that it is dependent on any bilateral treaties between designated nations and the United Kingdom.[323] The Act also does not demand reciprocity or symmetry,[324] and the terms of a bilateral extradition treaty "must give way to relevant legislation," in this case, the 2003 Extradition Act.[325] Even though the 1972 Extradition Treaty may have still been in force, the Treaty by itself did

314. *Id*. at [32].
315. *Id*.
316. *R. (on the application of Norris)*, EWHC 280, at [32].
317. *Id*. at [26].
318. *Id*. at [33].
319. *Id*. at [34].
320. *Id*. at [52].
321. *Id*. at [40].
322. *R.* (*In re Norris*), EWHC 280, at [40].
323. *Id*. at [43].
324. *Id*.
325. *Id*. at [24].

not create any treaty rights that could be invoked by individuals.[326] The Treaty merely "reflected the relationship agreed [to] between the United Kingdom and the United States for the purposes of extradition, rather than the municipal rights of United Kingdom citizens, enforceable against their own government."[327] Any lack of reciprocity with regards to the 2003 Extradition Treaty and any lack of symmetry with regards to the new Treaty or the 2003 Extradition Act were immaterial.[328]

The Court emphasized that Parliament granted the Secretary of the State the power to make the Extradition Act 2003 (Designation of Part 2 Territories) Order.[329] Therefore, the Secretary of State had the power to order that certain other states, such as the United States, were allowed increased aid in the extradition process.[330] It follows that the Secretary of State also had the ability to alter protections formerly offered to U.K. citizens.[331] The Court concluded that the Secretary of State did not unlawfully breach "any continuing, enforceable, free-standing rights vested in the [defendant]."[332] Therefore, the Court dismissed the application for judicial review.[333]

IV. IMPLICATIONS UNDER THE NEW EXTRADITION REGIME

Opposition to the new extradition regime in place between the United States and the United Kingdom after the ratification of the 2003 Extradition Treaty and the United Kingdom's enactment of the 2003 Extradition Act has been strong. In the United Kingdom, opposition has focused primarily on the lack of reciprocity and on an alleged lack of symmetry.[334] For example, when the United States initiated extradition proceedings against the NatWest Three and Ian Norris, and while the courts were working through their appeals, ratification of the

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326. *Id*. at [44].

327. *Id*.

328. *R.* (*In re Norris*), EWHC 280, at [44]-[45].

329. *Id*. at [45].

330. *Id*.

331. *Id*.

332. *Id*. at [46].

333. *Id*. at [53].

334. *See e.g.*, *Extradition and the NatWest Three: Unintended Consequences*, *supra* note 1, at 54; *Extraditing Bankers: No Place Like Home*, *supra* note 9, at 19; *Extradition: Quaking in Their Pinstripes*, *supra* note 7, at 21.

2003 Extradition Treaty had only taken place in the United Kingdom.[335] Despite this lack of reciprocity, the 2003 Extradition Act was still in place. The United States still had the quicker extradition process available under the Act, with or without the Treaty.[336] The designation of the United States as a Category 2 Territory for purposes of § 84(7) of the 2003 Extradition Act exempts it from any prima facie evidentiary requirements.[337] Therefore, any lessening of evidentiary requirements under the 2003 Extradition Treaty is arguably repetitive. In his extradition appeal, Ian Norris argued that the United States should no longer enjoy its preferential Category 2 designation.[338] This would have left only treaty procedures available to the United States, and without United States ratification, the more stringent 1972 Extradition Treaty evidentiary requirements should have applied. But the High Court rejected Ian Norris's argument and refused to override the Secretary of State's designation order.[339] It is unlikely that any future extradition subjects will make a similar argument because the United States has now ratified the 2003 Extradition Treaty.[340] The United States now enjoys "preferential treatment" under either the Treaty or the Act, and reciprocity is no longer an issue.

But was reciprocity the real problem? Lack of reciprocity may have been frequently denounced by opponents of the extradition regime, but the protest over lack of symmetry seems to be more at the core of the argument. This focuses generally on the notion that evidentiary requirements are less burdensome for the United States, that it is easier for the United States to extradite someone from the United Kingdom than it is for the United Kingdom to extradite someone from then United States, and that this is unjust. The 2003 Extradition Treaty has removed the prima facie evidentiary requirement when the United States seeks extradition, but the United Kingdom must still show probable cause as it had to under the 1972 Extradition Treaty.[341] As the United Kingdom's High Court has acknowledged, "the procedure which applies on one side of the Atlantic does not apply on the other."[342] The lack of an evidentiary showing requirement

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335. Osgood & Dunleavy, *supra* note 8, at 36.

336. *Id.*; *supra* Part II.B.2.b.

337. Extradition Act 2003 (Designation of Part 2 Territories) Order, 2003, S.I. 2003/3334, art. 3, ¶ 2 (U.K.); *supra* Part II.B.2.b.

338. *See supra* Part III.B.2.

339. *See supra* Part III.B.3.

340. 2003 Extradition Treaty, S. TREATY DOC. NO. 108-23; *supra* Part II.B.1.

341. Osgood & Dunleavy, *supra* note 8, at 36.

342. *R.* (*In re Norris*), EWHC 280, at [34].

means that a defendant in an extradition proceeding has little or no opportunity to challenge the sources of the charges against him during his extradition proceeding.[343]

The asymmetry argument might also lack substance. United Kingdom officials state that the new regime simply makes the process fairer to the United States.[344] The United States formerly had to satisfy the more stringent burden of proof, and the new regime will equalize that imbalance.[345] The requirements now may be more similar than some realize. In addition, many nations enjoy treatment similar to, or even more preferential than, the United States. Category 1 Territories are never required to prove a prima facie case,[346] and there are twenty-three other designated Category 2 Territories in addition to the United States.[347] Some of these other Category 2 Territories arguably have more unstable, unjust systems of justice than the United States.[348]

Perhaps British citizens are less upset by the actual changes than by who has been extradited under the new regime, and what those individuals may face once they get to the United States. Though the original intent of the 2003 Extradition Treaty was to make the prosecution of international terrorists easier, the United States has instead directed its efforts at prosecution of white-collar criminals. Over fifty percent of the extradition requests made by the United States since the signing of the 2003 Extradition Treaty have been related to white-collar crime cases.[349] Accordingly, extradition has become a topic of heated debate in the U.K. business community.[350] Business leaders are worried about being sent to the United States because of its aggressive judicial system.[351] United Kingdom citizens are wary of a system where "plea bargaining is prevalent, conviction rates, in some cases, exceed ninety percent, and sentences are becoming increasingly

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343. Graham & Ganatra, *supra* note 14.

344. *Extraditing Bankers: No Place Like Home*, *supra* note 9, at 19.

345. *Id.*; Binning, *supra* note 19, at 1625.

346. *See supra* Part II.B.2.

347. Extradition Act 2003 (Designation of Part 2 Territories) Order, 2003, S.I. 2003/3334, art. 3 (U.K.).

348. Miranda McLachlan, *UK Companies Fear Unfair Extraditions*, INDEP. ON SUNDAY (U.K.), Aug. 6, 2006 (Gr. Brit.), *available at* http://www.independent.co.uk/news/business/news/uk-companies-fear-unfair-extraditions-410675.html (citing Russia, Moldova, and Azerbaijan as examples).

349. Osgood & Dunleavy, *supra* note 8, at 39; Graham & Ganatra, *supra* note 14.

350. Graham & Ganatra, *supra* note 14.

351. *Id.*

severe."[352] The United States also takes an expansive view of extraterritoriality and claims jurisdiction over acts that have such a tenuous link to its territory that most other countries would not make a similar claim; for the United States, a fax or email that comes across its borders may be enough to instigate pursuit of a foreign business leader.[353] British citizens also bemoan the fact that non-resident defendants are rarely released on bail in the United States, so the defendants could spend years in jail waiting for their trials.[354]

Many British business leaders claim that the attacks on white-collar crime by the United States government will reduce British desire to deal with American companies at all.[355] Ian Norris's attorney has argued that if Norris is extradited, it will send the signal that "no English executive with subsidiaries or operations in the United States is safe."[356] British legal analysts have suggested that if U.K. companies are worried about compliance with U.S. criminal law, they should avoid a public listing in the United States, avoid locating in the United States, or advise their executives to avoid traveling to the United States.[357]

Many citizens are worried that with the new extradition regime under the 2003 Extradition Act, the United States will not be the only country they have to worry about.[358] Companies are worried that "it may be hard to tell what is permissible in some countries one day and not permissible the next."[359] Facing trial in the United States may be a daunting prospect, but facing trial in other countries may be worse; as one article noted: "Texan jails may be bad, but Turkish ones?"[360]

The lack of reciprocity and lack of symmetry arguments that have permeated the news in the United Kingdom since the extradition of the NatWest Three are likely smoke screens for Britain's real fears. The legal community in the United Kingdom is in general agreement that the NatWest Three would have been extradited under the old

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352. *Id.*

353. *Id.*

354. *Extraditing Bankers: No Place Like Home*, *supra* note 9, at 19.

355. *Id.*; Howard Flight, *Britain Should Be At No One's Beck and Call*, SUNDAY TELEGRAPH (U.K.), Aug. 6, 2006, *available at* http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2006/08/06/ccflight06.xml

356. *Extraditing Executives: The Long Arm of American Law*, *supra* note 3, at 81.

357. Williams et al., *supra* note 14.

358. *See* McLachlan, *supra* note 348; *Extraditing Bankers: No Place Like Home*, *supra* note 9, at 19.

359. McLachlan, *supra* note 348.

360. *Extraditing Bankers: No Place Like Home*, *supra* note 9, at 19.

extradition arrangements in the same way they have been extradited under the new arrangements.[361] The media attention that the cases of the NatWest Three and Ian Norris have garnered was not due to substantive concerns over lack of reciprocity or lack of symmetry under the new extradition regime between the United States and the United Kingdom. The attention was likely based on concerns over businessmen being extradited to face charges far from home, a situation that should become even more common in today's global economy where a business's activities are rarely confined within one nation's borders.

V. CONCLUSION

The 2003 Extradition Treaty and the 2003 Extradition Act altered extradition procedures between the United Kingdom and the United States. Officials in each country now enjoy a quicker process when seeking to extradite alleged criminals from the other. In addition, evidentiary requirements have changed, easing the requirements for U.S. prosecutors seeking to extradite from the United Kingdom, while failing to provide the same benefits to those on the United Kingdom's side. The two prominent cases discussed above focused significant media attention on the changes, highlighting a lack of reciprocity and lack of symmetry imposed by the Treaty. Though the NatWest Three and Ian Norris would likely have been extradited under the old extradition regime, the new regime changes may significantly impact other white collar defendants in the future. While lack of reciprocity has not been an issue since the recent, and delayed, United States ratification of the Treaty, lack of symmetry is likely to remain a point of controversy in the United Kingdom. The primary concern, though, seems to focus on the fact that British businessmen are now increasingly being extradited far from their homes to face charges in a country with a much tougher stance on white collar crime. The attention given to the NatWest Three and Ian Norris cases highlights the serious, and arguably justified, reservations about the new extradition procedures on the part of U.K. citizens; these reservations may soon call for changes to appropriately correct regime imbalances.

361. Binning, *supra* note 19, at 1625.