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Extradition Between the United States and Great Britain: A Sketch of the 2003 Treaty

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Extradition Between the United States and Great Britain: A Sketch of the 2003 Treaty

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Summary

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

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Senate Response to Initial Objections to 2003 Treaty. The Senate gave its advice and consent to the 2003 Treaty on September 29, 2006, subject to an understanding, two declarations, and three provisos, 152 *Cong. Rec.* S10766-767 (daily ed. Sept. 29, 2006). The understanding, declarations and provisos confirm that (1) federal courts will retain the authority to bar extradition when a request fails to meet the demands of 2003 Treaty; (2) the 2003 Treaty does not obligate the United States to take any action proscribed by the Constitution; (3) the parties have disclaimed any interest in prosecuting offenses committed in Northern Ireland prior to and addressed in the Belfast/Good Friday Agreement. It also urges the Secretary of State to consider carefully any requests for the extradition of a fugitive who was previous acquitted, and after the Treaty becomes effective it requires annual reports from the Secretary on the number and disposition of extradition requests under the Treaty. Critics had earlier objected to the Treaty on the grounds that: *It eliminates the political offense for any offense allegedly involving violence or weapons, including any solicitation, conspiracy or attempt to commit such*

crimes: It does and more. There is likely to be little consensus over whether this is objectionable. It is the issue that dominated debate over the Supplementary Treaty. There is little disagreement over the origins or original rationale of the exception. The difficulty comes in defining the exception's proper scope. Should it protect fleeing insurgents from prosecution and punishment for acts of violence they committed against the military forces of the government they sought to overthrow? Absent a treaty bar, United States courts have held that it should apply to crimes committed incidental to and in furtherance of rebellion or similar political disturbance. Reliance upon the exception led to the exemptions to the exception found in the proposed Supplementary Treaty. The Senate accepted a somewhat reduced list of exemptions to the political offense exception in exchange for expanded judicial authority to verify probable cause and the bona fides of a request. Several of the enlargements — those dealing with firearms possession, conspiracy, property damage, involuntary manslaughter, unlawful detention (serious or otherwise) — repeal specific Senate amendments to the Supplementary Treaty as originally transmitted to the Senate. The inclusion of threats, firearms, possession of explosives, property damage (independent of bodily injury), and accessories after the fact appears to carry the provision well beyond the coverage of even the more ambitious of such provisions in our other recent extradition treaties. Its sweep is made all the more dramatic by removal of the judicial safety valve found in the Supplementary Treaty's "improper motives" Article.

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The Senate responded with the explicit understanding that as part of the extradition process normally conducted under the laws of the United States, "a United States judge makes determinations regarding the application of the political offense exception." The understanding is reenforced by the second declaration confirming the role of the courts in the extradition process and by the provisos indicating that the 2003 Treaty is not designed to permit the prosecution of fugitives from Northern Ireland for offenses committed prior to the Good Friday Agreement.

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

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

Eliminates the need for any showing by the United Kingdom of facts sufficient to show the person requested is guilty of the crime charged — mere unsupported allegations are sufficient: The Supplementary Treaty's probable cause article reenforces the benefits of article 3. While the 2003 Treaty strikes (1) the Supplementary Treaty language insuring an individual the right to contest the existence of probable cause to justify extradition, and (2) the original treaty language on the weight of evidence required for extradition, it does insist that the documentation accompanying a request include "such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested," *2003 Treaty*, Art.8(3)(c).

Allows for extradition even if no U.S. federal law is violated: It does, but in a less dramatic manner than the objection might imply. As a general rule, the 2003 Treaty, like its predecessor, limits extradition to misconduct outlawed in both countries. The exception is found in cases of extraterritoriality. The existing treaty obligates the Parties to extradite with respect to crimes committed within the jurisdiction of the requesting country. Historically, the United States has construed this language to mean offenses committed within the territory of the requesting country. As the United States began to assert its criminal extraterritorial jurisdiction more regularly, it began to negotiate extradition treaties that either permitted or required extradition to the United States with respect to crimes committed outside this country.

Our present treaty favors the historical model. The 2003 Treaty requires extradition in extraterritorial cases where the law of the two countries would apply comparably; but permits extradition in other cases. Thus, the United States would be permitted to honor a British extradition request for an individual charged with a violation of British law on the basis of conduct committed entirely within this country (even if the conduct were completely lawful under our laws). And it would be required to honor a request based upon conduct here but in violation of a British version of a statute like 18 U.S.C. 2339B (providing material support to terrorist organizations) or 18 U.S.C. 956 (conspiracy to commit various acts of violence or property damage overseas).

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

Our existing treaty with the United Kingdom bars extradition if trial would be barred by the lapse of time under the laws of either country. The Supplementary Treaty submitted to the Senate contained an amendment which would have limited this clause to instances barred by the laws of the requesting country. The change was thought to benefit the United Kingdom in terrorism cases which were not subject to a statute of limitations. The Senate dropped the amendment from the Supplementary Treaty. Since then, a number of the treaties submitted to the Senate continue to contain a statute of limitations clause, but perhaps an equal number of others either silently omit the clause or include a clause specifically declaring that the expiration of a period of limitation is no

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bar to extradition. The 2003 Treaty eliminates the passage of time as a defense altogether regardless of the nature of the crime.

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

Allows for seizure of assets by the United Kingdom: Crime-related assets are subject to seizure under the laws of the United Kingdom and of the United States under various circumstances, some of which implement or supplement our treaty obligations. The existing treaty permits the transfer of evidence and assets from one country to the another. Facially, the 2003 Treaty's treatment of forfeitable property differs from its predecessor in two respects. It describes the property subject to confiscation more broadly and it omits any reference to the rights of claimants. The existing treaty provision is limited to proceeds rather than items "connected with the offense," and only extends to items in the actual possession of the individual to be extradited. The changes reflect a greater federal emphasis on forfeiture as a law enforcement tool than was the case when the existing treaty was negotiated. Federal law now authorizes confiscation of property derived from, or in some instances used to facilitate, any number of federal crimes including terrorism, organized crime, drug trafficking, and other profit generating crimes. When they are involved in financial transactions in this country, it permits the confiscation of the proceeds from drug trafficking, crimes of violence, fraud, public corruption or smuggling in violation of the laws of other countries.

Federal law also provides for federal court orders freezing property located in this country but subject to confiscation under foreign forfeiture laws comparable to our own, and for enforcement of foreign forfeiture orders by federal courts under some circumstances. Moreover, it vests the Attorney General with the power to share the proceedings from federal confiscations with foreign countries pursuant to an international agreement to do so. The innocent claimant protections of these statutes would seem to mitigate any adverse consequences attributable to the omission of any reference to the rights of claimants in the 2003 Treaty.

Allows for extradition for one offense, and then subsequent prosecution in the UK for an unrelated offense (thus eliminating the time-honored "rule of speciality"): The 2003 Treaty continues the rule in effect, but allows the United States to consent to deviation by the Great Britain and vice versa. The rule of specialty permits individuals to be tried and/or punished only for the crimes for which they are extradited. The rule is designed to ensure that an individual is not tried or punished for a crime for which he would not have been extradited. And the elimination of the rule might be particularly unfair where the individual sought has waived extradition. For purposes of American law, the rule is a matter of statutory construction, and consequently can be overcome by a provision in a later treaty. Most recent treaties permit the requested country to consent

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to trial or punishment for offenses other than those for which the individual was extradited. Even without a specific treaty clause, federal courts have held that the requested country may consent to trial or punishment for offenses other than those for which extradition was granted. Federal courts are divided, however, over the question of whether an individual may successfully raise the rule on behalf of the country of refuge. Our existing treaty with Great Britain codifies the rule and has no consent exception. The 2003 Treaty preserves the rule but contains an explicit consent exception.

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

Other Treaty Clauses. The 2003 Treaty has other clauses, some of them a departure from our earlier benefits and obligations. *Extradition to Third Countries or Entities*: As in the case with our existing treaty with Great Britain, the specialty ban on prosecution of additional crimes often includes a ban on re-extradition to a third country. Beginning in the 106th Congress, several extradition treaties submitted to the Senate bar re-extradition to international tribunals without consent. This may have been done at our behest with an eye to the International Criminal Court; or at the behest of our treaty partners with an eye to our statutory provisions relating to the Yugoslav and Rwandan tribunals; or both; or for some other reason. In any event, the 2003 Treaty may yield the same result through its more cryptic reference to "onward extradition."

In the case of multiple extradition requests, the 2003 Treaty maintains essentially the same standards for dealing with requests from a third country that elects to submit a contemporaneous request to the country of refuge rather than submitting a subsequent request to the country to whom extradition has been granted. The only real difference is that the existing treaty specifically mentions the nationality of the individual sought as a factor to be considered, while the Parties may count nationality among the unmentioned "relevant factors" that the 2003 Treaty considers in play. It may be, however, that the Parties have rejected nationality as a relevant extradition factor under any circumstances. After all, elsewhere in the 2003 Treaty they have denied themselves the right to refuse to extradite on the basis of nationality, and have removed the identification of the nationality of the person sought from the information that must be provided with an extradition request.

Double Jeopardy: Ordinarily, an individual cannot be extradited on the basis of conduct for which he has already been tried. Our existing treaty with Great Britain bars extradition if prosecution would be precluded in the country of refuge by virtue of any earlier trial there, or in the requesting country, or in a third country. The 2003 Treaty prohibits extradition where the individual has been tried in the country of refuge, and allows a country of refuge to deny a request for an individual tried in a third country. A Senate proviso urges the Secretary of State to be sensitive to the possibility of unfair

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treatment when considering a British extradition request for a fugitive previously acquitted there.

Nationality: Some nations prefer not to extradite their own citizens and have insisted that their extradition treaties preserve their right to decline requests to extradite their own nationals. The United States opposes his view. Our existing treaty with Great Britain does not address the issue directly and as a consequence the United States may not decline to extradite an American to Great Britain solely on the grounds of citizenship. Like several of our more recent extradition agreements with common law countries, the 2003 Treaty makes this result explicit.

Waiver: Neither federal law nor most early treaties provide any obvious mechanism under which an individual might waive extradition proceedings in this country. This can work to the inconvenience of both countries involved in cases where the delay is of no real benefit to the individual sought. The present treaty does not address the issue, but like most modern treaties, the 2003 Treaty has a waiver clause.

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

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

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

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

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