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International Journal of Law, Crime and Justice

journal homepage: www.elsevier.com/locate/ijlcrj

INTERNATIONAL
JOURNAL OF
LAW
CRIME
AND
JUSTICE

Resisting cooperation against crime: Britain's extradition controversy, 2003–2015

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ABSTRACT

International extradition serves as a crucial tool for fighting crime. In the era of globalization, the growth of transnational crime has led governments to facilitate extradition and relax some of the protections and safeguards that this process traditionally includes. Does this trend toward easier extradition enjoy public support? The recent debate over Britain's extradition arrangements provides insight into this question. This debate demonstrates a sharp divide between the law-enforcement community, on the one hand, and, on the other hand, the public, politicians, and NGOs. Representative of the judiciary, prosecution, and police supported the removal of barriers to extradition, whereas politicians and NGOs – highlighting flaws in the justice systems of the United States and EU countries – demanded greater protections. The British experience enriches our understanding of international extradition and offers a unique window into the domestic political controversy surrounding it. It shows that public support for extradition is less robust than we might expect – a cause for concern in the present era of rising nationalism.

Extradition is a central instrument of international cooperation in the suppression of crime. It prevents criminals from escaping justice by fleeing to a foreign country and facilitates the punishment of criminal conduct. At the same time, extradition raises serious concerns over the placing of individuals in the hands of a foreign legal system and the likelihood that they might not receive a fair treatment. The weight of these concerns had risen with the advent of international human rights in the post-World War II era, leading to the incorporation of various protections and safeguards in extradition treaties and legislation. Yet the growth of transnational crime in recent years has inspired a countertrend: governments increasingly seek to facilitate extradition by removing barriers and limiting the protections afforded to the requested person.

Does the public support this trend? Do citizens and other domestic actors favor easier, faster extradition to better combat crime? Or do they prefer that it be harder to send a person to be tried and imprisoned abroad? Existing literature examines extradition law, but tells us little about its underlying politics, especially within the domestic arena. As one author notes, the current understanding of extradition “relies on state-centric models of international relations ... overlook[ing] the important ways in which domestic politics shapes and influences state behavior” (Magnuson, 2012, 839).

This article uses Britain's debate over extradition reform to shed light on the domestic political controversy surrounding extradition. Britain is, in fact, an unlikely site for such a controversy given its longstanding commitment to extradition, dating back to the 18th century. Yet the 2003 reform of the Extradition Act to implement the European Arrest Warrant, alongside the signing of a new extradition treaty with the United States, spawned a heated public debate that lasted until 2015. This debate – encompassing several official inquiries, numerous parliamentary discussions, acts of public protest, and extensive media coverage – reveals a sharp fault line between two opposing views. On the one hand, members of the public, politicians, and NGOs showed skepticism and wariness toward the relaxing of extradition safeguards and restrictions, arguing that British citizens should preferably be tried in Britain rather

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<http://dx.doi.org/10.1016/j.ijlcrj.2017.10.004>

Received 13 July 2017; Received in revised form 25 October 2017; Accepted 26 October 2017

Available online 02 November 2017

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than be extradited. They also expressed strong reservations about the standards of justice in the United States and across the European Union (EU) which, in their view, fell below British standards. On the other hand, members of the law-enforcement community – judges, police, prosecutors, and some lawyers – expressed a much more favorable view of extradition as a cooperative tool for fighting crime and rejected proposals to make extradition more difficult.

By providing an in-depth, nuanced examination of the public debate over extradition, this article enhances and enriches our understanding of international cooperation against crime. It shows that while extradition has been a cornerstone of anti-crime efforts for at least two hundred years, there is still widespread skepticism toward this instrument, with many doubting the advisability and fairness of sending a person to be tried and punished by a foreign legal system. In other words, public support for extradition appears shaky, even in a country long committed to the full use of this mechanism. This finding carries much importance in the current era of rising nationalist sentiments worldwide. Such sentiments might limit governments' ability to use extradition effectively and efficiently in the fight against crime.

1. The balance between fighting crime and protecting the individual: A swinging pendulum

Extradition is based on states' shared interest in curbing crime and punishing criminal conduct. Through extradition, states seek to ensure that offenders do not escape the law by crossing national borders. At the same time, states are reluctant to automatically and unconditionally extradite wanted persons and thereby limit their own legal sovereignty. Extradition treaties and domestic extradition laws therefore typically include a set of conditions and safeguards. Among those are the principle of double criminality, a requirement of sufficient evidence to support the extradition request, the political offense exception, and a prohibition on extraditing one's nationals. These conditions and requirements vary across treaties and between states; yet in all countries extradition is subject to certain conditions and requirements whose purpose is, first and foremost, to safeguard the interests of states (Boister, 2012, 217–227). The individual – the extradited person themselves – was traditionally seen as a mere object of the proceedings, but not their subject.

In the post-World War II era, the growing importance of human rights turned individuals into legal subjects of the extradition process: states were no longer free to surrender individuals without regard to their rights (Bassiouni, 1989, 469; Dugard and Wyngaert, 1998). Many extradition treaties, for example, allow extradition to be refused unless the requesting country provides assurances that the death penalty will not be imposed. More broadly, some countries have established a human-rights bar to extradition in their domestic legislation. This allows courts to examine the different elements of the extradition process – the substantive crime, procedures, penalties, and prison conditions – and whether they adhere to norms of human rights and due process (Boister, 2012, 228–230).

Yet recent years have seen a countertrend. As Bassiouni (1989, 470) argues:

[T]he advent of modern manifestations of crime have tempted many states to revert back to an earlier historical period in the extradition practice where the individual was merely an object and not a subject of the proceedings. This has meant a reduction in the rights and defenses the individual can claim in extradition proceedings as well as an increased level of cooperation among states who have the same ideological and political perspectives.

I provide three examples of this trend toward facilitating extradition and curtailing the protections afforded to the individual.

In common-law countries, the extradition tribunal traditionally had to decide whether there is sufficient evidence to justify extradition. In Britain, the requesting state had to establish a prima facie case against the fugitive in a British court according to English rules of evidence. This evidentiary requirement posed an obstacle for countries requesting extradition, especially those belonging in the civil-law tradition. These countries' complaints led Britain to dispense with the prima-facie requirement with respect to States Parties to the European Convention on Extradition (Home Office, 2011, 256–284). In Australia, the 1988 reform of the Extradition Act established a “no evidence” requirement as a default rule. Critics charged that the abolition of the prima-facie requirement, part of “a trend towards streamlining the extradition process so as to facilitate extradition,” came “at the expense of individual rights” (Joint Standing Committee on Treaties, 2001, 22, 28).

A second expression of the trend toward easier extradition is the weakening of the prohibition on extraditing one's citizens, which is popular among civil-law countries. Common-law countries have long denounced this prohibition as an illegitimate relic of nationalist sentiments (Nadelmann, 1993, 847). The United States has sought to “convince individual countries and the world community that refusal of extradition on the ground of nationality is no longer appropriate, given the ease of flight and the increasingly transnational nature of crime” (U.S. Department of State, 2001). American pressure led Colombia to remove the ban on extraditing nationals in 1997, and Honduras narrowed the scope of its own prohibition in 2012 (Dudley, 2013). In 1988, the Netherlands revised its law to allow extradition of citizens, on the condition that they be returned for the serving of their sentence. Israel made a similar amendment in 2001.

The European Arrest Warrant (EAW), established in 2002, stands as the most significant manifestation of the trend toward easing extradition. It creates a fast-track procedure for surrender between member states of the European Union, based on the principle of mutual recognition of judicial decisions – a principle that requires that a decision made by a judicial authority in one member-state receive full and direct effect throughout the EU. This means that, under the EAW, national judicial authorities must accept a foreign warrant without inquiring into the underlying facts and circumstances. The EAW also seeks to remove other barriers, such as the ability of the Executive to block extradition – a feature of traditional extradition arrangements. Instead, the EAW's system of surrender relies on courts alone, with minimum formality and no involvement of the Executive. Importantly, under the EAW, nationality is not a ground for refusing extradition: EU countries must extradite their citizens to fellow members (Home Office, 2011, 91, 100).

The aforementioned developments illustrate the tensions inherent in international extradition. On the one hand, the public interest requires extradition to work promptly and efficiently, especially in the age of globalization – when modern communication and transportation contribute to the growth of international crime (UNODC, 2010). On the other hand, extradition poses grave problems to the extradited person, who will face trial and possibly punishment in a foreign country. The extradition process must therefore include safeguards to guarantee individual rights and due process and to prevent injustice (Home Office, 2011, 21). The balance between these conflicting goals – fighting crime and ensuring justice for persons facing extradition – shapes extradition law and practice. As we have seen, this balance may shift over time. But how do governments strike this balance? How do different actors – including the public – view the right balance? Who supports and who opposes the current trend of easier, faster extradition at the expense of the requested person's protections? Britain's extradition debate provides us with a unique view into this dilemma.

2. Britain's extradition debate: an overview

Extradition can become a deeply political issue that raises a domestic political controversy, given its far-reaching implications for sovereignty and individual rights. For example, in Germany, Poland, and Cyprus, the implementation of the European Arrest Warrant ran into constitutional problems due to these countries' prohibition on the extradition of nationals (Fichera, 2009). In Australia, the government's 2016 decision to ratify an extradition treaty with China triggered a heated public debate (Joint Standing Committee on Treaties, 2016). We know little, however, about the origins and dynamics of the domestic tensions surrounding extradition. Accounts of the politics of extradition are rare (Nadelmann, 1993; Pyle, 2001), and they provide little insight into the conflicting preferences of different domestic actors.

The debate over Britain's extradition reform (2003–2015) offers an excellent window into the extradition dilemma and its domestic politics. The public nature of the debate – which included several official inquiries, numerous parliamentary discussions, acts of public protest, and extensive media coverage – provides us with a unique insight into the concerns that extradition raises and the sentiments that fuel them. Indeed, it demonstrates how contentious extradition might become. Furthermore, Britain is an unlikely setting for such controversy, making this case particularly interesting. First, Britain is a country that adheres to the rule of law, with a long history of extradition relations dating back to the late 18th century. In fact, Britain has traditionally shown a stronger commitment to the idea of extradition than most European countries. Whereas the civil-law countries of Europe have restricted or prohibited the extradition of their citizens, Britain has surrendered its own citizens (Shearer, 1971, 97–110). Given Britain's long-standing support for extradition, one would not have expected the reform of the 2000s to trigger such an intense debate and public outcry. Second, it was not extradition to authoritarian countries with a weak rule of law that fueled Britain's extradition debate. The controversy surrounded Britain's extradition relations with democratic countries that respect the rule of law: the United States and EU members. One might have expected that extradition to these countries would generate little controversy, yet in reality it was the subject of a heated political debate, severe media criticism, and significant public concern.

At the center of the controversy stood the Extradition Act 2003, which was passed to modernize and streamline the way in which extradition requests submitted to Britain are processed. This reform arose from concerns about the complexity of existing extradition arrangements and the delay they caused, which made them inadequate as crime became increasingly global (Home Office, 2011, 69–70). The establishment of the European Arrest Warrant in 2002 and the need to incorporate it into British law provided another trigger for the 2003 reform.

The 2003 Extradition Act established a new extradition regime. Part 1 of the Act implements the European Arrest Warrant and lays out a simplified procedure for dealing with extradition to Category 1 territories – in effect, EU members. Part 2 of the Act deals with extradition to Category 2 territories – countries outside the EU with which Britain has extradition arrangements – and simplifies the extradition process to those as well. One of those Category 2 countries is the United States, with whom Britain signed a new extradition treaty in 2003. Criticism of that treaty and of the Extradition Act began during the Act's legislative process and escalated over time, fueled by a growing number of high-profile, controversial cases of extradition. Amid rising public concern, in October 2010 the government appointed a panel, chaired by Sir Scott Baker, to review Britain's extradition arrangements (hereafter Baker Panel). The panel's mandate, defined by the government, laid out the four main points of contention.

The first issue was an initiative for establishing a “forum bar” as a barrier to extradition. Such a bar would allow a judge to refuse an extradition if the alleged offense took place in Britain, and Britain is determined to be the appropriate forum, that is, the right place for a trial. Such a safeguard reflects a preference for trying British citizens at home and a reluctance to have them tried by a foreign judicial system.

The second issue concerned the Home Secretary's role. Whereas previously the Home Secretary enjoyed a significant discretion to block extradition, the 2003 Act eliminated most of that authority. Indeed, one of the Act's purposes was to increase the judiciary's role in the extradition process at the expense of the Executive (Home Office, 2011, 285–286). Critics, however, called for maintaining the Home Secretary's authority as a check on judicial power.

The third set of concerns related to specific judicial systems: those of EU members. Critics suggested that in certain EU countries prison conditions are poor and the right to a fair trial is not fully guaranteed, casting doubt on the EAW's fairness. The fourth set of concerns similarly revolved around a specific justice system: that of the United States. From the extensive use of plea bargains to broad extraterritorial jurisdiction – American standards of justice were deemed by critics to be low, making extradition to the United States unjust (Home Office, 2011, 8).

2.1. The fault line between law enforcers and the public

It was the Labour government that crafted or negotiated the instruments at the heart of Britain's extradition debate: the European Arrest Warrant, the 2003 U.S.-UK extradition treaty, and the 2003 Extradition Act. Yet as the debate over extradition heated up and came to involve several bodies of inquiry, Labour politicians took a back seat and did not present a strong defense of the arrangements they established. It should be noted that the establishment of these arrangements took place in the aftermath of the terrorist attacks of September 11, 2001 – a seminal event that created strong pressure for enhanced law-enforcement cooperation. Yet practical experience over several years revealed the shortcomings of these mechanisms and raised public concern, making them difficult for politicians to defend. Instead, the strongest support for Britain's extradition arrangements came from the law-enforcement and legal communities. Members of the law-enforcement community – police, prosecutors, and judges – are responsible for the day-to-day operation of the extradition process. As such, they have first-hand experience and understanding of the challenges and dilemmas of extradition, and they can assess the value and effectiveness of extradition as a law-enforcement tool. Representatives of this community participated in the public debate and generally expressed support for the existing arrangements and for the goal of facilitating extradition. Members of the legal community – lawyers associations and individual lawyers – also took part in the debate, exhibiting some variation: while certain lawyers and associations came out in favor of the existing arrangements, others expressed criticism and highlighted flaws. For the purpose of the following analysis, I group together those members of the law-enforcement and legal communities that favor easier, more efficient extradition and label their position the “law-enforcement view.”

The analysis contrasts the law-enforcement view with the “popular view” that is skeptical and apprehensive about the liberalization of extradition arrangements and sees unfairness in the removal of protections and safeguards. Proponents of the popular view included politicians (especially from the right), the media, members of the public, as well as NGOs concerned with human rights in the justice system: Liberty, JUSTICE, and Fair Trials International.

The contrast between the law enforcement and popular views can be clearly seen by comparing the Baker Panel with the three other official inquiries into Britain's extradition arrangements. Chaired by a former judge and consisting of two additional lawyers, the Baker Panel expressed the law-enforcement view: it sounded strong support for extradition, dismissed concerns about the unfairness of extradition arrangements, and opposed the introduction of additional safeguards, which would make extradition more difficult. Unfairness concerns and demands for safeguards received a more favorable hearing from the three *political* bodies – parliamentary committees – that examined the subject: the House of Lords and House of Commons' Joint Committee on Human Rights (reported June 2011); the House of Commons' Home Affairs Committee (reported March 2012); and the House of Lords' Select Committee on Extradition Law (reported February 2015).

Why this cleavage? A large body of literature suggests that trade and immigration – two key expressions of globalization – could meet resistance inspired by xenophobic or ethnocentric sentiments (e.g., Hainmueller and Hiscox, 2010; Margalit, 2012). Extradition is a manifestation of global integration that might elicit similar objections. Members of the public holding ethnocentric attitudes might view foreign legal systems as inferior and, therefore, as inappropriate partners (Hammond and Axelrod, 2006). The public's attitude may also reflect nationalist tendencies, which would lead to the rejection of extradition as undermining national legal sovereignty. Ethnocentric and nationalist sentiments might therefore drive public resistance to extradition as unfair and unjust – a threatening encroachment by foreign judicial systems. The implication of such view is that the state's nationals should not come under the authority of foreign judicial systems, which have lower standards of justice. Rather, nationals should receive justice from their natural, local judges and are entitled to the protection of their own state and its laws (Shearer, 1966, 277).

Politicians who seek public support might follow the public sentiment by arguing against easy extradition and by demanding protections for citizens. NGOs are also likely to subscribe to the popular view. Such a view emphasizes fairness, justice, and the protection of individual rights, and it is closer to the values typically promoted by NGOs than the law-enforcement view's emphasis on apprehending and prosecuting offenders (Welch 2001).

It is precisely this emphasis that leads members of the law-enforcement community to support swift, efficient extradition, even in the face of varying standards of justice across countries. After all, the mission of judges, prosecutors, and the police is to enforce the law and to secure compliance with legal rules and decisions. These actors naturally see much value in extradition, which aims to improve the enforcement of laws across borders and strengthen the rule of law.

Furthermore, extradition requires *interorganizational trust* – an expectation that foreign organizations or institutions will act in a reliable and fair manner (Zaheer and Harris, 2006). Indeed, the surrender of a wanted person is based on trust that the foreign legal system meets standards of due process. Such trust is likely to arise within professional communities, such as those of judges or prosecutors. Members of these communities have similar missions and professional expertise, and they face common problems and challenges. Such similarities foster trust and cooperative interaction between members of the community (Slaughter, 2003).

Self-interest may also be involved. Professionals typically seek to maximize their status and prestige both inside and outside the profession (Abbott, 1981), and this goal also characterizes members of the law-enforcement community. As the economic theory of judicial behavior suggests, judges are driven by the pursuit of power, prestige, and reputation (Posner, 1993; Schauer, 2000). Extradition may help, as it extends the authority and influence of courts across borders, and thereby boosts the power and status of judges. It also enhances the authority and extraterritorial reach of prosecutors, who can have persons extradited from abroad.

The following analysis highlights the contrast between the law-enforcement's view of extradition and that of the public and its representatives, as reflected by the four key issues in Britain's extradition debate: forum bar, the role of the Executive, the European Arrest Warrant, and the U.S.-UK extradition treaty. The analysis draws on a wealth of written sources: reports of the various parliamentary committees as well as the oral and written evidence brought before them; the report of the government-appointed Baker Panel and the evidence before it; records of debates in the House of Commons and House of Lords; and media coverage of extradition

from a variety of newspapers. This rich empirical material allows us to piece together a nuanced account of Britain's extradition controversy and understand the motivations and concerns of the opposing sides.

3. Four dilemmas in Britain's extradition debate

3.1. *Forum bar*

In cases where the alleged offense took place in Britain, a forum bar would allow the judge to determine that the appropriate venue for the trial is a British court, rather than a foreign court. The 2003 Act lacked a forum bar, but calls for introducing such a safeguard followed several high-profile, controversial cases in which the United States asked for the extradition of British citizens who committed the alleged offense on British soil. One case was that of the “NatWest Three” – three British businessmen who were extradited to the United States in 2006 to be charged with defrauding a British bank, which employed them in London. A second case concerned Gary McKinnon who, in 2001–2002, gained unauthorized access from a home computer in London to U.S. government computers, including those of the Army, Navy, Air Force, the Department of Defense, and NASA. The United States requested McKinnon's extradition in 2004, and British courts found him extraditable. Yet in the face of intensifying public pressure, and after it was revealed that McKinnon suffered from Asperger's syndrome, the Home Secretary declined to order his extradition in 2012, citing incompatibility with human rights. For critics, these and other cases epitomized the injustice of Britain's extradition system. They argued that British citizens who engaged in criminal conduct in Britain should not be extradited. If they are tried at all, they should be tried in Britain.

3.1.1. *Law-enforcement view*

A forum bar provides grounds for refusing extradition, especially that of British citizens. The law-enforcement view, as expressed by the jurist-based Baker Panel, repudiated the forum bar in favor of speedy, effective extradition proceedings that serve to fight crime. According to the panel, a forum bar was unnecessary, as there was no evidence that any injustice was being caused by existing arrangements. Furthermore, panel members argued that a forum bar would be a step backward from the achievements of the 2003 Act. It would complicate and slow down the extradition process, add to the cost of the proceedings without any corresponding benefit, and transfer decision-making on forum to the courts, who are less equipped to deal with this issue than prosecutors. “The forum bar would require a detailed investigation of the circumstances of the particular case, this would be a source of delay and undermine international cooperation in the fight against crime” (Home Office, 2011, 227–230).

Recognizing the role of ethnocentrism and nationalism in fueling resistance to extradition, members of the Baker Panel suggested that nationality “is actually one of the issues that lies at the heart of many people's misgivings about the extradition system” (Select Committee on Extradition Law, 2015b, 54). Yet the panel explicitly rejected the sentiment that a British national should preferably be tried in Britain rather than abroad. An obligation to prosecute citizens locally rather than extradite them, the panel reasoned, interferes with the principle of prosecutorial discretion, and it does not serve the public interest in having effective extradition procedures: when the crime affects another jurisdiction and can be effectively tried there, there is no reason to insist on a local trial. The panel's report approvingly cited a 19th century commentator who argued that “The refusal to surrender citizens must, therefore, be regarded as resting upon sentimental considerations and an exaggerated notion of the protection which is due by a state to its subjects” (Home Office, 2011, 222, 227–228).

The Crown Prosecution Service echoed the concern that a forum bar might complicate extradition proceedings and “will ultimately place the extradition courts in what may be an undesirable position: deciding in which jurisdictions prosecutions should occur” (Home Office, 2012, written representation). According to extradition judges at the Westminster Magistrates' Courts, a forum bar will “generate extra hours of litigation,” resulting in an “inevitable delay in extradition hearings” (Home Office, 2012, written representation). The Association of Chief Police Officers argued that a forum bar would “frustrate the extradition process” and would not “serve the long-term interests of mutual legal assistance and law enforcement relationships internationally” (Home Office, 2012, written representation).

3.1.2. *Popular view*

Supporters of a forum bar argued that a person should preferably be tried in Britain rather than be put “on a plane in chains to the far side of the world to be locked up in prison” (Select Committee on Extradition Law, 2015a, 51). These supporters included politicians, NGOs, members of the public, and the parliamentary committees. They made a variety of fairness-based claims as to why courts should have the discretion to bar extradition on the grounds that a person is more appropriately tried in Britain. Some of the arguments raised issues such as the transparency of decision-making on forum and courts' ability to take into account all relevant considerations. The House of Commons' Home Affairs Committee, for example, criticized the making of forum decisions “by prosecutors, behind closed doors, without the accused having any opportunity to make representations.” Instead, the principles of human rights, democracy, and the rule of law require that forum decisions be taken by a judge in an open court, allowing the defendant an opportunity to present his case (Home Affairs Committee, 2012, 11). Other arguments concerned the onerous burden of a trial abroad: separation of the extradited person from family, friends, and a support network, as well as lack of familiarity with the foreign country's laws and language. By creating a presumption in favor of a trial in Britain, argued several NGOs, a person will be able to avoid the “lengthy trauma of extradition” and go through a shorter judicial process (Select Committee on Extradition Law, 2015b, 747, 751).

But other arguments carried a more nationalist flavor: a preference for a trial in a British court as a necessary protection for British

citizens. MP Dominic Raab (Con) argued that lawmakers are charged “with the duty of preserving British standards of justice and ... have the ultimate responsibility for protecting our citizens.” MP Charlie Elphicke (Con) suggested that “people in this country should be tried by their peers” (HC Deb 24 November 2011, cc153WH, 172WH). As leader of the opposition, David Cameron declared in 2009 that “it should still mean something to be a British citizen – with the full protection of the British parliament, rather than the British government trying to send you off to a foreign court” (Drury, 2009). MP Dominic Grieve (Con) criticized the government’s willingness to easily extradite British citizens as combining “an extraordinary internationalism and an attitude that state borders are rather archaic with a reluctance to stand up for their own. That is troubling, as it undermines public confidence in the state, and will ultimately, and corrosively, undermine public confidence in the criminal justice system” (HC Deb 12 July 2006, c1419).

E-mails sent by British citizens to the Baker Panel similarly reflected a public sentiment with a nationalist tinge. One citizen argued that “If we allow America or any other country to demand extradition of British people for supposed crimes they have committed in Britain, we are betraying them and our own legal system. When are our politicians going to start looking after us?” Another citizen demanded “British courts for British people” (Home Office, 2012, public views). The slogan “British Justice for British Citizens” served as a rallying cry for opponents of existing extradition arrangements and appeared in the public campaigns that they waged. In 2011, a petition carrying nearly 150,000 signatures called on the government not to extradite a British citizen named Babar Ahmad to the United States, where he was accused of supporting terrorism, and, instead, “put him on trial in the UK and support British Justice for British Citizens.”¹

The government ultimately heeded the calls for a forum bar. In May 2012, Home Secretary Theresa May announced her intention to introduce a forum bar to address the perceived lack of transparency in the extradition process and to restore public and parliamentary confidence in extradition arrangements (HC Deb 16 October 2012, c165). The forum bar, as incorporated into the Extradition Act in 2013, allows courts to bar extradition if a substantial measure of the criminal activity took place in Britain and considerations of justice – such as the location of witnesses and the offender’s connections with Britain – suggest that extradition should not take place. Yet if British prosecuting authorities produce a certificate to the effect that they would not prosecute the person in Britain, extradition may not be barred. The NGOs criticized this formulation of the forum bar as lacking teeth and skewed in favor of extradition, since it allows courts to consider only specific considerations of justice and grants veto power to the prosecuting authorities (Select Committee on Extradition Law, 2015a, 47–49).

Overall, the dispute over the forum bar shows a clear fault line: on the one hand, actors who seek to facilitate extradition in the name of efficient law enforcement and efforts against crime; and, on the other hand, those wishing to protect British nationals from foreign justice systems by making extradition difficult.

3.2. *The role of the executive in extradition*

Extradition was traditionally an act of sovereignty, with the final word left to the Executive. Under Britain’s previous extradition legislation, the Home Secretary could ultimately decide not to order a person’s surrender, based on any relevant circumstances. The 2003 reform of the Extradition Act aimed, among others, to limit the Executive’s role in the extradition process and to increase the role of the judiciary in order to speed up the process and “remove any perception that [extradition] decisions are taken for political reasons or influenced by political considerations” (Select Committee on Extradition Law, 2015b, 632). Following the reform, the Home Secretary has no involvement in extradition under the European Arrest Warrant (Category 1 countries). In extradition to Category 2 countries, the Home Secretary may consider a narrow range of issues that involve limited discretion, and can also consider human rights concerns that arose after the extradition procedures had been completed.² This latter authority sparked controversy, since it allowed the Home Secretary to block an extradition after it was approved by a court. Advocates of the law-enforcement view, seeking to facilitate extradition, called for further curtailing the Executive’s involvement in the extradition process. By contrast, supporters of the popular view – NGOs and politicians – called for maintaining the Executive’s role as a check on judicial power that serves to protect British citizens.

3.2.1. *Law-enforcement view*

The law-enforcement viewpoint – favoring efficient extradition arrangements – received strong support from the jurist-based Baker Panel. The panel suggested that the Home Secretary’s involvement be further limited: courts, rather than the Home Secretary, should decide human rights issues arising at the end of the extradition process. This would allow courts to have full control over the extradition process, speed up this process that is prone to significant delays, and make it transparently nonpolitical (Home Office, 2011, 291–292). For Scott Baker, the panel’s chair, the speeding up of extradition through reduced involvement of the Executive is “consistent with the way that extradition has been moving over past years. Whereas it started by being an entirely political decision, it has now moved much more into the courts” (Select Committee on Extradition Law, 2015b, 71).

Other law-enforcement actors similarly favored a reduced role for the Home Secretary and emphasized the need for extradition to be a judicial process. Extradition judges, represented by the Chief Magistrate’s Office, argued that the judicial process of extradition already contains safeguards against injustice and that the Home Secretary’s involvement can lead to unnecessary delays and costs (Select Committee on Extradition Law, 2015b, 246). The Crown Prosecution Service suggested that less Executive involvement increased the speed of extradition and reduced its complexity, without a perceptible diminution of the protections afforded to persons

¹ <https://petition.parliament.uk/archived/petitions/885>.

² The primary responsibility to consider human rights issues during the extradition process falls to the courts.

requested for extradition ([Select Committee on Extradition Law, 2015b](#), 314, 325).

3.2.2. Popular view

Those participants in the debate who represented the popular view advocated a role for the Home Secretary in the extradition process. For the NGOs, such a role is one way to reverse what has become an automatic process that rubber-stamps foreign countries' requests. Liberty, in particular, argued that while a judge is best placed to consider the facts of an extradition case, the Home Secretary's discretion serves as an important safeguard "to ensure that any extradition which would be unjust is stopped notwithstanding earlier court findings" ([Joint Committee on Human Rights, 2011a](#), 25 and 2011b, 118).

Members of Parliament similarly argued against emptying the Home Secretary's authority and rejected the view of extradition as wholly judicial in nature. MP Sir Menzies Campbell (Lib Dem) argued that such view "fails to understand the nature of extradition ... Extradition is diplomatic in the first instance. It becomes judicial and ultimately it is political (HC Deb 24 November 2011, c167WH). MP Dominic Grieve (Con) indicated that people had written to him urging that the Home Secretary should exercise the discretion not to extradite – unaware that the 2003 reform eliminated that once-broad discretion (HC Deb 12 July 2006, c1421). He summarized the public mood that is contrary to the prevailing trend toward simpler, speedier extradition:

[A]s there has been a progressive move towards removing the Executive from the decision-making process ... the public's demand, interestingly enough, is the other way. They want Executive intervention when they feel that in some way that would cure some perceived unfairness ([Home Affairs Committee, 2012](#), Ev 66–67).

Whereas the jurist-based Baker Panel sought to further curtail the Home Secretary's authority, Parliament's Joint Committee on Human Rights did not support any changes ([Joint Committee on Human Rights, 2011a](#), 54). Yet in 2013 the Extradition Act was amended to remove human-rights matters from consideration by the Home Secretary, consistent with the Baker Panel's recommendation. The Home Secretary accepted the Baker Panel reasoning that this would facilitate management of extradition cases without undue delay and, she argued, it would also relieve political pressures ([Select Committee on Extradition Law, 2015b](#), 631–632, 873). Indeed, it is likely that the Home Secretary decided to reduce her involvement in extradition matters following the intense pressure that she faced to block Gary McKinnon's extradition.

3.3. European arrest warrant

The European Arrest Warrant streamlines extradition among members of the EU. For critics, however, "[f]ast-track extradition purely on the basis of administrative convenience and efficiency is justice denied" ([Coles, 2009](#)). The EAW raised several injustice concerns. One related to double criminality – a traditional safeguard in extradition. This requirement states that a person can be extradited to a foreign country only if the alleged conduct is also criminalized in the extraditing country. The EAW, however, dispensed with the requirement to verify double criminality for 32 broadly defined offenses, including murder, terrorism, corruption, as well as racism and xenophobia. For supporters of the popular view – politicians and NGOs – this opened the door to abuses of justice in cases where an extradition is requested for an alleged offense that is not a crime in Britain. The House of Commons' Home Affairs Committee expressed concern "about the erosion of the safeguard of 'dual criminality' ... and the ill-defined nature of the 32 categories of offense which will be exempt from the dual criminality requirement" ([Home Affairs Committee, 2002](#), 5). The NGO Liberty argued that "While at first blush there seems no problem with extraditing someone for 'murder,' we might think differently if another country's laws define murder as including abortion" ([Coles, 2009](#)). Yet the Baker Panel, representing the law-enforcement view, concluded that there were no difficulties arising in practice from the abolition of the double-criminality rule. The panel clearly prioritized cooperation against crime and dismissed the cross-national variation in legal standards:

While we accept that harmonisation of the criminal law within the European Union has not taken place, and that significant differences exist in the Member States' substantive criminal law, the trend should be towards even greater cooperation in the suppression of crime. This is in the public interest and reinforces the rule of law: it is not in the interests of good order both within a State and internationally for crime to go unpunished as a result of movement across borders ([Home Office, 2011](#), 188–189).

Another set of concerns related to the differing standards of justice across EU members and the variation in their respect for human rights. In some countries, prison conditions are poor: cells might be overcrowded or filthy, and prisoners might be subject to mistreatment by prison personnel or other prisoners. In addition, it has been suggested that some EU members fail to guarantee the right to a fair trial; for example, by holding the extradited person in a long pre-trial detention or by admitting evidence that has been inappropriately obtained ([Joint Committee on Human Rights, 2011b](#), 188–193).

The Baker Panel, expressing a law-enforcement view of support for extradition, dismissed these concerns as exaggerated given "the climate of mutual confidence among the like-minded Member States of the European Union, and given their democratic institutions and their expressed commitment to uphold the rights and freedoms contained in the European Convention on Human Rights." Therefore, the panel argued, it is appropriate "to begin with an assumption that surrender to another Member State of the European Union will not involve a violation of human rights." While acknowledging that "[t]rust and public confidence in overseas legal systems is not to be taken for granted," the panel believed that "at the heart of the principle [of mutual recognition] is the idea that Member States should not fear the differences between their legal systems, and that these differences are not a sufficient basis to justify a refusal to cooperate." The panel thus concluded that the Extradition Act – which requires that extradition be consistent with the European Convention on Human Rights – provides adequate protection against rights violations in EU countries ([Home Office, 2011](#), 137–138, 193). The panel's chair, Scott Baker, argued that criticism of the EAW stems from ethnocentrism – a tendency "in this

country [to] think our system is best and, therefore, anybody who does anything differently has got it wrong” ([Select Committee on Extradition Law, 2015b](#), 58).

The Crown Prosecution Service, another actor representing the law-enforcement viewpoint, similarly argued that “the practical alternatives to reliance on the good faith and integrity of requesting States are limited” ([Select Committee on Extradition Law, 2015b](#), 322). Indeed, the CPS suggested that “the introduction of the EAW has improved extradition arrangements between members of the European Union and increased cross-border co-operation” ([Select Committee on Extradition Law, 2015b](#), 314). Scotland’s prosecution service – the Crown Office and Procurator Fiscal Service – similarly suggested that the “introduction and operation of the EAW has undoubtedly led to a far swifter and more efficient system of surrender of fugitives from one EU Member State to another” ([Home Office, 2012](#), written representation). According to the Association of Chief Police Officers, the EAW has brought benefits to the police: “[I]t’s a faster, more efficient way of doing business” ([Home Office, 2012](#), oral evidence). Indeed, the EAW has become an “essential weapon” for the police ([Home Affairs Committee, 2013](#), 6). The Law Society of England and Wales noted the EAW’s “significant achievements ... in speeding up the extradition process,” and argued that “[m]utual trust requires the acceptance of differences between Member States” ([Home Office, 2012](#), written representation).

Whereas the law enforcement-minded actors emphasized the need for efficient extradition procedures, based on mutual trust, other actors expressed a more ethnocentric view – a concern that “British citizens [might] be whisked away to face trial ... in countries with lower standards of justice than in Britain” ([Prince, 2009](#)) and that “All traditional British beliefs in protecting the liberties of the subject have been thrown out of the window” ([Booker, 2009](#)). The Joint Committee on Human Rights – a political body – expressed such a concern:

It is important, however, to balance the need to return alleged offenders to the country in which the crime took place with the need to respect the rights of those requested for extradition. In our Report we highlight a number of areas where we believe the protection of rights for these persons is significantly below the standard which a UK citizen should expect. This is in part due to the introduction of a streamlined extradition process in the Extradition Act 2003, including the European Arrest Warrant, and the varying human rights protections within the European Union. ([Joint Committee on Human Rights, 2011a](#), 7).

The NGOs argued that the existing human rights safeguard in the Extradition Act is ineffective. They suggested that British courts are, in practice, unwilling to exercise that safeguard for fear of failing the concept of extradition based on mutual recognition. This, the NGOs maintained, creates a danger that human rights become theoretical and illusory. Both Fair Trials International and JUSTICE therefore proposed that the human rights safeguard be amended to enhance its effect. In addition, Fair Trials argued that the EU should build the mutual trust necessary for the EAW by working to create minimum defense-rights standards across Europe ([Home Office, 2011](#), 130–131; [Select Committee on Extradition Law, 2015b](#), 886). The London Criminal Courts Solicitors’ Association similarly argued that mutual trust is undermined by member states’ routine breaches of the European Convention on Human Rights ([Home Office, 2012](#), written representation).

For some politicians, the case of Andrew Symeou demonstrated how the EU’s pursuit of speed and efficiency might result in the denial of justice. Symeou, a British citizen, was surrendered to Greece in 2009, where he spent a year in squalid prison conditions, only to be acquitted. According to MP Dominic Raab (Con), this experience showed that the assumption of the adequacy of justice standards across Europe is “a sham and a fraud.” For him, it is “naive at best and reckless at worst” to believe that over time and with effort, the justice systems and prison conditions across Europe will get better, as EAW proponents suggest. For MP Nick de Bois (Con), the Symeou case demonstrated that the EAW is a tick-box exercise that sacrifices the fundamental rights of individuals on the altar of expediency and process (HC Deb 24 November 2011, cc148WH-149WH, 183WH).

Overall, the EAW controversy demonstrates a clear divide. Actors representing the law-enforcement perspective prioritized the efficiency of extradition and, for the sake of this goal, were willing to trust foreign justice systems. Politicians and NGOs, by contrast, were reluctant to express such trust. They sought to protect British nationals from the lower standards of justice that, in their view, prevail abroad.

3.4. U.S.-UK extradition treaty

At the heart of the controversy over the 2003 U.S.-UK extradition treaty stood the differential evidentiary burden borne by the two countries: the treaty required Britain to submit sufficient evidence to establish *probable cause* when requesting extradition from the United States; American extradition requests from Britain, by contrast, had to meet the *reasonable-suspicion* standard, as per the 2003 Extradition Act.³ How significant is the difference between the two evidentiary standards? Does it constitute an unwarranted imbalance? Opinions diverged mightily. Critics argued that the treaty is lopsided – it demands less of the United States and causes injustice to British citizens, who might be extradited on the basis of little or no evidence. This criticism came from politicians and NGOs who claimed unfairness and demanded better safeguards for British citizens. MP Boris Johnson (Con) argued that “[A] British national can be supramagnetically suctioned to America without any scrutiny of the evidence ... whereas the Americans would never allow that to happen to any of their nationals. That is the fundamental problem. We are failing to protect our nationals” (HC Deb 12 July 2006, c1432). Jago Russell of the NGO Fair Trials argued that “You don’t need to look very hard at the treaty to see that there’s a safeguard in that treaty that exists if there is an extradition from the United States but doesn’t exist the other way round, and that, quite rightly, strikes a chord with the British public and seems to be unjust” ([Home Affairs Committee, 2012](#), 6).

³ The treaty itself does not specify the evidentiary test for American extradition requests to Britain.

These arguments resonated with two of the political bodies that scrutinized Britain's extradition arrangements. The House of Commons' Home Affairs Committee accepted that

there is a body of respectable legal opinion which suggests that there is little or no distinction in practice between the “probable cause” and “reasonable suspicion” tests. Nevertheless, the imbalance in the wording of the Treaty, which sets a test for extradition from the US but not from the UK, has created the widespread impression of unfairness within the public consciousness and, at a more practical level, gives US citizens the right to a hearing to establish “probable cause” that is denied to UK citizens. ... The Committee therefore recommends that the Government seek to re-negotiate the US-UK Extradition Treaty to specify that the information requirements be the same in both jurisdictions ([Home Affairs Committee, 2012, 7](#)).

The Joint Committee on Human Rights similarly recommended a renegotiation of the treaty to increase the burden of proof required for the extradition of British citizens to the United States ([Joint Committee on Human Rights, 2011a, 52](#)).

By contrast, actors representing the law-enforcement view dismissed the notion of an improper evidentiary imbalance. The Solicitor-General argued that “Exact reciprocity between two legal systems is almost impossible to achieve ... although the approaches are not entirely equivalent, they are broadly so, in a rough and ready manner” (HC Deb 12 July 2006, c1412). Baroness Scotland, Minister of State for the Criminal Justice System at the Home Office, went further, arguing that “Complete reciprocity has never been a feature of our extradition arrangements” (HL Deb 16 December 2003, c1063). The Baker Panel concluded that the difference between the probable-cause test and the reasonable-suspicion test has no significance: under both tests, it is necessary to demonstrate an objective basis for suspecting legal wrongdoing ([Home Office, 2011, 242](#)). Extradition judges at the Westminster Magistrates' Courts similarly concluded that “[t]he difference is academic and semantic” ([Home Office, 2012](#), written representation).

Yet the cat was ultimately out of the bag. Underlying the criticism of the treaty was not “the minutiae of the treaty agreement,” but “a lack of public confidence in the US criminal justice system” ([Home Affairs Committee, 2012, Ev 60](#)). Both the Baker Panel and the House of Lords' Select Committee on Extradition Law observed that many of the witnesses before them focused, in fact, on “aspects of the US justice system which they felt made extradition inappropriate or unjust” ([Home Office, 2011, 254](#); [Select Committee on Extradition Law, 2015a, 99](#)). Such criticisms came from politicians and the NGOs, who measured the U.S. legal system by British standards and found it to be flawed. One criticism concerned the long prison sentences that American courts mete out. MP Dominic Grieve (Con) argued that such harsh penal policy “can appear disproportionate by European and British standards” ([Home Affairs Committee, 2012, Ev 60](#)). Some expressed concerns over the very high frequency of prosecutions ending in plea bargains. While plea bargains occur in the British legal system as well, critics suggested that the American system obtains these deals excessively and under pressure – “forc[ing] possibly innocent people to make guilty pleas,” according to MP David Davis (Con) (HC Deb 16 October 2012, c171). The harsh prison conditions in the United States also attracted criticism. MP Douglas Hogg (Con), for example, argued that U.S. prisons are “ghastly ... an affront to civilisation” (HC Deb 12 July 2006, c1440).

Another feature of the U.S. legal system that drew sharp criticism is the “overzealousness of US prosecutors” and the “exorbitant extraterritorial jurisdiction” that is oftentimes based on a very tenuous connection with the United States ([Home Affairs Committee, 2012, 11](#)). According to Liberty's Isabella Sankey, the United States might claim jurisdiction based on a connection “as small as a computer being used with a US server” ([Select Committee on Extradition Law, 2015b, 238](#)). This was demonstrated by the case of Babar Ahmad – accused by the United States of providing support for terrorism through a website he operated in Britain. U.S. authorities claimed jurisdiction because one of the servers hosting the website was located in the United States. Such a broad view of jurisdiction was inappropriate, critics argued, and dangerous, given the punitive nature of the U.S. legal system ([Select Committee on Extradition Law, 2015b, 37](#)). GC100, an association representing general counsel of companies, similarly denounced the “harshness of the US system” – especially the “aggressive use of the criminal law and process” to regulate business. ([Home Office, 2012](#), written representation).

The parliamentary bodies of inquiry and the NGOs suggested that the “manifestly unfair” treaty failed to protect the interests of British nationals, causing public concern and loss of confidence in Britain's extradition arrangements (HC Deb 12 July 2006, cc1396, 1445–1446; [Home Affairs Committee, 2012, 12](#); [Select Committee on Extradition Law, 2015b, 226](#)). The jurist-based Baker Panel dismissed these concerns and expressed trust in the U.S. justice system:

[T]he history of extradition between the United States and the United Kingdom provides no basis for concluding that individuals returned to that jurisdiction are generally not treated fairly. ... [T]he United States is a rights-based democracy where accused persons have protections provided by the Constitution to ensure that they are able to participate effectively in a criminal trial process that is conducted fairly: extradition from the United Kingdom to the United States takes place against the background of this protection ([Home Office, 2011, 252](#)).

Specifically, actors representing the law-enforcement view countered the argument concerning the overly broad U.S. jurisdiction. Scott Baker suggested that U.S. jurisdiction “is not as exorbitant as some people think. These days, with the internet and so forth, the tentacles of countries have to spread much wider than they previously did” ([Home Affairs Committee, 2012, Ev 29](#)). Anand Doobay, another member of the Baker Panel, argued that the U.S. broad view of jurisdiction is just different from the British view. “[T]hat is simply that they are taking a decision that we would not take ourselves” ([Select Committee on Extradition Law, 2015b, 64](#)). Another lawyer suggested that American prosecutors are better-funded than their British counterparts and more easily handle expensive multi-jurisdictional cases ([Select Committee on Extradition Law, 2015b, 370](#)). Lord Brown of Eaton-under-Heywood, former justice of the UK Supreme Court, argued that extradition proceedings, based on mutual trust, must accommodate legal and cultural differences between legal systems. “Naturally, we think that our own criminal justice system is best, but we cannot insist on all other countries following the same procedures” (HL Deb 16 September 2015, c269). This is a direct repudiation of the ethnocentric sentiments that

fuel resistance to extradition.

Overall, the debate over the U.S.-UK treaty demonstrates two opposing camps. Whereas proponents of the law-enforcement view did not see different legal standards as necessarily unfair, politicians and NGOs expressed mistrust in a foreign legal system that, in their view, fell below local standards.

4. Conclusions

Extradition has long been a cornerstone of law enforcement, preventing criminals from escaping justice by crossing borders. In recent years, the ease of international movement and the growth of transnational crime have further increased the importance of this instrument. These developments have pushed states to enhance the speed and efficiency of extradition and to relax some of the safeguards that this process traditionally includes. Thus far, the public response to the easing of extradition has seen little scholarly analysis. In fact, we generally know little about the domestic politics of extradition law (Magnuson, 2012, 843).

This article begins to fill this gap by offering an in-depth, nuanced analysis of the domestic political debate over extradition arrangements – a debate that demonstrates how international cooperation on crime control could meet fierce public resistance. In Britain, members of the law-enforcement community expressed support for eliminating hurdles to extradition and for making this process more efficient and depoliticized. In their view, cross-national differences in legal standards and practices should not impede cooperation against crime. By contrast, many politicians and NGOs thought that such differences mattered tremendously. For them, a British citizen should preferably be tried at home, rather than face a foreign system that fails to meet British standards. The slogan “British Justice for British Citizens” captures the nationalist sentiments that fuel the view of extradition as a threat – one that is growing as the political oversight of extradition is diminishing. Future work may examine whether similar dynamic and polarization characterize the politics of extradition in other countries. There is a good reason to think that they do. If extradition meets such resistance in Britain – a country committed to the rule of law and to cooperation on crime control – it might elicit similar negative responses in other countries as well.

While this study focuses on international extradition, its findings apply to other areas of cooperation between judicial systems. The concerns of Republican members of Congress over the citing of foreign law by American judges (Seipp, 2006) echo the anti-extradition arguments of British politicians. In Germany, actors seeking to shield themselves from U.S. civil jurisdiction argued that German sovereignty had to be protected from the incursion of American courts – an argument repeatedly heard in the British extradition debate (Baumgartner, 2004). More broadly, this study's findings comport with a growing body of literature that emphasizes the cultural content underlying societal attitudes toward globalization (Hainmueller and Hiscox, 2010; Margalit, 2012). The politics of international integration, it is becoming increasingly clear, is not confined to the pocketbook, but is fundamentally shaped by societal concerns over the inconsistency of local and foreign standards or values.

This study has important implications for the future of international efforts against crime. Successful international cooperation typically requires public support: governments find it difficult to engage in cooperation against public resistance (Minnich, 2005). The analysis here has shown that public support for extradition may be shakier than one would assume, and that the recent trend toward facilitating extradition might encounter domestic opposition. Law-enforcement authorities could find their efforts to enhance cooperation frustrated by the anxieties of the public and its political representatives – all the more so in the current climate of rising nationalism worldwide. How to increase public confidence in extradition while maintaining this process smooth and depoliticized? There are no easy answers. A possible way forward is to borrow from the rich experience in the area of trade: another form of international cooperation that raises domestic controversy. Yet despite political contestation, governments have increasingly liberalized their trade policies, struck a large number of trade agreements, and delegated authority to international trade institutions (Mansfield and Milner, 2012). The international trade regime shows that it is possible to enhance cooperation against a background of public sensitivity and concern – the same balancing act that extradition entails. One lesson from trade concerns the importance of selling international agreements domestically. Leaders often highlight the economic benefits of trade liberalization for domestic constituencies, and they also tout the foreign-policy benefits of trade agreements (Harris, 2016, 64). Governments should similarly make efforts to sell the public on the importance and benefits of extradition in fighting crime. A second lesson concerns two key principles of the trade regime: reciprocity and safety valves. States find it easier to strike trade deals that require all partners to make similar concessions and also contain enough protections against unforeseen negative effects of cooperation (Hoekman, 2002). Designing extradition arrangements with these principles in mind will help demonstrate the fairness of extradition and increase public confidence.

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