EMBASSY OF THE UNITED STATES OF AMERICA
LONDON

January 11, 2011

Rt. Hon. Sir Scott Baker
c/o Head of Judicial Co-operation Unit
5th floor, Fry Building
2 Marsham Street
London SW1P 4DF

Dear Sir Scott Baker:

Thank you for your letter of November 15, 2010, inviting the United States to provide a submission to the panel you are chairing to review the United Kingdom's extradition arrangements. I am writing to provide an initial submission for your panel's consideration. That submission is enclosed. The U.S. government may have additional information to provide during the course of the review, and I would ask you to treat this as an initial submission that may be supplemented based on further discussions between your panel and U.S. government officials.

In that regard, I would like to extend an invitation to you and the other panel members to hear directly from officials from the Department of Justice and the Department of State who are involved in the extradition process. We would be happy to arrange those meetings with you either here in London or in Washington, D.C., at your convenience. My point of contact for arranging such a visit will be Amy Jeffress, the Department of Justice Attaché for Criminal Matters at the U.S. Embassy, who can be reached at (020) 7894-0710, or at JeffressDA@state.gov.

[redacted]

Louis B. Susman
Ambassador

Enclosure: As stated.

The United States appreciates the opportunity to provide certain observations and information to the Extradition Review Panel established by the Home Secretary, with respect to the question whether the Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland (2003 Extradition Treaty or Treaty) is unbalanced. For the reasons set out below, we submit that the Treaty – far from being unbalanced – has for the first time created a balanced extradition relationship, and in so doing has significantly increased the safety of the citizens of both our countries. We would welcome the opportunity, should the Panel wish, to elaborate further on these views and our experiences with extraditions to and from the United Kingdom.

The 2003 Extradition Treaty, which was signed at Washington on March 31, 2003, and entered into force on April 26, 2007,[1] represents one of the most important steps forward in the U.S.–UK cooperative bilateral law enforcement relationship, a relationship that has been in place for more than two hundred years. The Treaty was negotiated in response to a growth in trans-border criminal activity, especially violent crime, terrorism, drug trafficking, and the laundering of proceeds of organized crime. It represents a substantial improvement over the prior treaty relationship, in that it enhances the ability of the United Kingdom and United States to cooperate on international extradition matters, while fully safeguarding due process and other fundamental rights that are common to both our systems of justice. The Treaty both rectified a previous

[1] The Agreement on Extradition between the United States and the European Union, signed on June 25, 2003, and entered into force on February 1, 2010 (U.S.-EU Extradition Agreement), amended and supplemented the 2003 Extradition Treaty. The Annex to the Instrument as contemplated by Article 3(2) of the U.S.-EU Extradition Agreement, as to the application of the 2003 Extradition Treaty, reflects the integrated text of the operative provisions of both treaties. The EU Agreement, however, had no impact on the standards for extradition that are erroneously criticized as imbalanced.

imbalance – an imbalance that disfavored the United States – in the evidentiary standard required for extradition and made the U.S.-UK treaty relationship consistent with modern extradition practice, including the practice of such other common law partners as Canada and Australia. It was negotiated bilaterally and approved by Parliament and the U.S. Senate in order to ensure that serious criminals cannot find a safe haven in either the United Kingdom or the United States; it has served that role well and it is critical that its functioning not be disrupted.

As noted above, one of the primary objectives of the 2003 Extradition Treaty was to rectify a prior imbalance in the standard of evidentiary proof required to support extradition requests from the United States and from the United Kingdom. Under the previous Treaty (and as provided for in UK domestic extradition law at that time), the evidentiary standard the United States had to meet in seeking the extradition of a fugitive from the United Kingdom was "prima facie" evidence, that is, evidence sufficient, if unrebutted, to establish the fact at issue. Moreover, as hearsay was not permissible, multiple first-person witness affidavits were required. Thus, under the prior Treaty, the United States was, in effect, required to put on its case in chief in order to secure extradition. This was not simply an enormous practical burden: it also allowed defendants essentially to have their cases tried twice.

In contrast, the United States always has required the standard of "probable cause" – that is, under both the prior and current treaties, the United Kingdom in its extradition requests to the United States only has to provide information demonstrating probable cause to believe that the person sought committed the crime for which he or she was accused. It is this standard that, under the new Treaty and the application of our respective domestic laws, is now applicable in both countries. To be sure, the terminology used to describe that standard differs slightly in each of our countries – with the United Kingdom using the term "reasonable suspicion," and the

United States the term "reasonable basis" or "probable cause."[2] But there can be no doubt that, for the purposes of extradition practice between the United States and the United Kingdom, these terms have essentially the same meaning.[3]

Indeed, the history of the Treaty makes clear that the intention of both the United States and the United Kingdom was to eliminate the requirement of a prima facie standard for U.S. extradition requests, and to replace it with a probable cause standard instead. Both the United States and the United Kingdom expected that a new treaty, in combination with UK extradition legislation, would permit U.S. requests for extradition to the United Kingdom to be subject to a more equal evidentiary standard analogous to the U.S. probable cause standard.[4] Some critics have suggested that because the text of the 2003 Extradition Treaty itself is silent at Article 8 on the standard of proof required in the case of extradition requests made by the United States, the United States does not have to satisfy any standard of proof in making requests to the United Kingdom. This is incorrect. Rather, as both parties understood in negotiating the Treaty, and as has been the case in practice, the fact that the Treaty is silent on the issue simply means that U.S. extradition requests must meet the standard established by UK domestic law. Following negotiation of the 2003 Extradition Treaty, the UK's 2003 Extradition Act went into effect and

[2] Article 8(c)(3) of the 2003 Extradition Treaty states that the United Kingdom must provide "such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested." Under U.S. domestic law and in practice, this translates to probable cause information. The "reasonable basis to believe" terminology is frequently used in the U.S. modern extradition treaties to express the probable cause standard.

[3] We note that U.S. courts apply the term "reasonable suspicion" in a different manner than do UK courts. In U.S. jurisprudence, "reasonable suspicion" is a standard somewhat lower than probable cause, e.g., information sufficient to permit an investigative stop, but not an arrest. See *Terry v. Ohio*, 392 U.S. 1 (1968). Of course, in the extradition context, the United States must satisfy the more demanding "reasonable suspicion" test as understood under UK law.

[4] At the time of the negotiation of the 2003 Extradition Treaty, the UK 1989 Extradition Act was in effect. Extradition requests to the United Kingdom executed under the 1989 Extradition Act did not have to meet the prima facie standard of proof, but rather had to be supported by "evidence sufficient for the issuance of a warrant."

the United States was designated a "Category 2" country pursuant to that Act. As a result, the prior prima facie standard was replaced with the less stringent "reasonable suspicion" standard described below. Since shortly after the entry into force of that legislation and signature of the 2003 Extradition Treaty, U.S. requests to the United Kingdom have been supported by "reasonable suspicion" information, as had been anticipated by the United States pursuant to the treaty negotiations.

Despite some public commentary to the contrary, the "probable cause" and "reasonable suspicion" standards of proof are essentially the same. Both are based on reasonableness, both are supported by the same documentation, and both represent the standard of proof that police officers in each country must satisfy domestically in order to arrest a suspect. Under the 2003 UK Extradition Act, for purposes of extradition to a Category 2 country such as the United States, a UK judge "may issue a warrant for the arrest of the person whose extradition is requested if the judge has reasonable grounds for believing that ... the information would justify the issue of a warrant for the arrest of a person accused of the offence within the judge's jurisdiction..."[5] Similarly, under U.S. jurisprudence, probable cause is defined as "evidence which would warrant a man of reasonable caution in the belief that a felony has been committed."[6] Thus, although different terminology has developed over time in our respective jurisprudence regarding the standard of proof for arrest and, therefore also for extradition, the U.S. and UK evidentiary standards for extradition are essentially equivalent both in law and practice. This understanding was explicitly expressed in the Secretary of State's October 2003

[5] Articles 71(1) and (2) of the 2003 Extradition Act.

[6] *Wong Sun v. United States*, 371 U.S. 471, 479 (1963), citing *Carroll v. United States*, 267 U.S. 132, 162 (1925).

letter to the U.S. Senate, submitting the new 2003 Extradition Treaty for the Senate's advice and consent:

> Article 8 ... describes the documents that are required to support a request for extradition. .... Article 8(3) provides that a request for the extradition of a person sought for prosecution must be supported by ... (c) for requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is sought. The Treaty will not change the evidentiary burden required for extradition requests to the United States, but the Treaty's entry into force will allow the United States to take advantage of the United Kingdom Extradition Act of 1989, which applies only to treaties that enter into force after 1989. *Under the 1989 Act, the evidentiary requirements for extradition from the United Kingdom are lowered from a "prima facie" standard to "evidence sufficient for issuance of a warrant," which is analogous to the U.S. probable cause standard.* [7]

Our shared understanding of the parity of proof required in our respective extradition requests was similarly and correctly articulated by the UK Attorney General in her letter to Parliament of 19 October 2009:

> 16. The information that must now be provided in order for a US extradition request to proceed in the UK is in practice the same as for a UK request to proceed in the US. It is important to stress that in both cases the standard of information which must now be provided for an extradition request to be accepted is the same as must be provided to a criminal court in that country in order for a domestic arrest warrant to be issued. When the UK makes an extradition request, the US courts must be satisfied there is information demonstrating probable cause to issue an arrest warrant. Probable cause has been defined as, for example, "facts and circumstances ... sufficient to warrant a prudent person to believe a suspect has committed, is committing or is about to commit a crime." (United States v. Hoyos, 892 F.2d, 1382, 1392 (9th Cir. 1989)). When the US makes a request, UK courts must be satisfied that there are reasonable grounds for suspicion to issue an arrest warrant. Reasonable suspicion has been defined (by Lord Devlin) in the following terms: "circumstances of the case ... such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence." While the development of the criminal law in the two countries means that there are semantic differences between these two tests, the crucial point is that in both cases the standard of information to be provided is

[7] Treaty Doc. 108-23 at vii-viii (2004) (*italics added*). Shortly after negotiation of the Treaty, the UK's 2003 Extradition Act went into effect, so U.S. requests to the United Kingdom were never executed under the 1989 Extradition Act. However, the standard of proof that would have been applicable under the 1989 Act is the same as that applied to the United States under the 2003 Act.

> exactly the same as must be provided in order to justify arrest in an ordinary criminal case in that country.

These evidentiary standards of proof for extradition requests are appropriate, and impose neither an unduly high nor a permissive standard for extradition. Both standards require more than mere allegations, but can be satisfied by hearsay, or second-person, evidence, and neither standard requires proof of guilt. Requests to the United Kingdom must be accompanied by an arrest warrant which, under U.S. law, must be based on "probable cause," the same standard that the United Kingdom must meet in making extradition requests to the United States.

In short, were the United Kingdom now to change its law to impose a higher evidentiary standard on extradition requests from the United States, this would not only represent a fundamental repudiation of the joint U.S. and UK intentions in negotiating and ratifying the new Treaty, but would also both revive the inequitable treatment of U.S. extradition requests that was present under the prior treaty framework and reimpose an unduly burdensome standard that has been largely abandoned in modern international extradition practice.

Nor, we submit, would there be any justification for such a repudiation of the Treaty. A review of the number of extradition requests and actual extraditions that have taken place between the two countries since the current Treaty entered into force on April 26, 2007, shows that the application of this common standard of proof has in no way prejudiced the United Kingdom in terms of how extradition cases have been reviewed and approved. In fact, the United States has not denied a single extradition request from the United Kingdom. Nor are the discrepancies of numbers of extradition requests any indication of imbalance in the Treaty: while the United States does send more extradition requests to the United Kingdom than it receives,

this is an understandable function of the size of the U.S. population, rather than a reflection of a supposedly more lenient standard of proof.

The actual breakdown of extradition results is set forth in the attached tables. As can be seen by a comparison of those figures, the United States has consistently acted favorably on UK requests, and indeed has been able to extradite a substantially higher percentage of fugitives sought by the United Kingdom than the United Kingdom has to the United States. In this regard, we note that a much higher percentage of cases in which U.S. fugitives have been arrested since 2007 remain pending in judicial proceedings in the United Kingdom (20 of 50 cases or 40%), as compared to the percentage of UK cases that remain pending in judicial proceedings in the United States (2 of 26 or approximately 8%). In our view, this disparity is due to the increasing problem of delay in the United Kingdom in concluding contested extradition cases (including, in some instances, UK courts holding their rulings in abeyance pending resolution of certain issues by the European Court of Human Rights in other extradition cases), as well as the extensive submissions we are being asked to submit at the various levels of review. It is our understanding that much of this review, and the additional litigation and delay it generates, focuses on fugitives' arguments that extradition to the United States would be incompatible with the UK Human Rights Acts and would entail "an abuse of process."

In our experience, this latter area of inquiry is very broad and has been exploited by a number of fugitives in an effort to thwart the extradition process and avoid answering for their alleged crimes. These efforts have included the raising of a variety of extraneous issues that have encumbered the judicial proceedings (and sometimes review by the Home Secretary) and require multiple responsive legal submissions by the United States. We can anticipate, based on cases submitted prior to the entry into force of the new Treaty, that the problems of delay will be

further exacerbated as cases under the new Treaty finish the process of judicial review in the United Kingdom, and are then appealed to the European Court of Human Rights.

While the United States accepts that the different domestic extradition process in the United Kingdom can entail multiple and time consuming levels of review (and we recognize in this context that the U.S. extradition process also entails various levels of review), the extent of and disparity in the delay occasioned by this review in the United Kingdom is becoming of increasing concern. Delays can deprive the victims of serious crimes, including terrorist crimes, of having the accused brought to justice. During any protracted period of delay, evidence can be lost or deteriorate, witnesses' memories may fade, and witnesses can die or otherwise become unavailable. Law enforcement – and the protection of our citizens – is best served when extraditions can be accomplished efficiently and in a timely manner.

The law enforcement relationship between the United States and United Kingdom is predicated on trust, respect, and the common goals of protecting our nations and eliminating safe havens for criminals. The 2003 Extradition Treaty is a foundational piece of this relationship, enshrining principles of due process, effective criminal justice and parity between our two nations. It neither advantages nor disadvantages either party, but instead places the extradition relationship between the United States and United Kingdom on a par with each other and with other nations with which both countries have modern extradition treaties. The fundamental fairness of the Treaty has been demonstrated by its actual application. We believe that it is essential that both the United States and the United Kingdom continue to rely on this Treaty to further the mutual, and critical, law enforcement objectives of both our countries.

ATTACHMENT

Extradition requests from the United Kingdom to the United States since April 26, 2007

Total number of requests sent to US:	33
Number later arrested in UK or 3rd country:	1
Number otherwise withdrawn:	1
Number deported to UK:	1
Number arrested by US:	26
Number extradited:	24
Number in judicial proceedings:	2
Number denied	0
Number pending submission to court:	2
Number where fugitive not yet located:	2

Extradition requests from the United States to the United Kingdom since April 26, 2007

Total number of requests sent to UK:	72
Number later arrested in US or 3rd country:	5
Number otherwise withdrawn:	1
Number arrested by UK:	50
Number extradited:	28
Number in judicial proceedings:	20
Number fled after arrest and on bail:	1
Number denied:	1[8]
Number pending submission to court:	8
Number where fugitive not yet located:	8

[8] A UK court denied this extradition request based on delay by the United States in seeking extradition.