

EUROPEAN ARREST WARRANTS IN THE UK: WHAT CAN BRITAIN LEARN FROM AMERICAN DUE PROCESS?

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I. INTRODUCTION

Imagine a man traveling abroad. He drives his car to a foreign country. He arrives at a border checkpoint and stops. He hands over the relevant paperwork, and the border guard steps away to verify it. The guard suspects that the driver has handed him a forged car insurance certificate. He questions the driver and, satisfied with his answers and explanations, lets him go without incident. The man drives off, perhaps a bit miffed at the entire incident, and later returns to his home country.

Fast forward several months. The man is at home when officers arrive at his doorstep with a warrant for his arrest for allegedly using forged insurance documents. He has not returned to the foreign country at any point; no foreign police officers have crossed international borders to remove him from his home country, and no diplomatic wrangling has resulted in his arrest. Despite this, he is held in prison in his home country for weeks. Finally he is sent, he thinks, to stand trial in the country where his alleged offense took place. When he arrives there, the matter is settled, perhaps anticlimactically, with the payment of an administrative penalty, and he receives no criminal record as a result.

This is the story of a British citizen extradited to Poland under Polish arrest orders through a European Arrest Warrant (EAW).¹ This story is not unique; troubling instances of similar arrests under the EAW system abound.² The EAW system has “abolish[ed] extradition between Member States and replac[ed] it by a system of surrender between judicial authorities”³ where Member States must respect and execute each other’s arrest decisions on the basis of mutual recognition.⁴ To some extent, the

¹ Andrew Gilligan, *Surge in Britons Exported for Trial*, TELEGRAPH (Aug. 21, 2010), <http://www.telegraph.co.uk/news/politics/7958202/Surge-in-Britons-exported-for-trial.html>.

² See Andrew Gilligan, *Arrested and Held in Britain on Demand of EU Prosecutors*, TELEGRAPH (Aug. 21, 2010), <http://www.telegraph.co.uk/news/uknews/law-and-order/7958208/Arrested-and-held-in-Britain-on-demand-of-EU-prosecutors.html> (detailing several other arrests under the EAW, including that of two English men extradited to Hungary on accusations of owing creditors £18,000; the men spent three months in jail before even being interviewed by Hungarian police and who were freed after five months in prison without ever being charged with a crime); see also Richard Edwards & Jackie Williams, *I Sold Junk. Now I Face Four Years in Greek Jail, Says Antiques Dealer*, DAILY TELEGRAPH (London), Aug. 28, 2010, at 17 (relating the story of a UK citizen whose alleged offense occurred in Britain, yet was extradited to Greece under the EAW).

³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) 1 (EC) [hereinafter Council Framework Decision].

⁴ *Id.* art. 1, para. 2.

practical result of the EAW system has been the so-called “Europeanization of penal law,”⁵ as the criminal laws of states requesting EAWs are now able to reach beyond national borders and compel action by police officers and judges in other Member States.⁶

This extradition mechanism has been used at an increasing rate against UK citizens since its implementation in 2004.⁷ For example, the number of Britons detained and extradited under the EAW during the period from April 2009 to April 2010 was over 50% higher than the number extradited in 2008–2009.⁸ A 70% increase is expected for 2011.⁹ The increase is partially driven by the UK’s participation in a new EU-wide database that will help fast-track extradition with greater access to information about defendants.¹⁰ The British Home Office estimates that the increase in extradition requests will lead to three times more extradition arrests and will cost an additional £17,000,000 even before police and court costs are considered.¹¹

This increase in arrests and extraditions may not be troubling in and of itself. The conventional wisdom of the incapacitation theory of criminal law suggests that more arrests mean more criminals behind bars, more criminals behind bars mean fewer criminals running free in society, and fewer free criminals means fewer criminals able to commit future crimes against innocent members of society.¹² What is troubling is that more and more

⁵ Helmut Satzger & Tobias Pohl, *The German Constitutional Court and the European Arrest Warrant: ‘Cryptic Signals’ from Karlsruhe*, 4 J. INT’L CRIM. JUST. 686, 687 (2006).

⁶ See Dorota Leczykiewicz, *Constitutional Conflicts and the Third Pillar*, 33 EUR. L. REV. 230, 231 (2008) (“[T]he answer to the question of whether the EAW mechanism can be used in a given case depends on how the offences are defined in the criminal law of the issuing Member State.”).

⁷ See Gilligan, *supra* note 2 (indicating that twenty-four people were extradited from Britain under the EAW scheme in 2004 while 1,032 were extradited in the year preceding April 2010); see also Gilligan, *supra* note 1 (noting that this jump was a forty-three-fold increase in the use of EAWs against UK citizens).

⁸ Gilligan, *supra* note 1. But see Christopher Booker, *Deportations Under EU Warrants Likely to Treble*, TELEGRAPH (Aug. 22, 2009), <http://www.telegraph.co.uk/comment/columnists/christopherbooker/6073950/Deportations-under-EU-warrants-likely-to-treble.html> (noting the British Home Office expected the number of extraditions under EAW’s to triple from 500 to as many as 1,700 each year).

⁹ Gilligan, *supra* note 1.

¹⁰ *Extraditions to Poland: Wanted, for Chicken Rustling*, ECONOMIST, Jan. 2, 2010, at 42.

¹¹ *Id.*

¹² JAMES Q. WILSON, *Selective Incapacitation*, in PRINCIPLED SENTENCING 148 (Andrew von Hirsch & Andrew Ashworth eds., 1992) (“When criminals are deprived of their liberty, as by imprisonment . . . , their ability to commit offenses against citizens is ended. We say these persons have been ‘incapacitated’”); James Q. Wilson, *Dealing with the High-Rate Offender*, 72 PUB. INT. 52, 52 (1983).

people, who may not be criminals, are being incapacitated because officials are abusing EAW power, especially in Poland.¹³ Statistics indicate that Poland is the most frequent seeker of EAWs against British citizens.¹⁴ The Polish insistence on extraditing citizens of the UK led British officials to send a delegation to Poland in 2008 to ask for fewer EAW requests.¹⁵ It also led to a November 2009 meeting of EU members in Brussels, the meeting's aim was to reach a compromise on the EAW issue between the two nations.¹⁶ Both efforts ultimately failed and British police resources that could be used for other endeavors remain dedicated to carrying out these requests.¹⁷

Some commentators have explained overuse or disproportionate use of the EAW by blaming the lack of an inter-European method for guaranteeing a defendant's presence for trial in a foreign country.¹⁸ Others have pointed to certain nations that, like Poland, have criminal systems mandating compulsory prosecution of crimes no matter how insignificant.¹⁹

¹³ See Gilligan, *supra* note 2 (indicating that Poland extradites so many individuals from the UK that "[t]he Polish accused even have their own low-cost airline – they are dispatched, en masse, by special fortnightly military flights"); see also Gilligan, *supra* note 1 (explaining that the UK uses the EAW to a far lesser extent, as "98 people were brought to the UK on European Arrest Warrants in 12 months, a fall of 6 per cent on the year before"); Andrew Gilligan, *Britain Left to Count Cost of European Arrest Warrant*, TELEGRAPH (Aug. 28, 2010), <http://www.telegraph.co.uk/news/uknews/law-and-order/7969981/Britain-left-to-count-cost-of-European-Arrest-Warrant.html> (supporting the notion that the UK uses the EAW to bring foreigners to trial in Britain far less than other nations by citing EU figures that show 44% of prisoners in Greek jails are foreigners while only 14% of prisoners in British jails are foreigners).

¹⁴ Gilligan, *supra* note 2 (noting that "[b]etween a third and a half of all EAW requests to the UK come from Poland"). But see *Extraditions to Poland: Wanted, for Chicken Rustling*, *supra* note 10 (indicating that Poland accounts for over half of Britain's extraditions, and that the number of extraditions to Poland "grew from four in 2005 to 186 in the first nine months of 2008," which is ten times the number of extraditions to Ireland, "despite the fact that Irish migrants . . . outnumber Poles in Britain").

¹⁵ *Extraditions to Poland: Wanted, for Chicken Rustling*, *supra* note 10.

¹⁶ *Id.*

¹⁷ *Id.* (indicating that "[f]ugitives are tracked down by the Serious Organised Crime Agency, an outfit designed to bust international crime syndicates" and that some have criticized Poland for using "more discretion at home, where its own resources are at stake").

¹⁸ Joachim Vogel & J.R. Spencer, *Proportionality and the European Arrest Warrant*, 6 CRIM. L. REV. 474, 479–80 (2010) (noting that EU Member States "have long noticed that a considerable number of European arrest warrants relate to petty offences" and that the major purpose of these "warrants seems to be to enforce the wanted person's presence in the issuing Member State's trial courts, in particular where the issuing Member State's law does not provide for in absentia proceedings," but also arguing that although "[p]olitically speaking, it might seem regrettable that there is, for the time being, no proper 'European summons' . . . the gap must not be filled by simply issuing European arrest warrants").

¹⁹ Rosemary Davidson, *A Sledgehammer to Crack a Nut? Should There Be a Bar of Triviality in European Arrest Warrant Cases?*, 1 CRIM. L. REV. 31, 34 (2009).

Compulsory prosecution requires that “where there is evidence of a crime it must be investigated and prosecuted, if necessary by the issue of an EAW.”²⁰

The European extradition practice includes jailing suspects for the commissions of crimes that are not crimes in their home states without consulting culpable evidence.²¹ Once extradition takes place, a suspect’s rights vary across the EU; there is no guarantee that a UK citizen will be treated abroad as he would be in a UK prison or be afforded the same protections as if he were a defendant in a British proceeding.²²

This Note posits that there must be a balance struck between the theoretical benefits of participating in the EU extradition process and the practical concerns for protecting citizens from potential abuse of this system. Proponents have stated that EAW procedures would promote the effectiveness of European cooperation on “criminal matters, such as those concerning attacks on information systems, organized crime and terrorism.”²³ This Note argues that EAW legislation in the UK should reflect the notion that “[e]xtradition and rights protection should not be mutually exclusive.”²⁴ Ideally, increased rights protection will not only curb the sheer number of EAWs executed by European nations against British citizens and save British resources. More importantly, this will also make the EAWs actually carried out comport with basic notions of fairness for criminal suspects.

Although the EAW system has EU-wide reach and implications, the focus of this Note is the use of the EAW in practice in the UK. It proposes a solution to the problems that have arisen in that country, namely the introduction of U.S.-style “due process” for to be considered by UK judges as they decide whether to surrender UK citizens to other nations under the EAW system. This procedure is intended to protect UK citizens from those abuses that they have endured in the six years since the EAW system has been in place.

²⁰ *Id.*

²¹ See Gilligan, *supra* note 1 (noting that one British man fighting extradition to Romania for possession of cannabis was in his third month in a British prison and was likely to spend at least two more months in prison before his appeal was even heard).

²² Michael Plachta, *Towards Miranda Warning Across European Union?*, 26 INT’L ENFORCEMENT L. REP. 394, 394 (2010) (explaining that “[s]tandards of justice vary greatly from one EU country to another and fundamental rights do not receive the same respect in every Member State” and that “[d]efense rights have been sidelined, not strengthened, in the name of closer cooperation”).

²³ William Sanchez, *Legislative Development: Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*, 9 COLUM. J. EUR. L. 195, 197 (2002).

²⁴ Eoin Carolan, *Reciprocity and Rights Under the European Arrest Warrant Regime*, 123 LAW Q. REV. 197, 202 (2007).

Part II of this Note describes the pre-EAW European extradition regime as well as the origins of the EAW. Specifically, this Note describes in detail the UK's extradition regime in existence prior to the Council Framework Decision. It explains the EAW extradition process as it was intended to be carried out under the Council Framework Decision. It also describes some of the practical problems with its implementation.

Part III documents the constitutional and legal challenges, levied against the EAW by various EU Member States, that have resulted from the lack of protection offered to citizens being extradited throughout the EU. It also describes the current state of the EAW in the UK and details the shortcomings in UK law with regard to protecting the fundamental rights of British citizens arrested under the EAW.

Part IV explains the valuable lesson to be learned from the state of the law in the EU and UK: there is a place for carve-outs from the EU framework that offer protection for citizens before they are extradited. Finally, this Note proposes a solution to excessive use of EAWs against UK citizens that relies on American ideas of due process to correct the most pressing and glaring weaknesses in the EAW scheme.

II. BACKGROUND

A. *The Extradition Process Before the Council Framework Decision*

A system of cooperation between Member States governed extradition in the EU before the 2002 Council Framework Decision was passed.²⁵ The system was governed by the European Extradition Convention,²⁶ originally signed in 1957 and modified through two additional protocols and one further convention on the suppression of terrorism.²⁷ Ultimately, the Convention set up a political process rather than a judicial process, as extradition requests between Member States were to be "in writing and . . . communicated through the diplomatic channel."²⁸ The Convention did allow police forces in the Member State where the person sought was located to conduct an arrest, but this was a limited "provisional arrest" power that could be relied upon only "[i]n case of urgency."²⁹ Furthermore, the

²⁵ Sanchez, *supra* note 23, at 195.

²⁶ European Convention on Extradition, *opened for signature* Dec. 13, 1957, 359 U.N.T.S. 273.

²⁷ Sanchez, *supra* note 23, at 195.

²⁸ European Convention on Extradition, *supra* note 26, art. 12, para. 1.

²⁹ *Id.* art. 16, para. 1.

“requested party”—the Member State in which the sought person was located—was ultimately still in control, because its competent authorities made the decision to arrest the sought person “in accordance with its law.”³⁰ The Extradition Convention thus maintained a degree of respect for both state sovereignty and the rights defendants were guaranteed under the laws of their home countries.³¹

The Extradition Convention system began coming apart with the Treaty of Amsterdam, under which the Member States of the EU resolved “to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice.”³² The European Council stepped even closer to the current EAW framework during its 1999 meeting in Tampere. At Tampere, the Council “called for the development of a ‘genuine European area of justice’ and for a ‘unionwide fight against crime.’”³³ It recommended that the system of formal extradition procedures between Member States be abolished and replaced with a system of mutual recognition.³⁴

The September 11, 2001 terrorist attacks in the United States added further momentum toward the acceptance of the EAW framework and the Tampere recommendations.³⁵ Those recommendations became a reality with

³⁰ *Id.*

³¹ Mark Mackarel, *‘Surrendering’ the Fugitive—The European Arrest Warrant and the United Kingdom*, 71 J. CRIM. L. 362, 365–66 (2007) (“The traditional values of extradition as set down in the European Convention on Extradition 1957 are concerned with facilitating extradition whilst protecting state sovereignty and the rights of the individual. The standards and procedures set down under the EAW are overwhelmingly concerned with the quick and efficient facilitation of rendition with the basic protections for the individual left to the trial process in the Member State.”).

³² Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 1, para. 3, Oct. 2, 1997, 1997 O.J. (C 340) 1; *see also* Sanchez, *supra* note 23, at 195 (stating that “[t]he Treaty of Amsterdam paved the way for a radically different approach to extradition within the Union when it listed the creation of an area of freedom, security and justice among its objectives”).

³³ Sanchez, *supra* note 23, at 195–96 (quoting Presidency Conclusions, Tampere European Council (Oct. 16, 1999), *available at* <http://www.unhcr.org/refworld/docid/3ef2d2264.html>).

³⁴ *Id.* at 196.

³⁵ *Id.* (“The movement toward the creation of a European arrest warrant gained fresh momentum following the terrorist attacks in the United States on September 11, 2001, as the European Council, at its extraordinary meeting of September 21, 2001, agreed to the introduction of a ‘European warrant for arrest and extradition in accordance with the Tampere conclusions, and the mutual recognition of legal decisions and verdicts.’ ”); *see also* Oreste Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems*, 9 GERMAN L.J. 1313, 1318–19 (2008) (arguing that “to a much greater extent after 9/11, a new awareness has emerged in terms of EU security” and that “only a few months

the 2002 Council Framework Decision on the European Arrest Warrant and Surrender Procedures Between Member States.³⁶

B. Relevant EAW Measures Under the 2002 Council Framework Decision

The Council Framework Decision explains how the EAW system is intended to function. It defines the EAW as a “judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.”³⁷ It requires Member States to “execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.”³⁸ Thus, under the EAW, extradition is intended to become an “exclusively judicial issue, unlike the previous regime where extradition has been either entirely prohibited or a matter for national executives to decide.”³⁹ Simply put, in the new EU Framework Decision extradition regime, there are no longer any political filters and trial judges make extradition decisions rather than government ministers.⁴⁰

Member States can seek EAWs for a wide range of crimes.⁴¹ Most notable and most problematic about this arrangement is a provision that requires extradition for certain listed crimes “without verification of the

after the attacks, and in light of the fact that it had been years since the EU produced any legislative response to the European diplomacy declarations, the European Council speedily adopted, pursuant to article 34 EU and following a rather limited debate among national Parliaments and within the European one, the Framework Decision on the Arrest Warrant and surrender procedures between Member States, with the explicit intent to replace all existent extradition-related instruments within the European judicial area”).

³⁶ Council Framework Decision, *supra* note 3.

³⁷ *Id.* art. 1, para. 1.

³⁸ *Id.* art. 1, para. 2.

³⁹ Carl Lebeck, *National Constitutionalism, Openness to International Law and the Pragmatic Limits of European Integration – European Law in the German Constitutional Court from EEC to the PJCC*, 7 GERMAN L.J. 907, 925 (2006).

⁴⁰ Vogel & Spencer, *supra* note 18, at 481 (indicating that before the EAW, the final stage of the extradition process was the approval of the UK Home Secretary “who could refuse if he thought that extradition would be disproportionate, or otherwise oppressive,” but under the EAW extradition regime, “if a Member State issues an EAW to recover a suspected shoplifter, the courts in the requested state are bound to execute it”).

⁴¹ See Council Framework Decision, *supra* note 3, art. 2, paras. 1–2 (explaining the scope of the EAW and listing a number of crimes for which Member States can seek an EAW, including things as vague as “racism and xenophobia” and as concrete as “kidnapping, illegal restraint and hostage-taking”).

double criminality.”⁴² While a number of the crimes listed in this provision are ones recognized by all judicial systems⁴³ (i.e., where double criminality already exists), others are not crimes within certain Member States or are rarely prosecuted there.⁴⁴

There are safeguards in place regarding extraditions, since the executing Member State can or must, depending on the circumstances, refuse extradition under an EAW. This happens, for example, where amnesty exists for the crime alleged,⁴⁵ where the sought person has already served a sentence for his crime,⁴⁶ where the person sought cannot be held responsible because of age,⁴⁷ and where the person sought is already being prosecuted by the state asked to execute the EAW.⁴⁸

However, the Framework Decision does not, by its terms, allow a state to refuse extradition because of the shortcomings of the legal system to which its citizen is being sent.⁴⁹ While “the purpose of the EAW has been to judicialise the process of extradition thereby injecting certain procedural rights into it, it has also eradicated the scrutiny of the legal systems of States making requests for extraditions.”⁵⁰

The Framework Decision puts into place some safeguards on the arrest process itself as well as the judicial process post-arrest. For instance, the judicial authority of the executing state must inform the arrested person of the EAW and its contents in accordance with the state’s law and the possibility of surrendering to the country that issued the EAW.⁵¹ The arrestee also has the “right to be assisted by a legal counsel and by an

⁴² *Id.* art. 2, para. 2.

⁴³ *See id.* (listing crimes such as rape, arson, trafficking in stolen vehicles, and murder, which are prosecuted by all judicial systems).

⁴⁴ *See, e.g.,* Edwards & Williams, *supra* note 2, at 17 (relating the story of Malcolm Hay, a UK citizen who sold broken pottery pieces to an art dealer from Athens, Greece in 1999 and was arrested by UK police eight years later under an EAW issued by Greece alleging that the items he sold were owned by the Greek state and thus constituted the crime of “illicit appropriation of an antique object,” which is not an offense under British law).

⁴⁵ Council Framework Decision, *supra* note 3, art. 3, para. 1.

⁴⁶ *Id.* art. 3, para. 2.

⁴⁷ *Id.* art. 3, para. 3.

⁴⁸ *Id.* art. 4, para. 2.

⁴⁹ Lebeck, *supra* note 39, at 925–26 (“[I]t is not possible for a State to refuse extradition on the basis that a legal system does not fulfill the standards of art. 6 ECHR” which is the provision of the European Convention of Human Rights that guarantees certain minimum protections for criminal defendants. “Nor is it necessary that a State requesting extradition does not fulfill constitutional standards of the extraditing State.”).

⁵⁰ *Id.* at 926.

⁵¹ Council Framework Decision, *supra* note 3, art. 11, para. 1.

interpreter in accordance with the national law of the executing Member State.”⁵²

There are significant gaps in the application of these important safeguards. For instance, both of these rights are defined by the law of the executing country, rather than by a uniform standard. Currently, no uniform standard for translation facilities and services exists. This is problematic because the legal systems of EU Member States vary in the amount of protection they offer for defendants’ rights and because the EU facilitates cross-border travel among countries where many different languages are spoken.⁵³

EU legislators have attempted to remedy this problem, having opened up talks on a draft directive that “aims to set common minimum standards on the right to interpretation and translation in criminal cases throughout the EU[] . . . [that] will improve the rights of suspects who do not understand or speak the language of the proceedings.”⁵⁴ These protections would apply to all criminal proceedings until the conclusion of a defendant’s case—pre-trial, sentencing, detention, and appeal—in all cases, including those under the EAW.⁵⁵ The directive would cover all relevant materials, including indictment and documentary evidence, and require translators to be accredited through a program of training and qualification.⁵⁶

This effort to boost protection offered during EAW proceedings is one of several ideas proposed to make criminal proceedings fairer and more convenient for defendants. For instance, to alleviate the consequences of the EAW’s overuse as a means to guarantee a defendant’s physical presence in a Member State’s courts, some commentators have proposed the use of video or telephone technology.⁵⁷ Others have proposed a “bar of triviality” that would prevent a nation from seeking an EAW for minor offenses, like thefts of items worth less than £50.⁵⁸ Others have proposed more serious reforms,

⁵² *Id.* art. 11, para. 2.

⁵³ See Booker, *supra* note 8 (recounting the story of Garry Mann, a UK citizen traveling abroad in Portugal for a soccer game who was arrested by Portuguese officials, and was not offered any translation services).

⁵⁴ Press Release, Comm. on Civil Liberties, Justice & Home Affairs, Stronger Language Rights for EU Citizens in Criminal Trials (Apr. 8, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100406IPR72182>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Vogel & Spencer, *supra* note 18, at 482.

⁵⁸ See, e.g., Davidson, *supra* note 19, at 31, 33–34 (relating comments by British judges in a recent EAW case involving the offense of receiving a stolen mobile phone suggesting that EAWs should not be used for such trivial cases, but ultimately rejecting such a bar of triviality because it would allow the defendant to escape the consequences of his actions and would

like a *Miranda*-style warning across the EU that would inform the defendant of the crime of which he was suspected and give him the right to the assistance of an attorney, to an interpreter, and to know the length of his detention.⁵⁹

C. Extradition in the UK Before and After the 2002 Council Framework Decision

UK extradition laws before the Framework Decision placed substantial control of the process in British hands.⁶⁰ A system of “dual control” by judicial and executive authorities existed, where judicial authorities oversaw the initial stages of extradition, and the Secretary of State for the Home Office made the final decision on the extradition of the sought person.⁶¹

British extradition law prefigured EAW procedures in certain respects. The last British Extradition Act before the Framework Decision, the 1989 Act, did not require EU Member States to prove a prima facie case based on the evidence against the sought person.⁶² This law, just like the EAW system, aimed to simplify the process and remove the delay in extradition of British citizens.⁶³ However, it preserved one important procedural safeguard that is absent from the EAW—a right of appeal for the sought person both after the court proceedings and after the Secretary of State’s decision to complete extradition.⁶⁴

Domestic dissatisfaction with these UK extradition procedures was highlighted by Spain’s attempts to extradite Augusto Pinochet, which led to review of UK extradition procedures by the Parliament.⁶⁵ Meanwhile, the Framework Decision, which was partially a response to growing concerns about terrorism in the wake of 9/11, was winding its way toward eventual

create “safe havens for fugitives who abuse their rights of free movement within Europe in order to evade justice”).

⁵⁹ See generally Plachta, *supra* note 22, at 394.

⁶⁰ See Mackarel, *supra* note 31, at 366 (arguing that the changes in procedural values are reflected in the language of the Council Framework Decision—“[g]one are the ‘requesting’ and ‘requested’ states . . . [t]he terms now reflect the lack of discretion built into the new EAW scheme where Member states are the ‘issuing’ and ‘executing’ authorities” and where “fugitives are no longer ‘extradited’ but under the new scheme ‘surrendered’”).

⁶¹ Martin Henley & Felicity Williams, *The Application of the EAW in the UK – Legislative Background and Human Rights Challenges*, in STILL NOT RESOLVED? CONSTITUTIONAL ISSUES OF THE EUROPEAN ARREST WARRANT 297, 297 (Elspeth Guild & Luisa Marin eds., 2009).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*; see also *supra* note 40 and accompanying text.

⁶⁵ Henley & Williams, *supra* note 61.

proclamation by the European Council.⁶⁶ When the Framework Decision called on Member States to “take the necessary measures to comply with the provisions of this Framework Decision by 31 December 2003,”⁶⁷ Britons passed legislation overhauling their extradition process. The 2003 Extradition Act, which came into force on January 1, 2004, was the domestic implementation of the Framework Decision and the EAW extradition system into British law.⁶⁸

The EAW system has substantially altered the extradition regime in the UK. On the one hand, it has made extradition quicker and more efficient; before the Framework Decision, extradition took an average of eighteen months, but now takes an average of only fifty days.⁶⁹ On the other hand, the EAW system has fundamentally changed relations between Britain and other EU nations. In extradition, one state “request[s] cooperation from the other, which in turn decides to grant it or not on the grounds of non-eminently judicial reasons, which rather lie, in fact, in the international relations framework, where the principle of political opportunity plays a predominant role.”⁷⁰ Conversely, the EAW “falls into an institutional scenario where judicial assistance is requested and granted within an integrated transnational judicial system,” and where states partially relinquish their sovereignty to foreign regulatory authorities.⁷¹

III. CURRENT STATE OF THE LAW: THE EAW REGIME IN PRACTICE

A. *Challenges Levied by EU Member States Against the European Arrest Warrant*

EU Member States have not evenly accepted domestic codifications of the Framework Decision—an unsurprising fact, given the implications of the EAW for state relationships mentioned above and the EAW’s necessary implication that states whose citizens are sought for extradition must cede

⁶⁶ *Id.*

⁶⁷ Council Framework Decision, *supra* note 3, art. 34, para. 1.

⁶⁸ Extradition Act, 2003, c. 41.

⁶⁹ Gilligan, *supra* note 2 (indicating also that extradition took only weeks in the case of Hussein Osman, a suspect accused of an attempted terrorist attack in London). *But see* Gregory J. Mann, Note, *The European Arrest Warrant: A Short-Lived Mechanism for Extradition?*, 34 SYRACUSE J. INT’L L. & COM. 715, 720 (2007) (stating that since the Framework Decision entered into force, “the average time taken to execute a warrant decreased from nine months to 43 days”).

⁷⁰ Pollicino, *supra* note 35, at 1321.

⁷¹ *Id.*

some measure of judicial and territorial sovereignty to requesting Member States.⁷² Fundamentally, the EAW asks a state to cede control over one of its citizens to another state. Understandably, countries are resistant to this idea and have nationality exceptions in their constitutions prohibiting the extradition of their citizens.⁷³ There are also the practical difficulties of integrating the EAW system into very diverse legal frameworks across the EU.⁷⁴ The provisions of the Framework Decision brought the domestic law of certain EU Member States directly into conflict with their commitment to create unified EU law on extraditions.⁷⁵ The cases of Germany, Poland, Cyprus, and the Czech Republic are particularly instructive in showing how the innovations of the EAW caused “unavoidable ‘constitutional disturbance’ ” in these nations.⁷⁶ Indeed, other Member States revised their own constitutions to avoid such constitutional disturbances.⁷⁷

The German Federal Constitutional Court struck down the German statute codifying the Framework Decision on the grounds that it was a violation of the German Basic Law because the rights afforded to German citizens sought under EAWs were not proportional to the protections offered to citizens domestically.⁷⁸ Because the court was concerned that the severity of the

⁷² See Carl Lebeck, *National Constitutional Control and the Limits of European Integration – the European Arrest Warrant in the German Federal Constitutional Court*, PUB. L., Spring 2007, at 23, 23, 25 (noting that “[t]he point of the EAW is that judicial review of requests for extradition to EU Member States shall be concerned only with whether the formal requirements for extradition are fulfilled,” and that “[w]hether the request for extradition is justified is only to be tried in the court that has requested the extradition”).

⁷³ See Mann, *supra* note 69, at 718 (arguing that nationality exceptions are grounded in “the sovereign authority of a State over its citizens”).

⁷⁴ See Satzger & Pohl, *supra* note 5, at 689 (noting that “the practice of implementation in the various Member States has not been consistent,” and that “[i]ntegration-friendly regulations such as Germany’s are opposed with implementation laws which — such as in Austria — widely exhaust the grounds for non-execution of the European Arrest Warrant as provided by the Framework Decision”).

⁷⁵ See Pollicino, *supra* note 35, at 1322 (explaining that “[a] number of Member States have wanted to avoid the application of such a measure to one of their own citizens,” and that before the Framework Decision was adopted, “thirteen of the (then) twenty-five Member States provided for constitutional dispositions forbidding, or, somehow, limiting the extradition of nationals”).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1322–23 (noting that some EU countries like Latvia, Portugal, Slovakia, and Slovenia revised each of their constitutions before the constitutionality of their implementing acts could be challenged in their national court systems).

⁷⁸ See Lebeck, *supra* note 72, at 23, 27; see also Satzger & Pohl, *supra* note 5, at 691–92 (indicating that the German Federal Constitutional Court struck down the German legislation because of the legislature’s “insufficient consideration of the principle of proportionality,” as German citizens sought under EAWs were not guaranteed that their behavior would not be

crime for which a German citizen could be extradited did not match the severity of the potential punishment under the EAW, the law was struck down, as the German Basic Law requires “a concrete review on a case-by-case basis . . . to ascertain that the prosecuted individual is not deprived of the guarantees or fundamental rights he would have been granted in Germany.”⁷⁹

One commentator has argued that the underlying theme of the German court’s “decision is a sense of ill-concealed distrust in the legal systems of the other Member States as to the safeguarding of the accused person.”⁸⁰ This distrust regarding the protection of individual rights in legal systems of other EU Member States “merges with a firm belief that the right to a commensurate protection from those different criminal law systems, which cannot protect the legal rights of a person under investigation, is the exclusive right of German citizens themselves.”⁸¹

In Poland, the amendments that were added to the Polish Code of Criminal Procedure in order to codify the Framework Decision were struck down by the Polish Constitutional Tribunal for being incompatible with the constitutional ban on the extradition of Polish citizens.⁸² However, the Tribunal did take advantage of a constitutional mechanism that allowed it to delay the date on which an unconstitutional act ceased to be binding⁸³ in order to allow for a transition period in which constitutional reform could take place without breaching EU law.⁸⁴

In Cyprus, the Supreme Court struck down the implementing statute as inconsistent with the nation’s constitution.⁸⁵ The relevant language of the Cypriot Constitution provided that “no one can be deprived of their freedom except for those cases provided for by the law,” which Cypriot jurisprudence

retroactively criminalized or guaranteed the right to judicial remedy, which is true because the German implementing act excludes action against granting extradition).

⁷⁹ Pollicino, *supra* note 35, at 1328.

⁸⁰ *Id.*

⁸¹ *Id.* at 1345; *see also id.* at 1347 (arguing that the German court’s opinion reflected distrust “of the other European legal systems’ ability to secure an adequate level of rights protection” and that the “sole guarantee left to the German citizen is the certainty of being, as far as possible, prosecuted, judged and eventually convicted by a domestic German court”).

⁸² Anthony Arnall, *Arrested Development*, 30 EUR. L. REV. 605, 605 (2005).

⁸³ *Id.* at 606.

⁸⁴ Daniel Sarmiento, *European Union: The European Arrest Warrant and the Quest for Constitutional Coherence*, 6 INT’L J. CONST. L. 171, 173 (2008).

⁸⁵ Pollicino, *supra* note 35, at 1314–15.

interpreted to prohibit extradition of citizens of Cyprus.⁸⁶ This difficulty could only be removed by altering the language of the constitution.⁸⁷

In the Czech Republic, the Brno Constitutional Court rejected the trend of striking down constitutionally faulty implementing statutes and upheld the Czech implementing statute.⁸⁸ It is important to note that it took “strain[ing] the verbatim content of both the constitutional disposition and the domestic law under discussion” in order to harmonize the plain language of the Czech Constitution with the Framework Decision mandate.⁸⁹ However, even the seemingly EU-friendly Czech Constitutional Court did not give blanket approval to the EAW being used against Czech citizens.⁹⁰ Rather, it found that an EAW could violate the Czech constitution “‘where the standards of criminal proceedings [in the issuing member state] do not meet the requirements for criminal proceedings enshrined in the Czech constitutional order.’”⁹¹ This, in effect, gave Czech criminal courts the authority to evaluate the adequacy of the criminal justice systems of requesting states on a case-by-case basis and deny extradition of a Czech citizen to a Member State whose criminal justice system falls short of the Czech constitutional standard.⁹²

Other Member States have avoided challenging their implementing statutes at the constitutional level, but have taken steps to institute “opt-outs” to the demands of the Framework Decision that limit the effectiveness of EAWs when used against their own citizens.⁹³ Holland will not agree to extradite its citizens unless they are permitted to serve their sentences in Dutch jails.⁹⁴ Belgium does not recognize EAWs applying to abortions in order to protect its citizens from extradition by Member States like Malta, Ireland, and Poland, which criminalize abortion and “abetting abortion.”⁹⁵

⁸⁶ *Id.* at 1355 n.8.

⁸⁷ *Id.* (noting that the new language of the Cypriot Constitution states “the arrest of a citizen of the Republic aimed at surrender following the issue of an arrest warrant, is possible only with regard to facts and actions subsequent to Cyprus’ adherence to the European Union”).

⁸⁸ *Id.* at 1315 (noting that, perhaps unexpectedly, the Czech Constitutional Court upheld the implementing statute despite language in the Czech Constitution that stated “no Czech citizen shall be removed from his/her homeland”).

⁸⁹ *Id.* at 1338.

⁹⁰ See Sarmiento, *supra* note 84, at 172–73 (noting that unlike most member states, Germany and the Czech Republic did not accede to both double criminality exceptions in their legislation).

⁹¹ *Id.* at 174.

⁹² *Id.*

⁹³ Gilligan, *supra* note 13.

⁹⁴ *Id.*

⁹⁵ *Id.*

France has shown reluctance to extradite its citizens pursuant to EAWs, and has previously stated that they will not be extradited.⁹⁶ Following the constitutional challenge to the German implementing statute, Germany passed a new implementing law.⁹⁷ However, German courts have since ruled that extradition of German citizens is proper only if it meets a “‘proportionality rule’ stating that only those accused of serious crimes can be seized under a warrant.”⁹⁸ Greece’s implementation statute includes additional grounds for mandatory refusal of an EAW that are not included in the Framework Decision.⁹⁹ Italy recognizes an “EAW provided it respects the fundamental rights of the supreme principles of the Italian constitutional order.”¹⁰⁰

B. Shortcomings of the Extradition Act of 2003 and of UK Officials in Protecting UK Citizens

The UK’s experience with implementing the Framework Decision has been different from that of the Member States noted above. The UK statute provides a check on extradition, empowering the Secretary of State to use national security as grounds to overrule competent judicial decisions.¹⁰¹ This minimal protection seems minor in contrast to those EU Member States that have installed more robust opt-outs that have either allowed states not to honor EAWs or have challenged the constitutionality of the implementing legislation. As a result, the UK has seemingly sacrificed the rights of its citizens for the sake of compliance with EU directives.¹⁰² Indeed, some critics have gone so far as to disesteem the actual text of the implementing legislation for adding further confusion to the extradition process.¹⁰³

⁹⁶ *Id.*

⁹⁷ Nicolas Nohlen, *Germany: The European Arrest Warrant Case*, 6 INT’L J. CONST. L. 153, 154 (2008).

⁹⁸ Gilligan, *supra* note 13; *see also* Vogel & Spencer, *supra* note 18, at 474, 476–77 (discussing a recent ruling by the Higher Regional Court in Stuttgart, Germany indicating that German jurisprudence on extradition and proportionality imposes a test on EAWs by which a sentence cannot be “intolerably severe” or “by all means incommensurate” or “in no way justifiable” in light of all relevant aspects of the case).

⁹⁹ Jacqueline S. Hodgson, *Safeguarding Suspects’ Rights in Europe: A Comparative Perspective*, 14 NEW CRIM. L. REV. 611, 626 (2011).

¹⁰⁰ *Id.*

¹⁰¹ Satzger & Pohl, *supra* note 5, at 690.

¹⁰² Gilligan, *supra* note 13 (indicating the UK has no such opt-outs, which has led critics to argue that British judges apply the EAW provisions too stringently without considering the injustices that can result for British citizens).

¹⁰³ *See* J.R. Spencer, *Implementing the European Arrest Warrant: A Tale of How Not to Do*

The criticism of UK policy is not new. Even before the EAW provision became a part of UK law, British commentators were concerned about the potential effects of the EAW within their country. While acknowledging that simplifying and reforming extradition may be a worthwhile endeavor, one commentator noted that it should “not be at the expense of the basic rights of British citizens.”¹⁰⁴ This concern, raised in 2001, seems prescient given the challenges the UK currently faces.¹⁰⁵ The former UK Home Secretary, who introduced the EAW, has stated that he was “right, as Home Secretary in the post-9/11 era, to agree to the European Arrest Warrant, but . . . was insufficiently sensitive to how it might be used.”¹⁰⁶

British law poses two structural problems for anyone seeking to challenge the UK EAW statute. First, while nations like Germany or Poland have constitutions against which to measure the fairness of EAW procedures, “there is—for good or ill—no equivalent in the United Kingdom.”¹⁰⁷ Furthermore, even principles of EU law will not help British citizens because of the actions of the UK government. The EU Charter of Fundamental Rights protects against punishments that are disproportionate to the alleged crime, and can be invoked in courts throughout the EU.¹⁰⁸ However, the UK extracted a concession from the Lisbon Treaty, which gives the EU Charter

It, 30 STATUTE L. REV. 184, 184–86, 188 (2009) (looking beyond the policy shortcomings of the Extradition Act to the “narrower question of the technical quality of the drafting by which the policy was—or was meant to be—carried out” and concluding that the implementing legislation is “unnecessarily complicated,” “pointlessly obtuse,” and “needlessly prolix” and that the legislators drafting it “have gone out of their way to distance the implementing text from the Framework Decision that it is supposedly designed to implement”); *see also* Mackarel, *supra* note 31, at 381 (explaining that “where criticism has arisen of the UK in respect of the EAW, it has been in relation to the legislative mismatch between the language and procedural requirements of the Framework Decision and the 2003 Act”).

¹⁰⁴ Norman Lamont, *EU Police Could Arrest You at Home and Jail You Abroad*, TELEGRAPH (Dec. 4, 2001), www.telegraph.co.uk/comment/personal-view/3570591/EU-police-could-arrest-you-at-home-and-jail-you-abroad.html.

¹⁰⁵ *See id.* (noting that “the European arrest warrant takes for granted complete trust in other countries’ legal systems” which have problematic criminal procedures and further arguing that even though “it cannot be right . . . to face trial for something that Parliament has not made criminal” or for “the law of another country . . . [to] be applied extra-territorially in the United Kingdom,” the government has not appreciated that these problems arise from the EAW abolishing the principle of double criminality); *see also* Spencer, *supra* note 103, at 184 (arguing that current detractors view the EAW as “a legislative sell-out which means that honest Englishmen, when falsely accused elsewhere of crimes they did not commit, are now removed, without a proper examination of the merits of the case, for trial in foreign legal systems which, by definition, leave much to be desired”).

¹⁰⁶ Gilligan, *supra* note 1.

¹⁰⁷ Vogel & Spencer, *supra* note 18, at 481.

¹⁰⁸ *Id.*

of Fundamental Rights the same effect as EU treaties in the courts of Member States, in theory, because it did not want “a second helping of human rights imposed upon the UK legal system via ‘Brussels.’”¹⁰⁹

Ironically, the European skepticism that motivated this concession stands in the way of the UK protecting its citizens from abuses abroad. For instance, UK citizens sent abroad under EAWs face a serious disadvantage because, as foreigners, they are regarded as flight risks who are often refused bail and can be kept in pretrial detention, potentially for years, even for minor crimes.¹¹⁰

The UK’s extradition regime is widely considered an unfair burden on the innocent and the current Home Secretary has announced that the regime, including the EAW provision, is being reviewed by the British government.¹¹¹ The Home Secretary has stated that her government will review the UK’s extradition agreements to make sure they are “even-handed” and “work both efficiently and in the interests of justice.”¹¹² Of particular concern will be the “breadth of Secretary of State discretion in an extradition case . . . the operation of the European Arrest Warrant, including the way in which those of its safeguards which are optional have been transposed into UK law,” and “whether requesting states should be required to provide prima facie evidence.”¹¹³ This review is expected to last until the end of the summer of 2011.¹¹⁴

IV. ANALYSIS: FIXING THE EAW REGIME IN THE UK

At the core of these challenges to the EAW system and the implementation of the Framework Decision is the inadequacy of full mutual recognition by EU Member States of judicial decisions in criminal matters. Mutual recognition implies transposing some degree of foreign legal elements into the domestic criminal justice arena. While mutual recognition of judicial decisions in the EU exists already for civil judgments and arbitral awards, the extension of this principle to criminal law is far more difficult.¹¹⁵

¹⁰⁹ *Id.*

¹¹⁰ Gilligan, *supra* note 13.

¹¹¹ *Reviewing Extradition: Hand ‘Em Over*, *ECONOMIST*, Sept. 25, 2010, at 69.

¹¹² Written Statement to Parliament from Theresa May, UK Sec’y of State for the Home Dep’t, Written Statement on Extradition Review (Sept. 8, 2010), *available at* <https://www.gov.uk/government/speeches/theresa-may-written-statement-on-extradition-review>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Ilias Bantekas, *The Principle of Mutual Recognition in EU Criminal Law*, 32 *EUR. L. REV.* 365, 365 (2007) (“Unlike foreign civil judgments and arbitral awards where only minor

Despite the “Europeanization of the penal law” that the EAW system has supposedly brought about, the EU has “rejected the notion of procedural criminal law harmonisation and unification ideology by proclaiming that the aim of the Member States was not: ‘to create a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe in the handling of security matters.’”¹¹⁶

It is precisely this lack of harmonization that leaves British citizens open to rights abuses at the hands of other EU Member States. As the challenges to the EAW noted above demonstrate, EU Member States do not feel the requisite trust in the legal systems of fellow Member States to ensure the system works well.¹¹⁷ Absent reform in the domestic criminal systems of EU Member States that bring all EU nations to an acceptable minimum level of defendants’ rights protections, the distrust demonstrated by the nations discussed above will continue.¹¹⁸ The EU itself has recently acknowledged

modifications are required in the civil procedural law of the executing state, the mutual recognition of foreign criminal decisions necessitates fundamental changes to the criminal procedure law of both the issuing and executing state in order to accommodate differences in gathering/admissibility of evidence, procedural rights and guarantees (such as right to counsel and legal aid, trials in absentia and others), as well as the enforcement of criminal sanctions that will vary from country to country.”); *see also* Mackarel, *supra* note 31, at 362 (“The EAW represented a fundamental change to the nature of extradition standards and procedure in the European Union (EU) and was the first manifestation of the policy to make mutual recognition the basis of measures to develop cooperation throughout the EU in criminal law and criminal procedure.”).

¹¹⁶ Bantekas, *supra* note 115, at 367–68.

¹¹⁷ *Id.* at 374 (“The problem, however, remains that even so, mutual recognition has not overridden trust concerns that relate to the detention facilities and efficiency of the legal systems of other EU Member States.”); *see also* Plachta, *supra* note 22, at 394 (arguing that “[m]utual recognition can only operate effectively in a spirit of confidence, whereby not only judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of one’s partners’ rules, but also trust that those rules are correctly applied”).

¹¹⁸ *See* Plachta, *supra* note 22 (quoting the EU commission tasked with preparing the implementation of mutual recognition of judicial decisions in criminal matters, even before the Council Framework Decision was passed, which indicated that “mutual recognition is very much dependent on a number of parameters which determine its effectiveness” among which are “mechanisms for safeguarding the rights of suspects” and the “definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition” and that “it must . . . be ensured that the treatment of suspects and the rights of the defense would not only not suffer from the implementation of the principle [of mutual recognition] but that the safeguards would even be improved through the process” but that a comprehensive proposal regarding defendants’ rights set forth by this commission was not adopted by the European Council, which promulgated the Framework Decision).

that “not enough ha[s] been done at the European level to safeguard fundamental rights of individuals in criminal proceedings.”¹¹⁹

A. A Potential Solution and Why It May Succeed

UK citizens remain unprotected from subpar criminal justice systems that currently exist in the EU.¹²⁰ The solution this Note proposes is to add an American-style due process provision to the UK’s EAW regime to be considered by judges when deciding whether to surrender UK citizens under EAWs. Such a due process provision would not simply transpose elements of the U.S. Constitution and associated case law into the British system of law. If the implementation of the EAW system across the EU has made anything clear, it is that transposing new procedures into already existing systems of criminal justice poses significant difficulties. Rather, this provision would consist of several factors discussed below that are inspired by U.S. Supreme Court rulings on due process. The provision is limited in scope and addresses the most common problems faced by UK citizens sought under EAWs. UK judges would weigh these factors in determining whether to honor EAWs submitted by other Member States. If, in light of these factors, UK judges are satisfied that Britons will be treated fairly by the foreign judicial system, the EAW will be honored and UK citizens may be extradited. An inquiry by British judges into individual EAW cases will help protect UK citizens.¹²¹

In the short-term, such a due process component would prevent UK citizens from being extradited to those EU states that do not adequately protect defendants’ rights. As a residual, long-term effect, it may push those Member States that are denied their EAW requests, and thus denied their

¹¹⁹ *Id.* (describing a November 30, 2009 Justice Council Roadmap for strengthening procedural rights which recognized this shortcoming).

¹²⁰ *See, e.g., id.* (giving one example of inconsistent defendants’ rights—meaning information is provided to defendants and how that information is presented—across the EU by noting that even though all EU states have signed on to provide fair trial rights according to the European Convention on Human Rights, in some EU states suspects only receive oral information about their procedural rights, while in others they receive technically complex written information only if they demand it); *see also id.* (“[A] suspect will be told of his/her right to interpretation orally in Belgium, in writing in Hungary and through a Letter of Rights in Germany. Fifteen countries only tell suspects about their right to remain silent orally. Some EU countries provide a comprehensive warning in writing but only provide oral translations of it to people who cannot understand the language.”).

¹²¹ *See* Hodgson, *supra* note 99, at 626 (“In assuming a level playing field and refusing to enquire into individual cases, in practice, mutual recognition tolerates different human rights standards.”).

ability to prosecute individuals they suspect of crimes committed within their borders, to make changes in their criminal justice systems that will bring them in line with appropriate levels of defendants' rights. Alternatively, it may push these states to support efforts at the European level to protect defendants' rights.

Several factors argue for the potential success of such a due process scheme. First, because the EAW system was implemented through a Council Framework Decision rather than a regulation, EU Member States are free to choose the best "form and methods" to reach the objectives set forth by the EU.¹²² The EAW system is not a rigid, perfectly uniform system that is directly binding on Member States. Variance in the content of statutes implementing the EAW system is tolerated, and states are only required to achieve the result sought by the Framework Decision.¹²³ Second, as demonstrated by the court rulings in Germany, Poland, and Cyprus that declared implementing statutes unconstitutional, there is precedent for challenging the contents of the Framework Decision and the EAW system it intended to create.¹²⁴ Third, there is also precedent for giving judges in executing states the power to deny extradition to Member States that do not offer sufficient protections for defendants. As noted above, the Czech court has retained authority to determine the adequacy of the criminal justice systems of requesting states and deny extradition of a Czech citizen. The German court has also ruled that judges are required to ascertain that a German citizen sought under an EAW is not deprived of the guarantees or fundamental rights he would have been granted in Germany. Fourth, the opt-outs practiced by several Member States indicate that domestic law carving out exceptions to the mandatory extradition required by the Framework Decision are common practice and tolerated by the EU. Finally, the UK government's ongoing review of its extradition scheme provides the perfect opportunity to implement the needed protections for UK citizens sought under EAWs.

¹²² See Consolidated Version of the Treaty Establishing the European Community art. 249, Nov. 10, 1997, 1997 O.J. (C 340) 3 ("A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.").

¹²³ *Id.*

¹²⁴ See, e.g., Angelika Nußberger, *Poland: The Constitutional Tribunal on the Implementation of the European Arrest Warrant*, 6 INT'L J. CONST. L. 162 (2008) (discussing the Polish constitutional approach to implementation).

B. The Contents of the Due Process Provision

The ultimate aim of the proposed due process provision is to ensure a fair trial for Britons abroad. Access to evidence and the right to a speedy trial are American ideas aimed at ensuring fair proceedings. These same rights would make up the contents of the due process provision, as they address the most pressing problems facing UK citizens extradited abroad under EAWs. Other due process rights would certainly be relevant and could be added as factors for British judges to consider. However, there are a number of reasons for the due process provision to be modest in scope. First, the opt-outs practiced by other Member States that serve as models for this provision are themselves rather limited (i.e., they are not blanket refusals to honor any and all EAWs). Second, and most importantly, a more expansive set of factors may cause the UK to violate of the Framework Decision by violating the objective sought to be achieved by the Framework Decision.

The U.S. Supreme Court has held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”¹²⁵ The Court indicated that this rule was “not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused” and that “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair.”¹²⁶

When viewed in light of this due process requirement, the very core of the EAW system seems to be the suppression of evidence for the purposes of accelerating the extradition process between Member States. There is no provision in the Framework Decision that allows a defendant to view evidence brought against him before he is extradited by his home nation, nor is there any requirement that the state seeking extradition under an EAW provide any substantive evidentiary basis to the judicial authorities in the state charged with executing their EAW. Rather, the Framework Decision requires that the state seeking extradition merely provide “a description of the circumstances in which the offence was committed, including the time, place[,] and degree of participation in the offence by the requested person.”¹²⁷

¹²⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹²⁶ *Id.* at 87–88 (further noting that “[a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant” and “casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice”).

¹²⁷ Council Framework Decision, *supra* note 3, art. 8, para. 1(e).

Under the EAW system as currently constituted, it is not the place of the British courts to analyze the sufficiency of the evidence used to deprive a British citizen of his or her liberty in a foreign state. In a sense, judges are asked to take on faith that the requesting state has sufficient evidence to try the UK citizen it seeks. They are asked to assume that the information provided by the requesting state is correct and to turn over the UK citizen.

This faith would be justified were it not for the accounts of extradited UK citizens jailed abroad who have never been permitted to see the evidence against them or to challenge the sufficiency of the evidence that was the basis for their arrest.¹²⁸ In the words of the Court in *Brady*, where the requesting state fails to provide the evidence to a UK citizen, that state fails to “comport with standards of justice” and treats the accused unfairly, such that the “system of the administration of justice suffers.”¹²⁹ Under this proposal, UK judges are tasked with weighing whether the evidence provided to them under the EAW request is sufficient for a fair trial and thus justifies extradition.

A further right guaranteed to defendants in the U.S. criminal justice system is the right to a speedy trial. The Constitution provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.”¹³⁰ This right attaches when the defendant in some way becomes the “accused,” as where the government initiates a criminal prosecution through indictment, information, formal charges, or by arresting and holding him to answer for a criminal charge.¹³¹

Under a U.S. due process analysis, the right to a speedy trial would attach either when the requesting state sends an EAW request to be executed by UK officials or when UK officers arrest a suspect on the basis of an EAW sent to them by a fellow Member State. Thus, under this proposal UK judges are tasked with determining whether the requesting state is likely to grant the British suspect a speedy trial. In making this determination, UK judges can look to the requesting state’s reputation, past practices—including the requesting state’s case law—and any other relevant evidence that may touch on the likelihood that this right will be respected.

The right to a speedy trial serves several interests. It aims at minimizing “the possibility of lengthy incarceration prior to trial [and] to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an

¹²⁸ See Gilligan, *supra* note 1 (providing individual accounts and statistics on no-evidence traditions resulting from EAWs).

¹²⁹ *Brady*, 373 U.S. at 87–88.

¹³⁰ U.S. CONST. amend. VI.

¹³¹ *United States v. Marion*, 404 U.S. 307, 313, 320 (1971).

accused while released on bail.”¹³² It also aims “to minimize anxiety and concern accompanying public accusation.”¹³³ Finally, it is meant “to limit the possibilities that long delay will impair the ability of [the] accused to defend himself.”¹³⁴

The case of Andrew Symeou illustrates just how harmful the lack of a speedy trial under the EAW can be. Mr. Symeou was arrested under an EAW sent to the UK by Greece in connection with a nightclub murder.¹³⁵ There were some serious contradictions in the evidence against Mr. Symeou and some alarming irregularities in the way the police investigated the incident.¹³⁶ Despite weak evidence, Mr. Symeou spent nearly a year in jail before being released on bail; almost three years after the victim’s death no trial date has been set.¹³⁷ The terms of his bail do not allow him to leave Greece, and this has caused his parents to move to Athens to support him.¹³⁸

The interests that the right to speedy trial aims to protect, which were noted above, are all implicated in Mr. Symeou’s case. Without a speedy trial requirement, there is nothing to minimize the possibility that Mr. Symeou’s incarceration prior to trial will be unnecessarily lengthy. While on bail, his liberty is severely impaired by since is restricted to Greece and prevented from going home to the UK. The “anxiety and concern” felt by his parents in response to his public accusation for a murderer are evident throughout their account. Finally, the delay of Greek officials in bringing this case to trial has limited Mr. Symeou’s ability to defend himself. With each passing day the recollection of witnesses supporting Mr. Symeou’s case fades. Witnesses may die or may no longer be found when the trial finally starts. Perhaps worst of all, evidence present at the scene of the victim’s death, deteriorates.

¹³² United States v. MacDonald, 456 U.S. 1, 8 (1982).

¹³³ United States v. Ewell, 383 U.S. 116, 120 (1966).

¹³⁴ *Id.*

¹³⁵ Andrew Gilligan, *Extradition Nightmare: ‘When We First Saw Our Son in Jail It Broke Our Hearts,’* TELEGRAPH (Aug. 21, 2010), <http://www.telegraph.co.uk/news/uknews/law-and-order/7958213/Extradition-nightmare-When-we-first-saw-our-son-in-jail-it-broke-our-hearts.html>.

¹³⁶ *Id.* (explaining that witnesses interviewed by Greek police, who have since recanted their testimonies, used “precisely the same, rather stilted words” in their statements despite the fact that their statements were supposedly taken at different times on different days and also that police showed witnesses a photo of a group of people, on which Andrew was circled with the word “perpetrator” written in Greek).

¹³⁷ *Id.*

¹³⁸ *Id.*

V. CONCLUSION

The use of EAWs against UK citizens has escalated since the implementation of the Council Framework Decision in 2004. This pattern is particularly alarming given the overuse and disproportionate use by the other EU Member States. More alarming than this is the lack of protection for defendants extradited from the UK to other Member States. While other EU states have challenged the implementation of the Council Framework Decision or have instituted opt-outs to protect their citizens, the UK has been left behind. This Note analyzed those abuses in light of U.S. due process rights and proposes a due process provision composed of those rights. This provision would give the UK grounds to decline extradition of any UK citizen where it is reasonable to expect that these rights owed to the defendant will not be respected by the requesting state.