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Witnesses: Roger Burlingame and Isabella Sankey

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Members present

Lord Inglewood (Chairman)
 Lord Brown of Eaton-under-Heywood
 Lord Empey
 Lord Hart of Chilton
 Lord Henley
 Lord Hussain
 Lord Mackay of Drumadoon
 Lord Rowlands
 Baroness Wilcox

Examination of Witnesses

Roger Burlingame, Kobre & Kim LLP, and **Isabella Sankey**, Director of Policy, Liberty

Q54 The Chairman: I extend a welcome to Roger Burlingame, who is from Kobre & Kim and previously a prosecutor in New York, and Isabella Sankey, who we welcome back, having given us a contribution to our informal seminar some weeks ago. We have had CVs from both of you, so I do not see any need to go over that, if that is alright. From the Committee's point of view, I think I am right in saying there are no declarations of interest to be made, so what I would like to ask is that we go straight into the question-and-answer session. But before we do that, would each of you please explain to the Committee who you are, for the purpose of the record, because the hearing is being recorded.

Isabella Sankey: My name is Isabella Sankey and I am the Policy Director at Liberty, the national council for civil liberties.

Roger Burlingame: My name is Roger Burlingame. I am a partner at Kobre & Kim. I do US-facing white-collar defence work, and I was a US federal prosecutor for just under 10 years in New York City.

The Chairman: I will probably direct, and the other members of the Committee will direct, questions initially to one of you, but the other person please feel free to reply if you want to;

there is no compulsion to do that. If I might, starting with Isabella Sankey, when the Home Affairs Select Committee of the House of Commons reported on the UK-US extradition treaty—and for that matter, similarly, Sir Scott Baker’s 2011 review, in its conclusions—it came to the opinion that the evidential requirements in the UK-US treaty are more or less evenly matched, but are there, do you think, other factors that suggest that the UK-US relationship in extradition, in some way or other, may be unbalanced?

Isabella Sankey: Yes, we do. Our concerns about the treaty and about the 2003 Act have never been based on a feeling that there is no reciprocity between the two nations. Our concerns stem from the basic procedural safeguards that no longer exist in domestic law, before somebody is extradited to the US but also to many other jurisdictions. Our view is that, just because the US has taken a decision to allow their citizens and residents to be extradited elsewhere without some fundamental safeguards in place, it does not mean that we should necessarily make that same decision. Our concerns have never been based on the reciprocity point.

With that said, I think that the conclusions of the Sir Scott Baker review and others do not point conclusively to the evidential standard being identical. With respect, the review was a little bit of a fudge around the two evidentiary standards, with the conclusion that it is just very difficult to be precise about whether the two tests are the same. There were no comparisons between court judgments as to reasonable suspicion, on the one hand, and probable cause, on the other. We do not think the matter has necessarily yet been investigated but, as I say, our point has never been about reciprocity, but just about basic safeguards in UK law.

The Chairman: It is essentially an internal UK problem, you think.

Isabella Sankey: Yes. We also think that the statistics on extradition between the two countries demonstrate that there is an imbalance somewhere. If it is not in evidentiary standards that are required, it may be due to resources, the approach of prosecutors in both states and the other arrangements or lack of safeguards.

The Chairman: Mr Burlingame, what do you feel about that please?

Roger Burlingame: As to the imbalance point, I do not see a major imbalance. The two standards to me appear to be functionally the same—the reasonable-suspicion and probable-cause standards. I cannot think of a case that I am aware of that would have turned on the difference between those two standards.

Q55 The Chairman: You have seen it from both sides, as it were, defence and prosecution. Is that right?

Roger Burlingame: I have seen it from both sides, defence and prosecution, and it seems to me that I am unable to think of the situation where the difference between the reasonable-suspicion and the probable-cause standards would make the difference, but it may be that that case is coming. To me it appears that they are functionally the same. The processes that are in place in the two countries are procedurally different, but they are both designed to implement the statute in accordance with the domestic laws, and it seems that they are functionally similar enough to provide that there is not a major imbalance. It seems to me that, if I understand the UK system correctly, one distinction that is an advantage for people being extradited from the United States is that the initial determination from the judge that there is probable cause for the arrest can be challenged in a hearing. Functionally, the challenge is not that significant, because the prosecution showing will be essentially a restatement of what is in the papers supporting the extradition request. That is a slight added benefit that someone coming back to England would have.

Possibly slightly counterbalancing that, and this is a point that we had discussed earlier, which we might follow up on later, is that there might be a tougher sift on who is being extradited based on the differing standards for seeking extradition in the United States versus the UK. The situation with federal prosecutors, which I can speak to most authoritatively, but I believe the state standards are the same, is that when you are seeking an indictment of someone, you are putting on that decision the same decision that the jurors will face upon conviction. You are not indicting somebody based on a probable-cause standard; you are indicting them on a guilty-beyond-reasonable-doubt standard. My understanding of the British request is that it is sufficient evidence for a reasonable prospect of conviction and that the prosecution is justified and in the public interest.

I am not an expert on British prosecution by any means, but just from living here and working here for the last year and a half, it is noticeable to me that British prosecutors do not win at the same rate. That might be a reflection of more aggressive charging decisions. The US prosecutor may feel, "This person has certainly committed the crime, but I am not going to be able to convince 12 jurors of that, and so I am not going to charge this person." My sense, and again you should speak to a British prosecutor, is that the standard is somewhat lower in England and that British prosecutors feel it is their duty to bring the case that they might lose, if that is the right decision to make. That is just a different way of approaching that decision, but the way that that trickles down into extradition is that it does provide some added protection to the person who is in the UK and is going to be arrested on a US extradition request, in that the prosecutor back in the US will have had to have cleared that higher hurdle.

The Chairman: Before we move on to Lady Wilcox, do you have guidelines in the US for prosecutors?

Roger Burlingame: Yes. There is a thing called the United States Attorneys' Manual, which you might want to take a look at.

The Chairman: That is where I am coming to. Could you point us in that direction please?

Roger Burlingame: Sure. It is called the USAM or United States Attorneys' Manual. It is what governs federal prosecutors. It is a collection of practices and policies on the various decisions that prosecutors have to make, so there would be a section in there on charging decisions related to extradition. I would be happy to provide the Committee with follow-up, a link to the website, et cetera.

Q56 Baroness Wilcox: That pretty well helps me too—that question that has already been made by our Lord Chairman. We have already seen the controversy over the difference between probable cause and reasonable suspicion, so I would like to know to what extent misunderstandings arise in the US-UK extradition process as a result of complexities in legal terminology. I will tell you that I am coming from a background of being Chairman of the National Consumer Council. I am very interested that the general public gets a much better view of what is going on. As you know, we have, for example, national newspapers in this country and they use a very short vocabulary. When it comes to the law, they use a very long and complex vocabulary and, therefore, the man on the street is between a rock and a hard place with these things. That is the area that I am asking the question from.

Roger Burlingame: The protection that is afforded to the citizens is knowing that the judge in their own country, who is going to be making the decision as to whether or not they are going to be arrested, is going to be putting the same view on what is presented to them—is putting the domestic standard on the application that is presented to them. If there is a UK prosecutor who is seeking the extradition of a British citizen from the United States, they are going to fill out a document that provides the basic facts of the case, the law and why they

believe this person broke the law. The US judge, who is going to issue the arrest warrant, is going to say, “Is there probable cause for the person to be arrested?” That person in the United States is going to have the same benefit of the probable-cause standard that any other United States citizen has before they are arrested.

If you have faith in the concept of extradition, which is essentially that we have sufficient faith in the criminal justice system of this other country that we are willing to extradite people who are in our country in order to be subject to its processes, then that should give you some comfort that you are getting the same treatment that the country’s own citizens are getting.

Baroness Wilcox: Can I just sneak in an extra one? Do the US prosecutors provide requested persons with any assistance to understand the charges levelled against them? What assistance do you actually offer in the States that is better than here in the way that we approach the people that we are trying to move?

Roger Burlingame: I am sorry; I do not think I understand the question.

Baroness Wilcox: You do not understand it. Okay, we will leave it until later.

The Chairman: Do you want to answer quickly and then we must move on?

Isabella Sankey: Yes, absolutely. As I said in part in response to the first question, our impression of the huge public concern about our extradition arrangements relates in part to the somewhat over-emphasised issue about whether there is a difference in evidentiary standards required by the UK, as per the US Government. If you look at the cases over which the public have been most concerned—the cases of Richard O’Dwyer, Babar Ahmad and Talha Ahsan—you see that the concern really stems from cases that are deemed to be disproportionate, as in the case of Richard O’Dwyer, where it is clearly not in the public interest to extradite a young student for a copyright offence: for setting up a website as part

of his studies at university. As with both of those, and also with Gary McKinnon's case, the activity took place wholly in the UK. People feel, I think understandably, a great sense of unfairness that, in these cases of concurrent jurisdiction, there are currently not proper processes in place to ensure that we get the first bite of the cherry as to whether we want to bring a prosecution here. There is an effective bar to prosecution in those cases. Again, it comes back to not whether or not the systems are equal, but whether we have the right protections for our citizens. That is what we think the public is so concerned about.

Lord Brown of Eaton-under-Heywood: You are really asking for a reintroduction of the prima facie evidence case across the board.

Isabella Sankey: Yes, we are. We think that this comes back to first principles.

Lord Brown of Eaton-under-Heywood: That would apply to Part 1 as well, would it not?

Isabella Sankey: Yes, to Part 1 and to Part 2.

Lord Brown of Eaton-under-Heywood: That is going back a long way now in the history and it would rewrite the entirety of extradition law, would it not?

Isabella Sankey: Those are the safeguards that have existed for decades and decades in British extradition law, and we think with very good reason. We think they were removed too hastily, and we now have experimented with their removal and seen incredibly unjust results that have caused huge consternation amongst the British public. Yes, sometimes law-makers need to reverse reforms that they have brought forward. It can seem like a very big ask, but we feel that the situation is incredibly unfortunate: our traditions of criminal justice standards in this country are something to be proud of yet, instead of requiring those same standards to be met by other countries, we have given away a lot of the procedural protections that we would require here in our own law. We think this may be for well intentioned reasons, because we want to have good diplomatic relations with other

countries, and we understand that extradition is in the interests of everybody, but we think that there are basic first principles that must be returned to.

The Chairman: Can I just come in there? We have got the message that you think that the thing is fundamentally misconceived in the present state of circumstances but, when we go forward, can we ask you—we have specific questions—bearing in mind the law is as the law is now, to give your gloss on that and not simply to go back to the point I think we have all got? We can entirely understand where you are coming from—some may agree; some may disagree. That is a separate point: that we have to go back and start it again. We have to approach it from the perspective of where we are now and see what the nuances may be, bearing in mind that is your firm position.

Lord Henley: I have a very quick question. Isabella Sankey said very firmly in her opening remarks that the statistics show there is an imbalance between the two countries. I wonder whether you can expand on that to show why the statistics show there is an imbalance, or whether you prefer to put something in writing to us to explain. Obviously we are different sized countries. Statistics can say an awful lot of things.

Isabella Sankey: I can certainly follow up in more detail on the statistics point but, in front of me here, I have statistics. In 2010, 33 people had been extradited from the US to the UK, and only three of those were known to be US nationals under the new arrangements, with the 2003 treaty and Act. In that same period, 62 had been extradited from the UK to the US; 28 were known to be British nationals or had dual citizenship. That shows, in that period, many more British nationals were being extradited to the US than vice versa and, given the different sizes in population, you would expect that to actually be the reverse. The statistics more than show that the current arrangements are operating, for various reasons, we think, in a very imbalanced way.

Q57 Lord Brown of Eaton-under-Heywood: That is one aspect of the statistics. Another is that, we have been told, the United States has never, ever denied us an extradition request, whereas we have denied 10 of theirs.

Isabella Sankey: That may be the case, but that could be for a whole host of justified reasons. Just because certain extraditions have been denied, it demonstrates that, on the facts in that particular case, extradition was not warranted. Statistics are always going to be a bit of a rough measure of things, but those statistics should give cause for concern that things are operating in such a hugely imbalanced way, particularly given the different population sizes. That may be to do with public-interest decisions about prosecution, which could be different in the UK and US, and different rules about that. It could be for all sorts of reasons. It could be that it is something that needs to be factored into the analysis.

The Chairman: Can I just intervene there? You said initially that there was a particular reason for that and now you have said that there are possibly all sorts of reasons. Clearly there is something that it is worth looking into, but I am not sure you have adduced any evidence to us as to what the conclusion we should draw from the statistics ought to be.

Isabella Sankey: One of the possible conclusions is that the US pursues disproportionate extradition requests that are not in the public interest.

The Chairman: That is one interpretation, but I think Mr Burlingame might have given a reason why he may think that possibly is not the right gloss to put on it. Lord Brown, you are in the driving seat with this.

Lord Brown of Eaton-under-Heywood: I would like Mr Burlingame's response to the statistics. Could you explain both sets of figures?

Isabella Sankey: Can I just make one more additional point? Another factor might be the way in which things operate currently for concurrent-jurisdiction cases. We see in nearly all

of those cases where there is concurrent jurisdiction the US successfully requests extradition. I am not aware of a single case of concurrent jurisdiction where the UK has successfully extradited someone from the US to the UK. In those cases where the US could prosecute or the UK could prosecute, I am not aware that the UK seeks, or at least successfully seeks, extradition.

Lord Hart of Chilton: Why do you say that is: because of weakness on our part?

Isabella Sankey: It is difficult to know how the prosecutorial decision-making processes work, because these are private discussions and negotiations between prosecutors but, if you look at the cases that come to court and the extradition requests that we get from the US, it is quite clear that, in many concurrent-jurisdiction cases, again for different reasons, our prosecutors decide not to pursue prosecutions and US prosecutors do. That could be a difference in approach, a different public interest test and all sorts of things, but the evidence is the cases that we have seen in this period that the treaty has been in operation. The evidence demonstrates that the US much more aggressively seeks extradition and prosecution in concurrent-jurisdiction cases. They may be better resourced. There are all sorts of considerations that there may be.

We think the way to fix this is by having an effective forum bar on the statute book that would make US prosecutors prove why, in concurrent-jurisdiction cases, prosecution should take place in the US, rather than in the UK. We think the way that the current forum bar that has recently been introduced operates would do nothing in practice to deal with this very disturbing situation that has developed.

The Chairman: Now, Mr Burlingame, you may wish to give us some thoughts arising from that.

Roger Burlingame: My understanding of the way it works is that all the UK authorities would have to do to take jurisdiction over a case in which the US is seeking to extradite a UK citizen is to indict their own citizen. My sense of what drives the prosecution decisions is the prosecutor with the better case is bringing the case. My sense is that it boils down to a prosecutorial resources issue.

The US has a huge, huge amount of law enforcement. One thing that has become apparent to me, being over here and interacting largely with UK white-collar defence attorneys and UK prosecutors, is the very different tracks that there are in the US and UK, in that the ranks of federal prosecutors are very well funded and there is no shortage of funds for people to be pursuing any cases that they want to be pursuing. The US has an expansive view of its jurisdiction and so it is seeking to bring cases that implicate US interests around the world and there are plenty of people to pursue those cases. The people who are pursuing those cases are, on the whole, the brightest and best of the US system. If you are at a Slaughter and May-equivalent firm in New York City and you get an offer to go work at the southern district of New York as a federal prosecutor that is the most exciting day of your life, not the day you got the job at Slaughter and May, and you are dying to go do that job. Those people at the end of doing that job are then going back to the Slaughter and May-equivalent and becoming the tippy-top members of the bar in New York City.

First of all, you have incredibly high-achieving, hard-working, motivated people at the height of their energy levels. The typical career trajectory is you do four or five years out of law school at a big firm, then you go to the US Attorney's office for five to 10 years, and then you go back to a big firm. In DC, New York and Chicago—the big cities—that is the trajectory. You have these people in their 30s with boundless energy, who are the most Type A aggressive achievers up to that point in their lives, and then they are given this job and the

cases that are going to get them the biggest headlines are huge international white-collar or terrorism cases. You have people with virtually unlimited resources working around the clock to pursue these kinds of cases. I do not have an in-depth knowledge of the way the SFO works and the way the Crown Prosecution Service works, but it seems like England has a different approach to funding law enforcement, and that there are different choices being made by people about their career trajectories. It seems to me that a natural function of those two systems at work would be that you would have less aggressive law enforcement and you would have less energy left over for doing, essentially, law enforcement in someone else's country.

Isabella Sankey: If I could just comment on that, as a person in my 30s with boundless energy, and with lots of friends in the same category, I would like to stick up for people who work in public service in the UK. I do not recognise that comparison and I do not think that we can put the difference down to that.

Could I just quickly illustrate, using the case of Babar Ahmad, why I do not think that interpretation stacks up? He and Talha Ahsan may have had the brightest and the best federal prosecutors going after them. Last week, the federal prosecutors were severely criticised by a US judge for the evidence that they brought to secure very long sentences for the two men. She was highly critical of their evidence and their approach, and gave much lower sentences than the federal prosecutors were after, so I do not think it is a question of the quality of the prosecutors or otherwise. On the issue of who has got the best case of the two prosecuting authorities, Babar Ahmad's case clearly shows that the evidence and the witnesses for his alleged activities were all in the UK. In fact, the Metropolitan Police handed over evidence to their US equivalents, so there is obviously a high degree of co-operation between the prosecuting authorities. I do not think any of the cases that I am

familiar with demonstrate that, in these cases where forum is an issue, the US necessarily has a stronger case before they co-operate with the UK.

Roger Burlingame: Just to clarify, I am by no means casting aspersions on anyone who is in public service in the UK. I think that there is just a slightly different incentive structure, on my understanding, in the way the law-firm systems work in the respective countries.

Q58 Lord Hussain: Could you tell us what are the processes involved in extraditing an individual from the US to the UK, and how these compare to processes in the UK?

Roger Burlingame: I think they are largely parallel. Is that towards me?

Lord Hussain: Yes.

Roger Burlingame: They are largely parallel processes. They are slightly different in some of the procedures involved. If you are in the UK and seeking to bring someone back from the US, the prosecutor here is going to make a judgment as to whether there is sufficient evidence for a reasonable prospect of conviction and that the prosecution is justified in the public interest. They are going to then provide the documentation required under the treaty to the diplomatic corps, the most salient of which is the information outlining how the individual's conduct has broken the law. That is transferred over to the United States. It is reviewed by first the State Department and then the Office of International Affairs. If they judge that it meets the requirements of the treaty, it goes to one of the local US attorney's offices, and then the federal prosecutor writes out a warrant for the person's arrest, brings that to a judge and the judge makes a probable-cause determination. Are there indeed facts and circumstances sufficient to warrant a man or woman of reasonable prudence to believe that there is evidence of a crime? If so, the person is arrested and then there is an extradition hearing, which is essentially: is this the person who was identified in the

warrant? Was the treaty followed? Within “was the treaty followed?” is there indeed probable cause here?

As I said earlier, there is the hearing but it is not a particularly robust opportunity for the person who is being extradited to change the trajectory of how things are going to go for them, because they are not able to put on a case; there is not a mini-trial that takes place. It would just be an opportunity for them to say, “We believe what was set forth in the papers does not in fact meet the standards. We believe the Treaty was not followed in X, Y or Z way.” After the hearing is cleared, there is an opportunity for appeal by habeas corpus, and then the person is certified for extradition and is returned to the UK.

The same process essentially happens in reverse going the other way. The US prosecutor either indicts the person before a Grand Jury or fills out an arrest warrant, which gets a judge to sign on the same probable-cause standard, transmits it to the Office of International Affairs. They make sure all the boxes are ticked in accordance with the treaty. It gets transmitted by diplomatic channels to the UK. A judge here then passes on an arrest warrant, making sure that it has set forth clearly the reasonable-suspicion standard and is in compliance with the treaty. The person is arrested. The main procedural difference between the two systems is that then the person does not have an extradition hearing in which to challenge the judge’s determination.

The Chairman: Can I just come in there? In the hearings in the US, are there any equivalent considerations brought into play, such as, for example in this country, the European Convention on Human Rights?

Roger Burlingame: There are indeed, yes.

The Chairman: Can you just specify, please, what they are?

Roger Burlingame: It would be the defences outlined in the treaty, so double jeopardy, not being prosecuted for the same crime twice, and then whether it is a politically motivated prosecution or whether there are humanitarian concerns. They are the same issues that would be addressed by courts here.

Lord Brown of Eaton-under-Heywood: That would be what: after the Grand Jury has issued the indictment?

Roger Burlingame: No, because this would be a person who is coming from the United States to England who has the benefit of the extradition hearing. If you are being indicted that means you are on your way to the United States.

Lord Brown of Eaton-under-Heywood: Does it? I do not know. I wrote the judgment in McKinnon and I just reminded myself of what happened there. As I understand it there, he had been indicted by Grand Juries in two districts, New Jersey and Virginia, and it was on the basis of those indictments that the request came to the UK to extradite him.

Lord Hart of Chilton: The same thing happened with Mr Tappin.

Roger Burlingame: Correct. For people who are coming from the UK to the US, step one in that process is often going to be their indictment in the US. The extradition hearing would take place for a UK citizen who is arrested in the United States and is then on the way back to the UK.

Lord Brown of Eaton-under-Heywood: I see. If you are being transferred the other way, then you are saying there is a human rights consideration stage or the equivalent.

Roger Burlingame: I think it is the home country—the country that is being requested to extradite the person—which is going to be evaluating the human rights concerns before they allow their citizen to be extradited.

Lord Hart of Chilton: Where does that happen? At the moment, the nuts and bolts of this are a bit of a puzzle to me. Is the hearing that you are referring to before a Grand Jury?

Roger Burlingame: No. I am sitting at my desk in New York City and decide that a British citizen has committed securities fraud. I go and indict him along with the other five co-conspirators who are sitting in New York City. I go to the Grand Jury; I present my case as to why this person has committed a crime. They vote out an indictment. I have my indictment, then I fill out my extradition packet and I send it off to Washington. It gets transferred to the UK and the person is arrested in the UK. At that point is their right to have their case reviewed, as to whether or not my prosecution of that person was in some way a humanitarian violation. The British judge would be responsible for that. The Grand Jury is just weighing in on the initial decision, "Did this person commit a crime?" It is step one of the process.

Lord Hart of Chilton: Is that usually a rubber-stamping exercise?

Roger Burlingame: With no disrespect to Grand Jurors all over the world, essentially it is very rare that a Grand Jury stands in the way of an indictment.

Lord Hart of Chilton: There is no advocacy in front of the Grand Jury?

Roger Burlingame: I guess I would want to know what you mean by "advocacy". Why it is typically a rubber stamp is because of what I mentioned before: when I am deciding whether or not I am going to indict this British trader for securities fraud, I am thinking, "Can I convict this guy at trial? What is the evidence that I am going to be able to introduce at trial?" When you go into the Grand Jury, you have a much lower standard than the beyond-a-reasonable-doubt standard at trial; you have just a probable-cause standard. It is very atypical that you would be able to clear this much higher burden and then get tripped up on the lower hurdle of: does it appear reasonable that they committed the crime.

Lord Brown of Eaton-under-Heywood: The accused does not even know of the existence of the Grand Jury proceeding, does he?

Roger Burlingame: Correct; it is secret.

Q59 Lord Henley: The Grand Jury process is unfamiliar to most people in the UK. I wonder if you can just expand a bit. I appreciate you have sent an email, which we have seen, but for the sake of the record it would be quite useful if you just explained to the Committee how the Grand Jury process works.

Roger Burlingame: I would have written my email more formally had I realised it was going to be distributed to the Committee. The Grand Jury is a group of between 16 and 23 jurors—members of the community in which the Grand Jury is sitting—who are called to Grand Jury service. It sits on a weekly basis and it will be comprised of the same Grand Jurors. In the federal system, the shortest Grand Jury would be three months, but it can renew and it will typically renew up to a period. I think it ends at two years, but I am not positive of that. It is like any other jury; it is members of the community. Over time, you can drop off after a three-month period, and so it tends to be people who like Grand Jury service the longer the Grand Jury has gone on. If you have a very stressful job, you might not want to spend two years on the Grand Jury. If you do not particularly like your day job, then having a day away sitting in the Grand Jury hearing about crimes being committed—that is the population of the Grand Jury. The prosecutor comes in and makes a presentation to the Grand Jury. Actually, sorry, there are two functions. The first is an investigatory function.

Lord Henley: The defence does not know about it.

Roger Burlingame: The defence has no right to know that the Grand Jury is taking place. One of the things that you can do is subpoena witnesses who have to come and testify to the Grand Jury. You can use it as a prosecutor as an investigative tool: “I want to find out

evidence from this person in the search of whether or not X crime was committed, so I will call them in and they will be forced to answer questions, under penalty of perjury, in the Grand Jury.” You would be conducting your investigation through the Grand Jury and then, at the end of that process, you would provide a summary of what your evidence shows to the Grand Jurors, read them the indictment and then, provided 12 of them voted that there was probable cause to believe that the crime charged in the indictment was committed, then there would be a true bill and that person would then be indicted.

The Chairman: Do they have to make any determination first not that the crime has been committed, but on whether or not the person alleged to have committed the crime is the perpetrator?

Roger Burlingame: Yes, that would be part of the indictment: that you have the right guy.

Q60 The Chairman: The second question I have is whether this procedure with the Grand Jury is part of getting the prosecution underway, or whether it is part of the trial of any person who is accused.

Roger Burlingame: No, it is the investigative role of helping the prosecutor adduce evidence as to whether or not a crime should be charged, and then it is the bringing of the charge. It has nothing to do with the proving of the charge and the trial afterwards. The whole thing can be avoided. The accused could waive their right to be indicted by Grand Jury and you could just proceed forward on what is called an information and have an indictment come into being that way. You can also arrest someone without indicting them first, but then you would have 30 days in which you would have to indict them to start the case. You cannot arrest somebody and indefinitely hold them.

The Chairman: Is the Grand Jury a universal characteristic of law in the United States or is it merely in some places and not in others?

Roger Burlingame: It is universal federal practice and I believe it is being used in a little over half of the states.

Lord Rowlands: Does any extradition case have to go before the Grand Jury?

Roger Burlingame: No. I could also be sitting at my desk as the prosecutor and write up an arrest warrant for a judge that lays out the facts and the law as to why this person, I believe, violated the law. I would submit that to the judge; the judge would put the American probable-cause test on to it, as to whether or not there is probable cause to believe this person committed the crime. He or she would then issue an arrest warrant, and then you would use that arrest warrant, which had just passed muster with the judge, not with the Grand Jury, as the arrest warrant that you are going to use in your extradition request.

Lord Rowlands: What determines which course you take then?

Roger Burlingame: Outside the extradition context, it has to do with timing concerns and how locked in you want to be, if there is any chance that, maybe, you do not want to seek the indictment of a certain person. For example, a typical case would be you have someone who you know committed a crime. You are hoping that they, instead of fighting the charge, are going to co-operate and are going to help you get the other person in, say, the drug gang or whatever. You get an arrest warrant, so that the agents can pull them over on the side of the road and say, "Listen, you are under arrest. Do you want to help us or not?" If the person says, "Yes, I want to help you," you can keep it secret; they could then go ahead and co-operate for years. If you have gotten your arrest warrant through an indictment, then you have the case sitting there and the judge is antsy about this person who is co-operating for years and years. It has to do with a firm beginning time on the beginning of the case and various strategic timing concerns.

Lord Rowlands: What proportion of extradition cases would go to Grand Jury as opposed to the other?

Roger Burlingame: I do not know the answer to that question. I suspect that Amy Jeffress, who is the next witness, will have a better answer to that question.

The Chairman: Can I interject there? We are getting down to an awful lot of technical detail. Would it be too much to ask if perhaps you could either point us to the kind of book that would lay it out for us or find someone to produce a paper that would explain? It is very alien and out of character with the approach we have, so it is obviously important, but I do not want to spend too much time on the nuts and bolts.

Roger Burlingame: Sure. I would be happy to provide the Committee with the names of basic federal criminal practice treatises that will lay this out.

Q61 The Chairman: Not too complicated please. One point that I think is important is that the human rights bars that exist in the English system are pretty emphatic. When you talk about the US system in terms of humanitarian considerations and political motivation, what degree of robustness pertains to them? Are they of equivalent strength, for want of a better way of putting it, to the bars that exist in this country, or are they in fact more loosely and more generally interpreted? Are they equivalent or are they not?

Roger Burlingame: I think that might be another question that is better posed to Amy in that, by dint of her job as the American attaché in London, she is going to have a better sense of the standards here than I do and be able to give you a better comparative answer.

The Chairman: That is an entirely fair response.

Lord Brown of Eaton-under-Heywood: Can I just ask one thing? Whether you base your extradition request to this country on a Grand Jury indictment or a judge's warrant, either

way, at least theoretically, the Grand Jury or the judge should have been satisfied as to probable cause.

Roger Burlingame: Correct.

Lord Brown of Eaton-under-Heywood: That is the only point at which anybody is looking at probable cause as opposed to the lesser standard of reasonable suspicion.

Roger Burlingame: There would also be internal controls in the Office of International Affairs before they approve the extradition request. They are going to read very carefully the information that comes along with it to be satisfied that it agrees with the individual US attorney offices and the judge's determination of probable cause.

Lord Brown of Eaton-under-Heywood: You say they apply the probable-cause standard too.

Roger Burlingame: Right, and there is also going to be internally the prosecutor who is sitting at his desk and saying, "I want to arrest this person." There are levels of supervision that they have to clear in order to be able to, so there are many sets of eyes that are looking and making sure that the US standard of probable cause has been cleared.

Q62 The Chairman: As far as the US end of the game is concerned, until you start looking out of the US border, it is all based on probable cause. Is that right?

Roger Burlingame: That is correct.

Lord Hart of Chilton: Can I just ask this? All these alpha males are burning up energy in getting to the point where—

Roger Burlingame: There are lots of alpha females as well.

Lord Hart of Chilton: I am sorry. Their energy is being used and a warrant has been issued. Why is there sometimes such a delay between the warrant being issued and the extradition process being started? In Tappin, for example, there was a three-year delay between the warrant being issued and the extradition process being started.

Roger Burlingame: I cannot speak to that case. A couple of possible explanations spring to mind. One would be if the investigation is covert; once you submit the extradition request, it is going to become overt. If there is continuing investigation going on, you might not want it to be known about that you are looking at a certain person or a certain group of people, because it would give away what is happening in the investigation. It can also just be bureaucratic. I do not think three years would be explained by bureaucratic processes, but there are many requests going through OIA and I am not sure that they are all—well, I will not comment on OIA, because I am not an expert on OIA. I think Amy will probably have more experience with that.

Lord Mackay of Drumadoon: Can the procedures you were talking about of going to a Grand Jury or a judge for a warrant be pursued by a state prosecutor or by a federal prosecutor?

Roger Burlingame: The system is identical from the point at which the arrest warrant has been secured but, up to that point, there are differing procedures in the states and for federal prosecutors. It is still going to be governed by a probable cause standard but, for example, Grand Jury procedure can differ greatly. For example, with the federal Grand Jury procedure, as I said, you are typically going to end up with a true bill. It is a much higher hurdle to clear in New York State, because the rules of evidence are in force and you cannot have people testifying through hearsay. It is a higher hurdle.

Q63 Lord Empey: Good morning. Because of the different systems, because of the different lengths of sentences, there could be a possibility that somebody would be encouraged into plea bargaining. That requires an admission of guilt rather than an assertion of innocence. Therefore, given the fact that people are away from home facing these very lengthy sentences, do you feel that there would be additional pressure on those people to actually enter a plea bargain rather than continue to assert their innocence?

Roger Burlingame: You have a constitutional guarantee of the right to trial. At base, you have the same decision in the United States that you have in the UK, which is whether you are going to challenge the case at trial or you are going to plead guilty and get a slightly better deal than you would get if you challenge the case at trial and lose. That is always an incredibly fraught, hard decision for people who are in that situation. My take on that question is that it boils back down again to the differing approach to the charging decision, as I perceive it. What I understand your question to be asking is whether there is an added pressure to plead guilty in the United States that there is not in the UK. Part of that may boil down to the much higher conviction rate and part of that may boil down to the much tighter sift on the charging decision.

I was incredibly struck recently. I was having a conversation with a prominent white-collar defence attorney in London after the phone-hacking trial ended. I said, "This is just amazing; one conviction. Heads would roll at any prosecutor's office in the United States if you got one out of eight in the most high-profile trial in the country." She said, "I thought it was a tremendous success, in that the main target was convicted." I think that reflected a huge difference in perspective as to what, when you charge someone, you are expecting. I do not think that the 95% conviction rate in federal courts—I am not sure it is actually 95%, but it is somewhere way up there—is because of a more talented group of prosecutors; I think it is because you are making a much stricter charging decision. If that is true and you are charging a pool of people who are more provably guilty, then it is going to make sense that those people are going to be feeling additional pressure to plead guilty, because it becomes a more futile thing to challenge the case at trial.

Lord Empey: Given the fact that there is a very significant political dimension to the identification of prosecutors and others, through elections in the various states, which is

obviously something we do not have, to what extent does that intervene in the decision-making as to whether somebody goes for a case or does not go, and what practical implications does that have for the individual?

Roger Burlingame: I have no personal experience of that. Federal judges are not elected, but I know it is very prevalent in many states. I have read some of the material—the Brennan Center study that was included in one of the questions that I was kindly sent. I found the study to be very troubling, but I do not think I can offer any sort of opinion that goes beyond what you would be able to glean by reading the study.

Lord Empey: Do you have a view on that, Isabella?

Isabella Sankey: We do have a view on that and also your earlier question about pressure to plea bargain. I think there is an increased pressure on those who are extradited from the UK, not only because there is such a difference between possible length of sentence in a way that, for many offences, there is not in the UK, because the US has much higher sentences for many crimes, but also because, as part of a plea bargain, the issue of where you get to serve your sentence often comes into play. For people who are far away from home without support, facing an alien justice system, the idea that you will be able to serve a period of your sentence back in the UK is always going to be much more comforting. There is an increased pressure to plea bargain and that is something that certainly should be taken into account in extradition decisions made by our judges.

Q64 Lord Brown of Eaton-under-Heywood: How would you take that into account? What do you do about that? Do you say, “They should not be given a discount if they plead in order to take the pressure off them. They should be required to contest the case”? How do you deal with it? Do you say, “We won’t extradite them; they can have sanctuary here”? How do you deal with that?

Isabella Sankey: It puts our judges in an invidious situation; I agree with that. In the McKinnon case, as you will remember—you dealt with it—you looked at the facts that were presented by his side and you reached a conclusion as to whether or not you thought that the plea bargaining in that case was oppressive. That is the best way of dealing with it and reaching the conclusions on a case-by-case basis. It is always going to be an incredibly difficult situation, because our criminal justice systems are so very different—more different than a lot of people realise—but it is something that needs to be taken into account, because it affects the ability of somebody to access justice when they are extradited and to get a fair trial. There is no way it cannot be taken into account.

The politicisation of the judiciary, at state level in the US, and prosecutors also is something that we should be very conscious of here in the UK. It is completely different from the politically impartial justice that we administer here.

The Chairman: Can I stop you there a moment? It is obviously something we have to take note of. Do you have—and you may not have it here with you—any evidence to suggest that there has been injustice caused by the kind of things we are talking about?

Isabella Sankey: You can look at the practical cases that have now reached a conclusion, one way or another, and what you will find is that so many people who are extradited from the UK to the US do plea bargain. It is impossible to know whether or not they should have done so, but the evidence is there that, for the vast majority of people—in fact, I cannot think of anybody who is planning to contest, apart from perhaps Paul and Sandra Dunham, who have recently been extradited and are now saying that they are planning to contest the charges—you do not see cases of people not wanting to plea bargain. It is a huge roll of the dice if you do not.

The Chairman: There are two points with that. To go back to what Mr Burlingame said, his proposition to us was that, in order to bring a prosecution, the way in which the American prosecutors look at it is they will not start at all unless there is a much greater degree of evidence to support the likelihood of conviction than is the case in the UK. You may not have any views about that; you may say you do not know enough about the detail; but I, and I am sure the Committee, would be interested to know your gloss on that perspective.

Isabella Sankey: I am not sure that there is evidence available to demonstrate that. In a number of cases, it is clear that the evidence that the US claims that they had was not there. In the case of Lotfi Raissi, when we did have a prima facie safeguard on the statute book, back in 2003, his extradition was rejected because the US did not make a basic case. Taking the prosecution's case at its highest, there was no case to answer. So there is an example. In the Babar Ahmad case that I just mentioned, the US judge in that case was highly critical of the evidence that the US prosecutors brought and said showed that material support to terrorists had been provided. There are a few anecdotal examples I can give you, but it is not my impression at all that a much more stringent test is exercised by US prosecutors before going after prosecutions.

If I could just make one connected point, all of these issues that we are grappling with are incredibly difficult—the plea bargaining, issues to do with the politicisation of judges in the US and the differences in our justice systems. We believe this is all the more reason why there need to be other procedural safeguards in place, which would in a way help you get around some of these more fundamental contradictions between our justice systems. Having an effective forum bar on the statute book, for example, would mean that we were not outsourcing so many prosecutions to the US of people who have allegedly done things here in the UK. It means we would not have to get into these very difficult assessments as to

the pressure to plea bargain, the treatment they might receive in the US, in US prisons. One very easy way to deal with a lot of these issues is to make sure we have better procedural safeguards so that the case can be barred for a different reason and somebody can be prosecuted here.

Lord Rowlands: Ms Sankey, you are leaving me with an impression that you would almost extradite no one. What would happen then to the interests of those who are the victims of the crime, who are waiting for justice?

Isabella Sankey: That is absolutely not the case. We believe in extradition wholeheartedly and we think it serves a very important purpose. We just think that too many safeguards have been given away. With so many of the cases where forum is an issue, potential victims are here in the UK just as they are in the US, and more evidence is often here. To us, it just seems to make no sense to have to send so many people to face justice abroad when they could quite easily be brought to justice here, but we do not deny the importance of extradition at all.

Q65 The Chairman: Can I come back here to a point that we almost got to but is quite important. We have heard evidence that, if you resist extradition and you then are subsequently extradited, bail in the US is denied. Is that correct?

Roger Burlingame: Not necessarily.

The Chairman: It is not so.

Roger Burlingame: It is not so.

The Chairman: Is it general practice to deny it?

Roger Burlingame: The bail determination is made by the judge, based on risk of flight or dangerousness to the community. Typically the most important factor for somebody who was being extradited in would be risk of flight. The arguments that are presented in bail

hearings to US judges to negate risk of flight are: this person has been living in this community for X number of years; their job is here; their family is here. Judge, where are they going to go? We have put down a bond on their house. They do not have enough money to be able to live on the lam. Not only do they have no incentive to flee because this is where they are, but they do not have the ability to flee. That becomes a much tougher hurdle to clear when you have no ties to the United States and you are brought in.

The Chairman: No money, no home, no nothing.

Roger Burlingame: Right. I do not think it is the act of challenging extradition that would lead to a low percentage of bail granted, but there are instances that I can think of that my firm has handled where, if you can assure the judge that the risk of flight is negated, so that the person will submit to some sort of electronic monitoring to show that they are still within the jurisdiction or be able to put up some sort of a bond that makes the judge satisfied that a particularly close family member would be financially ruined if they were to flee, or something along those lines, you can get bail.

The Chairman: It is a pretty high hurdle if you do not have much in the way of resources, is it not?

Roger Burlingame: That is correct.

The Chairman: Anybody else on this, otherwise I would like to ask Lord Hart. We have touched on forum and you have an interest.

Q66 Lord Hart of Chilton: We have. We need to go back to that. I would like to start by just having you explain in a little more detail how the various prosecutors, UK and US, work out together decisions on concurrent jurisdiction. What do they actually do? Just describe what happens?

Roger Burlingame: The relationship between the two countries is extremely strong, as in all other areas. If there was a case that was starting from an absolutely even starting line and the same amount of exact information was known to both the UK and the US at the beginning, and you were dividing up who was going to prosecute whom, then the idea would be for each country to focus on its own citizens and the ones who are there. Conflicts arise where one set of prosecutors has a greater quantum of evidence against a certain defendant and is more advanced in the investigation. Then you have a meeting at which one side says, “We can prove X, Y and Z. We are here with our investigation. You are not off the blocks. We should be entitled to this.”

The Chairman: I take it you have done these kinds of negotiations.

Roger Burlingame: Some of these investigations I have done. There are two federal prosecutors’ offices in New York City. When you become more senior at either one of them, you spend your life fighting with the other one about who is going to get which target. Prosecutors are prosecutors the world over, and do not like to invest a lot of time and effort investigating a case to then give away the target, so it becomes a question of who has the better more advanced case typically.

Lord Hart of Chilton: When you look at a case and you see that the defendants are located—let us take an example of UK-US—in the UK. Here are the defendants resident in the UK. The crime has probably been committed in the UK. Why would it be that that would lead to extradition?

Roger Burlingame: I guess it depends. I would need to know what happened and why the prosecutor was thinking about extradition in the first place. If it is a person who was involved in, say, allegedly fixing LIBOR and they were sitting in a bank in London, but two of the people they were conspiring with to fix LIBOR were in New York and one was in Hong

Kong, that group of people, you could argue as a prosecutor, should all be tried together, because they were committing the crime together. What is the appropriate jurisdiction in that case? I would think the jurisdiction that can prove the case.

One point that has been glossed over a little bit is that any time the UK wants to stop an extradition to the United States, it can just indict its citizen and then that is it for the extradition. Where there are cases where both sides are equally advanced in their investigation and prepared to prosecute, you are not going to have situations where people are being extradited. It is where one country is more advanced in the investigation and ready to go, whereas the other one is not similarly advanced on the same case.

Lord Hart of Chilton: Does it sometimes come down to the zeal of the prosecutors, going back to your alpha male or female?

Roger Burlingame: I think it is less about the prosecutors, possibly, and more about their resources and how much attention is focused on those sorts of cross-border, multi-jurisdictional, white-collar cases, terrorism cases and currently US tax evasion cases. They are the kinds of cases where the US is reaching across borders. No one is coming to try to extradite people for marital disputes that lead to dust-ups in south London. It is crimes that the US perceives have some logical connection to the United States.

Isabella Sankey: That logical connection could be as small as a computer being used with a US server based in the US for a matter of months.

Lord Brown of Eaton-under-Heywood: You would not suggest McKinnon was more appropriately tried here than the United States considering, although his action was here, it was targeted exclusively at destroying capabilities in the United States.

Isabella Sankey: We believe that, in all cases, there should be a forum bar that could be argued by somebody who has not left the jurisdiction. It will then be up to a UK court to determine whether extradition should be barred on forum grounds.

The Chairman: We have really got to the end of the time we have as we have the next witness coming on line in a minute or two. What I would like to say to both of you is thank you very much indeed. Speaking for myself, I now know a lot of things I did not know before the session began. You have given certainly everybody here a considerable amount of food for thought. If anything crops up later, I hope we might be able to come back to you and seek additional evidence, if that were possible, please.

Roger Burlingame: Of course. Thank you so much for the opportunity.

Isabella Sankey: Thank you, Lord Chairman.