ARTICLE

Why Countries Diverge over Extradition Treaties with China: The Executive Power to Extradite in Common and Civil Law Countries

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China has made a concerted effort for over a decade to conclude extradition treaties with developed countries that are popular “safe havens” for its fugitive officials and economic criminals. Chinese President Xi Jinping has placed these efforts at the forefront of Chinese foreign policy in recent years as part of his anticorruption campaign, invariably pressing the issue of extradition with these trade partners and their (largely) liberal democratic leaders. Nonetheless, China’s extradition drive has attained mixed results. A number of developed civil law states have concluded treaties with China while their common law counterparts almost universally refuse to follow suit. This Article analyzes this pattern of divergent behavior and is the first to offer a legal explanation for it. It argues that the nature of executive authority to extradite and other branches’ checks on that authority differ significantly in common and civil law systems. Differing policies regarding the extradition of nationals and evidentiary standards for extradition requests exacerbate these structural differences. These factors calibrate a state’s threshold to enter into an extradition treaty, particularly with a controversial state like China.

The geopolitically significant backdrop of China’s extradition drive teases out the differences between common and civil law systems, broadly shedding light on the collective impact of these legal dissimilarities on state extradition practice at a time when many states are in the process of streamlining their extradition schemes to boost international law enforcement cooperation. Independent of its novel arguments, this Article also comprehensively catalogues and elaborates on factors (legal and non-legal) relevant to any state’s decision to enter into an extradition treaty. This article will be of interest to scholars, governments, and others interested in how divergent extradition schemes influence state practice and, by extension, impact the efficacy of international extradition law, international legal cooperation, and individual rights protections.

* My heartfelt gratitude to Jerome A. Cohen, Ira Belkin, Yu-Jie Chen, and Adam Gordon of the U.S.-Asia Law Institute, and many others, for their support and encouragement.
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I. INTRODUCTION

There is no one-size-fits-all formula for extradition. A state’s decision to enter into an extradition treaty implicates both foreign policy and legal considerations. These broad interests further unpack into a multitude of legal and non-legal factors such that the concrete terms for extraditions vary not just by state, but also across bilateral relationships with the same state. Extradition has international and domestic dimensions as well. Internationally, extradition law has evolved into an uneasy marriage of comity and human rights protections. Domestically, the ground rules set by a state’s legal system influence its decision to extradite or conclude an extradition treaty. Nowhere are these complexities more evident than in extradition agreements with the People’s Republic of China. China has been engaged in an ongoing hunt for economic fugitives and corrupt officials abroad since the 1990s. This hunt has reached a crescendo in recent years as Chinese President Xi Jinping has internationalized his prolonged anti-corruption campaign. A critical element of this hunt for fugitives abroad has been China’s drive to conclude extradition treaties, particularly with the developed nations that are the most frequent destinations for fugitives seeking to elude China’s grasp. Despite efforts across the board, China’s roster of extradition treaties consists almost exclusively of civil law states, including a number of developed civil law states. At the same time, China has reached a treaty with only one common law jurisdiction.

This paper aims at a deeper understanding of extradition generally by accounting for the disparate legal postures of common law and civil law states regarding China. I have chosen China for two reasons. First, this case study involves a comparison of countries with disparate legal systems that otherwise enjoy a great deal of similarities. China’s top target countries for extraditions are economically and legally developed, concerned with human rights, and enjoy a large degree of political and ideological overlap. The ample commonalities between these countries accentuate their legal differences. Second, China is controversial. It is a rising power brimming with economic promise and cooperative potential as well as strategic challenge and human rights controversy. The stakes are high, and these high stakes tease out the differences between common and civil
law states in a way not possible in dealings with countries where extradition arrangements are unanimously considered to be desirable, extremely problematic, or too unimportant to bother with in the first place.

The structure of this paper is as follows. After an introduction to international extradition law and background on China’s pursuit of extradition treaties, I illustrate the common-civil law divide over extradition treaties with China. I then address a number of legal and non-legal factors that are relevant to any state’s decision to conclude an extradition treaty. I argue that many of these obstacles—ambiguity of the political offense exception, human rights concerns, bilateral distrust, and the costs of treaty making—are shared concerns of the common and civil law states that comprise the greatest successes and failures of China’s extradition push. Next, I address the areas of greatest disparity: the extradition of nationals, the nature of the executive power to extradite, judicial checks on this power, and evidentiary requirements for extradition. I argue that for common law systems the decision to conclude a treaty is itself a major protection of individual rights that represents a “point of no return” because there are fewer protections after a treaty is in place. Conversely, the absence of a treaty does not significantly protect individuals in civil law systems. This overarching difference explains common law states’ greater aversion to extradition treaties with China than their civil law counterparts.

II. INTERNATIONAL EXTRADITION LAW

International extradition is the practice of one country formally surrendering an alleged criminal to another country with jurisdiction over the crime charged.1 States comply with the vast majority of extradition requests2 and extradition remains an important mechanism for suppressing crime worldwide because it removes safe havens for criminals.3 Extradition operates through a number of mechanisms. Although bilateral extradition treaties currently dominate state practice, multilateral extradition

1. BLACK’S LAW DICTIONARY 655 (9th ed. 2009).
conventions exist as well.4 Furthermore, international treaties not directed at extradition per se still govern its practice. For example, article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) charges states with respecting and ensuring the civil and political rights of persons within their jurisdiction and territory. Essentially, this obligates states not to knowingly repatriate individuals back into circumstances of civil and political rights violations.5 Many countries employ “disguised extradition” in addition to formal extradition. Technically a form of repatriation distinct from extradition, “disguised extradition” describes the state practice of utilizing legal procedures other than formal extradition to transfer a suspect from one state to another.6 Disguised extradition therefore achieves the same result as extradition, but circumvents many procedural and substantive hurdles to repatriation through extradition.7 Such a process can take place through diplomatic negotiation or deportation, depending on the domestic laws of the states involved.

Extradition norms have evolved over the course of history to encompass concepts of comity and human rights. From as early as 1258 B.C.8 up until the nineteenth century, rulers would repatriate suspects with no questions asked in a (reciprocal) gesture of naked comity.9 By the mid-nineteenth century, countries began to recognize extradition as a tool for crime suppression as well as comity.10 Treaties thus enumerated extraditable crimes.11 Procedure was also formalized, and extradition began to operate through official requests that


7. Id.


11. Magnuson, supra note 2, at 851. Treaties began to enumerate regular and private crimes while largely excluding political ones. This represented a break from the past, where the criminals sought for extradition were those who had committed a political crime against their government. Id.
justified the extradition under the relevant treaty by stating grounds for the request and proffering factual support.\textsuperscript{12} National courts increasingly determined the legality of extraditions.\textsuperscript{13}

The next wave of major developments emerged after World War II with the birth of international human rights norms.\textsuperscript{14} These norms are codified in a number of treaties covering, for example, the obligation to extradite or prosecute for certain crimes,\textsuperscript{15} refusal of extradition for victims of discrimination\textsuperscript{16} or torture,\textsuperscript{17} and rights to life, personal liberty, and a fair trial.\textsuperscript{18} Human rights norms have not displaced comity’s prominent role in extradition law, but they have introduced an important tension between the rights of states and the rights of individuals.\textsuperscript{19}

This evolving interplay of comity and human rights is crystallized in the United Nations Model Treaty on Extradition (Model Treaty).\textsuperscript{20} Adopted in 1990, the Model Treaty was amended in 1997 to incorporate the Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters.\textsuperscript{21} While every bilateral extradition

\begin{thebibliography}{20}
\bibitem{12} Id.
\bibitem{13} Id.
\bibitem{14} ARVINDER SAMBEI & JOHN R.W.D. JONES, EXTRADITION LAW HANDBOOK 95 (2005).
\bibitem{16} The 1967 Protocol amended the 1951 Convention and protects against extradition any individual who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country…” \textit{Convention Relating to the Status of Refugees} art. I(A)(2), July 28, 1951, 189 U.N.T.S. 150.
\bibitem{17} \textit{Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment}, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. The CAT prohibits extradition where there are substantial grounds for believing that a suspect is in danger of being subjected to torture upon extradition. \textit{Id.} art. 3.
\bibitem{18} ICCPR, \textit{supra} note 5, art. 9. The ICCPR guarantees rights to, \textit{inter alia}, life, freedom from torture, liberty and security of the person, freedom of expression, and a fair trial. \textit{Id.} Note that China has signed but not ratified the ICCPR, meaning that it is under international obligation not to undercut the object and purpose of the covenant. \textit{Vienna Convention on the Law of Treaties} art 18, May 23, 1969, 1155 U.N.T.S. 331; \textit{see also} China: Ratify Key International Human Rights Treaty, HUMAN RIGHTS WATCH (Oct. 8, 2015), https://www.hrw.org/news/2013/10/08/china-ratify-key-international-human-rights-treaty#.
\bibitem{20} G.A. Res. 45/116 (Dec. 14, 1990) [hereinafter Model Treaty].
\bibitem{21} G. A. Res. 52/88 (Dec. 12, 1997).
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treaty is a negotiated reflection of the idiosyncratic relationship between its parties, the Model Treaty faithfully reflects prevailing international standards. A non-exhaustive list of its basic principles is in Appendix B to this Article.

It is relevant to note that Chinese extradition law has not obstructed its pursuit of extradition treaties. The Extradition Law of 2000 (Extradition Law), 22 by and large comports with the standards set out in the Model Treaty. It incorporates generally accepted principles of international extradition law such as double criminality, specialty, nationality, as well as exceptions for political and military offenses. 23 It contains mandatory refusals for discrimination, torture, and immunity, as well as discretionary refusal for humanitarian considerations or where the individual sought is being prosecuted domestically. To the degree we are permitted a glimpse of bilateral treaty talks, countries generally do not take issue with the text of China’s extradition law or treaties. 24 However, one related issue does surface in discussions with China.

Bilateral treaties operate in the shadow of the political offense exception. This exception is meant to protect the legal integrity of the surrendering country (rather than the rights of the requested individual) against manipulation for the political ends of the requesting country. 25 Accordingly, it allows the requested country to deny extradition where the offense is “political” in nature, and under some interpretations, where the charges are politically motivated. 26 Agreeing on what constitutes a political offense is a challenge common to most if not all treaties, 27 and although some have attempted greater precision through the open-ended listing of certain qualifying offenses, most treaties

24. One notable exception is a report by Australia’s Joint Standing Committee on Treaties, noting that the (now-abandoned) Sino-Australian treaty conspicuously omitted an option to refuse extradition where it would be “unjust or oppressive,” which was contained in ten other extradition treaties and arrangements with 50 other commonwealth jurisdictions.
26. Id.
27. See ADB/OECD Thematic Review, supra note 23, at 51.
embrace the fact-intensive and generally ambiguous nature of the concept. These differences exist even between allies. For example, United States courts relied on the political offense exception to deny a number of United Kingdom extradition requests for Irish Republican Army members during the 1970s and 80s. This tension, manifested between coordinate branches of government as well as both governments on the whole, eventually led both states to revamp their treaty scheme. If the political offense exception threatens treaty arrangements between longtime allies, it poses a greater threat to less stable relationships. Fundamental differences over the uses of judicial and political power between China and the developed states with which it seeks extradition treaties further amplify the friction caused by the political offense exception, as China is often accused of exactly the kind of conduct the exception is meant to protect against. This kind of worry exemplifies the criticisms of China’s domestic criminal justice system, its implementation, and the sufficiency of Chinese guarantees regarding the treatment of repatriated individuals. I address these issues at length below.

III. China’s Extradition Push

Following the ravages of the Cultural Revolution, China’s economic resurgence began in the late 1970s and 1980s with Deng Xiaoping’s policy of “Reform and Opening” (改革开放). This policy put China on a trajectory to the prosperity it enjoys today. Unfortunately, corruption was parasitic on China’s economic growth. An illustrative statistic from China’s Ministry

28. Id. at 44-45.
29. Magnunson, supra note 2, at 892.
31. See ADB/OECD Thematic Review, supra note 23, at 117; see also Chen Qinglai [陈清华大学]., Wang Qishan Arrives in America to Supervise “Foxhunt” as Difficulties Mount [王岐山访美督战“猎狐”障碍重重], US-CHINA PERCEPTION MONITOR [中美印象] (Mar. 26, 2015), www.uscnpm.com/model_item.html?action=view&table=article&id=2857 (identifying the political offense exception as a major obstacle to a United States-China treaty and describing it as bound up with United States distrust of China’s judicial system and human rights issues) [hereinafter Chen Qinglai].
of Commerce reported that 4,000 corrupt officials fled China between 1978 and 2003, taking with them at least $50 billion.\textsuperscript{34} In particular, the early 1990s saw a growing exodus of corrupt Chinese officials and wealthy businessmen with ill-gotten gains absconding abroad with state assets.\textsuperscript{35} It was no coincidence that China first began to seek extradition treaties with other nations around this time.\textsuperscript{36} In fact, China’s push for extradition treaties is, and has historically been, motivated by a desire to recover corrupt officials and other economic fugitives.\textsuperscript{37} Understanding why China seeks to secure the return of these high-priority fugitives is critical to understanding why extradition treaties have become a focal point of Chinese foreign policy.

Bringing the corrupt to justice would be reason enough for China to seek their repatriation. However, there are instrumental considerations that amplify the focus on corruption. Namely, corrupt officials take state secrets and assets when they flee China. Consider the ongoing case of Guo Wengui (郭文贵). Guo, who also goes by Miles Kwok, is a Chinese property tycoon who has been living in “self-imposed exile” in New York.\textsuperscript{38} While Guo himself was not a government official, he was a wealthy businessman with substantial assets and government access. At the height of his career (around 2014), Guo was China’s seventy-fourth richest person with a net worth of $2.6 billion.\textsuperscript{39} He is

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Huang, The Truth About Chinese Corruption, DIPLOMAT (May 29, 2015), https://thediplomat.com/2015/05/the-truth-about-chinese-corruption/ (arguing that the very structure of economic reforms was conducive to corruption).
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35. Zhou, supra note 33.
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36. Bloom, supra note 4, at 188.
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currently, according to some, China’s most wanted fugitive abroad.\textsuperscript{40}

A comprehensive investigative report by Chinese business magazine \textit{Caixin} paints Guo as a “power hunter” (权力猎手) who accumulated wealth and influence by shrewdly navigating the murky in-between of Chinese business and elite politics.\textsuperscript{41} For example, Guo secretly recorded a sex tape of Beijing Deputy Mayor Liu Zhihua (刘志华) with his mistress in 2006.\textsuperscript{42} The tape found its way to the upper echelons of Chinese Communist Party (CCP) leadership and led to the investigation and subsequent downfall of Liu and several associates who stood in the way of Guo’s Pangu development project near the site of the then-upcoming Beijing Olympics.\textsuperscript{43}

Guo’s fortunes changed in early 2015 when a former business partner and his patron, Ma Jian (马建), the Deputy Chief of China’s Ministry of State Security, fell under CCP scrutiny for corruption.\textsuperscript{44} Stripped of his powerful backer, Guo laid low abroad until early 2017, when he began making a series of inflammatory corruption allegations aimed at top CCP officials.\textsuperscript{45} He has also painted a picture of disunity at the top of the CCP.\textsuperscript{46} Guo has made (unverified) claims that he can obtain any official Chinese document he desires.\textsuperscript{47} He has distributed a Chinese document purporting to authorize a network of spies in the United States, and claims to be preparing dossiers on a number of other hot-button issues for United States officials.\textsuperscript{48}

\textsuperscript{40} Id.


\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Id.


\textsuperscript{46} \textit{Guo Speaks with V.O.A}, supra note 45.


\textsuperscript{48} Id.
Often described as a “showman,” Guo has made ample use of social and traditional media. Guo had a twitter that has since been suspended and a YouTube channel to spread his allegations of corruption and disharmony at the heart of CCP leadership. He has even publicly criticized China before Congress.

China’s response to Guo has been swift and strong. China issued an Interpol Red Notice seeking Guo’s arrest. Red Notices are often informally referred to as “international arrest warrants.” At present, he stands accused of some 19 crimes, ranging from bribery, fraud, and money laundering to kidnapping and rape. He is being sued for defamation in United States courts by numerous Chinese companies and individuals.

Guo’s fallen patron Ma Jian has also appeared for the first time since his arrest—but before his trial—to make a video confession on YouTube (which is banned in China) that he had taken bribes from Guo and misused his power to further Guo’s business interests. The Chinese embassy deemed the documents Guo distributed “fake news.”

Guo has since applied for political asylum in the United States. His law firm was the reported victim of a cyber-attack around that time. In May 2017, officials from China’s Ministry of State Security (China’s equivalent to the Central Intelligence Agency) entered the United States on transit visas but in violation of these visas paid a visit to Guo in New York in an attempt to

49. Billionaire Gadfly, supra note 38.
52. Suspected Cyberattack as Guo Wenhui Appears in Washington, supra note 47.
53. Guo Speaks with VOA, supra note 45.
58. Suspected Cyberattack as Guo Wenhui Appears in Washington, supra note 47.
60. Suspected Cyberattack as Guo Wenhui Appears in Washington, supra note 47.
persuade him to stop inciting anti-CCP sentiment. The Federal Bureau of Investigation (FBI) got wind of this visit and apprehended the officials in Penn Station, where they were told to leave the country. Nonetheless, the officials paid Guo a second visit two days later, kicking off inter-agency conflict between the FBI, which wanted to arrest the officials, and the State Department, which did not.\(^6\) In late 2017, the Hudson Institute suddenly cancelled an event where Guo was slated to speak.\(^6\) The event was set to take place in Washington, D.C. as the United States and China held high-level bilateral talks on law enforcement and cyber security.\(^5\) The institute’s president blamed the cancellation on poor planning and logistical issues.\(^4\) However, the cancellation came on the heels of a cyber-attack and calls to Institute staff from the Chinese embassy, warning them not to let Guo speak.\(^5\)

Guo Wengui touches an especially raw nerve for Beijing because his allegations threaten China’s security as well as its political and economic stability. On the security front, Guo has valuable classified information about the top echelons of the CCP, which is a boon for organizations like the FBI.\(^6\) Politically, Guo’s allegations came at a time of transition. China’s Nineteenth Party Congress took place in October, and Guo’s claims, if substantiated, would have seriously damaged the legitimacy of Xi’s popular anticorruption drive, not to mention cast aspersions on what was otherwise supposed to be a harmonious transition period for the CCP and the country.\(^5\)

Economically, allegations of political discord threaten to deter investors, negatively impacting China’s economic growth.\(^5\)

Guo is unique in his outspoken criticism of the CCP and his broad, public platform, but otherwise represents a typical Chinese economic fugitive. He is a not-too-sympathetic character whose insider knowledge the CCP seeks to contain, and

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63. Id.

64. Id.

65. Id.

66. *See Guo Wengui Accused of Rape*, supra note 55 (quoting Willy Lam, expert on Chinese politics at the Chinese University of Hong Kong).


68. *Billionaire Gadfly*, supra note 38.
whose ill-gotten assets the CCP seeks to reclaim. He is a symptom of a widespread corruption epidemic that has garnered a systematic response from the CCP—one that has explicitly and repeatedly recognized corruption as an existential threat. 69 Corruption consistently features as the top concern among ordinary Chinese people, 70 and is politically sensitive—the government fears a “political earthquake” (政治地震) should it fully disclose the scale and scope of corruption. 71 In recent years, Chinese President Xi Jinping has launched a high-profile anticorruption campaign. Under the umbrella of this larger campaign, Xi has established two dedicated international operations: “Foxhunt” and “Skynet.”

“Operation Foxhunt” (猎狐行动) was unveiled in 2014 as the international counterpart to Xi’s domestic pursuit of “tigers and flies,” or corrupt officials at the highest and lowest ranks of CCP leadership. 72 Operating under the auspices of the Central Anticorruption Working Group, “Operation Foxhunt” reportedly involved the coordinated efforts of 2,000 personnel, sending over seventy police teams overseas to hunt down economic fugitives. 73 According to Chinese media, “Foxhunt” secured the return of 680 suspected economic criminals from

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69. James Leung, Xi’s Corruption Crackdown: How Bribery and Graft Threaten the Chinese Dream, FOREIGN AFFAIRS (May/June 2015), https://www.foreignaffairs.com/articles/china/2015-04-20/xis-corruption-crackdown (quoting Xi’s warning that corruption could lead to “the collapse of the Party and the downfall of the state”); Spotlight: China, World Stand to Benefit Big from Xi’s Anti-Corruption Campaign, Xinhua (June 22, 2017), http://www.xinhuanet.com/english/2017-06/22/c_136385831.htm (citing numerous experts for the propositions that corruption threatens CCP legitimacy and social stability).

70. Govt Wants a Better View of ‘Naked Officials’, supra note 34.

71. See, e.g., Minitrue: Axe Story on Naked Officials, CHINA DIGITAL TIMES (Aug. 7, 2014), https://chinadigitaltimes.net/2014/08/minitrue-axe-story-naked-officials/ (explaining that a leaked circular from Chinese authorities directing media to cease questioning why data on “naked officials” was being withheld, and to instead report that nondisclosure was necessary to avert a “political earthquake”).


sixty-nine separate countries in its first six months, a figure 4.5 times that of the whole of 2013.74

April 2015 saw the start of Xi’s second grand operation, dubbed “Operation Skynet” (天网行动). Expanding on “Foxhunt’s” success at repatriating fugitives, “Skynet” is a systematic effort aimed at asset recovery that reportedly coordinates the efforts of the Ministry of Public Security (MPS), which continues “Foxhunt” for economic criminals, the Supreme People’s Procuratorate, which recovers individuals and assets, the People’s Bank of China, which cracks down on money laundering through offshore accounts and underground banks, and the Central Organization Department, which regulates import/export controls in tandem with the MPS.75 This push to recover fugitive officials and their stolen assets has seen significant success. According to Chinese state media, China secured the return of 381 fugitive officials by extradition, “persuasion,” or other means, and over 1.24 billion Chinese Yuan Renminbi (CNY) (approximately $240 million) in the first half of 2016 from over 40 different jurisdictions.76

The cumulative achievements of “Skynet” and “Foxhunt” have resulted in the capture of some 2,873 fugitives (over 1,000 in 2016 alone) from over ninety countries and regions as well as the reclamation of nearly CNY 9 billion (approximately $1.5 billion), according to statistics from the office of China’s Central Anticorruption Working Group.77 Despite its impressive efforts, China has a long way to go in its pursuit of fugitive corrupt officials and economic criminals. According to statistics from the Central Commission for Discipline Inspection (CCDI), the CCP’s internal anticorruption apparatus, 946 corrupt officials remained abroad as of April 2017.78

74. Id.
75. Id.
76. Id.
77. Id.
to China’s making good on its promise that fugitives will have nowhere to hide.\footnote{Press Release, Ministry of Foreign Affairs of the People’s Republic of China, Foreign Minister Wang Yi Meets the Press (Mar. 8, 2015).}

Alternative means of repatriating fugitives are undesirable or impractical for China. \textit{Ad hoc} negotiations with other states are time-consuming and successful resolution uncertain.\footnote{Sui-Lee Wee, \textit{Corrupt Chinese Hiding in Western Nations Elude China’s ‘Fox Hunt’}, REUTERS (Aug. 27, 2014, 9:00 PM), \url{http://www.reuters.com/article/us-china-corruption/corrupt-chinese-hiding-in-western-nations-elude-beijings-fox-hunt-idUSKBN0GS01S20140828} (citing Chinese state media) [hereinafter \textit{Corrupt Chinese Hiding in Western Nations Elude China’s ‘Fox Hunt’}].} For example, Lai Changxing (赖昌星), once China’s most-wanted man, fled to Canada in 1999 and sought refugee status after claiming charges that he ran a multi-billion dollar smuggling ring were politically motivated. By the time his case had wound its way through the Canadian court system, it was already 2011. Although Canadian law permits \textit{ad hoc} extradition, Lai was ultimately deported—not extradited—and jailed for life the following year in China.\footnote{S. v. e.g., Mark Mazzetti & Dan Levin, \textit{Obama Administration Warns Beijing About Covert Agents Operating in U.S.}, \textit{N.Y. TIMES} (Aug. 16, 2015), \url{https://www.nytimes.com/2015/08/17/us/politics/obama-administration-warns-beijing-about-agents-operating-in-us.html} (quoting a U.S. Justice Department spokesman, who said “the United States is not a safe haven for fugitives from any nation”) [hereinafter \textit{Administration Warns Beijing About Covert Agents Operating in U.S.}]; Andrew Russell, \textit{Canada-China Extradition Treaty: Here’s What You Need to Know}, GLOBAL NEWS (Sep. 21, 2016), \url{https://globalnews.ca/news/2953881/canada-china-extradition-treaty-heres-what-you-need-to-know/} (quoting a Canadian statement in response to questioning on its negotiations with China, which said “Canada does not want to be seen as a safe haven for fugitives and it is in Canada’s interest to have such persons removed”) [hereinafter \textit{Canada-China Extradition Treaty: What You Need to Know}].} As this example shows, repatriation without a treaty (when it is available at all) can be a lengthy process, even as countries seek to avoid being a safe haven for criminals.\footnote{ Administration Warns Beijing About Covert Agents Operating in U.S., supra note 82 (referencing such incidents in the United States and Australia); Robert Fife & Nathan Vanderklippe, \textit{Chinese Agents Enter Canada on Tourist Visas to Coerce Return of Fugitive Expats}, \textit{THE GLOBE AND MAIL} (Sep. 21, 2016), \url{https://beta.theglobeandmail.com/news/politics/chinese-agents-enter-canada-on-tourist-visas-to-coerce-return-of-fugitive-expats/article31981251/} [hereinafter \textit{Chinese Agents Enter...}].}

China, understandably impatient at such significant costs, has less-understandably taken to hunting down fugitives on foreign soil without contacting local authorities, a phenomenon reported in the United States, Canada, Australia, and even France, with whom China has an extradition treaty.\footnote{Multiple countries
reportedly have proof that these undercover Chinese agents intimidate and harass their targets, often by threatening their family members back in China. In the ominous terms of Li Gongjing (李公敬), captain in the economic crimes division of the Shanghai Public Security Bureau, “A fugitive is like a flying kite. Even though he is abroad, the string is grounded in China. He can always be found through his family.”

China, for its part, has enthusiastically reported on numerous fugitives “successfully convinced” to return home. Needless to say, these violations of territorial sovereignty have proven a source of friction in several of China’s bilateral relationships.

Because the alternatives are monetarily, diplomatically, or otherwise impractical or costly, extradition treaties with nations like the United States, Canada, and Australia—the most common destinations for China’s fugitive officials—are a top priority for China. In fact, China has explicitly called on these three nations to sign extradition treaties. Extraditing fugitives and recovering ill-gotten assets has become a top priority for the CCDI.

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84 See, e.g., Administration Warns Beijing About Covert Agents Operating in U.S., supra note 82.

85 See, e.g., CCDI, Number 15 Most Wanted Chen Yijuan Returns from England, Surrenders to the Authorities (Jan 14, 2016), https://web.archive.org/web/20160118054916/http://www.ccdi.gov.cn/yw/201601/t20160114_72816.html (reporting on overt Chinese agents in France despite the countries’ extradition treaty) [hereinafter When China Recovers its Fugitives in France].

86 Corrupt Chinese Hiding in Western Nations Elude China’s ‘Fox Hunt’, supra note 81 (citing Chinese state media); see also Qin Gang, Spokesman, Chinese Foreign Ministry, Press Briefing on June 14 (June 18, 2007), http://www.gov.cn/english/2007-06/18/content_651971.htm (naming “corrupt Chinese officials absconding in [sic] the US” as an impetus for seeking an extradition treaty with the U.S.) [hereinafter Foreign Ministry Press Briefing June 14, 2007].


88 Choi Chi-yuk, China to Keep up Overseas Graft Hunt Down to Last Fugitive — Even If Ill-Gotten Gains are Gone, SOUTH CHINA MORNING POST (June 6, 2016), https://www.scmp.com/news/china/policies-politics/article/1966926/china-keep-overseas-graft-hunt-down-last-fugitive-even.
he comes across foreign leaders.” In 2016 then-CCDI deputy head and Minister of Supervision Huang Shuxian (黄树贤) announced China’s plans to focus on securing additional extradition deals in the official CCP journal, Qiushi. China’s Foreign Ministry has also established an international law committee composed of scholars and experts to consult on how China can best advance its interests through international law, a mandate that includes extraditions. In sum, extradition treaties—particularly with developed common law states—remain a gaping hole in China’s “Skynet,” which it is determined to close.

There are several other reasons for China’s extradition push, all of which are compatible with China’s hunt for high-value fugitives. First, extradition treaties play a symbolic role in legitimizing China’s criminal justice system because they signal a country’s imprimatur. China can then hold this endorsement up to the international community and Chinese domestic audiences. Second, extradition treaties enable China to track down and silence political dissidents abroad. If Xi’s “Foxhunt” and “Skynet” are the international counterparts of his domestic

89. Id.
90. Id.
92. See, e.g., Mike Blanchfield, Canada Looking at Extradition Talks with the Chinese, THE STAR (Sept. 20, 2016), https://www.thestar.com/news/canada/2016/09/20/canada-looking-at-extradition-talks-with-chinese.html (quoting Human Rights Watch China Director Sophie Richardson, who said “China’s particular interest in pushing [an extradition treaty] with Canada at the moment is to then be able to say to the U.S. and Australia, ‘They did it, why won’t you?’”).
93. For example, in 2015, Thailand extradited two Chinese dissidents, Dong Guangping and Jiang Yefei, despite their being classified as refugees by UNHCR. Both men gave televised confessions to “human trafficking” charges. Dong allegedly “engaged” a “trafficking network” to leave China illegally, and Jiang allegedly “assist[ed] others to illegally cross [China’s] border.” Dong previously served three years in prison from 2001 to 2004 on a charge of “inciting subversion of state power” for promoting democracy, and was again detained in July 2014 following his participation in an event commemorating the victims of the Tiananmen Square crackdown in 1989. Case History: Dong Guangping, FRONTLINE DEFENDERS (last visited June 23, 2019), https://www.frontlinedefenders.org/en/case/case-history-dong-guangping. Jiang is the Chairperson of the Thai branch of the Federation for a Democratic China. He was detained and reportedly subject to torture for critical interviews given to foreign media regarding the 2008 Sichuan earthquake. Id.
hunt for tigers and flies, extradition policy serves as a potential avenue for Xi to internationalize his domestic suppression of rights defenders and dissidents, even as it simultaneously performs legitimate functions.94 Last, but certainly not least, China—like all countries—has a strong stake in the international effort to combat transnational crime. In addition to its involvement in the United Nations Convention Against Corruption,95 China is party to a number of international conventions dedicated to combatting organized crime as well as drug and human trafficking.96 While it has faced criticism in implementing its commitment to stamp out human trafficking,97 China has successfully joined forces with several states to combat drug trafficking.98 Consequently, a lack of extradition treaties with noteworthy common law states frustrates a variety of domestic and international goals of China.

IV. THE COMMON LAW-CIVIL LAW DIVIDE

China has successfully concluded 34 extradition treaties. A full list can be found in Appendix A to this Article. This roster

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98. See, e.g., Austin Bodetti, China-US Cooperation and the New Opium War, THE DIPLOMAT (Aug. 16, 2017), https://thediplomat.com/2017/08/china-us-cooperation-and-the-new-opium-war/. According to a senior U.S. Drug Enforcement Agency (DEA) official, “[t]he working relationship between the U.S. and China in general has been strained, but, on narcotics trafficking, there have always been fairly quiet and constructive engagements.” Id. Former DEA Chief of International Operations Mike Vigil stated that “China is aggressively trying to control the production of illicit opioids and is working closely with the US in the sharing of information.” Id.
consists near-exclusively of civil law states and includes a number of developed states. (I use “developed” as a crude stand-in for countries with levels of democratic governance, legal development, and concern for human rights that justifies their comparison to China’s most sought-after common law jurisdictions.) Even China’s earliest treaties were with developing nations. All of them were civil law countries, and many were former socialist countries with legal systems closely related to China’s soviet-civil hybrid system. These states were less demanding on human rights issues as well.

China did not reach an extradition agreement with a developed state until 2006, when Spain ratified a treaty with the noteworthy condition that China refrain from imposing the death penalty on extradited criminals. This condition was not a one-off concession but rather a standing compromise by China aimed at securing extradition agreements from a broader swathe of states. In offering to refrain from imposing the death penalty, China actively courted developed “Western” countries, most of which have outlawed capital punishment and refuse to extradite to countries that impose it. Significant success followed China’s concession on capital punishment. China ratified treaties with France and Portugal that also prohibited the death penalty for repatriated suspects shortly after its successful treaty with Spain. While the French treaty encountered backlash and delay for seven years after Chinese ratification in 2008, the French Parliament finally ratified it in 2015. Its first application


101. Bloom, supra note 4, at 189.


followed soon after with the extradition of Chen Wenhua, who was sought for embezzling $2.9 million. A Sino-Italian extradition treaty signed in 2010 similarly entered into effect in 2015. China has also concluded a treaty with South Korea in 2010, similarly entered into effect in 2015. China has also concluded a treaty with South Korea in 2000, and is currently engaged in treaty negotiations with Japan, which has only two other treaties, one with the United States and one with South Korea. As a rough measure of development, both nations are above or comparable to France, Spain, and Portugal in the World Justice Project’s Rule of Law Index. Thus, China has had noteworthy success securing treaties with developed civil law states.

The same cannot be said for common law states. China has failed to secure extradition treaties with all but one of the world’s common law countries. Treaties with the United States, Australia, and Canada—the top destinations for China’s wealthy fugitives—have proven especially elusive, though China also lacks treaties with the United Kingdom, New Zealand, Singapore, and even the Chinese territory of Hong Kong.

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111. Under the terms of its return to China in 1997, Hong Kong currently exists under a rubric of “one country, two systems” and accordingly has its own legal system as well as administrative autonomy. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of
The United States currently maintains a case-by-case approach to extradition requests from China, employing disguised extradition and relying in part on diplomatic assurances regarding the treatment of repatriated individuals. This approach offers more flexibility than a bilateral treaty, which would standardize extraditions. The United States has approximately 39,000 undocumented Chinese immigrants awaiting deportation back to China. China reportedly drags its feet in providing the necessary documentation such that some deportations have been in limbo for over a decade. When the United States agrees to repatriate “Foxhunt” fugitives, it typically demands that Beijing accept a number of undocumented immigrants. While this quid pro quo repatriation may not be considered official United States policy, the countries are engaged in parallel talks, and China clearly views both kinds of repatriation as linked. Another consideration behind the United States’ strategy is that the additional costs of time-consuming and painstaking diplomatic negotiation for each individual extradition may spur China to make certain criminal justice reforms. Nonetheless, the United States’ case-by-case approach has resulted in repatriations as recent as July 2018.

Unlike the United States, Australia actually signed an extradition treaty with China in 2007. Despite endorsement by the Turnbull administration, the ratification fell through in March 2017 amid legislative opposition to China’s criminal
justice system and human rights record.\textsuperscript{123} Even without an extradition treaty, Australia still repatriates fugitive Chinese on a case-by-case basis.\textsuperscript{124} Canada also lacks an extradition treaty with China, but is engaged in bilateral dialogue on the subject. In September 2016, the Trudeau administration reached an agreement to hold a High-Level National Security and Rule of Law Dialogue explicitly aimed, among other things, at reaching an extradition agreement.\textsuperscript{125} It is too soon to know whether these talks will bear fruit. Trudeau’s political opponents and a hefty portion of public opinion reportedly oppose the prospect of an extradition treaty.


127. These alleged diplomatic favors include favorable terms on exports of canola oil to China, see Canada-China Extradition Treaty: What You Need to Know, supra note 82, and the release of alleged Canadian spy Kevin Garratt, see Trudeau Says Canada Has ‘Extremely High Standards’ for Extradition, supra note 126. Although Garratt was released shortly after Ottawa and Beijing announced their new dialogue, Canada’s foreign minister denied any quid pro quo. See Matthew Kupfer, Canada Made No Concessions to Bring Kevin Garratt Home, Stephane Dion
be seen whether a Sino-Canadian treaty will fail despite executive endorsement, as was the case in Australia. Like the United States and Australia, Canada repatriates dozens of Chinese fugitives on a case-by-case basis every year.\textsuperscript{128}

It is clear that China’s efforts to secure extradition treaties have failed with common law states where the same concerted effort has produced substantial success among the developed civil law community. I highlight below various legal and non-legal considerations that factor into any state’s decision to conclude an extradition treaty. With regard to China, these considerations are shared impediments and attributes of common and civil law states. At the same time, however, four facets of domestic legal systems—the extradition of nationals, the nature of the executive power to extradite, the courts’ ability to check this power, and evidentiary requirements for extradition—differentiate common and civil law states. These differences create a higher threshold for common law states, relative to their civil law counterparts, to enter into extradition treaties. China illustrates this fundamental difference.

V. LEGAL FACTORS: CRIMINAL JUSTICE, HUMAN RIGHTS, AND SOVEREIGNTY

Countries that decline an extradition treaty with China most commonly cite legal reasons. They frame these reasons in terms of the requested state’s international or domestic legal obligations and China’s corresponding failure to meet these legal standards. Some reasons are a harsh condemnation of China’s criminal justice and human rights abuses, while some cite incompatible
legal systems. In either case, criminal justice and human rights issues are a shared concern of common and civil law states.

The United States, Australia, and Canada have consistently cited China’s criminal justice system and human rights record as the chief obstacle to an extradition treaty. The difficulty of monitoring an opaque Chinese criminal justice system and the sovereignty-infringing covert operations of Chinese agents within their territory further compound these apprehensions.

Regarding human rights, all three countries have decried China’s systematic failure to guarantee the right to a fair trial as well as its pervasive torture, forced confessions, and other cruel treatment of criminal suspects, its oppression of defense lawyers who take up politically sensitive cases or clients, and its use of capital punishment, particularly for non-violent crimes. China explicitly rejects the “erroneous thinking” (错误思潮) of judicial independence not to mention other “Western” ideological “traps” (陷阱) like constitutional democracy and separation of powers. Beyond its borders, China has sought to enlist other countries and international mechanisms in what many have
determined to be politically-motivated prosecutions. Within its borders, the CCP exercises direct control over individual cases through Political-Legal Committees at each level of government that direct and supervise the work of state legal institutions, including courts. Limited resources and complex political realities further thwart even well-meaning reforms of China’s extensive court system.

Lack of transparency in China’s criminal justice system has further frustrated extradition treaties. For example, Australia’s Joint Standing Committee on Treaties noted “the secrecy and lack of transparency attached to China’s judicial system,” ultimately recommending an unprecedented monitoring scheme for any prospective treaty with China.

Lastly, all three countries have expressed their displeasure at the Chinese practice of sending government agents abroad to pursue fugitives without coordinating with local authorities. China apparently continues this troubling practice even in countries with which it has extradition agreements. In international practice, incursions of this sort have justified states’ refusal to extradite on the basis of non-compliance with its domestic law. Whether the product of dysfunction or design, the problems outlined above represent enduring obstacles to any extradition treaty with China.

Evidently, states have genuine human rights and rule of law concerns standing in the way of an extradition treaty with China. These concerns, however, do not explain states’ divergent practices of concluding or refusing extradition treaties with

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132. See China Upset as Interpol Removes Wanted Alert for Exiled Uighur Leader, supra note 94. China expressed dissatisfaction at Interpol’s decision to remove a “red notice” alert seeking the arrest of Dolun Isa, president of the World Uyghur Congress. Id. China claims Isa is a terrorist, but according to Reuters’ diplomatic sources, has never provided any evidence. Id.


134. Id.

135. Australian JCST Report 167, supra note 24, ch. 3.37, 3.56.

136. Chinese Agents Enter Canada on Tourist Visas, supra note 83.

137. When China Recovers its Fugitives in France, supra note 83 (noting that French authorities learned of a Chinese operation on French soil only from a victorious post on the CCDI website, and Chinese authorities had not made any extradition request or informed France of the operation).

China. After all, the civil law states that have treaties with China are not human rights or rule of law vacuums. France, Spain, and Portugal have strong human rights records.\(^\text{139}\) South Korea’s rule of law ranks even higher.\(^\text{140}\) Moreover, many countries with which China maintains extradition treaties have also issued open criticism of its human rights record. In June 2017, Greece blocked an otherwise-unanimous condemnation of China’s human rights record that was to be submitted to the United Nations Human Rights Council by the European Union.\(^\text{141}\) The European Union (EU) includes a number of states that maintain extradition treaties with China, such as Bulgaria, France, Italy, Lithuania, Portugal, Romania, and Spain. France was also one of eleven countries (including Canada and Australia) that penned an unreleased letter to China in 2017 condemning its treatment of human rights lawyers.\(^\text{142}\)

In 2013, Spain issued international arrest warrants for former Chinese President Jiang Zemin, former Prime Minister Li Peng, and three other retired top CCP officials for the crime of genocide in Tibet.\(^\text{143}\) This act prompted a harsh response from China, which froze high-level meetings.\(^\text{144}\) The case was eventually dropped in light of a new law limiting universal jurisdiction, which Spain denied was in response to complaints from China.\(^\text{145}\) Nonetheless, this indicates that Spain’s extradition agreement was not due to a disregard for human rights. If


\(^{140}\) See supra note 11.


\(^{144}\) Id.

\(^{145}\) Fiona Ortiz, Spain High Court Dismisses China Rights Cases, REUTERS (June 23, 2014), https://uk.reuters.com/article/uk-spain-china/spain-high-court-dismisses-china-rights-cases-idUKKBN0EY2IS20140623.
anything, the incident reveals a rift between coordinate branches of government. For its part, Portugal opts for “pressure in private” rather than public opposition to China’s human rights problems.\(^{146}\)

Suffice it to say that concern for human rights and rule of law is a shared feature of the common and civil law countries relevant to our inquiry. To the extent there is selective disregard for human rights by the same countries, this is a common attribute as well.\(^{147}\) While these features constitute a general obstacle to treaty negotiation, then, they do not account for the split between common and civil law countries when it comes to extradition treaties with China.

\section*{VI. Non-Legal Factors}

It would be naïve to discount the political and practical dimensions to an extradition treaty.\(^{148}\) Extradition resides at the crossroads of law and foreign policy and is impacted by both. There are essentially two classes of non-legal considerations that go into a state’s decision about whether to enter into an extradition treaty. I term these “distrust” and “pragmatism.”

\subsection*{A. Distrust}

I use “distrust” as a blanket term for an unwillingness, or at least reluctance, to cooperate with China due to ideological bias, domestic political scapegoating of China, or cultural misunderstanding. These issues feature heavily in many Chinese criticisms of common law states unwilling to conclude an extradition treaty with China.\(^{149}\) The charge is that such factors

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147. See Alex Lo, The Double Standards at Work over Extradition Treaties with China, SOUTH CHINA MORNING POST (Apr. 1, 2017), https://www.scmp.com/comment/insight-opinion/article/2083963/double-standards-work-over-extradition-treaties-china (noting how Western countries make treaties with countries possessing equal or lesser rule of law than China) [hereinafter \textit{Double Standards over Extradition with China}].


149. See, e.g., James T. Areddy, China: Western Countries Obstruct China’s Efforts to Recover Fugitives and Assets, \textit{WALL STREET JOURNAL} (Nov. 27, 2014), https://cn.wsj.com (noting that the Head of China’s Ministry of Foreign Affairs Treaty Law Department, Xu Hong [徐 Hong],
\end{quote}
impact governments’ subjective assessment of China and its credibility, and therefore their willingness to cooperate with it. Distrust in fact does little to explain China’s dearth of extradition treaties with common law states. To the extent distrust exists, it has not impeded substantial cooperation between China and these states.

The United States, Canada, and Australia all cooperate significantly with China in ways other than extradition treaties—the main difference being that other forms of cooperation do not implicate human rights concerns and are therefore less contentious. All three countries have Mutual Legal Assistance Treaties (MLATs) with China. MLATs have proven uncontroversial because they contribute to a fair trial by facilitating the inclusion of additional evidence, and they indirectly promote future cooperation by increasing bilateral communication and forging interpersonal contacts.

On a country-specific level, China and the United States collaborate on international law enforcement through a number of working groups under the framework of the U.S.-China Joint Liaison Group on Law Enforcement Cooperation (JLG). In particular, the Anti-Corruption Working Group deals squarely with many of the issues at the heart of a potential extradition treaty between China and the United States.


[152] See JLG Remarks by Bruce Ohr, supra note 129 (discussing successes and difficulties of Sino-U.S. cooperation).
have praised the annual dialogues since their inception in 1998.\footnote{153. See id.; see also China, US to Discuss Law Enforcement Cooperation, XINHUA (Nov. 6, 2016), http://english.gov.cn/news/international_exchanges/2016/11/16/content_281475492603192.htm.} China has also been a recipient of the Department of Treasury’s asset-sharing program, which shares forfeited assets with governments who contribute to joint investigations into narcotics trafficking and money laundering.\footnote{154. U.S. DEPT OF STATE, BUREAU OF INT’L NARCOTICS AND L. ENFORCEMENT AFF., INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: ASSET SHARING (2016).} More recently, China and the United States held a high-level Law Enforcement and Cyber Security Dialogue, agreed to by Presidents Xi and Trump in April, 2017.\footnote{155. Nike Ching, High-Level US-China Talks Focus on Immigration, Fugitives, VOICE OF AMERICA (Oct. 4, 2017), https://www.voanews.com/usa/high-level-us-china-talks-focus-immigration-fugitives.} This dialogue, which replaced the bilateral Strategic and Economic Dialogue, reiterated both countries’ continued collaboration on specific criminal cases.\footnote{156. U.S. DEPT OF JUST., FIRST U.S.-CHINA LAW ENFORCEMENT AND CYBER SECURITY DIALOGUE: SUMMARY OF OUTCOMES (2017); see also JLG Remarks by Bruce Ohr, supra note 129 (referencing Kaiping Bank of China cases, in which individuals defrauded a Chinese bank out of $485 million and absconded to the United States). In a recent example, the United States repatriated Yang Xiuzhu after denying her asylum. She had been on the run for 13 years and was suspected of embezzling public funds and accepting bribes totaling over $4 million. See Laurie Chen, After 13 Years on the Run, China’s Most-Wanted Fugitive Jailed for Graft, SOUTH CHINA MORNING POST (Oct. 13, 2017), https://www.scmp.com/news/china/policies-politics/article/2115279/after-13-years-run-chinas-most-wanted-fugitive-jailed.} In 2013, Canada became the first country to reach a deal with China to share forfeited assets,\footnote{157. Xiaoqing Pl and Brian Spegele, Canada Loses Luster as Destination for Corrupt Chinese Cash, WALL STREET JOURNAL (July 6, 2013), https://blogs.wsj.com/chinarealtime/2013/07/06/canada-loses-luster-as-destination-for-corrupt-chinese-cash/.} building on an existing MLAT that encompassed the return of stolen assets to lawful owners\footnote{158. Statement of Foreign Affairs Minister John Baird and Backgrounder Agreement on The Sharing of Forfeited Assets and the Return of Property, GOVERNMENT OF CANADA (July 4, 2013), https://www.canada.ca/en/news/archive/2013/07/stepping-up-fight-against-transnational-organized-crime.html?=undefined&.} as well as cooperation in the exchange of evidence.\footnote{159. China-Canada MLAT, supra note 150.} During Prime Minister Justin Trudeau’s first visit to China in September 2016, the countries agreed to hold bilateral security talks aimed in part at reaching an extradition agreement.\footnote{160. Corrupt Chinese Hiding in Western Nations Elude China’s ‘Fox Hunt’, supra note 81.} Even without an
extradition agreement, the Canada Border Services Agency has deported 1,368 individuals to China since 2014. 161

Australia maintains significant cooperation with China despite pulling out of their extradition treaty in 2016. The countries have a treaty covering the international transfer of prisoners in addition to their MLAT. 162 Australia repatriated AUD 7.5 million (approximately $5.3 million) in embezzled, laundered, and fraudulently obtained assets to China between 2002 and 2014. 163 Most recently, April 2017 saw the launch of the Australia-China High-Level Security Dialogue, which covered issues of bilateral legal cooperation. 164

Nor do cultural differences fully explain China’s difficulties in securing extradition treaties. The influence of their colonial pasts notwithstanding, Singapore and the Chinese territory of Hong Kong—which both lack extradition treaties with China—are a powerful refutation to arguments alleging cultural misunderstanding.

The non-legal factors referenced above boil down to an issue of trust. The claim is that common law states do not trust China because of cultural and ideological differences, or because China is a strategic rival. Reality demands that we recognize some distrust between China and countries like the United States, Canada, and Australia. 165 These countries are strategic rivals of China and long-term allies with a history of coordinated action. 166 State extradition arrangements and laws sometimes reflect double standards as well. 167 Nevertheless, distrust has not

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166. Partisan Maneuvering Halts Ratification, supra note 149 (quoting Gao Jia [高佳], Assistant Dean of The University of Melbourne’s Faculty of Arts).

167. See, e.g., Double Standards over Extradition with China, supra note 149 (noting Canada’s and Australia’s treaties with countries possessing equal or lesser rule of law than China).
prevented a track record of cooperation with China. Moreover, a great deal of existing distrust has different roots—skepticism in the merits of China’s criminal justice system and human rights record or inward distrust between a state’s own coordinate branches of government.

B. Pragmatic Concerns

“Pragmatic concerns” involve a cost-benefit analysis. These concerns undoubtedly influence the decision to conclude an extradition treaty. Some concerns are intrinsic to calculating whether any treaty is “worth it” for a state. For example, a state will want to consider whether it will be the primary beneficiary of the treaty (that is, whether it is more likely to be the requesting or requested state), whether the other country demands a more credible or formal commitment, or whether a treaty imposes or reduces political costs. A treaty may spark political disapproval because of its high profile, but may also insulate the government from political heat by “legalizing” a controversial action. States may take into account the amount of criminal traffic between them, the general benefits of reducing global crime by eliminating criminal safe havens, and the prospect of bolstering bilateral relations. States will contemplate the transaction costs of negotiating a treaty and—particularly applicable with regard to China—the costs of monitoring compliance with that treaty. Ultimately, they will calculate whether all of the above justify the expense of a treaty, or whether the same ends can be achieved by a less costly informal agreement (or should be foregone altogether). Even without applying this complex matrix of factors


168. See Bassiouni, supra note 148, at 9 (“[R]ealpolitik certainly plays a role in the practice of extradition.”).

169. Magnuson, supra note 2, at 865. For example, the United States makes many more extradition requests than it receives, id. at 866, and it has over 150 extradition treaties, see Bassiouni, supra note 148, at 42.

170. Magnuson, supra note 2, at 863.

171. Id. at 864, 878 (describing the use of pledges when there are high transaction costs and the use of extradition agreements).
to existing and prospective extradition treaties with China specifically, it requires a unique calculation by each state that impacts its decision to conclude or reject an extradition treaty.

Other concerns are economic and diplomatic. Besides its intrinsic value, an extradition treaty is also a bargaining chip in the marketplace of foreign relations. A country like China can sweeten an extradition deal by offering an attractive economic or diplomatic package (or threatening repercussions) in exchange. Indeed, China is known to build a strong diplomatic case for the return of its fugitives, emphasizing the costs to bilateral relations of failure to comply in ad hoc negotiations.\(^{172}\) It is willing to use its economic clout\(^ {173}\) for leverage in extradition negotiations as well.\(^ {174}\) More broadly, countries have accused China of buying smaller countries’ silence on human rights issues.\(^ {175}\) Dampered human rights criticism paves the way for more repatriation. There is no direct evidence of China exerting similar pressure to obtain extradition treaties. However, there is speculation. For example, Canadian media has theorized that Trudeau agreed to discuss a treaty with China in order to secure favorable terms on canola oil exports to China,\(^ {176}\) the release of an alleged Canadian spy in Chinese custody,\(^ {177}\) and to stem China’s troubling practice of pursuing fugitives on Canadian soil without informing Canadian authorities.\(^ {178}\)

Economically stronger countries will have a greater resistance to economic and diplomatic packages because they are less easily tempted and more difficult to pressure. Even so, the economic explanation leaves questions unanswered. Why would Canada

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174. Eder & Lang, supra note 106.


177. Trudeau Says Canada Has ‘Extremely High Standards’ for Extradition, supra note 126. Although Garratt was released shortly after Ottawa and Beijing announced their new dialogue, Canada’s foreign minister denied any quid pro quo. See Canada Made No Concessions to Bring Kevin Garratt Home, supra note 127.

bend where Australia rebuffed its greatest trading partner? Is France (treaty) more economically dependent on China than New Zealand or Singapore (no treaties, even though they are common destinations for Chinese fugitives)? The economic rationale is relevant, but it does not adequately explain these phenomena.

Deciding on a prospective extradition treaty implicates a wealth of pragmatic considerations. Some considerations are intrinsic to any prospective treaty, while others pertain to the treaty’s value as an economic or diplomatic bargaining chip. These factors are relevant to a state’s decision to enter into an extradition treaty. However, they do not entirely explain the common law-civil law divide over extradition treaties with China.

The common and civil law states with which China most desires extradition treaties have a great deal in common, then. They share apprehensions about treaty provisions, human rights and criminal justice concerns, and even strategic, ideological, or cultural distrust. The cost-benefit analysis of treaty making is inevitably country-specific, but does not sufficiently account for the divergent behavior of states either. Instead, the best explanation for the common law-civil law divide is found in the domestic legal differences of these states.

VII. DOMESTIC LEGAL DIFFERENCES

Developed nations agree that a fair trial and due process are essential human rights, but there is no international consensus on how these rights translate into concrete norms and procedures under domestic law. Laws governing criminal procedure, the status of precedent, and the roles of judges, lawyers, and juries vary between common and civil law states as well as within these two broad categories. It should come as no surprise that legal doctrines and protections—not to mention the

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180. See ICCPR, supra note 5, art. 14. Note that China has signed but not yet ratified the ICCPR.
configuration of checks and balances between coordinate branches of government—vary among legal systems as well.  

Extradition, as a “combination of national and international law,” must reconcile these differences between states.

Some have attributed China’s difficulty in securing extradition treaties with common law states to differences in their domestic legal systems. The Chinese legal system, a civil law model with lingering Soviet influences, has more in common with its civil law cousins than the world’s common law systems. Nonetheless, a great number of common and civil law countries maintain extradition treaties with each other despite their separate legal pedigrees, suggesting that mere incongruence of legal systems is not an insurmountable impediment. In recent decades civil and common law systems have gone to great lengths to overcome—or at least compromise over—their differences such that there is an increasing convergence of state practice.

The purpose of this section is to discuss the enduring legal differences between common and civil law states that account for the divergent postures toward extradition treaties with China.

A. The Executive and the Legislature

There is no general obligation under customary international law to prosecute or extradite individuals for non-international

183. See, e.g., Michael V. Profit, Refusing to Be One’s Own Witness: How the Privilege Against Self-Incrimination Differs in China, France, and the United States, 8 ELON L. REV. 155 (2016) (noting that the countries differ on the scope of application, the time frame in which authorities must notify individuals of the privilege, and how and when evidence resulting from police misconduct is excluded).

184. Sadoff, supra note 110, at 135.


186. CIA World Fact Book: China, supra note 100.

187. GEOFF GILBERT, RESPONDING TO INTERNATIONAL CRIME 4 (2006) (“Some of the great distinctions of the past between civil law and common law traditions...are becoming the subject of compromises, such that there is an increasing convergence of State practice.”).
States opt into a duty to extradite along a spectrum of commitment. In its condensed form, this spectrum consists of duties created by ad hoc agreement, treaty, and national legislation. Under these options, a duty to extradite may be owed to a single state in a one-off, negotiated exchange or at the other extreme to all states in all exchanges. Because the duty to extradite originates in formal commitment alone, states set substantive conditions on extradition as well. Most states agree that treaty and domestic law are the exclusive sources of a duty to extradite. However, legal bases for the power to extradite vary by state. Common law states historically rely on bilateral treaties supplemented by domestic legislation to regulate procedure while civil law states find a legal basis for extradition in reciprocity and comity in addition to treaty and legislation. Comity and reciprocity are usually enshrined in treaties and national legislation. Extradition treaties in common law states empower the executive because they grant authority to act where none existed before. Civil law extradition treaties, on the other hand, rest against a backdrop of preexisting executive discretion to extradite. They can enable or constrain.

In common law states, the executive branch cannot effectively conclude a treaty without legislative support. Among the common law countries, the United States requires two-thirds of Congressional approval for the President to conclude a treaty. The practice of Australia and Canada has been to seek the approval of Parliament. While neither country technically requires parliamentary approval, it is required in practice because their respective parliaments are responsible for implementing legislation. Extradition is no exception. This division of power lays the foundation for the traditional common law model of extradition, under which a treaty is required in order to extradite.

188. Bassiouni, supra note 148, at 12–13. Contrast this with the arguably customary obligation to prosecute or extradite for jus cogens violations. Id. at 14.
189. Id. at 168-69. A duty to extradite may be found in multilateral treaty, bilateral treaty, ad hoc negotiation, specific reciprocity agreement, or reciprocity or comity enshrined in the national legislation of the requested state. States may also opt for informal comity or a general reciprocity undertaking, which do not create legal duties. Id.
190. Id. at 2, 43.
191. Id. at 43.
192. Id. at 42.
193. Id. at 8.
The United States is the strictest adherent to this model. Supreme Court precedent requires an extradition treaty or legislative grant of authority in place before the United States may grant extradition requests. The same restrictions apply where there is a gap in an existing treaty. The United States’ practice of “disguised extradition” is also noteworthy as an executive strategy for circumventing certain legislative and judicial checks. This is when the executive uses the less-stringent mechanism of immigration law to deport those it cannot legally extradite. In this way, it functions like a constrained version of ad hoc extradition.

The other common law states have strayed to varying degrees from the strict common law model, opting to grant their executives more flexibility. Nonetheless, these deviations for the most part remain faithful to the common law tradition in ways that maintain the differences between common and civil law states.

Australia’s Extradition (Foreign States) Act of 1974 allowed the executive to extradite on the basis of reciprocity. It was repealed in March 2015—in time for legislative opposition to thwart the executive’s extradition treaty with China. The current Australian law, the Extradition Act of 1988, permits repatriation to an “extradition country” in addition to those with which Australia maintains a treaty. Extradition countries are those designated as such in executive regulations promulgated by

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196. Valentine v. United States, 299 U.S. 5, 9 (1936) (holding that there is no duty to extradite besides that in treaty, and that “[t]here is no executive discretion to surrender [the sought individual] to a foreign government, unless that discretion is granted by law,” i.e., express legislative or treaty provision); 18 U.S.C. § 3181(a) (“The provisions of this chapter [18 U.S.C.S. §§ 3181 et seq.] shall continue in force only during the existence of any treaty of extradition with such foreign government”); see also U.S. DEPT OF JUSTICE, JUSTICE MANUAL § 9-15.100 (2018) (noting that the 1996 amendments to “18 U.S.C. 3181 and 3184 permit the United States to extradite, without regard to the existence of a treaty, persons [other than citizens, nationals or permanent residents of the United States], who have committed crimes of violence against nationals of the United States’ overseas). Note also that many acts of repatriation are in fact “disguised extradition,” which employ legal mechanisms other than extradition, such as deportation, to achieve the same effect, thereby circumventing legal standards for extradition. See Bloom, supra note 4, at 183. For a recent example of this, see Sarah N. Lynch, China Hails First Fugitive Extradition from U.S. Under Trump, REUTERS (June 1, 2017, 6:03 AM), https://www.reuters.com/article/us-china-usa-crime/china-hails-first-fugitive-extradition-from-u-s-under-trump-idUSKBN18S4L6.


198. Bloom, supra note 4, at 181.


Australia’s Governor-General. These regulations are also “subject to such limitations, conditions, exceptions, or qualifications as are necessary to give effect to a bilateral extradition treaty.” This scheme appears to accord the Australian executive much of the discretion embodied in the civil law tradition because it can domestically implement its own treaties. However, the Senate’s power to disallow regulations acts as a crucial limitation on this discretion. Thus, the legislative branch retains an important control over the executive even as it permits increased flexibility. The common law tradition has evolved but not eroded in Australia.

Even where common law states permit *ad hoc* extradition, they typically condition this grant of authority on greater safeguards for the human rights of the fugitive. For example, Section 194 of the Extradition Act of 2003 permits the United Kingdom to respond to *ad hoc* extradition requests. *Ad hoc* extraditions require a “memorandum of understanding” (MOU) between the United Kingdom and the requesting state. Generally speaking, MOUs describe a form of agreement that may or may not create binding obligations under international law. However, a report commissioned by the United Kingdom Secretary of State describes these MOUs as “a mini-extradition treaty” setting the terms of a one-off extradition. *Ad hoc* extraditions from the United Kingdom must also adhere to the more stringent procedures imposed for “Category 2” countries under the Extradition Act of 2003, including the highly

201. Id.


204. THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 255 (John P. Grant & J. Craig Barker eds., 2007) [hereinafter HARVARD RESEARCH IN INT’L LAW].

205. Extradition Act 2003, c. 41 § 194 (Eng.).

206. TT BAKER ET AL., A REVIEW OF THE UNITED KINGDOM’S EXTRADITION ARRANGEMENTS 455 n.238 (2011) (commissioned by the United Kingdom Secretary of State [hereinafter REVIEW OF THE UK’S EXTRADITION ARRANGEMENTS]).


208. REVIEW OF THE UK’S EXTRADITION ARRANGEMENTS, supra note 206; see also The US-UK Extradition Treaty, supra note 167 (describing the United Kingdom’s two-category system, including some admitted inconsistencies in its classifications).
demanding, prima facie case evidentiary requirement. Thus, the UK’s grant of flexibility also exhibits a distrust of executive discretion in extradition.

In the furthest break from tradition with its common law peers, Canada’s Extradition Act permits the executive to enter into “specific agreements” with other states to extradite in individual cases. Essentially, this is ad hoc extradition, but with added safeguards contained in the Act itself, which prevail over the terms of any ad hoc agreement. The Act also expressly identifies the legislative provisions that an extradition treaty may amend or override. Ad hoc extraditions in Canada remain subject to higher evidentiary standards than in civil law states.

A pattern emerges from these common law states. The degree to which they adhere to the traditional extradition model maps onto their current posture toward an extradition treaty with China. We can gauge this posture through executive outreach and legislative resistance. The executive is the most responsive branch to requests for extradition and extradition treaties, and not only because they are the point of contact for foreign governments. The practice of disguised extradition, even by common law countries that permit ad hoc extradition and even as their legislatures oppose an extradition treaty with China, showcases an executive desire for expediency that circumvents legislative and judicial obstacles to repatriation. In fact, China has sensed this legislative and judicial interference in executive agendas. Speaking for the Ministry of Foreign Affairs, Treaty Law Department Head Xu Hong (徐宏) has singled out legislators and judges as the primary blocks to American, Canadian, and

209. The UK Home Office concluded in a 1982 review of extradition law that the prima facie case requirement resulted in the failure of approximately one third of extradition applications made to the United Kingdom. See HARVARD RESEARCH IN INT’L LAW, supra note 204, at 261.


212. Id art 10(2).

213. NEWZEALAND LAW COMM’N, MODERNIZING NEW ZEALAND’S EXTRADITION AND MUTUAL ASSISTANCE LAWS (NZLC R 137) (2016) (explaining the Canadian system) [hereinafter NZLC Issues Paper 137].

Australian extradition treaties with China. Chinese scholars have blamed legislatures as well.

Some common law executives are more receptive than others to China’s pursuit of extradition treaties. It was Trudeau’s executive decision to initiate Canada’s High-Level National Security and Rule of Law Dialogue with China and to “start discussions” for an extradition agreement as part of these talks. Similarly, New Zealand Prime Minister John Key has stated that an extradition treaty with China is “possible,” albeit with some additional safeguards. New Zealand also permits ad hoc extraditions.

Legislative resistance to an extradition treaty with China exists in countries with receptive executive branches, and the strongest pushback has been where a treaty would most empower the executive. The United States has perpetually resisted an extradition agreement with China and maintains its archetypal common law extradition regime. The canned Sino-Australian extradition treaty was signed while Australian law experimented with a civil law model, but was abandoned when Australia returned to its common law roots. Even Canada is “a long, long way from negotiations.”

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216. See, e.g., Chen Qinglai, supra note 31 (quoting Beijing Normal University law professor Huang Feng [黄风] that the United States Congress obstructs a treaty with China).
220. NZLC Issues Paper 137, supra note 213, at 3.1.
executive’s power to negotiate a treaty that would be opposed in the legislature. However governments do not undertake expensive negotiations lightly or waste resources where there is no chance of success.222

Civil law states are more uniform in their extradition practice relative to their common law counterparts. All of them statutorily permit extradition in the absence of treaties. These statutes in turn yield to the precise terms of existing treaties.223 In France, the authority to extradite in the absence of a treaty was once the king’s birthright.224 The country’s Extradition Law of 1927 now grants this power to the French executive.225 Under this law, extradition treaties circumscribe executive discretion to engage in ad hoc extradition.226 Thus, French legislators have cabined ad hoc terms to where there is no treaty, where a treaty default occurs, or where there is a gap in an existing extradition treaty.227 Where an extradition falls within the scope of a treaty, the executive is bound by the legislature’s terms. The Law also influences the executive more subtly by functioning as an accepted guide for negotiating new extradition treaties.228

Similar or identical schemes exist in Spain, Portugal, Italy, and South Korea. Spain’s Law on Passive Extradition does not require a treaty to extradite.229 In the absence of a treaty, extradition may be granted on terms of reciprocity,230 and treaty terms can supplant those in the Law.231 The Portuguese Constitution and The Law on International Judicial Cooperation in Criminal Matters (LIJCCM) govern extradition from Portugal.232 The Constitution sets absolute prohibitions on

retrial.html (Schellenberg’s sentence related to drug charges and China arrested two others for “endangering national security”).

222. Magnuson, supra note 2, at 860.
223. HARVARD RESEARCH IN INT’L LAW, supra note 207, at 254-55.
224. Extradition between France and the US, supra note 197, at 657.
225. Id.
226. Id. at 658; see also Loi 830520 du 10 Mars 1927 de à l’extradition des étrangers [Law 830530 of March 10, 1927 on French Extradition], DIRECTION DES JOURNAUX OFFICIELS [J.O] [OFFICIAL JOURNALS DIRECTORATE], June 28, 1983, art. 1.
227. Extradition between France and the US, supra note 197, at 658.
228. Id.
230. Law on Passive Extradition (Spain), supra note 229, art. 1.
231. Id.
232. CONSTITUTION OF THE PORTUGUESE REPUBLIC (PORTUGAL), 25 Apr. 1976, art. 33. [hereinafter CONSTITUTION OF PORTUGAL]; see also Law on International Judicial
certain extraditions\textsuperscript{233} while the LIJCCM recognizes the primacy of treaties over domestic law and functions in the absence of a treaty or where a treaty is silent.\textsuperscript{234} It also permits extradition based in comity or reciprocity.\textsuperscript{235} The Italian Criminal Code permits extradition in the absence of treaty or international convention so long as it is not expressly prohibited by the same.\textsuperscript{236} Extradition in the absence of a treaty is governed by the Italian Code of Criminal Procedure, which adds, among other things, protections of the criminal suspect’s fundamental rights and a default procedure.\textsuperscript{237} The Italian Constitution also creates absolute prohibitions on certain kinds of extraditions.\textsuperscript{238} Korea permits extradition in the absence of a treaty as well. Extradition is, however, conditioned on reciprocity by the requesting state.\textsuperscript{239}

The degree to which an extradition treaty would empower a country’s executive correlates strongly with that country’s posture toward an extradition treaty with China. Relatively speaking, common law legislatures require more convincing to form extradition treaties because in doing so they expand the power of their executives. Civil law legislatures, on the other hand, do not expand executive power when they endorse a treaty. They may even enact specific provisions that do the opposite.

B. The Executive and the Courts

Differences in the executive-judicial relationship further reinforce the differing configurations of checks and balances in common and civil law states. Nearly all countries have adopted a scheme under which courts can prevent extraditions but cannot mandate them. However, common and civil law states diverge in the degree to which courts are free to second-guess executive

\textsuperscript{233} Constitution of Portugal, supra note 232, art. 33(7), (5), (6) (noting prohibitions on certain extraditions such as the extradition of nationals, death, and irreversible physical damage).

\textsuperscript{234} LIJCCM (Portugal), supra note 232, art. 3.

\textsuperscript{235} Id. art. 4.

\textsuperscript{236} C.p., n. 13 (It.).


\textsuperscript{238} See art. 10, 26 Costituzione [Cost.] (It.) (mandating no extradition unless expressly required by treaty, and no extradition for political offenses).

\textsuperscript{239} Korea Extradition Act, art. 4.
determinations. An extradition treaty generates less worry for civil law legislatures because their courts are less deferential to executive determinations when scrutinizing extradition requests. By comparison, a common law executive empowered by a treaty faces minimal judicial obstacles.

Extradition in all countries was entirely the prerogative of the executive until the nineteenth century. In 1842, the United States and Great Britain committed themselves in treaty to providing a judicial hearing as part of the extradition process. Both countries soon thereafter implemented this treaty through domestic legislation. These laws established an extradition scheme under which the judiciary could block an extradition with a negative extradition ruling, but the executive retained discretion not to extradite in the event of a positive ruling. Many countries besides the United States and England have followed this “Anglo-American scheme,” including the developed nations with which China seeks to conclude or has concluded extradition treaties.

Executive decisions to extradite, then, are in principle subject to judicial scrutiny in both common and civil law countries. The strength of this scrutiny varies with the degree of inquiry into the requesting state’s criminal justice system. Common law jurisdictions abide strictly by the “rule of non-inquiry.” Under this rule, states respect each other’s laws, beliefs, and culture by not scrutinizing the requesting state’s justice system, legal processes, or the motivation behind a request for extradition.

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240. Bassiouni, supra note 148, at 819.
242. Id. at 820. England did so though generic implementation legislation and the United States through the Extradition Statute of 1848. See 6 and 7 Vict., Chs. 75, 76; see also 33 and 34 Vict., Ch. 52; Act of August 12, 1848, ch. 167 (an act for giving effect to treaty stipulations). The scheme enacted by the 1848 Extradition Statute largely survives today. 18 U.S.C. § 3184.
243. See Bassiouni, supra note 148, at 819-20; see also § 12 Gesetz über die internationale Rechtshilfe in Strafsachen [Act on International Cooperation in Criminal Matters] (Ger.); IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 199 (1971) (citing France’s Extradition Law of 1927); IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 199 n. 4 (1971) (citing Japan’s extradition law); Law on Passive Extradition (Spain), supra note 229; CONSTITUTION OF PORTUGAL, supra note 232, art. 33(7).
244. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 92 (2012) (explaining because of the rule of non-inquiry, courts in common law jurisdictions are often discouraged from investigating into the fairness of the proceedings of the requesting state).
245. Sadoff, supra note 110, at 314; see also Bassiouni, supra note 148, at 633-42 (characterizing non-inquiry as an expression of respect for state sovereignty).
Where the executive opts not to scrutinize another state’s legal system, this is an exercise in discretion—a deliberate act of comity toward another state. For courts, however, non-inquiry is a judicial rule mandating deference to the executive’s determinations regarding a foreign state.246

Nominal challenges to the rule of non-inquiry have appeared in common law states, as human rights conventions impose obligations that arguably require exceptions to the rule.247 Even so, these challenges remain nascent if not impotent. Several United States circuit courts mention in dicta how the right set of facts could produce an exception where the requested individual would be subject to severe violations of due process or cruel, inhuman, or degrading treatment upon repatriation.248 In Gallina v. Fraser, for example, the Second Circuit conceived of situations “where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court’s sense of decency as to require reexamination of [the rule of non-inquiry].”249 This decency standard has yet to be successfully invoked despite being affirmed in other cases.250 Even with the existence of Gallina-like exceptions in several other circuits, none has ever denied extradition on humanitarian grounds.251 The prevailing rule remains that “humanitarian considerations…are within the purview of the executive branch and generally should not be addressed by the courts in deciding whether petitioner is

246. FEDERAL JUDICIAL CENTER, INT’L EXTRADITION: A GUIDE FOR JUDGES 25 (2014) (emphasizing that the doctrine of non-inquiry is based on notions of comity and institutional competence).

247. Bassiouni, supra note 148, at 663; see also id. at 801 (addressing the principle of non-refoulement as defined by the Convention Against Torture); John Quigley, The Rule of Non-Inquiry and Human Rights Treaties, 45 CATH. U.L. REV. 1213, 1217-48, (1996) [hereinafter “Non-Inquiry and Human Rights Treaties”] (arguing United States federal courts are bound by the country’s human rights treaty obligations to reject the rule of non-inquiry).


250. Donald K. Piragoff & Marcia V.J. Kran, The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts, 3 CRIM. LAW FORUM 225, 256-57 (1992) [hereinafter Impact of HR on US-Canada Extradition] (explaining that the Gallina exception, while affirmed in other cases, has never been successfully invoked to prevent extradition); see also Sindona v. Grant, 619 F.2d 167, 174-75 (2d Cir. 1980) (declining to interpret Gallina as holding that a magistrate must consider humanitarian considerations in making an extradition determination). Where the relator cited Gallina and the risk of murder or injury at the hands of political factions should he be returned to Italy, the Second Circuit held that this determination was for the executive to make. Bassiouni, supra note 148, at 942. The relator was ultimately extradited to Italy, where he was killed in his prison cell. Id. at 943.

251. Bassiouni, supra note 148, at 943.
extraditable.” In principle, the Secretary of State’s discretionary decision to extradite can be reviewed for abuse of discretion under the Administrative Procedure Act. But this is virtually unheard of. Canada’s Canada v. Schmidt and United States v. Allard cases similarly recognize circumstances that would allow courts to block extraditions where the proceedings or penalties that the requested individual faces “sufficiently shock the conscience” or are “simply unacceptable.” These standards impose a high bar, and the Canadian judiciary undertakes such inquiry “with caution.” Scholars have noted a minimal role for the Judiciary in Canadian legislation as well, with one remarking, “it is difficult to understand why the judicial role has been retained in the [Extradition Act of 1999], as the extradition judge has little, if anything to do.” The Minister of Justice cannot be arbitrary in the decision to extradite, but this is a minimal check on his or her authority. Canada’s Extradition Act of 1999 envisions a role for the Judiciary in extraditions even less than that in the United States. Australia continues its “substantial shift away from judicial review of the extradition process towards the exercise of

252. Hoxha v. Levi, 465 F.3d 554, 563 (3d Cir. 2006) (applying the non-inquiry standard even where petitioner claimed he would face torture and possibly be murdered if extradited to Albania).
254. Canada v. Schmidt [1987] 1 S.C.R. 500, 522-23 (Can.) (dismissing an appeal of a Canadian citizen resisting extradition to the U.S. for violation of Ohio law on the grounds that she was acquitted of the same charge under federal U.S. law); United States v. Allard, [1987] 1 S.C.R. 564, 572 (Can.) (finding that extradition could be denied if surrender is found to violate the principles of fundamental justice).
255. Impact of HR on US-Canada Extradition, supra note 252, at 249; see also Argentina v. Mellino, [1987] 1 S.C.R. 536, 556 (Can.) (“The courts may, as guardians of the Constitution, on occasion have a useful role to play in reviewing such decisions, but it is obviously an area in which the courts must tread with caution.”).
258. Id. at 8 (“Whereas in America there remains an interplay between executive discretion and the role of the judiciary in interpreting the legal rules and exemptions with respect to allowing supportive evidence, in Canada the new Act precludes the exercise of judicial discretion in these areas. There is virtually no interaction between the executive and the courts, and the statute specifically attempts to pigeon-hole the discretionary roles of the Minister [of Justice] and extradition courts so that they do not even intersect.”).
unreviewable executive discretion.” The Australian High Court has held that this view “has force,” and a report from the Joint Standing Committee on Treaties (JSCT) commissioned by the Australian Parliament endorsed concerns “about the way in which the [Extradition Act of 1988] has placed responsibility for scrutiny of human rights protections in the hands of the executive rather than the courts.” For example, Stanton v. DPP held that the Extradition Act left no room for the court to consider whether the requested individual would receive a fair trial from the requesting state, the Philippines, even as the court expressed concern. The Minister for Justice and Customs’ decision to extradite is technically reviewable in that a court may review the process but not the merits. However, the JSCT report found that the Minister’s discretion was “to a great extent unreviewable in practice”—indeed, no such review has ever blocked an extradition from Australia—and noted a menacing synergy between the executive’s unreviewable discretion and the lowering of Australia’s evidentiary standards for extradition, which further diminished courts’ role as a foil to the executive.

The legal status of non-inquiry is unclear in the United Kingdom. Its domestic orthodox approach is rigid non-inquiry. The Extradition Act of 2003, through the Human Rights Act of 1998, apparently permits inquiry by domestic courts because it incorporates protections from the European Convention on Human Rights. There has been at least one


260. DPP v Kainhofer (1995) 185 CLR 528, 541 (Austl.) (finding that there has been a substantial shift from judicial review of the extradition process towards the exercise of unreviewable executive discretion).


262. Stanton v. DPP (Unreported, Federal Court of Australia, Spender J., Jan. 12, 1993) (Austl.) (finding the Attorney-General subsequently refused to surrender the individual).

263. Extradition: An Unreviewable Executive Discretion, supra note 259.

264. Id.


267. Extradition: An Unreviewable Executive Discretion, supra note 259.
judicial denial of extradition on human rights grounds. Even so, there is doubt as to meaningful erosion of non-inquiry.

Suffice it to say that the rule of non-inquiry remains a fixture of common law courts despite nominal exceptions in case law. A rigid rule of non-inquiry effectively removes an important check on executive power and in doing so fuels legislative apprehension of the executive and, by extension, treaties the executive might enter. This worry is well founded, considering that judicial deference exposes national governments to political pressure from foreign governments and a de-emphasis on human rights.

This generalization holds true in the realm of extradition as well. Civil law courts play a more active role in assessing whether extradition would violate an individual’s human rights. France, for example, rejects the doctrine of non-inquiry and refuses extraditions that contravene domestic public policy (ordre public). The Conseil D’État, France’s highest administrative court, has the power to quash extradition orders and inquire into the conditions of the requesting state when considering such orders. For example, where Spain requested the extradition of Basque separatists, the Conseil D’État found, as a prerequisite to extradition, that the Spanish judicial system respected individual rights and liberties. The Conseil D’État has proven itself willing to exercise its power to prevent extraditions as well. In another case, Turkey requested the extradition of an individual on murder charges. When the French government communicated that extraditing an individual into possible capital punishment violated French ordre public, the Turkish government replied that capital punishment was only available for


269. Extradition: An Unreviewable Executive Discretion, supra note 259.


premeditated murder, which had not been charged in the case. The French government subsequently ordered the defendant’s extradition with the understanding that he would not be executed, but the Conseil D’État prevented it because France failed to secure Turkey’s assurance (or more specifically, that of the Turkish judiciary) that it would not execute.274 A number of French courts of appeals have also prevented extraditions where the extraditee was convicted in absentia.275 More recently, a French court refused to extradite the former prime minister of Kosovo to Serbia, reportedly out of concern that his right to a fair trial would be violated.276

Other civil law courts have integrated international law with domestic judicial practice. The Italian Court of Cassation recently blocked an extradition to Romania with reference to case law within Italy as well as that of the Court of Justice of the European Union and the European Court of Human Rights.277 The Italian Court determined that information provided by Romania, which has a history of substandard prison conditions and abuse, was insufficient to verify the conditions awaiting the requested individual.278 The burden fell on the Italian executive to obtain sufficient guarantees meeting international standards before the court would permit the extradition.279 In another case, Italy’s Justice Ministry agreed to extradite a suspect wanted for first-degree murder to the United States on the basis of diplomatic assurances by a Florida prosecutor’s office that it would not seek the death penalty. The Italian Constitutional Court blocked the extradition, unanimously declaring unconstitutional legal provisions that would have enabled Italy to extradite the suspect so long as they received assurances that the death penalty would not be applied.280

278. Id.
279. Id.
In short, civil law judiciaries often refuse to defer to executive determinations about the requesting country and the treatment awaiting a requested individual. This trend includes the developed civil law states that have extradition treaties with China. It would also be a mistake to ignore the influence of powerful regional arrangements. The European Court of Human Rights is capable of blocking extradition and imposing a duty of inquiry on states. Perhaps even more influential is the European Arrest Warrant system, which has “judicialized” the surrender of fugitives between European Union states by removing the decision from the executive and placing it wholly in the hands of courts. While these mechanisms are regional in scope, they reflect an influential pattern of practice. This practice stands in contrast to that of common law states because civil law courts are more reliable foils to executive decisions to extradite.

C. Extradition of Nationals

Prohibitions on the extradition of nationals comprise another legal divide between common law and civil law states. In fact, such prohibitions are arguably the most common barrier to

281. Other noteworthy examples: Spain’s National Court blocked an extradition of HSBC computer engineer to Switzerland based on the merits because his actions did not amount to the crimes alleged. The claims against him were “somewhat confusing and inconsistent,” and his leaks in fact exposed other crimes. Ilan Brat, Spain Refuses to Extradite Ex-HSBC Employee, WALL STREET JOURNAL (May 8, 2013), https://www.wsj.com/articles/SB10001424127887323744604578470671572774086. Germany nominally practices non-inquiry but often allows challenges. In the Yemen Citizen’s Extradition Case, for example, the German Federal Constitutional Court noted that “the requesting state is, in principle, to be shown trust as concerns its compliance with the principles of due process of law and the protection of human rights. This principle can claim validity as long as it is not shaken by facts to the contrary.” See Individual Constitutional Complaint, BVerfG, 2BvR 1506/03; ILDC 10 (DE 2003), 5 Nov. 2003. In Soering v. United Kingdom, Germany intervened to argue that extradition should be denied where inhuman or degrading treatment is anticipated in the requesting state. See 195 Eur. Ct. H.R. (ser. A) at 82 (1989). In considering whether to extradite a fugitive to China, the Tokyo High Court held that it was more appropriate for the executive to decide on the compatibility of China’s system of criminal justice with human rights norms because these issues “relate to prediction of facts to occur in future.” See sources cited supra note 34. Sweden and Argentina also do not adhere to a doctrine of non-inquiry. See Non-Inquiry and Human Rights Treaties, supra note 247, at 1226-28.

282. See, e.g., Bassioni, supra note 148, at 346 (discussing situations where the European Court of Human Rights has blocked extraditions). The factual analysis of conditions in the requesting state applied by the Court of Human Rights is “not wholly compatible with the doctrine of non-inquiry.” Id. In particular the Court explicitly does not apply non-inquiry with respect to the violation of certain fundamental rights. Id.

Traditionally speaking, common law states extradite their own nationals while civil law states do not. This difference is often explained in terms of jurisdiction—common law states exert territorial jurisdiction over individuals, while civil law states claim universal, and often exclusive, jurisdiction over nationals and are frequently prevented from extraditing their own by legislation or constitutional provisions. This is the case for the developed civil law countries that have extradition treaties with China. The executives of Spain, Portugal, France, and Italy generally cannot extradite nationals. Korea retains discretion to extradite. Exceptions to this rule are quite strict. For example, Spain and France require reciprocity, limit the practice to within the European Arrest Warrant system, and require that a national be returned to serve his or her sentence in their country if convicted. Portugal’s constitution forbids extraditing nationals, though the Portuguese Supreme Court has permitted extradition within the European Union even in the absence of reciprocity. Italy may only extradite nationals where expressly allowed by treaty, and specific treaties between close political and diplomatic allies occasionally permit the extradition of nationals. But generally civil law countries do not extend this special treatment beyond a close comfort zone.

Common law states, on the other hand, do not draw a distinction between nationals and non-nationals for the purposes of extradition. These states must therefore contemplate the fate of their own citizens under a treaty. A government-

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284. Sadoff, supra 110, at 234.
286. Sadoff, supra note 110, at 324-36 (describing the civil law tradition).
287. See U.S. LIBRARY OF CONGRESS, LAW ON EXTRADITION OF CITIZENS (2013) (offering a comprehensive list of countries’ extradition practices).
288. Id.
289. Id.; see also NICHOSS ET AL., THE LAW OF EXTRADITION AND MUTUAL ASSISTANCE 289 (3d ed. 2013) [hereinafter LAW OF EXTRADITION] (“The Spanish Constitutional Court… held that Spain should not extradite its own nationals in the absence of reciprocity.”).
290. CONSTITUTION OF PORTUGAL, supra note 234, art. 33(1).
291. LAW OF EXTRADITION, supra note 288, at 289.
293. See U.S. LIBRARY OF CONGRESS, LAW ON EXTRADITION OF CITIZENS (2013); see also Australian JCST Report 40, supra note 261, chs. 3.41, 3.103 (noting that Australia does not extradite nationals and discussing the similar policies in other common law jurisdictions).
commissioned report to the United States Congress, for example, notes:

[S]ometimes not pursuing [extradition treaties] is a conscious choice, even where there is a possible law enforcement need. This is because extradition treaties are reciprocal and in addition to obtaining the return of fugitives to the United States, we must be prepared to surrender fugitives, including U.S. nationals, to face the legal, judicial and penal systems of our treaty partners. Where we are not prepared to do so, we do not pursue such a treaty even though that may mean foregoing the possibility of obtaining the extradition of fugitives from that country.\textsuperscript{294}

The United States further adheres to a policy of extraditing nationals even where treaty partners cannot (due to domestic law) or will not reciprocate.\textsuperscript{295} While the Secretary of State has statutory discretion to refuse extradition of citizens, it is essentially unreviewable (under the Administrative Procedure Act), and therefore is no guarantee to individual citizens who can in theory be sacrificed for the sake of bilateral relations.\textsuperscript{296} This scheme—a general policy that does not distinguish between nationals and non-nationals, coupled with (rarely-invoked) discretion to refuse extradition of nationals—is a general feature of common law governments.\textsuperscript{297}

An extradition treaty therefore carries risks for common law citizens and political repercussions for the elected officials accountable for putting their extradition into law. These costs are not borne by the citizens and political branches of civil law states.\textsuperscript{298} Whereas these risks are minimized in a treaty with a trusted ally, they are salient in a treaty with a country like China that is often accused of human rights and fair trial violations as


\textsuperscript{295} Id § 705.

\textsuperscript{296} 18 U.S.C. § 3196 (“If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a . . . citizen . . . if the other requirements of that treaty or convention are met.”); Bassiouni, supra note 148, at 751.

\textsuperscript{297} See, e.g., Australian JCST Report 40, supra note 261, chs. 3.105, 3.108 (noting Australia’s policy and quoting an expert for the statement that discretion to refuse extradition of nationals is a general common law feature).

\textsuperscript{298} Magnuson, supra note 2, at 880.
well as political prosecutions aimed at silencing dissidents and critics. These concerns further intensify the common law reluctance to conclude extradition treaties.

D. Evidentiary Standards

Evidentiary standards have long been regarded as one of the most intractable issues in extradition between common and civil law states. This is beginning to change, however, as common law states increasingly accommodate their civil law extradition partners. Civil law systems generally do not insist on any evidence in connection with an extradition hearing. Instead, they typically require a _bona fide_ indictment or arrest warrant and proof that the person to be extradited is indeed the person sought. Civil law states take these documents at face value, granting extradition so long as a treaty’s other formal obligations are fulfilled. In contrast, common law systems traditionally impose higher evidentiary requirements to effectuate extradition. Such requirements range from the (strictest) “prima facie case” requirement to the (more lenient) “probable cause” requirement, to the (most lenient) “reasonable probability” requirement. These requirements subject extradition requests to the


300. Sadoff, _supra_ note 110, at 215.

301. Id. at 216. But see _supra_ note 204 (holding up the European Extradition Convention of 1957 as an exemplar of the civil law model and noting that it has no evidentiary requirement). Germany and the Scandinavian countries employ higher evidentiary requirements on a discretionary basis, making them exceptions within the community of civil law states. Id. at 262 n.58.

302. Sadoff, _supra_ note 110, at 216.


304. Id. at 821. Article 12 of the European Extradition Convention of 1957 provides an illustrative example. It requires a written request supported by (1) an authenticated copy of the conviction, sentence, arrest warrant, or similar document; (2) a statement of the offenses for which extradition is requested, including the time and place of their commission and their legal descriptions; and (3) a copy or statement of relevant law and information helpful to identify the individual sought. Notably, there is no evidentiary requirement. See European Extradition Convention of 1957, Dec. 13, 1957, E.T.S. No. 024.

305. Sadoff, _supra_ note 110, at 216. The _prima facie_ case requirement demands evidence sufficient to convict the individual sought in the courts of the requested state. Probable cause calls for reasonable grounds to believe the individual committed the alleged crime, though not necessarily enough to convict. Reasonable probability is that sufficient to undermine confidence in the outcome of the sought individual’s case. _Id_ at nn.192-94.
In other words, an extradition request will meet the *prima facie* case requirement for country X where evidence is sufficient to convict the defendant in country X.

Nowadays, many common law countries relax procedural rules for the benefit of requesting states. For example, hearsay from a requesting state may be admissible because extradition hearings are not necessarily bound by all rules of evidence that would apply at trial. That being said, common law extradition hearings sometimes deem evidence inadequate even though hearings are not supposed to hash out the merits of the case. Examples of inadequate evidence include situations where the defendant will have no opportunity to confront a key witness, statements are suspiciously identical, the information was collected unlawfully (under duress, torture, or unauthorized surveillance), or the reviewing court sniffs out bad faith, corruption, or discriminatory intent. In this way courts have occasionally attempted to use evidence to cover ground left barren by a strong rule of non-inquiry.

Disparate evidentiary standards have long impeded extradition because common law standards are “alien to civil law states’ investigation-prosecution procedure.” In the past, common law states have reported that requesting civil law states have trouble meeting their more stringent tests. To cite a dramatic example, an Anglo-Spanish extradition treaty lapsed in 1978 because England had not granted a single Spanish request, mainly due to Spain’s inability to meet the *prima facie* case

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307. For example, the United States Supreme Court has defined the probable cause standard as requiring “competent evidence to justify…trial.” Collins v. Loisel, 259 U.S. 309, 316 (1922) (denying Collins’s petition for writs of habeus corpus in part because “[i]t was not the function of the committing magistrate to determine whether Collins was guilty, but merely whether there was competent legal evidence which, according to the law of Louisiana, would justify his apprehension”). While this evidence need not be enough to justify a conviction, id., it must meet the federal standards set forth in 18 U.S.C. § 3184. Thus, evidence appended to an extradition request must be enough to justify a domestic trial, had the conduct been committed in the requested state. Id. at 314-15.
308. Collins, 259 U.S. at 317.
310. Id.
311. Id. at 220-21.
312. See supra note 204.
Moreover, the United Kingdom Home Office concluded during a 1982 review of extradition law that approximately one third of extradition applications made to the United Kingdom failed due to the requesting state’s inability to satisfy the prima facie case requirement. Under its 2003 Extradition Act, the United Kingdom now requires prima facie evidence from most states. However, it maintains lower evidentiary standards with nations in the European Arrest Warrant System, and has designated its close common law allies—Australia, Canada, New Zealand, and the United States—as states that need only meet a “reasonable suspicion” test when seeking extradition.

The United States adopts probable cause as its default standard, but most recent extradition treaties follow the civil law evidentiary standard. The United States appears unprepared to extend this relaxed evidentiary standard to China. In opening remarks to the Joint Liaison Group on Law Enforcement Cooperation’s Anti-Corruption Working Group, then-United States Associate Deputy Attorney General Bruce Ohr highlighted disparate evidentiary standards as an obstacle to U.S.-China extradition. He noted that the sharing of information had been “slow and difficult” and requested that China “furnish evidence in a form that, while different from that which might be used in their own courts, is admissible in a U.S. court.”

Canadian case law similarly defaults to evidence that “would justify committal for trial in Canada.” However, its Extradition Act also permits evidence in the form of “the record of the case.” The record of the case must include a summary of the evidence to be used against the requested individual in the

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315. See supra note 204.


319. JLG Remarks by Bruce Ohr, supra note 129.

320. Extradition Act (Can.), supra note 211, § 29(1); see also Ho v Australia (In re Extradition of Ho), 2000 BCSC 1744, ¶ 19 (Can.) (“The role of the extradition judge is…to determine whether a prima facie case has been made out that would justify the Applicant’s committal for trial if his conduct had taken place in Canada.”).

321. Extradition Act (Can.), supra note 211, § 32(1).
requesting state. Moreover, a judicial or prosecutorial authority of the requesting state must also certify that—under its own laws—the evidence is available for trial, was legally obtained, and is sufficient to justify prosecution. The practical result of this system is to meet civil law systems half way. For example, it permits the introduction of hearsay, but will require more than a *bona fide* prosecution document and proof of identity. New Zealand currently maintains a *prima facie* case standard for non-exempted countries, but the New Zealand Law Commission in 2016 recommended a streamlined “case to answer” standard that mimicked Canada’s “record of the case” approach.

Australia has been particularly flexible on evidence, primarily for the purpose of facilitating treaties with civil law countries. Evidentiary requirements in Australian treaties range from *prima facie* case (e.g., with Hong Kong and Israel) to probable cause (e.g., with the United States and South Korea) to “no evidence” (numerous treaties), which is essentially the civil law standard. Its now-rejected extradition treaty with China would have adhered to the “no evidence” standard. Australia also maintains a warrant-backing program with New Zealand. While it retains the *prima facie* evidence standard in a number of treaties, particularly those with other Commonwealth countries, Australia has adopted “no evidence” as its preferred model for extradition treaties, requiring the requesting country to provide only documentation such as a duly authenticated statement of the offense and the applicable penalty, the warrant for arrest, and a statement setting out the alleged conduct constituting the offense. A full brief of evidence is not necessary. Australia has been able to conclude 38 extradition treaties since permitting “no evidence” in extraditions. Thus, historical differences over

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322. Id. §§ 33(1), 33(3).
323. See NZLC Issues Paper 137, supra note 213, ch. 9 (discussing evidence).
326. Australian J.CST Report 167, supra note 24, ch. 3.32.
329. NEW ZEALAND LAW COMMISSION, EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS ch. 7.22 (2014).
evidence required for extradition have not prevented common law states from increasingly accommodating civil law standards.

VIII. The Common Law-Civil Law Divide Explained

Multiple political and legal factors apply equally across common and civil law states with actual and potential extradition treaties with China. Political differences between China and the developed democracies with which it seeks extradition treaties mean that the political offense exception is a pronounced legal hurdle between them. Common and civil law states relatedly share grave concerns about China’s criminal justice and human rights record. They harbor distrust of China as a rising power and strategic rival. Lastly, states must make individual calculations about a costly treaty’s practical, political, and diplomatic value. These common concerns and country-specific valuations are undoubtedly relevant to any extradition treaty. However, they cannot entirely explain the common law-civil law divide over extradition treaties with China.

Domestic legal differences provide a more coherent explanation of the common and civil law divide over extradition treaties with China, chief among which are the nature of executive authority and existing checks on that authority. The common law configuration creates barriers to treaty formation that do not exist in civil law states because common law executive branches ordinarily cannot extradite without a treaty and treaties require legislative approval. Once empowered by treaty, the executive faces limited resistance from courts, which have fewer tools at their disposal to block extraditions due to a rigid rule of non-inquiry. Conversely, civil law extradition treaties can circumscribe the executive’s preexisting power to extradite. Civil law courts are also less deferential to executive determinations, and have proven themselves willing to frustrate executive attempts to extradite in ways that are not possible for common law courts.

Second, the extradition of nationals poses a unique challenge for common law states. It is best conceptualized as an aggravator of substantive issues, rather than an issue in its own right, because it broadens the scope of existing worries to encompass the extraditing country’s own nationals. This comprises a weightier obligation on a state and substantially increases the domestic
political costs of an extradition treaty. Meanwhile, the domestic impact of civil law extradition treaties is more limited because they do not implicate the extradition of nationals. Where the physical integrity and liberty of domestic constituencies is secured, the political branches enjoy more freedom to conclude extradition treaties.

Third, evidentiary standards obstruct extradition treaties to the extent that common law countries persist in maintaining high standards for extradition requests from countries like China. There is reluctance to invest in a treaty that, like the Anglo-Spanish treaty that lapsed in 1978, may well crumble under the weight of its own evidentiary requirements. Sunk costs aside, this kind of failure may generate more diplomatic fallout than no treaty at all. At the same time, lowering evidentiary standards for an extradition treaty with China removes perhaps the most significant common law protection of individual rights after a treaty enters into force. Removing familiar evidentiary protections, as most if not all common law states have done to some degree, facilitates the conclusion of extradition treaties with civil law states. However, it simultaneously raises domestic anxieties about assuming a binding treaty obligation with lower evidentiary standards that may be applied in the extradition of its own nationals.

These particular differences amount to an important thematic difference between states. Common law systems require more convincing to conclude a treaty because extradition treaties represent a “point of no return” that does not exist for civil law systems. Under the common law model, the decision to enter into a treaty in the first place is the major gateway protection of

330. See Magnuson, supra note 2, at 880 (discussing the impact of excluding/including nationals in a treaty).

331. This is not to say that the individual costs of extraditing non-nationals are entirely ignored. Domestic constituencies may advocate for the interests of requested individuals and pressure their political branches to fulfill domestic and international obligations. The international community is another source of pressure on governments.

332. See supra note 204; see also JLG Remarks by Bruce Ohr, supra note 129 (“Because evidentiary laws differ, we ask our partners to furnish evidence in a form that, while different from that which might be used in their own courts, is admissible in a U.S. court in order to build a case against that country’s fugitives in the United States. If we do not get this evidence, we will be unable to proceed against that fugitive in our courts.”).

333. See Australian JCST Report 40, supra note 261, ch. 4.17 (indicating lower evidentiary standards diminished human rights protections); see also Sadoff, supra note 110, at 217-21 (noting the ways common law courts use evidence as a de facto protector of other rights, e.g., by inferring corruption, collusion, discriminatory intent, or other bad faith from the requesting state).
individual rights because without one there can be no extradition. Once a treaty is concluded, individuals are significantly more vulnerable to extradition. Common law states can extradite their own nationals, and courts have a limited ability to check executive determinations and decisions, even as they are charged with interpreting the text of treaties. Many grounds for refusal are discretionary. Executive decisions of this type are subject only to administrative review that is insurmountable in practice. Other grounds, such as the political offense exception, the rule of double criminality, and the principle of specialty, exist for the benefit of states, not individuals.\textsuperscript{334} Even “mandatory” grounds for refusal require an executive determination that receives tremendous deference in common law courts.

An extradition treaty under the civil law model is not a momentous commitment, but a mere adjustment of the status quo—the executive’s preexisting power to extradite. A treaty can impose greater restrictions on extradition, or if need be, streamline the process by lifting restrictions within legislative and constitutional bounds. Furthermore, civil law systems retain a number of protections regardless of whether an extradition treaty is in place. Civil law systems do not—and in some states cannot—extradite their own nationals except to a shortlist of partners in a select few arrangements. Even where states permit the extradition of nationals, they typically mitigate post-conviction worries by demanding the convicted individual be returned to their country for punishment. Civil law courts also play a strong role in scrutinizing extradition requests, one that permits an inquiry into whether an extradition will result in rights violations for the requesting individual.

I reference the common and civil law “models” above because these are necessarily generalizations. This paper has shown that states diverge to varying degrees from the “ideal type” of their distinct legal pedigrees. A fine-grained analysis could pinpoint each country somewhere along a common-to-civil law spectrum. For my purposes, it is enough to show that the nature of the executive power to extradite, the strength of legislative and judicial checks on that power, the extradition of nationals, and to a lesser extent, evidentiary standards collectively

\textsuperscript{334} Dugard & Van den Wyngaert, \textit{supra} note 19, at 188; \textit{see also} United States v. Barinas, 865 F.3d 99, 105 (2d Cir. 2017) (holding that only states, not defendants, have prudential standing to invoke the rule of specialty objection to extradition).
explain the common law-civil law divide over extradition treaties with China. This analysis has broader significance as well. A similar pattern emerges from a tentative glance at the extradition network of Russia and Turkey. These countries, like China, are characterized by cooperative potential as well as strategic and human rights challenges. As countries seek to modernize their extradition regimes and increase global cooperation in the realm of law enforcement, the common law-civil law divide and its underlying causes should inform their efforts.

IX. APPENDIX

A. China’s Current Extradition Treaties

Data on treaties comes from China’s Ministry of Foreign Affairs and is dated February 2017. Legal classifications are from the CIA World Factbook.

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336. 我国对外缔结司法协助及引渡条约情况 [China’s Status in Concluding Legal Assistance and Extradition Treaties].
337. CIA World Fact Book, supra note 100.
<table>
<thead>
<tr>
<th>Country</th>
<th>Legal System</th>
<th>Date Signed</th>
<th>Entry into Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thailand</td>
<td>Civil law with common law influences</td>
<td>8/26/1993</td>
<td>3/7/1999</td>
</tr>
<tr>
<td>Russia</td>
<td>Civil law</td>
<td>6/26/1995</td>
<td>1/10/1997</td>
</tr>
<tr>
<td>Romania</td>
<td>Civil law</td>
<td>7/1/1996</td>
<td>1/16/1999</td>
</tr>
<tr>
<td>Mongolia</td>
<td>Civil law influenced by Soviet and Romano-Germanic systems</td>
<td>8/19/1997</td>
<td>1/10/1999</td>
</tr>
<tr>
<td>Cambodia</td>
<td>Civil law influenced by customary law, Communist legal theory, common law</td>
<td>2/9/1999</td>
<td>12/13/2000</td>
</tr>
<tr>
<td>South Korea</td>
<td>Mixed system of European civil law, Anglo-American law, and Chinese classical thought</td>
<td>10/18/2000</td>
<td>4/12/2002</td>
</tr>
<tr>
<td>Philippines</td>
<td>Mixed system of civil, common, Islamic, and customary law</td>
<td>10/30/2001</td>
<td>3/12/2006</td>
</tr>
<tr>
<td>Tunisia</td>
<td>Mixed system of civil and Islamic law</td>
<td>11/19/2001</td>
<td>12/29/2005</td>
</tr>
<tr>
<td>United Arab Emirates</td>
<td>Mixed system of Islamic and civil law</td>
<td>5/13/2002</td>
<td>5/24/2004</td>
</tr>
<tr>
<td>Pakistan</td>
<td>Common law with Islamic law influence</td>
<td>11/3/2003</td>
<td>1/10/2008</td>
</tr>
<tr>
<td>Lesotho</td>
<td>Mixed system of English common law and Roman-Dutch law</td>
<td>11/6/2003</td>
<td>10/30/2005</td>
</tr>
<tr>
<td>Brazil</td>
<td>Civil law</td>
<td>11/12/2004</td>
<td>8/16/2014</td>
</tr>
<tr>
<td></td>
<td>Country</td>
<td>Legal System</td>
<td>Start Date</td>
</tr>
<tr>
<td>---</td>
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</tr>
<tr>
<td>23</td>
<td>Azerbaijan</td>
<td>Civil law</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>Spain</td>
<td>Civil law with regional variations</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>Namibia</td>
<td>Mixed system of uncodified civil law based on Roman-Dutch and customary law</td>
<td>12/19/2005</td>
</tr>
<tr>
<td>26</td>
<td>Angola</td>
<td>Civil law based on Portuguese system</td>
<td>6/20/2006</td>
</tr>
<tr>
<td>27</td>
<td>Algeria</td>
<td>Mixed system of French civil law and Islamic law</td>
<td>11/6/2006</td>
</tr>
<tr>
<td>28</td>
<td>Portugal</td>
<td>Civil law</td>
<td>1/31/2007</td>
</tr>
<tr>
<td>29</td>
<td>France</td>
<td>Civil law</td>
<td>3/20/2007</td>
</tr>
<tr>
<td>30</td>
<td>Mexico</td>
<td>Civil law with US constitutional law influence</td>
<td>7/11/2008</td>
</tr>
<tr>
<td>31</td>
<td>Bosnia-Herzegovina</td>
<td>Civil law</td>
<td>12/20/2012</td>
</tr>
<tr>
<td>32</td>
<td>Italy</td>
<td>Civil law</td>
<td>10/7/2010</td>
</tr>
<tr>
<td>33</td>
<td>Iran</td>
<td>Religious legal system based on secular and Islamic law</td>
<td>9/10/2012</td>
</tr>
<tr>
<td>34</td>
<td>Tajikistan</td>
<td>Civil law</td>
<td>9/13/2014</td>
</tr>
</tbody>
</table>

B. Non-Exhaustive List of International Extradition Standards Reflected in the UN Model Treaty on Extradition

<table>
<thead>
<tr>
<th>Standard</th>
<th>Explanation</th>
<th>Article</th>
</tr>
</thead>
<tbody>
<tr>
<td>Double criminality</td>
<td>Extraditable offenses are only those that are punishable under the laws of both parties.</td>
<td>2</td>
</tr>
<tr>
<td>Specialty</td>
<td>The extradited person can only be tried for the offense for which extradition was granted, or one to which the requested state consents.</td>
<td>14</td>
</tr>
<tr>
<td>Nationality</td>
<td>A requested state may refuse to extradite its own nationals.</td>
<td>4(a)</td>
</tr>
<tr>
<td>Political Offense Exception</td>
<td>Refusal is mandatory for offenses regarded as an “offense of a political nature” by the requested state.</td>
<td>3(a)</td>
</tr>
<tr>
<td>Non-Discrimination</td>
<td>Refusal is mandatory if the purpose of extradition is to prosecute or punish a person on account of that person’s race, religion, nationality, ethnic, origin, political opinions, sex or status, or that that person’s position in</td>
<td>3(b)</td>
</tr>
<tr>
<td><strong>Military Offense Exception</strong></td>
<td>Refusal is mandatory if the offense for which extradition is requested is an offense under military law but not ordinary criminal law.</td>
<td>3(c)</td>
</tr>
<tr>
<td><strong>Double Jeopardy (&quot;non bis in idem&quot;)</strong></td>
<td>Refusal is mandatory if there has been final judgment rendered against the person in the requested state.</td>
<td>3(d)</td>
</tr>
<tr>
<td><strong>Immunity</strong></td>
<td>Refusal is mandatory if the person has become immune from prosecution or punishment for any reason, including lapse of time or amnesty.</td>
<td>3(e)</td>
</tr>
<tr>
<td><strong>Torture and Other Cruel, Inhuman, Degrading Treatment Or Punishment</strong></td>
<td>Refusal is mandatory if the person sought was or would be subject to such treatment, or if the person has not or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights, article 14.</td>
<td>3(f)</td>
</tr>
<tr>
<td><strong>Death Penalty</strong></td>
<td>Refusal is optional if the offense for which extradition is requested carries the death penalty under the law of the requesting state, unless that state gives assurance, considered sufficient by the requested state, that the penalty will not be imposed, or at least will not be carried out.</td>
<td>4(d)</td>
</tr>
<tr>
<td><strong>Humanitarian Considerations</strong></td>
<td>Refusal is optional if the extradition would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of the person sought.</td>
<td>4(h)</td>
</tr>
<tr>
<td><strong>Fair Trial and Due Process</strong></td>
<td>Refusal is mandatory if the person sought has had judgment rendered against him or her in absentia (and there will be no opportunity for retrial) or has not had sufficient notice of the trial or opportunity to arrange his or her defense. The Model Treaty also provides for optional refusal where competent authorities in the requested state have decided to drop charges, where the requested state lacks jurisdiction under its own laws, or where the individual sought faces trial by an extraordinary or ad hoc court or tribunal.</td>
<td>3(g); 4(b); 4(e); 4(g)</td>
</tr>
</tbody>
</table>