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TREATIES

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UNITED STATES SENATE

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TREATIES

TUESDAY, NOVEMBER 15, 2005

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 9:23 a.m. in Room SD–419, Dirksen Senate Office Building, Hon. Richard G. Lugar [chairman] presiding.

Present: Senators Lugar [presiding] and Dodd.

OPENING STATEMENT OF HON. RICHARD G. LUGAR, U.S. SENATOR FROM INDIANA

The CHAIRMAN. This hearing of the Senate Foreign Relations Committee is called to order. The committee will begin with an opening statement by the chair and then testimony by our distinguished witnesses. We are going to commence a few moments before 9:30 and that will offer an opportunity for me to give my statement and for the witnesses to begin at approximately 9:30. I mention that because we will have a series of roll call votes on the Senate floor, estimated at 10:45. So we will have ample time, I believe, for the testimony of the witnesses and responses to questions by Senators. At the end of the hearing I will ask the witnesses for prompt responses to the questions that will be submitted in writing that we have not had an opportunity to discuss in public here.

The committee meets today to hear testimony on four bilateral law enforcement treaties. Within the Congress, the Senate Foreign Relations Committee is charged with the unique responsibility of reviewing treaties negotiated by the administration. Our colleagues in the Senate depend on us to make timely and judicious recommendations on these treaties.

We are pleased that administration officials are with us today and we look forward to hearing why they believe the Senate should approve the four treaties under consideration. In advance of this hearing, committee staff members have reviewed these treaties very carefully. They have held two formal committee briefings covering the treaties, with administration representatives available to answer questions. I appreciate the support and cooperation of Senator Biden, the distinguished ranking member, throughout this process.

Today we welcome Mr. Samuel Witten, Deputy Legal Adviser at the Department of State, and Ms. Mary Ellen Warlow, Director of the Office of International Affairs in the Criminal Division in the Department of Justice. They will testify on extradition treaties

with the United Kingdom and Israel and mutual legal assistance treaties, or MLATs, with Germany and Japan.

These four countries are close United States allies, with whom the United States enjoys excellent cooperation in the areas of law enforcement and anti-terrorism. Extradition and mutual legal assistance treaties provide critical tools for United States law enforcement authorities as they investigate and prosecute transnational crime, including terrorism. Extradition treaties ensure that those who commit crimes in the United States cannot escape justice by fleeing to other countries.

The extradition treaties with the United Kingdom and Israel are designed to update our existing extradition relationships with these two countries. Upon entry into force, the treaty with the United Kingdom would replace the existing U.S.-UK extradition treaty, which dates back to 1972. The protocol with Israel would amend an existing agreement that was negotiated in 1962.

Among other provisions, both treaties would move away from the use of a specified list of offenses that are extraditable and toward a modern, dual criminality standard for extradition. The dual criminality standard allows perpetrators of serious offenses that are a crime in both countries to be extradited.

The committee is aware that particular interest has been expressed about the treaty with the United Kingdom. The committee will carefully consider this treaty and expects to hold an additional hearing next year to hear from witnesses outside our government. Today we want to establish a record of the administration's views on the treaty to which the committee and all interested parties can refer as we continue our deliberations.

Mr. Witten and Ms. Warlow also will address new mutual legal assistance treaties that have been negotiated with Germany and Japan. The MLATs commit the signatories to provide each other with assistance related to criminal investigations, including establishing streamlined mechanisms for sharing criminal evidence. The treaties with Germany and Japan are the latest in a series of such agreements negotiated by the United States over the last couple of decades. They contain many provisions similar to those in earlier agreements.

I commend the American negotiators who have worked on these four agreements, some of which are the product of years of patient diplomacy, and I look forward to the contributions of our witnesses.

I have been joined by my distinguished colleague Senator Dodd of Connecticut. Do you have any opening comments, Senator Dodd?

STATEMENT OF HON. CHRISTOPHER J. DODD,
U.S. SENATOR FROM CONNECTICUT

Senator DODD. Well, Mr. Chairman, thank you. We have got a very busy morning and I want to underscore your points as well. These are extremely important, and as evidence of the tremendous work done by our witnesses and others who I know worked with them, we do not have a packed hearing room this morning, which is usually good evidence you have done a tremendous job. A crowd is usually drawn when there is controversy and the fact that you have been able to do such a successful amount of work on these is very worthwhile.

Mr. Chairman, I want to thank you for your opening comments, but also in particular the line in your prepared statement about the additional hearing on the U.K.-U.S. Northern Ireland treaty, if you will, because we would like to raise some additional issues with that. That treaty, as you point out, was signed on March 31, 2003, and transmitted to the Senate in 2004, and if ratified it would replace the 1972 treaty as modified by a highly controversial 1985 supplementary treaty.

You may recall—I cannot believe it was 20 years—when we had these debates in the heat of the matters going on in Northern Ireland at the time. That was during President Reagan's administration and of course Mrs. Thatcher—and you were Chairman, I think, at that point, too. I should say it was controversial, but it was not terribly so because it passed rather overwhelmingly. The Senator from Connecticut thought it was controversial and raised some issues at the time.

Anyway, I would like to ask unanimous consent for some comments here to be included in the record.

The CHAIRMAN. They will be included in the record in full.

[The prepared statement of Senator Dodd follows:]

PREPARED STATEMENT OF SENATOR CHRISTOPHER J. DODD

Mr. Chairman, this morning the committee on Foreign Relations is holding a hearing to review a number of extradition treaties that are pending before this committee. Among these treaties is the 2003 U.S.-UK Extradition Treaty, which was signed on March 31, 2003 and transmitted to the Senate on April 19, 2004. If ratified, this treaty would replace a 1972 Treaty as modified by a highly controversial 1985 Supplementary Treaty.

Mr. Chairman, the last time the subject of extradition came before this committee relative to the United States and the United Kingdom was two decades ago. At that time you were Chairman and I was a freshman Senator new to the committee. At that time, the committee's consideration of the 1985 Supplementary treaty was the subject of intense review and scrutiny. It was the subject of three hearings and two markups, over the course of roughly twelve months—with more than twenty witnesses heard by the committee. Ultimately the committee gave its advice and consent, but not before adopting three amendments and declaration relative to the treaty, including an amendment related to a political offense exception to extradition.

Mr. Chairman, I am not suggesting that the Extradition treaty now before us need take that amount of the committee's time or is necessarily as controversial. However, I do believe that before deciding whether to give our advice and consent to this new treaty, and under what conditions, we need to fully understand the changes that are being proposed to the existing extradition framework.

I believe that there are a number of important questions raised by the pending treaty. Among the most important are why was Article 3 of the Supplementary Treaty removed and what is the effect of that change? Article 3 was added by this committee in 1986, and was the subject of painstaking negotiation. It bars extradition if the person sought establishes that the extradition request has been made with a view to try him on account of his race, religion, nationality, or political opinions, or that if surrendered, he would be prejudiced at trial or punished because of those reasons. This provision also provides for judicial review of these questions, a provision unique to our bilateral extradition treaties. I recognize that it is unique—but there were unique reasons for its inclusion twenty years ago.

I understand that there have been only a handful of cases in which Article 3 was invoked, and that none are pending now. But believe that before we consider modifying this article we find out whether there any cases likely to be filed in the near future that would be affected by the changes to Article 3?

More generally, how do the provisions of the new treaty compare to the current treaty with the UK, and why were such changes made?

Will the treaty have any effect on Americans who have been politically active in their opposition to British rule in Northern Ireland?

What benefits will the United States gain, in its effort to obtain the extradition of suspects to the United States? In other words, to state it plainly, what is in it for us as a nation if we approve this treaty?

Mr. Chairman, I recognize this is only an initial hearing, and that there will be more discussion and review in the months ahead. My office and I assume other members of the committee have been contacted by individuals and organizations, including the ACLU expressing concerns and raising questions about the impact of this treaty on individuals who may have committed past political crimes that would not have been extraditable under existing treaty arrangements, but could be in jeopardy under the new one.

Without doubt, much has changed since the 1985 Supplementary Treaty entered into force. First and foremost was the conclusion of the 1998 Good Friday Accord, which has established a framework for resolving the root causes of the political conflict in Northern Ireland. While there have been bumps along the road with respect to the full implementation of the Accords, I believe that it has been largely effective in ending the sectarian conflict that cost so many lives.

Since the signing of the Good Friday Accords in 1998, British authorities have taken a number of legal steps to address legal questions related to sectarian conflict. In 1998 the UK introduced an early release program whereby IRA and Loyalist prisoners could apply for release on license after they had served two years in prison—447 individuals have been released under this scheme. More recently, on November 9 of this year, the Northern Ireland Offense bill was introduced in the British Parliament to cover those individuals who do not fall within the framework of the 1998 early release program—namely those who went "on the run" before trial or escaped from prison before serving two years of their sentences. Once that bill becomes law, I believe that most so called political crimes related to the Northern Ireland conflict will be put to rest.

These are important legal steps that have been taken since the committee considered the 1985 Supplementary Treaty. Some of which may not yet fully appreciated or understood. Additional hearings where expert witnesses can layout these and other facts would enormously help this committee in its consideration of the treaty.

It is my understanding, Mr. Chairman, that you are open to calling additional witnesses. Presumably that won't be possible until next year.

I thank you, Mr. Chairman for your willingness to more extensively study this treaty, and I look forward to working with you to find the kind of witnesses that can best inform the committee as we carry out our responsibilities with respect to this treaty. Unfortunately, I will not be able to stay for the entire hearing this morning because the Banking Committee where I also serve is currently conducting a nomination hearing for Chairman Greenspan's replacement on the Federal Reserve Board. With your permission I will submit some questions for the Record. I would also ask unanimous consent to have several written statements that have been prepared for this hearing, printed in the record so they can be available for the review of all Senators.

I look forward to reviewing the hearing record, and to working with you, Mr. Chairman, on future hearings on this treaty.

Senator DODD. There are a number of important questions raised by the pending treaty. Among the most important is why was article 3 of the supplementary treaty removed and what is the effect of that change. Article 3 was added by this committee in 1986 and was the subject of painstaking negotiation, I might point out. It bars extradition of the person sought establishes that the extradition request is made with a view to try him on account of his race, religion, nationality, or political opinions, or that if surrendered he would be prejudiced at trial or punished because of those reasons.

This provision also provides for judicial review of these questions, a provision unique to our bilateral extradition treaties. I recognize that it is unique, but there were unique reasons for its inclusion some 20 years ago as well.

I understand that there have been only a handful of cases in which article 3 was invoked and that none are now pending. But I believe that before we consider modifying this article we find out whether there are any cases likely to be filed in the near future

that would be affected by the changes to article 3, more generally how do the provisions of this new treaty compare to the current treaty with the United Kingdom, and why such changes were made.

There are some additional comments here, Mr. Chairman, that I will submit for the record. But I think the fact that we are going to have an additional hearing on the subject matter will give us a chance to examine those questions as well, and I am very again grateful to you.

The CHAIRMAN. I thank the Senator for his comments. His statements will be made a part of the record.

Senator DODD. Mr. Chairman, there are some additional comments here regarding this point that I would like to have included in the record regarding that particular point.

The CHAIRMAN. It will be included in the record.

[The material to which Senator Dodd referred appears in Appendix II of this hearing transcript.]

Senator DODD. Thank you very much.

The CHAIRMAN. As I mentioned in my opening statement, and as the Senator from Connecticut referenced, we appreciate that the treaty, the U.S.-UK treaty, is a controversial area. There has been the work that I cited by our mutual staffs, and that will need to continue. As the Senator has pointed out, we look forward to future witnesses and an additional hearing in the coming year.

Now I would like to recognize our witnesses, and we appreciate your coming. I will ask you to testify in the order of first of all Mr. Witten and then Ms. Warlow. Let me say that your full statements will be made a part of the record and you may either deliver those or summarize, and after you have concluded, why, then we will ask questions of you.

Mr. Witten.

STATEMENT OF SAMUEL M. WITTEN, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

Mr. WITTEN. Thank you, Mr. Chairman, Senator Dodd. I will submit my full statement for the record, and I will give a very brief summary here.

I am pleased to appear before you today to testify in support of four bilateral law enforcement instruments, two relating to extradition and two relating to mutual legal assistance in criminal matters. If approved by the Senate and brought into force, these treaties will improve key aspects of our bilateral law enforcement relationships with four of our most important international partners: the United Kingdom, Israel, Germany, and Japan. We understand that all four of these countries have completed or nearly completed their domestic approval processes and it is important that the United States be in a position to bring these treaties into force as soon as possible.

The growth and transport of criminal activity, especially violent crime, terrorism, drug trafficking, and the laundering of proceeds of organized crime, has confirmed the need for increased international law enforcement cooperation. Extradition treaties and MLATs are essential tools in that effort and their negotiation is an

important part of a concerted effort by the Departments of State and Justice to modernize the legal tools available for the extradition of criminal fugitives and in the investigation and prosecution of crimes.

I will highlight several important points and more detail will be contained in my lengthier submitted statement. Turning first to the proposed new U.S.-UK extradition treaty, I note that the United Kingdom is one of the U.S. Government's most important allies in the global war against terrorism. The new treaty, if approved by the Senate, will substantially improve our ability to cooperate together on international extradition matters, one of the cornerstones of international law enforcement cooperation. The treaty before the Senate updates the existing U.S.-UK treaty relationship to make it consistent with virtually all of our modern extradition treaties in Europe and elsewhere.

Among other things, the new treaty will incorporate into the U.S.-UK extradition relationship modern provisions on key extradition issues, such as dual criminality, provisional arrest, statutes of limitations, political offense, political motivation, and other matters. Consistent with longstanding U.S. practice, the treaty would be applicable to offenses committed before as well as after the date of entry into force.

The extradition protocol with Israel would supplement the 1962 extradition convention currently in force between the United States and Israel and would update our existing treaty relationship with this very important law enforcement partner for the first time in over 40 years. Significantly, the protocol would replace the current list of offenses in the 1962 convention with a dual criminality regime, thus permitting extradition for offenses not currently included in the existing convention. It also makes helpful changes in areas such as the descriptions of the information needed for provisional arrest and for extradition, the definition of the political offense exception, and the rule of specialty.

The protocol addresses the issue of extradition of nationals in an innovative way intended to build on important advances in Israel's domestic extradition law that make the extradition of nationals possible for Israel under certain circumstances. In short, as the result of this new protocol, combined with helpful advances in Israel's domestic extradition law, Israel will be able to extradite its nationals who are residents of Israel for trial in the United States so long as they can be returned to Israel to serve any sentence imposed.

I will now turn to the two mutual legal assistance treaties pending before the committee, with Germany and Japan, two key law enforcement partners. The treaties broadly apply to criminal investigation and proceedings and also enable certain assistance in connection with investigations by regulatory agencies.

I will not go into great detail on these treaties since most of their provisions are by and large typical of those found in our over 50 existing mutual legal assistance treaties and are described in great length in our transmittals of the treaties to the Senate and in our prepared testimony. I will say, however, that the proposed MLATs with Germany and Japan fill a significant gap in our network of MLATs with major law enforcement partners. With the new proposed treaties with Germany and Japan, the United States will

have concluded such treaties with all of our partners in the Group of 8, the G-8.

Mr. Chairman, we very much appreciate the committee's decision to consider these important treaties. I will be happy to answer any questions the committee may have.

[The prepared statement of Mr. Witten follows:]

PREPARED STATEMENT OF SAMUEL M. WITTEN

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. I am pleased to appear before you today to testify in support of four bilateral law enforcement instruments, two relating to extradition and two relating to mutual legal assistance in criminal matters. If approved by the Senate and brought into force, these treaties will improve key aspects our bilateral law enforcement relationships with four of our most important international partners—the United Kingdom, Israel, Germany, and Japan. We understand that all four of these countries have completed or nearly completed their domestic approval processes, and it is important that the United States be in a position to bring these treaties into force as soon as possible.

The Department of State greatly appreciates this opportunity to address these treaties. The growth in transborder criminal activity, especially violent crime, terrorism, drug trafficking, and the laundering of proceeds of organized crime, has confirmed the need for increased international law enforcement cooperation. Extradition treaties and MLATs are essential tools in that effort, and their negotiation is an important part of a concerted effort by the Departments of State and Justice to modernize the legal tools available for the extradition of criminal fugitives, and in the investigation and prosecution of crimes.

I will address each of the instruments individually.

EXTRADITION TREATY WITH GREAT BRITAIN AND NORTHERN IRELAND

Turning first to the proposed new U.S.-UK Extradition treaty, I note that the United Kingdom is one of the U.S. Government's most important allies in the global war against terrorism. The new treaty, if approved by the Senate, will substantially improve our ability to cooperate together on international extradition matters, one of the cornerstones of international law enforcement cooperation.

The treaty before the Senate updates the existing U.S.-UK treaty relationship to make it consistent with virtually all of our modern extradition treaties. It will replace the 1972 extradition treaty and 1985 supplementary treaty that are currently in force between the two countries. Once the treaty is ratified, the United States will be positioned to continue to receive the benefits of several recent changes in UK law, including the reduction in the evidentiary standard that the United States will be required to meet when seeking the extradition of a fugitive from the United Kingdom, thereby making it easier to bring fugitives to justice in the United States. Among other things, the treaty would also streamline the extradition procedures regarding requests to and from UK territories, by enabling U.S. certification of extradition requests to be made in those territories rather than through the United Kingdom's central authority in London.

The proposed treaty defines conduct as an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty. This kind of pure "dual criminality" clause will be an improvement over the treaty regime currently in place, which lists categories of offenses plus other offenses listed in relevant UK extradition law and considered felonies under U.S. law. As with all of our dual criminality treaties, this provision means that the United States would not be required to extradite a fugitive where the UK charge would not be a crime if committed in the United States, for example, because the underlying conduct would be protected by the Constitution and therefore could not be criminalized.

The treaty requires that extradition be denied if the competent authority of the Requested State determines that the request is politically motivated. Like all other modern U.S. extradition treaties, the new treaty grants the executive branch rather than the judiciary the authority to determine whether a request is politically motivated. This change makes the new treaty consistent with U.S. practice with respect to every other country with which we have an extradition treaty. Under the new treaty, as under the existing treaty, U.S. courts will continue to assess whether an offense for which extradition has been requested is a political offense.

Another helpful improvement in the proposed treaty deals with the treatment of the statute of limitations. A decision by the Requested State whether to grant the request for extradition shall be made without regard to any statute of limitations in either State. This of course does not eliminate the application of the statute of limitations for either the United States or the United Kingdom once a fugitive has been returned. Rather, it reserves the legal determination on the issue of the statute of limitations to the courts of the country where the criminal charges are pending. This provision is typical of our other modern extradition treaties. Similarly, the treaty has a modern provision on the provisional arrest of fugitives that is typical of our extradition practice and consistent with U.S. law.

The treaty also provides that the Requested State may, to the extent permitted under its law, seize and surrender to the Requesting State all items and assets, including proceeds, that are connected with the offense in respect of which extradition is granted. This same concept, which is contained in the existing treaty and virtually all U.S. extradition treaties, is helpful to law enforcement officials in some cases in securing evidence related to the offense for which the fugitive is sought.

In addition, the treaty sets forth a clear "Rule of Specialty" which provides, subject to specific exceptions, that fugitives can only be tried for the charges for which they were extradited, absent specific consent by the State that has extradited the fugitive. The current U.S.-UK treaty does not contain a provision for waiver of the rule of specialty, and the proposed provision is substantially the same as the parallel provision in our modern extradition treaties.

Consistent with longstanding U.S. practice, the treaty would be applicable to offenses committed before, as well as after, the date of entry into force.

EXTRADITION PROTOCOL WITH ISRAEL

The extradition protocol with Israel, signed July 6, 2005, would supplement the 1962 extradition convention currently in force between the United States and Israel. The protocol would update the existing treaty relationship with this very important law enforcement partner in a manner consistent with our modern extradition treaties.

Significantly, the protocol would replace the current list of offenses with a "dual criminality" regime, thus permitting extradition for offenses not currently included in the existing convention. The protocol also updates the provision listing the exceptions to extradition, including by adding a military offense exception; expanding the list of offenses excluded from the political offense exception; and modernizing the prior prosecution clause to provide that extradition may—as opposed to shall—be denied if the person has already been tried and convicted in a third country for the offense for which extradition is requested.

The protocol updates the statute of limitations provision in the current convention, which states that extradition shall not be granted if an offense or the execution of the penalty is time-barred in either the Requested or the Requesting Party. The protocol would limit this exception to only those situations where the Requested Party's law requires the denial of extradition if the offense or execution of the penalty is time-barred in the Requested Party. Although Israeli law currently precludes extradition if the offense or execution of the penalty is time-barred in Israel, this kind of flexible treaty provision will be helpful if Israel were to change its law to permit extradition regardless of Israel's statute of limitations.

Other provisions that would be updated by the protocol include: the provision providing for postponement of extradition proceedings or the deferral of surrender when a fugitive is already being proceeded against or serving a sentence for another offense; the procedures for requesting extradition and provisional arrest; the provision providing for the transit of a fugitive wanted by a third state; the rule of specialty provision; and the expenses provision, which also provides that a Requested Party shall represent the Requesting Party in any extradition proceedings. As with our other modern treaties, the protocol will apply to offenses committed before as well as after the date it enters into force.

The protocol addresses the issue of extradition of nationals in an innovative way intended to build on important recent advances in Israel's domestic extradition law that make the extradition of nationals possible for Israel under certain circumstances. It repeats the existing convention's requirement that extradition cannot be denied solely on the basis of the nationality of the fugitive. It also provides that if required by its law, the Requested Party may condition the extradition of a national and resident on the assurance that the fugitive shall be returned to serve any sentence of incarceration in the Requested Party. The assurance ceases to have effect if the fugitive consents to serving his sentence in the Requesting Party or refuses to or withdraws his consent. The United States and Israel are parties to the

Council of Europe Convention on the Transfer of Sentenced Persons, which provides the framework for the transfer of Israeli citizens back to Israel to serve their sentence. Moreover, the protocol requires that Israel enforce, according to its laws, the sentence imposed in the United States, even if that sentence exceeds the maximum penalty for such offense in Israel. Under Israeli law, prisoners are eligible for parole after serving 2/3 of their sentence. A returned fugitive would therefore be eligible for parole once he has served 2/3 of the term of years imposed in the United States.I will now turn to the two mutual legal assistance treaties pending before the committee with Germany and Japan, two key law enforcement partners.

MUTUAL LEGAL ASSISTANCE TREATY WITH GERMANY

The proposed U.S.-Germany Mutual Legal Assistance Treaty in Criminal Matters (MLAT) fills a significant gap in our network of MLATs with major European law enforcement partners. Like other recent MLATs concluded by the United States, the treaty with Germany broadly applies to criminal investigations and proceedings. It enables assistance in connection with investigations by regulatory agencies, for example the Securities and Exchange Commission, to the extent that they may lead to criminal prosecutions. Further, certain antitrust investigations and proceedings, even some types which are considered civil matters under German law, are within the scope of the MLAT.

The MLAT with Germany is typical of our over 50 MLATs with countries around the world, including most of the countries of Europe. It has several innovations, including provisions on special investigative techniques, such as telecommunications surveillance, undercover investigations, and controlled deliveries. It allows certain uses for evidence or information going beyond the particular criminal investigation or proceeding, which can include bilateral assistance to help prevent serious criminal offenses and the averting of substantial danger to public security.

The treaty identifies the U.S. Attorney General and the German federal Ministry of Justice as the central authorities responsible for the execution of the treaty. In view of the federal systems in both countries, it also lists, in an appendix, those other federal and state authorities which are competent to initiate requests for assistance.

MUTUAL LEGAL ASSISTANCE TREATY WITH JAPAN

The United States and Japan signed an MLAT on August 5, 2003. While the United States has similar treaties in force with over 50 countries, this is the first MLAT signed by Japan. With the new proposed treaties with Germany and Japan, the United States has now concluded such treaties with all of our partners in the Group of Eight (G-8).

The Japan MLAT will provide an effective tool in the investigation and prosecution of a wide variety of offenses of concern to our two countries, including terrorism, drug trafficking, fraud and other white-collar crimes. The treaty permits assistance both for matters already deemed criminal and in connection with an administrative investigation of suspected criminal conduct (e.g., an investigation by the Securities and Exchange Commission of suspected securities fraud), in appropriate cases.

There is one aspect of this treaty related to the designation of Central Authorities that should be mentioned. The Central Authority is the entity that performs the functions provided for in the MLAT on behalf of each government. For the United States, the Central Authority is the Attorney General or a designee, a function that has been delegated to the Office of International Affairs in the Criminal Division of the Department of Justice. For Japan, on the other hand, the Central Authority is either the Minister of Justice or the National Public Safety Commission (the National Police) or their designees. The authorization for Japan to designate two agencies is necessary because of the respective jurisdictions of the two Japanese agencies concerned. The MLAT is accompanied by an exchange of diplomatic notes provided to the Senate for its information that specifies the kinds of mutual legal assistance requests that will be handled by each agency on the Japanese side.

Mr. Chairman, we very much appreciate the committee's decision to consider these important treaties.

I will be happy to answer any questions the committee may have.

The CHAIRMAN. Thank you very much, Mr. Witten.

Ms. Warlow.

STATEMENT OF MARY ELLEN WARLOW, DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Ms. WARLOW. Thank you, Mr. Chairman, thank you for the opportunity to submit my written statement for the record, and I will try to briefly summarize that statement. I too am pleased to appear before you—I am pleased to appear before the committee today to present the views of the Department of Justice on these four important law enforcement treaties. As you noted, Mr. Chairman, these are treaties with four of our most important allies and partners in combatting crime and fighting terrorism. Each of these instruments is something that will advance the law enforcement interests of the United States.

I would like to turn first briefly to the two extradition instruments, with the United Kingdom and Israel. Both contain features we regularly seek in order to have modern, effective extradition relations. First, as you noted, Mr. Chairman, both are dual criminality treaties, that is, extradition is dependent solely on whether both countries criminalize the conduct at issue as a felony, thus dispensing with the approach of list treaties in the two existing instruments. This is extremely important to us because it gives us the broadest possible range for extraditable offenses and it also allows the treaties to keep to date with developments in the law. In the decades since these treaties were negotiated, we have seen new offenses, such as money laundering, computer crimes, trafficking in persons, and crimes such as providing material support to terrorism.

Also, both treaties are very important for practitioners because they ease the burdensome evidentiary requirements that the United States has had to meet in order to seek extradition. Both the United Kingdom and Israel had required presentation for purposes of an extradition of a prima facie non-hearsay case, and I cannot stress enough how difficult these requirements were in complex cases involving multiple victims or complex criminal activity.

However, neither the new treaty with the United Kingdom nor the protocol to our treaty with Israel will modify the evidentiary standard for extradition proceedings in the United States. That is information, information that can include hearsay, that is sufficient to meet a standard of probable cause when the person is sought for extradition for trial.

Both treaties contain provisions consistent with modern extradition practice and procedure. These include the temporary surrender provision that allows us to have someone extradited temporarily when they are already serving a sentence in the other country. Also, both treaties streamline the procedures for requesting provisional arrest, that is the issuance of a warrant in urgent circumstances pending the presentation of a full extradition hearing and the formal extradition documents. Currently these requests have to be made through the diplomatic channel and, though our colleagues in the State Department are extremely efficient, we also have to deal with our embassies abroad and foreign ministries. Under these treaties we can make requests directly to our counterparts in the United Kingdom and Israel.

Other procedural improvements in both treaties include limiting or eliminating the statute of limitation as a consideration in the extradition proceedings. This is a benefit that we have sought in many of our modern extradition treaties.

Other common aspects of both treaties are explicit provisions for defendants to waive extradition and thus accelerate their return if they so consent and modern comprehensive provisions regarding the rule of specialty, a principle that bars prosecution of a fugitive for offenses other than those for which he has been extradited.

As Mr. Witten noted, the treaties are somewhat different on extradition of nationals with the United Kingdom. Our longstanding tradition of extraditing without regard to nationality would remain. The protocol with Israel, as Mr. Witten has explained quite thoroughly, has a novel approach reflecting advancements in the Israeli law. Thus the former bar on extradition of nationals from a 1978 law is now changed and in a way that we can take advantage of. We have had some experience with this provision of the revised Israeli law and since 1999 15 Israeli citizens have in fact been extradited to the United States.

Consistent with our modern treaties with countries with which we have a long and reliable extradition history, both the U.K. extradition treaty and the Israel protocol exclude application of the political offense exception where the offense at issue is a serious crime of violence, offenses including bombs and other destructive devices, irrespective of the purported political motivation or justification of the defendant. This limitation on the political offense exception is not new to our relations to the United Kingdom and indeed the 1985 supplementary treaty was the first U.S. extradition treaty to specifically exclude the most serious terrorist offenses and crimes of violence from consideration as a political offense. Thus with the protocol with Israel, Israel too will have the benefit of this improvement in our treaty practice.

Very briefly on the MLATs for the committee has assisted us in the Department of Justice greatly over the years by approving over 50 mutual legal assistance treaties. Let me just note a few elements of these treaties.

Although the treaties are structured somewhat differently, in substance they are very much the same. As a general rule, there is not a requirement of dual criminality, although that does exist to some extent with respect to compulsory measures. Both treaties have the advantage of direct contact between central authorities. They allow us to take depositions that accommodate U.S. requirements of confrontation. They allow us to transfer incarcerated witnesses if they agree. We have provisions for confidentiality, seizure, and forfeiture of assets, and of course residual authority to deny assistance where our essential interests are implicated.

Thank you, Mr. Chairman. I would be happy to respond to your questions.

[The prepared statement of Ms. Warlow follows:]

PREPARED STATEMENT OF MARY ELLEN WARLOW

Mr. Chairman and members of the committee, I am pleased to appear before you today to present the views of the Department of Justice on four law enforcement treaties, including one protocol, that have been referred to the committee. Each of

these instruments will advance the law enforcement interests of the United States. They are of particular importance as we face an increasing need for cooperation and assistance from the international community in the investigation of crimes relating to terrorism and other serious violent activity, trafficking in persons and drugs, and large-scale financial offenses.

The updated extradition treaty between the United States and the United Kingdom of Great Britain and Northern Ireland modernizes and streamlines the 1972 treaty and the 1985 supplementary treaty. The protocol to the extradition treaty between the United States and Israel amends the terms of the existing treaty. The bilateral mutual legal assistance treaties ("MLATs") with Germany and Japan are the first of their kind to be negotiated between the United States and the treaty partner.

The decision to proceed with the negotiation of law enforcement treaties such as these is made by the Departments of State and Justice, and reflects our international law enforcement priorities. The Department of Justice participated in the negotiation of these extradition and mutual legal assistance treaties, and we join the Department of State today in urging the committee to report favorably to the Senate and recommend its advice and consent to ratification of each of the treaties. In my testimony today, I will concentrate on why these treaties are important for United States law enforcement agencies engaged in investigating and prosecuting serious offenses.

THE EXTRADITION TREATY AND PROTOCOL

Modernizing our extradition treaties and, where appropriate, establishing new extradition relationships, remain among the top priorities of the Justice Department's international law enforcement efforts.

The extradition treaty and protocol being considered by the committee replace and update, respectively, the existing treaties that govern our extradition relations with two of our most important law enforcement partners, the United Kingdom and Israel. Both of the new instruments contain features we regularly seek in order to establish or augment a modern, effective extradition relationship.

THE UNITED STATES-UNITED KINGDOM EXTRADITION TREATY

The new extradition treaty with the United Kingdom of Great Britain and Northern Ireland, which will replace the outdated 1972 treaty and the supplementary treaty of 1985, was signed on March 31, 2003, and is an integral part of the coordinated bilateral commitment to enhancing and modernizing the U.S.-U.K. law enforcement relationship. It includes a number of improvements to the existing instruments. For instance, it is a "dual criminality" treaty, expanding the scope of extraditable offenses well beyond those specifically recognized in the existing treaty's list or in domestic U.K. extradition law and allowing the automatic extension of the proposed treaty's provisions to new forms of criminality that are made punishable as felonies in both countries in the future. It will allow requests for provisional arrest, which are used in urgent circumstances to prevent the flight of serious felons or protect society from dangerous and violent suspects, to be made directly between the Department of Justice and an authority to be designated by the United Kingdom, thus obviating the need to go through formal diplomatic channels in order to secure emergency assistance. Further, it gives clear guidance to the courts on actions not to be considered as "political offenses" for which extradition is barred and redirects decisions on "political motivation" to the Executive branch, a placement of responsibility that is consistent with all our other modern extradition treaties and longstanding United States caselaw.

Another provision in the new treaty of particular significance is that authorizing "temporary surrender." Under the current treaty, the extradition of an individual who is being prosecuted or serving a sentence in one country must be deferred until the completion of the trial and any sentence imposed. Such a deferral can have disastrous consequences for a later prosecution due to lapse of time, the absence or death of witnesses, and the failure of memory. The new provision will allow the individual being tried or punished in one country to be sent temporarily to the other for purposes of prosecution there and then returned to the first country for resumption of the original trial or sentence. The availability of "temporary surrender" has become more and more significant in recent years as international criminals, including terrorists, transgress the laws of a number of nations to plan and carry out their illegal activities. This particular provision has a very real and practical impact on our ability to successfully prosecute defendants who have violated the laws of both nations. We wish to inform the committee that our government has requested the extradition of a defendant who has been indicted in a major terrorism case here in

the United States. However, that defendant currently stands charged with criminal violations in the United Kingdom as well. In this scenario, the establishment of a temporary surrender mechanism through approval of this new treaty is considered vital to ensuring that this defendant—and others similarly situated—ultimately faces trial and is broughtto justice in the United States.

All of these provisions of the new treaty will clearly be of benefit to both the United States and the United Kingdom and will serve to enhance our efforts to bring fugitives to justice. One of the primary United States objectives in negotiating the new treaty was to remove the "prima facie" evidence requirement imposed by the United Kingdom in extradition cases and replace it with a less stringent standard being made available under new U.K. domestic extradition laws. As events transpired, the government of the United Kingdom undertook to designate the United States for favored treatment under the new legislation and the lower standard of proof as of January 2004, even though the United States ratification process was not yet complete. This designation has made the preparation of extradition requests far easier and, in some cases, allowed us to proceed with cases that we might earlier have declined to pursue. Unfortunately, as time has passed, the government of the United Kingdom has been the recipient of increasingly sharp criticism in the press and in Parliament over having given the United States the beneficial designation without a showing of reciprocal support for an improved extradition relationship through United States approval of the new treaty. Moreover, a number of significant defendants in pending extradition cases from the United States are starting to raise the allegation of a "flawed" designation process in the lower courts and on appeal. We therefore hope that this hearing will lead to speedy approval of the new treaty and its entry into force in the immediate future.

We understand that some have raised questions about certain provisions of the treaty. We will be pleased to respond to any such questions. The Departments of Justice and State believe that this treaty will significantly improve our extradition relationship with the United Kingdom without undermining in any way the commitment of the United States to the protection of individual human rights and the fulfillment of our international obligations. As we have emphasized earlier, the provisions of the new treaty do no more than place our extradition relationship with the U.K. on a par with other nations with which we have modern treaties.

THE UNITED STATES-ISRAEL EXTRADITION PROTOCOL

The Protocol with Israel, signed on July 6, 2005, amends the 1962 Convention on Extradition ("Convention") that is currently in force and brings it up to the standards of our modern extradition practice. Like the new U.S.-U.K. Treaty, the Protocol establishes a "dual criminality" approach, carrying the obligation to extradite for all offenses that are punishable in both treaty partners' countries by imprisonment for a period of one year, or by a more severe penalty. This approach replaces the outmoded ″list″ regime of our current Convention, which limits extradition to those crimes enumerated in the text. Dual criminality treaties carry the advantage of reaching the broadest range of felony offense behavior, without requiring the repeated updating of the treaty as new forms of criminality emerge. This is particularly important as United States authorities investigate and prosecute crimes related to terrorism, trafficking in persons, high-tech crimes, and other recent trends. The Protocol will make such crimes as material support of terrorism, money laundering, computer crimes and a broader range of sex offenses against children extraditable.

Further, the Protocol significantly streamlines the process of requesting extradition by establishing that extradition documents containing hearsay will be admissible in court. Permitting the formal documents in support of extradition requests to contain hearsay evidence will alleviate the burden on United States prosecutors of preparing often voluminous packages for Israeli courts; United States courts have long accepted hearsay in extradition proceedings. The Protocol also expands the list of crimes excluded from the political offense exception to extradition to bring it into line with our modern practice. It establishes that a murder or other of the most serious violent crimes shall not constitute a political offense. Likewise, offenses as to which we are obligated to extradite or prosecute under the terms of a multilateral international agreement—such as offenses under ten U.N. anti-terrorism treaties—may not be considered political offenses for which extradition is barred.

The extradition of Israeli nationals has been problematic for the United States since Israel enacted a 1978 law that conflicted with the Convention and barred the extradition of Israeli citizens. The 1997 case of United States national Samuel Sheinbein who was charged with murder in the State of Maryland, fled to Israel and successfully avoided extradition by claiming Israeli citizenship, highlighted the

issue and led to a change in Israel's extradition law. While the Israeli legislation does not entirely eliminate restrictions on the extradition of nationals, it provides a much-improved framework for dealing with fugitives who claim Israeli citizenship. First, offenders are no longer able to avoid extradition by claiming citizenship after committing an offense in the United States; limitations on extradition apply only if the defendant establishes that he was a citizen and resident of Israel at the time of the offense. Second, the limitations on extradition are significantly modified: as long as we are able to assure that the defendant will be returned to Israel to serve his sentence, Israeli citizens may be extradited to stand trial. The Protocol accommodates the approach of Israel's legislation.

We have already had experience in several cases utilizing this approach, and found it to be workable. The Council of Europe Convention ("COE Convention") on the Transfer of Sentenced Persons, to which both the United States and Israel are parties, provides the framework for the transfer of Israeli citizens back to Israel to serve their sentences. Specifically, since 1999, the United States has extradited a total of 20 fugitives from Israel, of whom 15 were Israeli nationals (including dual United States-Israeli nationals). Of those 15 Israelis, following their United States trials we have transferred 5 back to Israel under the COE Convention; 6 are serving their sentences in the United States because Israel determined that they were not residents of Israel at the time of their crimes; 1 was not transferred because his United States sentence was too short to allow for processing and transfer; and 3 cases remain pending in the United States. This approach of permitting extradition of nationals on condition of their return for service of sentence is similar to that in the 1983 United States-Netherlands extradition treaty. However, the Protocol with Israel has the significant additional benefit that Israel has explicitly agreed to enforce the United States sentence, even if it exceeds the maximum penalty under Israeli law.

The Protocol incorporates a variety of procedural improvements in extradition practice. Like the new U.K. treaty, the Protocol streamlines the procedures for "provisional arrest" by permitting such emergency requests to be made directly between the respective Justice authorities, without requiring initial resort to the diplomatic channel. Another similar provision contained in the Protocol is "temporary surrender." The Protocol allows a person found extraditable, but who is already in custody in the requested State on another charge, to be temporarily transferred to the requesting State for purposes of trial. As discussed previously, this provision is designed to overcome the problem of delaying extradition while a fugitive is serving a sentence abroad, during which time the case underlying the extradition request may become stale—or completely unviable—because of the unavailability of witnesses or other evidentiary difficulties.

THE MUTUAL LEGAL ASSISTANCE TREATIES

The two MLATs before this committee will expand the United States's complement of law enforcement mechanisms designed to strengthen our ability to obtain evidence and other forms of assistance from overseas in support of our criminal investigations and prosecutions. I realize the committee has become acquainted with the significant benefits MLATs provide to the international law enforcement community since the first such treaty came into force in 1977. We now have over 50 MLATs in force. Accordingly, I will briefly review only some of those benefits in this statement.

Our practical experience with MLATs over the years has demonstrated that they are generally more efficient than other formal means of international legal assistance, specifically including letters rogatory, as MLAT requests do not require a court order and they are not routed through diplomatic channels. MLATs establish a direct channel of communication between Central Authorities—usually contained within the respective treaty partners' Departments of Justice—and they confer a binding legal obligation to provide assistance if the requirements of the treaty are met. MLATs are broad in scope, and provide for assistance at the investigatory stage, usually without the requirement of dual criminality. These treaties pierce bank secrecy and provide a mechanism for addressing legal and policy issues such as confidentiality, admissibility requirements for evidence, allocation of costs, confrontation of witnesses at foreign depositions and custodial transfer of witnesses. Significantly, MLATs provide a framework for cooperating in the tracing, seizure and forfeiture of criminally-derived assets.

Despite these and other benefits, we realize that MLATs in themselves are not the solution to all aspects of law enforcement cooperation. They are similar to extradition treaties in that their success depends on our ability to implement them effectively, combining comprehensive and updated legal provisions with the competence

and political will of our treaty partners. Our recognition of the importance of effective treaty implementation led to the development of a consultation clause that we include in our MLATs, to ensure that we will have regular dialogues with our treaty partners on the handling of our cases.

While the two MLATs before the committee share certain standard features, their specific provisions vary to some extent. The transmittal packages explain these variations, which are the result of negotiations over a period of years with countries that have a different legal system from that of the United States and represent a different law enforcement priority for the United States.

I would like to highlight how each of the MLATs before the committee reflects our international law enforcement priorities:

The United States-Germany MLAT

The United States-Germany MLAT, signed on October 14, 2003, is the first such treaty between our countries and is the culmination of a lengthy negotiation. Upon its entry into force, the MLAT will enhance the existing mutual assistance relationship characterized by longstanding, collegial, but discretionary cooperation, and establish an obligation to provide assistance in the investigation and prosecution of offenses including terrorism, drug trafficking, fraud, and other serious crimes. The treaty provides for a broad range of cooperation in criminal matters, including taking the testimony or statements of persons; providing documents, records, and articles of evidence; locating or identifying persons; serving documents; transferring persons in custody for testimony or other purposes; executing requests for searches and seizures; assisting in proceedings related to immobilization and forfeiture of assets, restitution to the victims of crime and collection of fines; and any other form of assistance not prohibited by the laws of the State granting the assistance. Also, enforcement agencies such as the SEC that have authority to refer matters to the Department of Justice for criminal prosecution may make requests under the MLAT.

In addition, this is the first United States MLAT to include special investigative techniques among permissible types of assistance. Specifically, Article 12 establishes that the Parties may use telecommunications surveillance, undercover investigations, and controlled deliveries, in accordance with their domestic law, in execution of requests for assistance. This provision was included at Germany's request, to assert the Federal government's legal authority, vis-a-vis the States, to undertake such actions on behalf of foreign authorities.

The United States-Japan MLAT

The United States-Japan MLAT was signed on August 5, 2003, and is the result of nearly a decade of negotiations. The treaties with Germany and Japan complete our network of MLATs with our partners in the Group of Eight (G-8). Japan's legislative body, the Diet, has ratified the treaty, which is Japan's first MLAT, and enacted the necessary domestic legislation to implement it. The treaty will enhance law enforcement cooperation between our countries in the investigation and prosecution of a wide variety of crimes, including terrorism, drug trafficking, child exploitation and obscenity, antitrust violations, fraud, crimes against the environment, and others. Like other treaties in force, and the United States-Germany MLAT also presented for the committee's consideration today, the United States-Japan MLAT obligates the Parties to assist one another in investigations, prosecutions and other proceedings in criminal matters through the taking of testimony; producing documents and other items of evidence; inviting persons to testify in the requesting state; transferring persons in custody for testimony and other purposes; assisting in proceedings relating to forfeiture and any other assistance permitted under the laws of the requested party and agreed upon by the Central Authorities. In addition, concerning certain proceedings related to criminal offenses, Article 1(3) permits assistance in connection with an administrative investigation of suspected criminal conduct (e.g., the Securities and Exchange Commission's investigation of suspected securities fraud) in appropriate circumstances.

A salient feature of the MLAT is the designation in Article 2 of two Central Authorities for Japan. The Central Authority is a key ingredient to the success of any mutual assistance relationship, as it is the entity that governs the execution of requests. For the United States, the Attorney General or a designee is the Central Authority; this duty has been delegated to the Office of International Affairs within the Department's Criminal Division. For Japan, the two designated Central Authorities are the Minister of Justice and the National Public Safety Commission, which oversees Japan's National Police Agency. A related Exchange of Notes sets forth the kinds of requests that each agency, headed by a co-equal, Cabinet-level official, will handle. During the negotiations, the Japanese delegation explained that this unusual, dual Central Authority approach will give their police the ability, in

certain circumstances, to request assistance under the MLAT without going through the Ministry of Justice. They based their rationale on internal Japanese policies and the manner in which criminal cases are investigated and prosecuted in the Japanese legal system. This approach will have no negative effect on the process of making United States requests to Japan, or on Japan's execution of our requests. In fact, it memorializes our current practice and, as the Exchange of Notes states, the United States may continue to consult directly with the Japanese Ministry of Justice concerning any United States request under the treaty. The MLAT follows a modern dual criminality approach, with the limited exception of requests involving conduct not constituting a criminal offense under the laws of the requested Party and requiring compulsory process to execute. In such cases, the requested Party may deny assistance.

CONCLUSION

We appreciate the committee's support in our efforts over the years to strengthen and enlarge the framework of treaties that assist us in combating international crime. We at the Department of Justice view extradition and mutual legal assistance treaties as particularly useful tools in this regard. In addition, as our network of international law enforcement treaties has grown in recent years, we have focused increasing efforts on implementing our existing treaties, with a view to making them as effective as possible in the investigation and prosecution of our most serious crimes, including those related to terrorism. We join our colleagues from the Department of State in urging the prompt and favorable consideration of these treaties, to enhance our ability to fight transnational crime. I will be pleased to respond to any questions the committee may have.

The CHAIRMAN. Well, thank you very much, Ms. Warlow, for your testimony. As we mentioned, the prepared statements of both witnesses will be made a part of our record, in full.

I have two very lengthy and complex questions with regard to the United States-U.K. treaty, so suffer with me through the reading of the question, but the questions have been crafted so that you will have opportunities to offer the technical responses that this hearing tries to bring about, because we are attempting to have as comprehensive a view as possible of each of the four treaties.

The first treaty that we are talking about appears to be the more complex and more controversial and therefore we will work our way through that first of all. My question: There has been a great deal of interest in the provision of this new treaty relating to political motivation. The existing treaty with the United Kingdom as amended in 1986 prohibits extradition for political offenses while excluding certain violent offenses from being considered to be political offenses.

Individuals whose extradition is requested for an offense that has been excluded from the political offense exception may raise in court a claim that the extradition request was made in order to try or punish them on account of their race, religion, nationality, or political opinion. Like the existing treaty, the new treaty would bar extradition for political offenses, again excluding certain violent crimes from this category. It also continues to prohibit extradition where the request for extradition is found to be politically motivated. However, in the United States such claims would be determined by the executive branch rather than by the courts.

That being the case, let me ask you these questions. First, in what types of cases has the current provision permitting political motivation claims to be determined by the court been invoked in practice over the past 19 years, and with what results? Mr. Witten, do you have a response to that?

Mr. WITTEN. Mr. Chairman, on this question I will ask my colleague Ms. Warlow to discuss some of the developments that have occurred since the 1985 supplementary treaty was brought into force and I will add any comments at the end.

The CHAIRMAN. Very well. Ms. Warlow?

Ms. WARLOW. Thank you, Mr. Chairman. There have been very few cases in which this provision has been invoked. In sum, there have only been five persons who have availed themselves of this particular provision for judicial review of political motivation. The first was a case in which there was an asserted claim that the defendant, named Howard, would have suffered bias in his trial by virtue of his race. That claim was rejected by the First Circuit.

The following four cases in fact involved offenses relating to Northern Ireland, described as terrorist-related or IRA-related. They all arose in the early 1990s. The first was the case of a person named Smith. He was arrested in 1992. There was extensive litigation about his case. Ultimately, after a long process of litigation, in 1996 he was extradited to Ireland. He was released in 1998.

The next three defendants, whose names were Art, Kirby, and Brennan, their cases were consolidated and again there was extensive taking of evidence about conditions in Northern Ireland. The claims of the defendants were heard exhaustively. The case continued on in various stages until the year 2000. So we had the first defendants arrested in 1992 until 2000. At that point the case was pending rehearing en banc before the Ninth Circuit.

The cases were withdrawn by the United Kingdom in 2000, at the end of 2000, consistent with a general statement of policy by the United Kingdom that they were no longer seeking extradition of such defendants. It has not been invoked in any case since.

The CHAIRMAN. Thank you.

Secondly, is the provision in the new treaty which refers such claims to the executive branch consistent with the treatment of this issue in other modern U.S. extradition treaties?

Mr. WITTEN. Mr. Chairman, yes, it is consistent. In fact, all of the treaties that this committee has considered over the years with the exception of the supplementary treaty with the United Kingdom have included a standard provision that the issue of political motivation or wrongful motivation would be handled by the executive branch. We are in an unusual situation here where one of our closest partners in the global war on terror has an additional burden of going through the U.S. court system on what is essentially an issue of the reasons for the extradition request being made, an issue that we would handle in all other treaties, including with Europeans and countries around the world, as a matter for the executive branch to sort through.

The CHAIRMAN. Thirdly, why is it now appropriate in our extradition relations with the United Kingdom to remove this issue from the purview of the judiciary?

Mr. WITTEN. Mr. Chairman, Ms. Warlow has outlined some of the difficulties that have transpired over the years as U.S. courts have been asked to analyze issues of prejudice to position and political motivation. Particularly in the last 4 years in the aftermath of September 11th, the United States and the United Kingdom have had an extraordinarily close law enforcement and counterterrorism

relationship. It is anomalous at this point for there to be a provision in one of our two fundamental law enforcement treaty bilateral relationships with the United Kingdom where the motivation of the United Kingdom is sorted out as a judicial matter rather than a matter for the executive branch.

This administration strongly believes that the treaty with the United Kingdom should be rationalized and made equivalent to all of our other treaty partners.

Ms. WARLOW. I might just add, Mr. Chairman, that the 1985 supplementary treaty was the first that had these explicit carveouts for certain types of offenses in the sense that they could not be considered political offenses. Since that time, the Senate has approved a number of treaties which have taken exactly the same approach. So there was, I believe, some initial concern that this new approach to the political offense might require an additional balance or additional inquiry by the judiciary.

In fact, I believe every new treaty that we have concluded with a European partner has the same sort of approach with respect to political offense, but none of them have adopted this shifting of the inquiry to the judiciary rather than the executive.

The CHAIRMAN. I thank the witnesses.

Now, this question really raises a set of issues that have come essentially from letters to the committee. Obviously, the treaty that we were just discussing, and that you have just testified on in these first responses, is controversial and has brought much attention throughout now many years, and we have recited the history of the situation. The staffs of the committee have summarized in these questions some of the responses and I would like to ask your comments on these.

I start by saying the committee has received letters expressing concerns regarding several of the treaty's provisions, in addition to questions concerning the treatment of political motivation, which we just discussed. I am going to read to you several excerpts from these letters. I would ask you for the administration's response.

Number one. The first of these excerpts indicates a concern regarding the treaty's potential impact on the free speech rights of American citizens. It states, "We are convinced that this treaty as it reads will trample on the rights of all Americans and especially Irish Americans to speak out on what we see as political and human rights violations by the United Kingdom in the north of Ireland or anywhere else."

Now, to witnesses: Please explain whether or how this new treaty could be used to extradite an individual from the United States for engaging in speech that would be protected under the United States Constitution.

Mr. WITTEN. Thank you, Mr. Chairman. Mr. Chairman, the treaty could not be used in this manner. The treaty, like all of our other extradition treaties, requires a finding that the conduct at issue would constitute a criminal offense punishable by a sentence of 1 year or more if committed in the United States. Since engaging in constitutionally protected free speech cannot be punished as a crime in the United States, this test of dual criminality would fail and therefore the conduct in question would not be extraditable.

The CHAIRMAN. I thank you.

The second issue. One of the letters asserts that the treaty "allows for extradition even if no American Federal law is violated." Is that an accurate assumption?

Ms. WARLOW. No, Mr. Chairman, it is not. Again, it is the issue of dual criminality which provides the protection. Extradition can succeed only if the conduct is criminal, recognized as a felony, in the United States. Now, it is not the case that it need be a Federal felony, but it can be also a State felony. This is an established practice in extradition law and of course it makes sense for us because we do not have a full Federal criminal code. It is limited.

The CHAIRMAN. The third issue. This third excerpt addresses the procedures that may be applied under the new treaty to determine whether a person is extraditable. It states, "The treaty would eliminate the need for Britain to present and show evidence before U.S. courts that the person requested for extradition is guilty of the crime he or she is charged with. They would only need to convince a member of the administration in office that a crime had been committed. Unsupported allegations of wrongdoing could be sufficient cause for extraditing law-abiding citizens."

What would be the administration's reaction to this statement?

Mr. WITTEN. Mr. Chairman, the statement is incorrect. The treaty does not change the manner in which proceedings that would lead to extradition to the United Kingdom would be pursued. There would still be the obligation for the U.S. executive branch to present to a U.S. court enough evidence to satisfy the standard of probable cause. The statement assumes that these kinds of decisions would be made by the executive branch without the judiciary's involvement and in fact under both the new treaty and the existing treaty with the United Kingdom, like all of our other extradition partners, the executive branch must present sufficient evidence to meet the probable cause standard.

The CHAIRMAN. The fourth situation. Another excerpt asserts that the treaty, "allows for provisional arrest and detention for 60 days upon request by the United Kingdom without a court hearing or a trial, as well as the seizure of assets in the United States by the British government."

What is the administration's response to this assertion?

Ms. WARLOW. Mr. Chairman, this provision is not novel. It is a standard provision regarding provisional arrest and there are similar provisions in the existing treaties. In order to have someone provisionally arrested, a prosecutor must file a complaint with a judge that sets out sufficient information for the judge to make a determination that an arrest is warranted. Then a decision of whether or not the person is to be held or not is for the judge to determine. And the length of time, 60 days, is a common length of time for provisional arrest.

As to the question of seizure, in no way does the treaty authorize the United Kingdom to seize assets in the United States. A request for seizure has to be supported by facts sufficient to meet our legal requirements.

The CHAIRMAN. A fifth issue. The letters also raise the issue of retroactive application of the treaty. One letter states, "The terms of the proposed treaty will apply retroactively for offenses allegedly committed even before the treaty's ratification."

Is this accurate? And then furthermore, does the treaty permit extradition for an offense that was not criminalized in both countries at the time the conduct occurred? What would be the effect of precluding retroactive application of the treaty?

Mr. WITTEN. Mr. Chairman, first, the statement is accurate, but there is nothing novel about a provision in an extradition treaty that the treaty could be invoked for conduct that took place before the treaty enters into force. It is a standard provision, and indeed both the existing treaty and the new treaty have provisions along these lines. The provision for retroactivity is in virtually all, perhaps all, of our modern extradition treaties.

With respect to the aspect of your question, Mr. Chairman, about conduct that was not criminalized at the time it took place, this treaty would have nothing to do with the standard in the U.S. law of ex post facto. For the United States to seek extradition for conduct, it would have to be conduct that is criminalized under our law, and under our Constitution we would not be in a position to make criminal conduct that was not criminal at the time it took place.

I will defer to my colleague for more on that.

Ms. WARLOW. That is fine.

Mr. WITTEN. We have nothing further, Mr. Chairman.

The CHAIRMAN. Finally, in this last excerpt I want to raise with you, the letter states, "The treaty would effectively eliminate any statute of limitations." Now, this statement appears to refer to the fact that the new treaty contains a provision requiring the requested party to decide whether to grant extradition without regard to the statute of limitations in either party, which represents a change from the existing agreement.

What was the reason for including this provision in the new treaty? Is the provision common in other modern U.S. extradition treaties and would extradited individuals be able to raise a statute of limitations defense before a competent court in the requesting party following their extradition?

Mr. WITTEN. I will take that question, Mr. Chairman. The treaty does not in any way eliminate application of the statute of limitations for either the United States or the United Kingdom. What it does is it makes the issue of the statute of limitations an issue which we believe is appropriately reserved to the courts of the country requesting extradition and therefore irrelevant in the extradition proceeding itself.

In our view it is not appropriate that a foreign court should seek to apply our own statute of limitations in an extradition proceeding or seek to apply its statute of limitations with respect to an offense committed in the United States. This is not a novel provision. It is found in several of our modern treaties.

Also, I would have to stress that the person who is extradited in no way is inhibited in raising issues of statute of limitations in the context of their trial. So the treaty does not impinge on those rights or change this in any respect. In our view, this provision makes good sense. We have had many cases where we have seen courts grapple with trying to apply foreign statutes of limitations or their own statute of limitations to cases investigated under different pro-

cedural rules and this is an appropriate and common provision in our view.

The CHAIRMAN. I thank you.

Now, this question is not from writers of letters. This is my own. Our extradition relations with the United Kingdom are currently governed by a treaty dating back to 1972. Why do we need to replace this treaty and in what way will the new treaty improve U.S. efforts to obtain extradition of fugitives from the United Kingdom?

Ms. WARLOW. I would be happy to respond to your question. As you noted, our treaty is more than 30 years old and it is important for us, with the United Kingdom, one of our most important law enforcement partners, to have a state of the art treaty. Our practice under the old treaty was a difficult one for the reasons we described in our statements. The old list approach was very difficult and limiting. It did not allow us to capture modern offenses. The burden of proof was extremely difficult and has actually been abandoned by virtually all common law countries at this time.

We need other modern mechanisms. A temporary surrender provision is quite important. We have at least two cases already on our radar screen that we think would be important ones where we would be able to surrender people soon for trial. One of them is a murder case. Another one is a case involving terrorism.

This is an important treaty for the United States. I have to stress, we have in a sense a rather imbalanced extradition relationship with the United Kingdom by way of numbers. Our requests to the United Kingdom run five, six times as many as the United Kingdom's requests to us and they are a range of offenses from murders, narcotics, frauds. We also now have, I believe, six individuals now in custody in the United Kingdom who we sought the extradition of for terrorist offenses against the United States.

So this is an extremely important relationship. It is a good relationship, and we have now come to the point where we can take advantage of improvements in UK extradition law that are memorialized in this treaty and then will control our relationship in the future. So it is a very important instrument for us from a law enforcement perspective.

The CHAIRMAN. Are there any extradition requests from the United Kingdom now pending that relate to the conflict in Northern Ireland? If not, when was the last such extradition request received by the administration?

Ms. WARLOW. Mr. Chairman, there are no such requests. The last requests we received were the—I forget which of the defendants it would have been in the era of 1994. There have been none since. And those requests, as I noted, were in fact withdrawn in 2000.

The CHAIRMAN. The supplementary treaty of 1985 narrowed the political offense exception to exclude certain violent offenses such as those covered by multilateral counterterrorism conventions to which both the United States and the United Kingdom are party. The new treaty would continue this trend. Does the United States have any active extradition requests to the United Kingdom related to acts of terrorism?

Ms. WARLOW. Yes, Mr. Chairman, we do. We have three older cases that involve persons who have been charged for involvement

in the bombings of the U.S. embassies in Africa. We have I believe two cases involving persons who sought to establish jihadist camps in the United States. Another case involves material support of terrorism, which is from the District of Connecticut.

The CHAIRMAN. I thank you.

Now, this next question deals with the proposal for a treaty between the United States and the government of Israel amending the convention on extradition. The protocol would allow Israel to condition extradition of its resident nationals to the United States on assurances that any sentence imposed on them in the United States would be carried out in Israel. Do we have any other extradition treaties with similar provisions?

Secondly, how would the provision work in practice? I understand that Israeli law has already been amended to include such a requirement. What has our experience been with Israel to date under this new law?

Mr. WITTEN. Mr. Chairman, with respect to your first question, do we have any other extradition treaties with similar provisions, the answer is yes. The U.S.-Netherlands bilateral extradition treaty does have a provision that provides for extradition of its nationals with the understanding that a Dutch national can then serve his or her sentence in The Netherlands if extradited to the United States, convicted, and given a term of imprisonment.

With respect to how this mechanism with Israel has worked in practice over the last few years, I will defer to my colleague Ms. Warlow. I will just make a brief comment, that in the last 5 years there has been tremendously positive cooperation between the U.S. and Israel on this very issue. This issue became very prominent, as you may remember, in the late 90s. The Israeli government was determined to make improvements in its domestic law that would facilitate extradition of its residents and nationals, and we are now in 2005 seeing the very positive results of their efforts. We commend the Israeli government for all of its hard work in this area.

The CHAIRMAN. Ms. Warlow?

Ms. WARLOW. Mr. Chairman, by way of the procedure that we use, if the fugitive—there is a reason to believe the fugitive is in a position to make a claim of Israeli citizenship, our practice is to provide an assurance at the time we seek the person's arrest or extradition that if they are found to be, in accordance with the Israeli law, both a national and resident of Israel at the time of the offense, we will agree that they will serve a sentence in Israel. We use the Council of Europe prisoner transfer treaty as our mechanism for doing this.

The Israeli courts are the ones that determine whether or not the person is indeed a citizen and resident of Israel. I would like to point out that the issue of also finding that the person was a resident at the time of the offense significantly narrows the extent to which a person might avail themselves of this procedure. Of the Israeli nationals, of the 15 returned to the United States, 6 were serving, are serving their sentences here now because the Israeli courts found they were not nationals at the time of the offense.

Something else that is quite important to us in this scheme and is explicitly reflected in the treaty itself is Israel's commitment that

it will apply the sentence imposed by the United States. In other words, it does not use a resentencing under Israeli law.

The CHAIRMAN. The 1962 convention currently bars extradition for offenses of a political character. The protocol would retain this bar, but exclude certain violent offenses from being considered political offenses under the treaty. Is this new provision consistent with other modern U.S. extradition treaties? For example, how does it compare to the new extradition treaty with the United Kingdom, which is also before us today?

Mr. WITTEN. Mr. Chairman, the exclusions to the political offense exception in the Israeli and U.K. treaties are substantially similar. There are a few minor differences that resulted from the fact that these treaties are negotiated individually between us and our treaty partners. They each exclude from the political offense exception a list of serious crimes of violence and crimes relating to explosives and destructive devices.

In addition, as you mentioned, Mr. Chairman, they exclude offenses that are covered under the multilateral law enforcement conventions to which the U.S. and the UK are party, such as the terrorist bombing convention, the terrorism financing convention, and other instruments.

These exceptions are similar to those that are in quite a few of our other modern treaties and I will just mention for the record a number of important law enforcement partners—Canada, France, Germany, Lithuania, Luxembourg, Poland, South Africa, and Spain. We have done similar narrowings of the scope of the political offense exception with all of them.

Thank you, Mr. Chairman.

The CHAIRMAN. The 1962 convention prohibits extradition where the prosecution would be time-barred under the laws of either country. Under the protocol, extradition would be prohibited only where the law of the requested party requires it to apply its own statute of limitations law as a condition to extradition and the prosecution would be time-barred under that law. How do you expect this provision to be implemented and what does Israeli law, in contrast to U.S. law, require on this point?

Ms. WARLOW. Thank you, Mr. Chairman. For the United States there is no provision of our law that requires us to test statute of limitations in the context of extradition. This is consistent with our policy, as I noted earlier. We believe that this issue is best reserved for the trial court, the court that is going to actually hear the case, and defendants are free to make any claim as to statute of limitations before the court where they are tried.

We had in the context of the negotiations sought to have a complete elimination of the statute of limitations. This is very strongly our preferred view. At present Israeli law still requires that Israeli courts test the offense under Israeli statute of limitations. However, we are hopeful that this might change and the treaty is drafted in such a way that if Israel were to change its law and eliminate this requirement then either country would apply questions of statute of limitations in the extradition context.

The CHAIRMAN. I thank you.

I turn now to the questions on the United States-Federal Republic of Germany MLAT treaty. Is the U.S.-Germany MLAT con-

sistent with the provisions of the MLAT signed by the United States and the European Union in June of 2003, and what is the relationship between these two treaties?

Mr. WITTEN. Thank you, Mr. Chairman. The two treaties are largely consistent. They were actually negotiated in parallel. The U.S.-German MLAT negotiations extended back quite a number of years. The U.S.-EU negotiations began while the U.S.-German bilateral negotiations were in progress.

In a few respects, the EU treaty will serve to amend or supplement the bilateral treaty with Germany and it will do the same thing with respect to all other modern MLATs with EU member states. We will be doing a short bilateral treaty with Germany that will be submitted to the Senate some time in 2006 along with the U.S.-EU MLAT. Our plans are to submit to the Senate at the same time the U.S.-EU framework agreement on legal assistance and the bilateral treaties that have been negotiated with the individual EU member states that will form together, along with the bilateral MLATs, a fairly comprehensive and innovative law enforcement relationship for legal assistance.

The CHAIRMAN. I thank you.

Now, article 3 permits a party to deny assistance if a request's execution would prejudice the state's sovereignty, security, or other essential interests. Do you anticipate that Germany may use this provision to deny certain requests for business records or other information? Indeed, do the parties understand the term, "essential interests," to encompass German data protection or privacy concerns?

Ms. WARLOW. Thank you, Mr. Chairman. Under this provision, which is common in our MLATs, we actually think it will be very rarely invoked and rarely, if at all, invoked with respect to business records, the type of information that you referred to. One of the reasons for that is that the treaty is very careful about providing for confidentiality and use limitations, which certainly have been a concern for Germany as to sensitive business data, for example, in the antitrust arena or with personal data.

So we have a very rigorous regime that spells out what the uses are for information, onward uses, and confidentiality. So we think it is unlikely that these issues would rise to the basis of denial on an essential interests claim. Thank you.

The CHAIRMAN. A third question. This treaty contains a new provision not seen in earlier U.S. MLATs that would permit each party, in accordance with its laws and upon the request of the other party, to employ certain special investigative techniques in its territory on behalf of the other party. These techniques are surveillance of telecommunications, controlled deliveries, and undercover criminal investigations by law enforcement officers of the other party.

What is the purpose of this provision and how do you anticipate that it would be used in practice? Does United States law currently regulate or limit the ability of the United States to use such techniques on behalf of a treaty partner?

Ms. WARLOW. Thank you, Mr. Chairman. This is a newer provision and our understanding is that Germany wished to have it included. First, there is an increasing interest in Europe in setting

out issues of what are called special investigative techniques in a treaty framework. Also, I believe there may have been an issue that Germany wanted to be sure these were included in the treaty so they could respond to requests from us on a federal level. So by including it in the treaty, it allowed them to do so. They have a very strong federalist system in Germany.

In reality, from the perspective of United States practice it is not necessary for us to deal with issues of controlled delivery or undercover, authorized undercover activity in an MLAT itself. These are matters that we generally deal with through our police channels. If they are agreed upon at a police level by our DEA or FBI, they are somewhat—they do not necessarily require an MLAT from our perspective. Many European countries do, however, like us to make a request through an MLAT, for example, if we were having a controlled delivery.

As to the issue of electronic surveillance, I would like to point out that the clause makes it clear that it is only to the extent permissible under our law. At present we do not have the authority to conduct electronic surveillance based solely on collecting evidence of a foreign crime. So that is not something that is in reality permitted under our law.

The CHAIRMAN. I thank you both.

I want to raise questions finally with regard to the United States-Japan MLAT. I understand that this agreement is the first mutual legal assistance treaty Japan has negotiated with any country. How does this treaty compare with other modern U.S. MLATs, and does it provide for all of the forms of assistance traditionally included in such agreements?

Mr. WITTEN. Thank you, Mr. Chairman. It is our understanding that this is the first MLAT that Japan negotiated with any other country, and it is a major achievement in what is a good, very good law enforcement cooperation with Japan. But we are delighted, as the result of extensive and very productive negotiations with the Japanese government, to be in a position to ask this committee to approve the treaty.

It compares—it is similar to those other MLATs that this treaty—excuse me—that this committee has considered, and it does include the essential provisions that are sought by the United States. This would include matters such as taking testimony, examining persons, inviting persons to testify, search and seizure of items, and so forth. While the Japan MLAT does not provide for service of judicial documents, that service is covered by the 1963 U.S.-Japan consular convention.

Thank you.

The CHAIRMAN. Under this treaty assistance may be provided in connection with administrative investigations of suspected criminal conduct at the direction of the requesting party. Does this represent an expansion of assistance traditionally provided under U.S. MLATs and what types of administrative investigations is it intended to cover? Could it be used, for example, to obtain assistance from Japan for administrative investigations of criminal conduct at the U.S. State level as well as at the Federal level?

Ms. WARLOW. Mr. Chairman, the inclusion of this sort of provision was an objective of ours in this treaty. We do try to make the

treaties flexible enough that regulatory agencies that have the ability to refer matters for criminal investigation and prosecution can avail themselves of the MLATs.

The types of investigations or agencies I think most typically would be the Securities and Exchange Commission, which does conduct investigations which often are referred to the Department of Justice for prosecution. We have other regulators of commodities under the Federal trade laws.

Also, the treaty would permit State regulators of securities and similar agencies to also make requests. As in all our MLATs, they are tools available both to Federal and State law enforcement authorities.

The CHAIRMAN. Let me ask either of you if you have any further comments or testimony on any of the four treaties as we attempt to complete this phase of the administration's responses?

Ms. WARLOW. No, Mr. Chairman. Just to thank you and the members for holding the hearing on these very important instruments.

Mr. WITTEN. The same here, Mr. Chairman. Thank you very much for convening this hearing and considering these treaties.

The CHAIRMAN. Well, we thank both of you for your preparation for the hearing and we look forward to continued consideration of the treaties. As has been mentioned, with the UK-United States-Ireland treaty there will be another hearing of the committee, probably in the next year, in calendar 2006, at which independent witnesses from outside the administration will be called upon for their testimony.

I appreciate the staff work of Republican and Democratic staff members in the panels of discussion they have already conducted with you and other administration officials, as well as with other parties, to formulate the very best questions that we ought to ask prior to Senate consideration of the treaties. We thank you for the completeness of your statements today. We ask that you be open to questions that might be raised by other members of the committee. The schedule, as the Senator from Connecticut and I pointed out in our opening statements, is rigorous in the windup of some of our other issues on the Senate floor, and if you would respond swiftly to those inquiries that will help us complete our record.

We thank you very much and the hearing is adjourned.

[Whereupon, at 10:26 a.m., the committee was adjourned.]

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APPENDIX

Appendix I—Responses to Additional Questions Submitted for the Record by Members of the Committee

QUESTIONS FROM CHAIRMAN LUGAR

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR LUGAR TO SAMUEL WITTEN, U.S. DEPARTMENT OF STATE, AND MARY ELLEN WARLOW, U.S. DEPARTMENT OF JUSTICE

Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland (Treaty No. 108–23)

Question. Some opponents of the treaty have raised concerns regarding Article 22(1), which states that the treaty "shall apply to offenses committed before as well as after the date it enters into force." In testimony before the Committee on November 15, 2005, you indicated that provisions in extradition treaties allowing for application to offenses committed before their entry into force are standard in U.S. extradition practice. What would be the effect of precluding such application of this treaty?

Answer. The treaty's provision on retroactivity is typical of the U.S. Government's extradition practice. If the extradition treaty applied only to offenses committed after the treaty entered into force, there would be no treaty under which a fugitive who committed an offense before the new treaty enters into force could be extradited (except, as described in Article 23(3), where documents in support of an extradition request have already been submitted to the courts of the Requested State).

Question. Article 16(1) of the treaty provides: "To the extent permitted under its law, the Requested State may seize and surrender to the Requesting State all items in whatever form, and assets, including proceeds, that are connected with the offense in respect of which extradition is granted." In testimony before the Committee on November 15, 2005, you stated that, contrary to an assertion by opponents of the treaty, this provision does not authorize the United Kingdom to seize assets in the United States.

(a) Please explain how this provision would work in practice.

(b) Are such provisions found in other U.S. extradition treaties?

Answer. (a) Article 16 refers to the Requested State's ability to seize items and assets that are connected with the offense for which the fugitive is sought and transfer them to the Requesting State. This provision will be useful to law enforcement officials in some cases in securing evidence related to the offense for which the fugitive is sought.

In practice, this provision would work in the following way: In its diplomatic note requesting provisional arrest or extradition, the Requesting State would ask the Requested State, pursuant to Article 16, to seize items connected with the offense and, if extradition is granted, to surrender those items to the Requesting State. In the United States, all such seizure and surrender actions would be carried out by U.S. authorities and would occur in accordance with U.S. law, including prohibitions against unreasonable searches and seizures found in the United States Constitution and in various state constitutions, and implemented in various federal and state statutes. Typically, law enforcement authorities would obtain a warrant from a judge to arrest the fugitive and, in executing the arrest warrant, will seize items and assets connected with the offense for which extradition is requested. If extradition is granted by the judge, and the Secretary of State authorizes the extradition, typically the U.S. authorities would turn over such items and assets, seized incident to arrest, pursuant to Article 16 of the treaty. If U.S. law enforcement authorities

are unable to seize items incident to the arrest, they will have to obtain a seizure warrant, consistent with U.S. law, to seize those items. The seizure warrant would typically be obtained pursuant to a formal request for assistance under the Mutual Legal Assistance Treaty in place between the United States and the United Kingdom.

(b) There is nothing novel about this provision; this same concept is contained in virtually all U.S. extradition treaties, including the existing U.S.-UK treaty currently in force between the two countries.

Question. In testimony before the Committee on November 15, 2005, you stated that, in the case of extradition requests from the United Kingdom under this treaty, a U.S. court would determine whether there was enough evidence to satisfy the probable cause standard.

(a) Please elaborate on the role U.S. courts would play under this treaty in determining whether an individual may be extradited to the United Kingdom.

(b) What is the legal basis for the role of U.S. courts in this process?

Answer. U.S. extradition proceedings are undertaken pursuant to § 18 U.S.C. § 3184, which provides that a U.S. judge or magistrate judge determine whether there is sufficient evidence to make a determination of extraditability. The United States Constitution, together with federal case law, provides the standard used by the court to evaluate the sufficiency of the foreign evidence provided in support of an extradition request—probable cause to believe that the person who is before the court is the person charged or convicted in the foreign country and, in those cases where the person has not been convicted, probable cause to believe that person committed the offenses for which extradition is sought. The court also determines whether the offense for which extradition is sought is an extraditable offense under the treaty. In the case of the new treaty, the relevant question would be whether dual criminality exists, i.e. whether the conduct at issue is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty. In this context, the court would also consider any claims raised by the fugitive that the offense is a political offense. If the court issues an order of extraditability, the Secretary of State then determines whether to issue a surrender warrant.

Question. In testimony before the Committee on November 15, 2005, you stated that the last three extradition requests from the United Kingdom for offenses related to the Northern Ireland conflict were withdrawn by the United Kingdom In 2000 "consistent with a general statement of policy by the United Kingdom that they were no longer seeking extradition of such defendants."

(a) Please provide a copy of this UK policy statement.

(b) Has the United Kingdom taken any other steps in regard to fugitives wanted in connection with offenses related to the Northern Ireland conflict that may be relevant to the potential for extradition requests for such fugitives under this treaty?

Answer. (a) A copy of a statement dated September 29, 2000, by Peter Mendelson, the Secretary State for Northern Ireland at that time, is attached. This document can also be accessed on the Internet from the UK government's official web site at http://www.nio.gov.uk.

(b) Following the Belfast Agreement, the U.K. government introduced the Northern Ireland (Sentences) Act of 1998. The legislation outlined an early release scheme whereby prisoners could apply for "release on licence" after they had served two years in prison. The scheme covers a certain set of terrorist-related offences carrying a sentence of five years or more committed before April 10, 1998. "Release on licence" means that the individual is not in jail but must comply with certain conditions. The conditions are that the person does not support certain specified organizations (essentially those which are still involved in terrorism); does not become involved in the commission, preparation, or instigation of acts of terrorism; and, in the case of a life prisoner, does not become a danger to the public.

In September 2000, the U.K. government announced (see the attached statement) that it would no longer pursue the extradition of individuals who, if they had remained within the Northern Ireland prison system, would now be eligible for early release. Kevin John Artt, Terrence Damien Kirby, and Pol Brennan (three individuals who were the subjects of the U.K. extradition requests to the United States in the 1990s) all fell within that category, and the U.K. is no longer seeking their

extradition. The Government of the United Kingdom has informed the United States Government that there has been no change in this position since 2000.

In 2003, the governments of the U.K. and the Republic of Ireland published a set of proposals in relation to terrorist suspects who are "one the run." These proposals were aimed at resolving an anomaly which arose from the 1998 early release scheme. The anomaly was that individuals who had gone "one the run" before the trial or escaped from prison before serving two years of their sentence would not be eligible for the early release scheme, whereas their counterparts who had stayed in prison would have been released on licence.

Following a statement by the IRA on July 28, 2005, and the subsequent decommissioning of its weapons, the U.K. Government introduced legislation in November of 2005 to implement those proposals. However, the legislation was withdrawn by the Government of the United Kingdom from consideration by Parliament on January 11, 2006. Secretary of State for Northern Ireland Peter Hain indicated in a statement to the Parliament that it was withdrawn because of opposition from victims' groups and from all Northern Ireland parties, including Sinn Fein. Sinn Fein, which had previously not opposed the legislation, decided that it could not accept that British military and police officials who were involved in criminal acts in connection with "The Troubles" in Northern Ireland would be eligible to participate in the proposed scheme.

The withdrawal of this legislation does not change the status of individuals who have already been convicted and sentenced, including Artt, Kirby, and Brennan, in any way.

[The information referred to above follows:]

Northern Ireland Office
Media Centre
Friday 29 September 2000

Statement by Peter Mandelson:

Extradition of Convicted Fugitives

On 28 July, all remaining prisoners eligible under the early release scheme who had completed 2 years of their sentences were released as envisaged in the Good Friday Agreement.

The completion of these remaining releases has implications for a number of people who were sentenced to imprisonment for offences committed before the Good Friday Agreement, but who failed to complete these sentences. In most cases those concerned escaped from custody and fled to other countries up to 20 years ago. In many cases, extradition proceedings were initiated and in some of these the government is now being pressed by Court authorities to clarify its position.

Whether to pursue an extradition request depends on the public interest at stake, including the remaining sentence which the fugitive would stand to serve if he or she were returned. It is clearly anomalous to pursue the extradition of people who appear to qualify for early release under the Good Friday Agreement scheme, and who would, on making a successful application to the Sentence Review Commissioners, have little if any of their original prison sentence to serve.

In view of this and the time that has elapsed, I do not believe that it would now be proportionate or in the public interest to continue to pursue such cases.

Northern Ireland Office
Media Centre
Friday 29 September 2000

If these individuals wish to benefit from the early release scheme, they will be able to return to Northern Ireland and make an application to the Sentence Review Commissioners. If this is granted, normal licence conditions, including liability to recall to prison, will apply. The decision has no implications for the prosecution of other offences where sufficient evidence exists. It is not an amnesty.

As with the rest of the early release programme, I do not under-estimate the hurt this decision may cause the victims of those whose extradition will no longer be pursued, and the onus it places on all of us to ensure that the Good Friday Agreement does result in a permanent peace in which there are no more victims.

Question. Article 2(4) of the treaty provides for extradition for offenses committed outside the territory of the requesting party if the laws of the requested party similarly criminalize such conduct when committed outside of its territory. Where this condition is not met, the requested party may, in its discretion, permit extradition.

(a) Do other U.S. extradition treaties contain similar provisions regarding extraterritorial offenses?

(b) What specific concerns led to the inclusion of this provision in this treaty?

(c) Are you aware of particular offenses for which there is extraterritorial application under the law of the United Kingdom, but not under U.S. law?

Answer. (a) Yes. This type of provision is included in several of our modern extradition treaties. For example, our treaties with Argentina, Brazil, Canada, Hungary, South Africa, and South Korea, all contain similar provisions.

(b) We seek this sort of provision where there may be a question whether extradition will be permitted for particular extraterritorial offenses, in light of the fact that U.S. criminal law often has extraterritorial application of some kind. For the United Kingdom, the dual criminality inquiry in extradition cases extends to the question of whether it could also exercise extraterritorial jurisdiction under similar circumstances. U.S. law, however, does not require such a strict duality of jurisdiction in extradition cases involving extraterritorial offenses. This type of provision accommodates both legal frameworks while providing as much flexibility as possible with respect to extraterritorial offenses.

(c) As a general matter, the United Kingdom exercises less expansive extraterritorial jurisdiction than the United States. We are not aware of particular offenses for which there is extraterritorial application under the law of the United Kingdom, but not under U.S. law.

Question. Some opponents of the treaty contend that it would eliminate the protection traditionally afforded to extradited individuals by the rule of specialty, which prohibits their prosecution in the requesting state for crimes other than those for which they were extradited. What is the Administration's response to this assertion?

Answer. Both the current and new treaties with the United Kingdom contain the rule of specialty. The main difference is that, under the new treaty, in keeping with current international extradition practice, either party may request that the other party waive the rule of specialty. Indeed, provisions similar to the one contained in the new treaty with the United Kingdom are contained in virtually all of our modem extradition treaties, including Argentina, Belize, Austria, India, Peru, and Sri Lanka. In practice, rule of specialty waiver provisions are infrequently invoked. However, in certain circumstances, these treaty provisions are important, for example, where new information regarding criminal conduct surfaces that was not previously available to the Requesting State at the time the extradition was sought.

Question. The existing extradition treaty with the United Kingdom employs a hybrid approach to determining what offenses are extraditable, permitting extradition for listed offenses, as well as other offenses that meet certain specified criteria. The new treaty would institute a pure dual criminality approach, meaning that offenses are extraditable if they are criminalized in both countries and punishable for a period of one year or more.

(a) How do you anticipate that the new dual criminality approach would facilitate U.S. efforts to apprehend fugitives that have fled to theUnited Kingdom?

(b) Are there particular crimes for which the United States has not been able to obtain extradition under the existing hybrid approach?

Answer. (a) The new dual criminality approach will make it easier to incorporate new criminal offenses into the extradition relationship, thereby making it harder for fugitives to escape justice on the basis of legal technicalities characteristic of the old "list" approach.

(b) Under the existing treaty's hybrid approach, the United States had not been able to obtain extradition for individuals charged with offenses such as conspiracy to commit white collar crimes, non-drug money laundering, and certain insider trading and antitrust crimes.

Under new UK extradition legislation, the United States can now request extradition for these offenses. However, we understand from our UK counterparts that entry into force of the treaty and its new dual criminality approach will put an end to arguments from fugitives sought for extradition that try to exploit the inconsistency between the existing treaty and the UK's domestic law position which, since 2003, has employed a pure dual criminality approach when handling extradition requests from the United States.

Question. Article 4(2) of the treaty contains a list of violent crimes to be excluded from consideration as political offenses. This list differs somewhat from the existing list of such offenses contained in the 1985 Supplementary Treaty. Please explain the differences between the two lists and the reasons these changes were made.

Answer. As in other extradition treaties, the new treaty provides that certain types of offenses will not be considered to be political offenses for the purpose of evaluating a request for extradition. Many of these provisions, including (a), (c), (d), (e), and (g), are similar to provisions contained in the existing treaty.

The addition of section (b) ("a murder or other violent crime against the person of a Head of State of one of the Parties, or of a member of the Head of State's family") has become a routine provision under the political offense exception, in recognition of the inherent seriousness of attacks against heads of state.

The addition of section (f) ("possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm or of causing substantial property damage"), which is not contained in any other extradition treaty of the United States, is designed to address the problem of an extremely narrow U.S. judicial interpretation of the more general language of the current U.K. supplementary treaty regarding explosives offenses. In the extradition case involving Pol Brennan, the United Kingdom sought the extradition of Brennan, who was arrested with a companion in downtown Belfast on the early afternoon of a business day in possession of an armed 23-pound bomb, which they intended to plant in a shop. Brennan was subsequently convicted of the offense of possession of explosives with intent to endanger life or injure property, escaped from prison, and was subsequently arrested in the United States. (*Matter of Artt,* 972 F.Supp. 1253, 1260–1262 (N.D.Cal. 1997).) In the course of the U.S. extradition case against Brennan, the Court of Appeals for the Ninth Circuit held that this offense did not constitute an "offense involving the use of a bomb" excluded from consideration as a protected political offense under Article 1(d) of the Supplementary Treaty. *Matter of Artt,* 158 F.3d 462, 471–473 (9th Cir. 1998). The language of the new treaty makes it clear that such an explosives offense, like other serious crimes of violence, is not to be considered a "political" offense for which extradition is barred.

The use of "manslaughter" in section (c) of the new treaty, as opposed to "voluntary manslaughter" in the 1985 Supplementary Treaty, is consistent with the language used in other recent U.S. extradition treaties, including Canada, Hungary, Luxembourg, and Poland. The use of "any form of unlawful detention" in section (d) instead of "serious unlawful detention," reflects the language used in other extradition treaties, including those with Canada, France, and Hungary. The use of "an offense involving" certain acts, in section (d), is not unique to the new treaty—it is used in Article 1(d) of the 1985 Supplementary treaty. This same language is also

used in other of our modern U. S. extradition treaties, including those with France, Hungary, and Poland.

The changes to the wording in section (e) ("placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, causing grievous bodily harm, or of causing substantial property damage") derive from our decision to have this language track the analogous international commitment in the United Nations Intemational Convention for the Suppression of Terrorist Bombings, an international law enforcement cooperation agreement to which both the United States and the United Kingdom are parties. Section (e) also includes unlawful use of firearms, which, of course, was beyond the scope of the U.N. Convention and, in this respect, is similar to the analogous provision in Article 1(d) of the existing treaty.

The changes to the wording in section (g) ("an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any of the foregoing offenses") closely reflect the wording of U.S. criminal law on principals and aiding and abetting, which states, in part, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2.

Protocol between the Government of the United States and the Government of the State of Israel Amending the Convention on Extradition (Treaty No. 109–3)

Question. The Protocol would amend the existing 1962 Convention to replace the existing list of extraditable offenses with dual criminality approach, meaning that offenses would be extraditable if they are criminalized in both countries and punishable for a period of one year or more.

(a) How do you anticipate that the new dual criminality approach would facilitate U.S. efforts to apprehend fugitives that have fled to Israel?

(b) Are there particular crimes for which the United States has not been able to obtain extradition under the existing list approach?

Answer. (a) The "dual criminality" approach facilitates U.S. efforts to obtain the extradition of fugitives from Israel by expanding the scope of extraditable offenses well beyond those specifically recognized in the existing convention's list. It allows the automatic extension of the convention's provisions to new forms of criminality that are made punishable as felonies in both countries in the future, without any need to update the convention as new forms of criminality emerge.

(b) Under the new Protocol, the United States would now be able to obtain extradition for conduct not currently included on the list of extradition offenses, such as sexual abuse of boys as well as girls, money laundering (other than laundering of drug proceeds, which can be reached by virtue of application of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances), and computer intrusions and hacking.

Question. Why does Article 5 of the Protocol delete Article IX of the 1962 Convention? What was the purpose of Article IX and how has it been used?

Answer. Article IX was originally intended to reflect the fact that domestic procedural law governed the extradition process, in the absence of specific treaty provisions. After review between the governments, we determined that the provision was unnecessary and could be misunderstood as permitting unilateral modification of the treaty's obligations through enactment of inconsistent domestic law.

Treaty between the United States of America and Germany on Mutual Legal Assistance in Criminal Matters (Treaty No. 108–27)

Question. Article 15(3) of the treaty would allow each party to use evidence or information obtained under the treaty, without the prior consent of the other, "for averting substantial danger, to public security." This appears to be a new provision in U.S. mutual legal assistance treaty practice.

(a) Why was this provision included in this treaty and under what conditions do you envision that it might be invoked?

(b) Will the Executive Branch seek to include similar provisions in future mutual legal assistance treaties?

Answer. (a) Article 15(3) of the MLAT with Germany permits a Requesting State, without the prior consent of the Requested State, to use evidence or information for certain specified purposes, e.g. "averting substantial danger to public security,"

other than for the particular criminal investigation or proceeding underlying the request. Germany sought this broadening of the strict MLAT use limitation article found in approximately half of our MLATs in order to reflect corresponding provisions of German privacy law which provide its law enforcement agencies additional flexibility to use information received from a foreign government. The United States anticipates that Article 15(3) could be relied upon, for example, where information supplied by Germany about an individual who is the subject of a U.S. criminal prosecution also is relevant to a separate U.S. criminal investigation into threatened terrorist activity. This provision thus is helpful to the United States by creating a presumption that information received pursuant to an MLAT request can be used for prevention as well as prosecution purposes.

(b) Similar language is included in Article 9(1)(b) of the 2003 Agreement on Mutual Legal Assistance between the United States and the European Union, and in the implementing mutual legal assistance instruments currently being completed with each EU member state. The U.S.-EU Agreement, together with all implementing instruments, will be submitted to the Senate in 2006 for its advice and consent to ratification. Once these agreements enter into force, this additional flexibility in using information supplied pursuant to an MLAT request will be available to the United States in its judicial assistance relationships across the EU. Whether such a provision will be included in future U.S. MLATs with non-European governments will depend in part upon whether they have adopted privacy laws of the type found in Europe.

Treaty between the United States of America and Japan on Mutual Legal Assistance in Criminal Matters (Treaty No. 108–12)

Question. U.S. mutual legal assistance treaties traditionally provide for each party to designate a central authority, generally the Attorney General in the case of the United States, which will be responsible for making and receiving requests under the agreement. In this treaty, Japan has designated two central authorities—the Minister of Justice and the National Public Safety Commission.

(a) Please explain how this dual central authority system will work in practice.

(b) Will it affect the ability of the United States to obtain assistance under the treaty?

Answer. (a) Japan has designated the Minister of Justice as the central authority for all requests made by the United States. In this regard, the Japan NH-AT will work the same way as other U.S. MLATs. With respect to requests made by Japan, the Minister of Justice will serve as the central authority for requests submitted by Japanese public prosecutors or the judicial police, or if a request requires examination of a witness in a U.S. court. The National Public Safety Commission will serve as the central authority for requests submitted by the Japanese National Police or imperial guard officers. The two Japanese agencies will establish a mechanism to avoid unnecessary duplication and facilitate efficient provision of assistance. If necessary, the U.S. Department of Justice may consult with the Japanese Ministry of Justice regarding the execution of any request, regardless of which agency initiated the request on the Japanese side.

(b) This arrangement is not expected to affect the ability of the United States to obtain assistance under the treaty, since the Minister of Justice will be the central authority for all requests made by the United States. Thus, whenever the United States requests assistance under the treaty, the Japan MLAT will work in the same way as other MLATs.

QUESTIONS FROM SENATOR BIDEN

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN TO SAMUEL WITTEN, U.S. DEPARTMENT OF STATE, AND MARY ELLEN WARLOW, U.S. DEPARTMENT OF JUSTICE

Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland (Treaty No. 108–23)

Question. Are there any diplomatic notes or negotiating statements relative to the meaning of treaty terms about which the Committee has not been informed?

Answer. No.

Question. Has the executive branch prepared a technical analysis of the treaty, as was done in connection with consideration of extradition treaties in the 105th, 106th, and 107th Congresses (no such treaties were considered in the 108th Congress)? If so, please provide it. If not, why was such analysis not prepared?

Answer. No technical analysis of the treaty was prepared. For a number of years, the executive branch drafted technical analyses for bilateral law enforcement treaties, motivated largely by the need to explain mutual legal assistance treaties (which at the time were new and innovative types of law enforcement instruments) to U.S. prosecutors and the public. After more experience and upon further consideration, the executive branch determined that these analyses, which are not typically prepared for other treaties, were no longer needed. Moreover, the content of such technical analyses of law enforcement treaties had become largely duplicative of the section-by-section analysis provided in the Secretary of State's Report (provided to the Foreign Relations Committee as part of the President's transmittal package) on each treaty.

Question. On August 3, 2004, the Department of State issued a "Fact Sheet" on the treaty. Does it provide an authoritative representation of the views of the Executive Branch regarding the treaty terms that are addressed by the fact sheet?

Answer. The Fact Sheet was prepared in an effort to address, in plain language, questions that had been posed about aspects of the proposed new U.S.-UK extradition treaty. It is meant to serve as a general guide to the new treaty, but the Administration's definitive view of relevant issues is provided in the transmittal documents given to the Foreign Relations Committee and in the administration's November 15, 2005 testimony.

Question. Please provide data on the following:

(a) The number of extradition requests made by each party under the current U.S.-U.K. extradition treaty in the last five years (on either a calendar year or fiscal year basis), and information on the number of such requests that were (1) approved, (2) not approved, or (3) withdrawn.

(b) Of all requests filed by the United States to the United Kingdom since January 1, 2003, provide a general summary of the types of cases (e.g., numbers of cases involving terrorist offenses, number of cases involving violent crimes, number of cases involving narcotics charges, number of cases involving fraud offenses).

Answer.

(a) Approximate number of U.S. extradition requests to the United Kingdom during calendar years 2001 through 2005: 116. Of these, approximately 20 were approved, 2 were not approved, 10 were withdrawn, and approximately 36 are currently being litigated in UK courts. (Others had dispositions such as: the fugitive died prior to disposition; the fugitive waived extradition proceedings; the fugitive was subsequently arrested in the United States; the fugitive was subsequently located in a third country; the fugitive could not be located; or the fugitive has been found extraditable and is in custody in the United Kingdom but cannot be surrendered until he has served his UK sentence.)

Approximate number of UK extradition requests to the United States during calendar years 2001 through 2005: 33. Of these, approximately 7 were approved, 2 were not approved, 2 were withdrawn, and approximately 4 are pending but not yet the subject of judicial proceedings in the United States. (Others had dispositions such as: the fugitive was deported; the fugitive waived extradition proceedings; the fugitive was subsequently located in a third country; the fugitive could not be located; or the fugitive has been found extraditable and is in custody in the United States but cannot be surrendered until he has served his U.S. sentence.)

(b) A general breakdown of the U.S. extradition requests made to the United Kingdom between January 1, 2003, and the present, by types of crimes together with their approximate numbers, is as follows:

- Fraud and other white collar crimes (including money laundering, forgery and counterfeiting, and tax offenses): 22
- Terrorism (including supporting terrorist activities and weapons of mass destruction): 8
- Narcotics offenses: 14
- Violent crimes (including homicide, attempted homicide, assault, robbery, burglary, and weapons/firearms offenses): 12
- Kidnapping (including parental abduction): 2

• Sexual offenses (including child molestation/rape and child pornography): 10

Question. The proposed treaty excludes Article 3 of the 1985 Supplementary Treaty, which provided that extradition would not occur if the fugitive established before a U.S. court, by a preponderance of the evidence, that the request for extradition was made on account of his race, religion, nationality, or political opinion, or that he would be prejudiced at trial by reason of his race, religion, nationality, or political opinion. By its terms, this provision from the 1985 Supplementary Treaty is broader than the political motivation provision barring extradition under Article 4(3) of the proposed treaty.

(a) What was the rationale for eliminating the provisions of Article 3 of the Supplementary Treaty?

(b) Please describe all instances where a fugitive sought judicial review under Article 3 of the 1985 Supplementary Treaty and extradition was denied on a basis set forth in that article.

Answer. In U.S. law and practice, the question of "political motivation" and questions regarding motivation based on similarly improper bases such as race or religion, are determined by the Secretary of State. This responsibility of the Secretary of State has been recognized by U.S. courts in the longstanding "Rule of Non-Inquiry," whereby courts defer to the Secretary in evaluating the motivation of the foreign government. This principle recognizes that among the three branches of the U.S. Government, the Executive branch is best equipped to evaluate the motivation of a foreign government in seeking the extradition of an individual. The U.S. Government's extradition treaties reflect the fact that the U.S. Secretary of State appropriately makes this judgment, and not the U.S. courts.

Indeed, until 1985, the issue of motivation of the Government of the United Kingdom in making an extradition request of the United States was treated the same as in all of our other extradition relationships—the courts played no role in reviewing this issue. In 1985, however, as part of an amendment of other aspects of the UK extradition relationship, the U.S. Senate developed what became Art. 3(a) of the 1972 U.S.-UK extradition treaty, as amended by the 1985 supplementary treaty, which states that extradition "shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions." This text was added pursuant to the Senate's Resolution regarding advice and consent to the 1985 supplementary treaty.

This anomalous treaty provision has led to long, difficult, and inconclusive litigation in several cases, where U.S. courts were thrust into the unfamiliar and inappropriate position of addressing motivation of a foreign government. The provision for judicial review of political motivation claims has been invoked in five cases, all dating from the early 1990s. The first involved Curtis Andrew Howard, who claimed he would be prejudiced in legal proceedings in the United Kingdom because of his race. He was extradited in 1993. The other four of these cases involved persons of Irish Catholic background who were convicted of crimes of violence in Northern Ireland, and who escaped from prison in Northern Ireland in 1983 and fled to the United States.

The first of these cases involved James Joseph Smyth, who had been convicted of the attempted murder of a prison guard. More than 40 witnesses were heard at his extradition hearing, and a 5-week evidentiary hearing was held. (Ultimately, the record in the case exceeded 3,000 pages.) In 1996, Smyth was finally extradited from the United States to the United Kingdom. He was subsequently released from prison in 1998 pursuant to an accelerated release law, the Northern Ireland (Sentences) Act 1998, that grew out of the Belfast Agreement. The next three cases involved defendants Kevin John Artt, Terence Damien Kirby, and Pol Brennan, who were arrested separately in the United States between 1992 and 1994. Their extradition cases were consolidated for consideration by U.S. courts. All had been convicted in the UK judicial system of felonies and sentenced to terms of imprisonment. Artt was convicted of murdering a prison official; Kirby was convicted of offenses of possession of explosives and a submachine gun, false imprisonment, assault, and felony murder arising out of two separate incidents; Brennan was convicted of possession of explosives. There was extensive litigation and testimony in the U.S. District Court regarding their claims of prejudice under Article 3 of the 1985 supplementary treaty and numerous appeals. This litigation was and is unprecedented; as U.S. courts were put in the position of evaluating defendants' claims of generalized, sys-

temic bias within a foreign system of justice. In 2000, the United Kingdom withdrew its request for extradition, consistent with its announcement that it would not be seeking the extradition of persons who, if they had remained in prison in Northern Ireland, would have benefited from the 1998 early release law.

Question. Article 4(3) of the proposed treaty provides that extradition shall not be granted if the competent authority of the Requested State determines that the request was politically motivated. Please describe the process of review in the Executive Branch when a person whose extradition has been certified by a court under 18 U.S.C. § 3184 makes such a claim. In the last five calendar years, how often has the Secretary of State denied extradition under similar provisions in other bilateral extradition treaties?

Answer. Consideration of whether a request for extradition is politically motivated begins when it is received by the Department of State. We have found that requests which the Department of State believes may be politically motivated are generally also insufficient as a technical matter, for example, the facts and evidence provided by the Requesting State do not meet the probable cause standard, the proper documentation has not been provided, the papers have not been appropriately certified, or the dual criminality requirement is not met. This circumstance is not surprising given that these types of requirements in extradition treaties are designed, in part, to ensure a robust level of integrity in the extradition process.

If, at any time in the extradition process prior to the signing of the surrender warrant by the Secretary of State (or other appropriate principal of the Department of State), the U. S. Executive Branch becomes aware of facts or circumstances that suggest a request might be politically motivated, the Department of State explores that possibility through the diplomatic channel and otherwise until fully satisfied that the request is not politically motivated.

After a fugitive has been found extraditable and committed to the custody of the U.S. Marshal, and all appeals in U.S. courts have been exhausted, the Department of State reviews the record of the case as certified by the District Court to the Secretary of State. This record normally consists of the Magistrate's Certification of Extraditability and Order of Commitment, any related orders or memoranda issued by the Magistrate, all court orders issued in the course of any appellate proceedings, the transcript of the extradition proceedings before the Magistrate, and the documents. submitted by the requesting State. In addition, it is the Department of State's policy to accept and review written argumentation against extradition submitted by the fugitive or his counsel if received in time to be included with the Department's final review of the case. Also, members of the fugitive's family or other interested parties may make written representations (these are usually of a humanitarian nature) on behalf of the fugitive. All of these things are taken into consideration by the Department of State with a view to determining what recommendation to make to the Secretary of State with respect to a possible extradition.

In the last five calendar years, the Secretary of State has not denied extradition on the basis that the request was politically motivated. As noted above, some requests are not processed through the U.S. court system because they are based on summary assertions of culpability with inadequate evidence, or other reasons that could be indicative of political motivation.

Question. Please provide information on the number of deportations from the United States to the United Kingdom or Ireland in the last five years (on either a calendar year or fiscal year basis).

Answer.

Removals (not including expedited removals):

	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Ireland	50	64	69	63	43
UK	329	462	430	369	325

Expedited Removals: The following figures for expedited removals are not complete because, we understand, these figures were not being kept before 2004 and, even then, the figures are not complete even for 2004 and 2005.

Expedited Removals:

	FY 2004	FY 2005
Ireland	4	12
UK	34	21

Question. Please elaborate on how Article 2(4), which permits extradition even if the laws of the requested state do not provide for punishment of such conduct committed outside its territory, is consistent with the requirement of dual criminality in Article 2(1). Additionally, please provide information on what crimes might be covered by this provision.

Answer. Article 2(4) addresses a disparity between U.S. and UK extradition law and practice regarding extraterritorial offenses.

For the United States and most other countries, there is no requirement of equivalence of extraterritorial jurisdiction in the extradition context, and thus provisions such as Article 2(4) do not appear at all in many extradition treaties. However, the United Kingdom and some other common law countries do condition extradition not only on a finding of "dual criminality" but also, with respect to extraterritorial offenses, on a finding that the United Kingdom could also have exercised jurisdiction in similar circumstances. To accommodate this difference, Article 2(4) gives the Requested State the discretion to deny a request for extradition where it would not have had similar authority to exercise extraterritorial jurisdiction. (Israel's extradition law is similar to the United Kingdom's in this respect, and a similar provision can be found in Article III of the 1962 U.S.-Israel extradition treaty, which is unchanged by the Protocol before the Committee.)

Thus, Article 2(4) addresses a jurisdictional issue present in the law of the United Kingdom and some other countries, whereas Article 2(1) addresses the criminal nature of the conduct itself.

Currently, Article 2(4) would potentially cover some types of crimes related to sex with children (where the U.S. statute is broader than the corresponding UK statute), and certain types of murder (where the UK statute is broader than the U.S. statute). At the time the treaty was negotiated, Article 2(4) had been relevant to an even wider group of offenses, such as some terrorism-related and counterfeiting offenses, but UK law is now more flexible in these areas.

Question. Ms. Warlow testified that in 2000, requests for extradition of Artt, Kirby and Brennan were withdrawn by the United Kingdom, "consistent with a general statement of policy by the United Kingdom that they were no longer seeking extradition of such defendants." Does the Executive Branch have any information from the government of the United Kingdom that the policy remains in effect? Please elaborate.

Answer. In September 2000, the UK government announced that it would no longer pursue the extradition of individuals who, if they had remained within the Northern Ireland prison system, would now be eligible for early release. Kevin John Artt, Terence Damien Kirby, and Pol Brennan, (three individuals who were the subjects of UK extradition requests to the United States in the 1990s), all fell within that category, and the UK is no longer seeking their extradition. The Government of the United Kingdom has informed the United States Government that there has been no change in this position since 2000.

Question. There are several differences between the political offense exception set forth in the 1985 Supplementary Treaty and the proposed treaty. Please elaborate on the rationale for, and the significance of, each the following textual changes:

(a) In Article 4(2)(c): "manslaughter" (proposed treaty) instead of "voluntary manslaughter" (1985 Supplementary Treaty);

(b) In Article 4(2)(d): "any form of unlawful detention" (proposed treaty) instead of "serious unlawful detention" (1985 Supplementary Treaty);

(c) In Article 4(2)(d): "an offense involving" certain acts, such as kidnaping (proposed treaty) rather than the listing of the acts (1985 Supplementary Treaty);

(d) In Article 4(2)(f): "possession of an explosive, incendiary. . . ." (proposed treaty); the 1985 Supplementary Treaty contains no analogous provision on possession.

Answer. The words and phrases chosen in Article 4 were negotiated between the two governments to ensure that the exceptions to political offense were clearly stated in a way that would reflect modern extradition practice in the two governments and would also be consistent with other modern U.S. treaties. They reflect careful consideration by relevant U.S. Government components, including the Justice Department's Office of International Affairs, which supervises the litigation of extradition cases in U.S. courts and the manner in which various phrases in these treaties have been litigated.

(a) The use of "manslaughter" in section (c) of the new treaty, as opposed to "voluntary manslaughter" in the 1985 Supplementary Treaty, reflects the language used in other of our modern extradition treaties, including those with Canada, Hungary, Luxembourg, and Poland.

(b) The use of "any form of unlawful detention" in section (d) instead of "serious unlawful detention," as in the 1985 Supplementary Treaty, reflects the language used in other of our modern extradition treaties, including those with Canada, France, and Hungary.

(c) The use of "an offense involving" certain acts, in section (d), is not unique to the new treaty—it is used in Article 1(d) of the 1985 Supplementary treaty. This same language is also used in other of our modern extradition treaties, including those with France, Hungary, and Poland.

(d) The addition of section (f) ("possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm or of causing substantial property damage") is designed to address the problem of an extremely narrow U.S. judicial interpretation of the more general language of the current U.K. supplementary treaty regarding explosives offenses. In the extradition case involving Pol Brennan, the United Kingdom sought the extradition of Brennan, who was arrested with a companion in downtown Belfast on the early afternoon of a business day in possession of an armed 23-pound bomb, which they intended to plant in a shop. Brennan was subsequently convicted of the offense of possession of explosives with intent to endanger life or injure property, escaped from prison, and was subsequently arrested in the United States. (*Matter of Artt,* 972 F.Supp. 1253, 1260–1262 (N.D.Cal. 1997)) In the course of the U.S. extradition case against Brennan, the Court of Appeals for the Ninth Circuit held that this offense did not constitute an "offense involving the use of a bomb" excluded from consideration as a protected political offense under Article 1(d) of the Supplementary Treaty. *Matter of Artt,* 158 F.3d 462, 471–473 (9th Cir. 1998). The language of the new treaty makes it clear that such an explosives offense, like other serious crimes of violence, are not to be considered "political" offenses for which extradition is barred.

Question. Article 4(2)(f) of the proposed treaty provides that mere possession of certain items would not be covered by the political offense exception. Of course, the dual criminality provision of Article 2 would apply.

(a) Is there such an offense under U.S. law? If so, please elaborate. If not, why is this provision contained in the proposed treaty?

(b) Is such a provision set forth in any other extradition treaty to which the United States is a party?

Answer. (a) There are certain offenses under U.S. law that criminalize possession of explosives and other dangerous items, particularly in settings where danger to public safety is heightened. For example, it is a felony to possess an explosive in an airport (18 U.S.C. §844(g)) or to transport a hazardous material aboard a civil aircraft (49 U.S.C. §46312). It is also a federal felony to possess stolen explosives (18 U.S.C. §18 U.S.C. 842(h)); to possess explosives during the commission of another federal felony (18 U.S.C. §844(h)); to possess explosive or incendiary missiles designed to attack aircraft (18 U.S.C. §2332g); to possess radiological dispersal devises (18 U.S.C. §2332h); or to possess nuclear materials (18 U.S.C. §831)). Possession of explosives or similar materials may also be an offense under the laws of individual U.S. states. See, for example, Chapter 21, Article 37, Section 3731(a) of the Kansas criminal code, which states that "[c]riminal use of explosives is the possession, manufacture or transportation of commercial explosives; chemical compounds that form explosives; incendiary or explosive material, liquid or solid; detonators; blasting caps; military explosive, fuse assemblies; squibs; electric match or functional improvised fuse assemblies; or any completed explosive devices commonly known as pipe bombs or Molotov cocktails."

As discussed in response to the previous question, the addition of section (f) ("possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm or of causing substantial property damage") is de-

signed to address the problem of an extremely narrow U.S. judicial interpretation, in the context of political offense, of the more general language of the current UK supplementary treaty regarding explosives offenses, where the court focused on the nomenclature of the offense rather than on the conduct.

(b) This provision is not contained in any other extradition treaty of the United States. As noted above in subsection "a" of this answer, the language was negotiated in the aftermath of a judicial decision interpreting the relevant language in the current U.S.-UK treaty.

Question. Article 4(2)(e) would seem to be largely covered by paragraph 2(a), by virtue of the fact that both the United States and the United Kingdom are parties to the International Convention for the Suppression of Terrorist Bombings. Are there any material differences between the two provisions? What does paragraph 2(e) add that is not covered by 2(a)?

Answer. The changes to the wording in section (e) ("placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, causing grievous bodily harm, or of causing substantial property damage") derive from our decision to have this language track the analogous international commitment in the United Nations International Convention for the Suppression of Terrorist Bombings, an international law enforcement cooperation agreement to which both the United States and the United Kingdom are parties. Section (e) also includes unlawful use of firearms, which, of course, was beyond the scope of the U.N. Convention and, in this respect, is similar to the analogous provision in Article 1(d) of the existing treaty.

Question. Article VIII(1) of the current treaty governs provisional arrest. It provides, inter that the application for provisional arrest shall contain "such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested party." This language is omitted from Article 12 of the proposed treaty. Why?

Answer. The provisional arrest language of the 1972 treaty has not been continued in this or other modern treaties because it does not provide sufficient guidance about what information should be provided at the provisional arrest stage—those urgent cases where it is appropriate to effect the immediate arrest of the fugitive—as opposed to the information that must be submitted with the formal extradition request to support a final judicial determination of extraditability.

The language of Article VIII(1) of the 1972 treaty states that the provisional arrest request should contain "an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a conviction against that person, and, if available, a description of the person sought, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed in the territory of the requested Party." Article VII(3) of the 1972 treaty provides that the formal extradition request, in the case of a person not yet convicted, must include information that "would justify [the fugitive's] committal for trial if the offense had been committed in the territory of the requested Party . . . ." From the perspective of U.S. practitioners, the antiquated language of these two provisions is not particularly helpful and would therefore not typically be included in a modern extradition treaty.

The purpose of provisional arrest is to permit, in urgent circumstances, the immediate arrest of the fugitive, pending the submission of the formal extradition documents which must be sufficient to meet all the requirements for extradition under the treaty and the domestic law of the requested country. Thus, information submitted in the context of provisional arrest is necessarily more abbreviated. The provision of the 1972 treaty gave no guidance as to what "further information," beyond the existence of a warrant and description of the fugitive, might be required and indeed suggested that no further information at all might be necessary. Article 12(2) of the new treaty makes it clear that more information is required and provides guidance as to the several categories of information U.S. courts are likely to expect in order to issue a provisional arrest warrant.

In addition, the language of Articles VII and VIII of the 1972 treaty is confusing because the distinction it clearly means to draw between the abbreviated provisional arrest request made in urgent circumstances and the fully documented formal extradition request is muddied by referencing standards of proof at two stages in a domestic criminal case—arrest and committal for trial—which are not in fact different under much of modern U.S. criminal procedure.

The new treaty resolves these difficulties by requiring more information about the offense and offender at the provisional arrest stage, and by making clear in Article 8(3)(c) that the formal extradition request must include information sufficient for the U.S. court to determine probable cause to believe the fugitive committed the offense for which extradition is sought.

Question. The current treaty provides for a probable cause standard for extradition. Article 2 of the 1985 Supplementary Treaty explicitly states that an individual sought for extradition may present evidence whether there is probable cause; Article IX(1) of the 1972 treaty provides that extradition shall only be granted if the evidence is sufficient "according to the law of the requested Party" to "justify the committal for trial of the person sought" if the offense had been committed in the territory of the requested party; and Article VII(3) provides that request must be accompanied by "such evidence as, according to the law of the requested Party, would justify his committal for trail if the offense had been committed in the territory of the requested Party."

The proposed treaty contains only the last provision (in Article 8(3)(c)), requiring that the request for extradition to the United States be supported by "such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested."

> What is the standard for extradition from the United States under the proposed treaty, and upon what specific provisions of the treaty and U.S. law is that standard based?

Answer. The standard for extradition from the United States under Article 8(3)(c) of the proposed treaty and under U.S. law is that of probable cause. Under U.S. law, the United States Constitution, together with federal case law, provides the standard used by courts to evaluate the sufficiency of foreign evidence provided in support of an extradition request. The applicable standard requires there be probable cause to believe that the person who is before the court is the person charged or convicted in the foreign country and, in those cases where the person has not been convicted, probable cause to believe that person committed the offenses for which extradition is sought. *See United States* v. *Wiebe,* 733 F.2d 549, 553 (8th Cir. 1984) ("The probable cause standard applicable in extradition proceedings is defined in accordance with federal law and has been described as evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.") (internal quotation marks omitted).

Question. Article 16 of the proposed treaty provides for, "[t]o the extent permitted under its law," the seizure and surrender by the requested State of assets connected with the offense in respect of which extradition is granted.

> (a) Please summarize U.S. law on such seizure and surrender.
>
> (b) In extradition cases, at what point in time does such seizure occur?
>
> (c) Most modern U.S. extradition treaties, as well as the 1972 treaty with the United Kingdom, contain a statement that the rights of third parties shall be respected. Why is such a statement not included in Article 16 of the proposed treaty?

Answer. In the United States, all such seizure and surrender actions would be carried out by U.S. authorities and would occur in accordance with U.S. law, including prohibitions against unreasonable searches and seizures found in the United States Constitution and in various state constitutions, and implemented in various relevant federal and state statutes.

Like in other U.S. treaty relationships, under the UK treaty in a diplomatic note requesting provisional arrest or extradition, the Requesting State would ask the Requested State, pursuant to Article 16, to seize items connected with the offense and, if extradition is granted, to surrender those items to the Requesting State. Typically, law enforcement authorities would obtain a warrant from a judge to arrest the fugitive and, in executing the arrest warrant, will seize items and assets connected with the offense for which extradition is requested. If extradition is approved by the judge, and the Secretary of State authorizes the extradition, typically the U.S. authorities would turn over such items and assets, seized incident to arrest, pursuant to Article 16 of the treaty. If U.S. law enforcement authorities are unable to seize items incident to the arrest, they will have to obtain a seizure warrant, consistent with U.S. law, to seize those items. The seizure warrant would typically be obtained pursuant to a formal request for assistance under the Mutual Legal Assistance Treaty in place between the United States and the United Kingdom.

There is nothing novel about this provision; this same concept is contained in virtually all U.S. extradition treaties, including the existing U.S.-UK treaty currently in force between the two countries.

A statement about the rights of third parties was not necessary in this treaty given that the laws of the United States and of the United Kingdom on this topic are largely similar and provide adequately for the rights of third parties under domestic laws and procedures.

Question. Article 18 of the proposed treaty authorizes the requested state to waive the rule of specialty.

(a) In an average year, how often does the United States or other treaty partners seek the waiver of the rule of specialty in extradition cases? How often is it granted by the United States? What is the process for reviewing and authorizing such requests in the United States?

(b) In the view of the Executive Branch, what types of cases are appropriate for waiver of the rule?

Answer. In practice, rule of specialty waiver provisions are infrequently invoked. From 1991 to the present, the Department of State has received approximately 30 requests for waiver of the rule of specialty. Of these, 17 were granted, 5 were denied, and 8 are pending. In the same time period, the United States has made approximately 6 requests to other countries to waive the rule of specialty.

Generally, the criteria for evaluating a request from a treaty partner to waive the rule of specialty are (1) timeliness, (2) whether the justification for the request is sufficient, and (3) whether there is sufficient evidence to meet the probable cause standard regarding the offense for which the request is made. If the request fails to meet any of these criteria, the request is denied.

The Department of State receives such requests in the form of a diplomatic note from the foreign government. The Office of the Legal Adviser of the Department of State does a preliminary review of the request and then forwards it to the Office of International Affairs of the Department of Justice for its review. If these offices agree that the request should be granted in whole or in part, the Office of the Legal Adviser sends that recommendation to the Secretary of State (or other appropriate principal of the Department of State) together with the relevant facts and analysis. If the Secretary (or other appropriate principal) approves the request in whole or in part, notice of that decision is communicated in a diplomatic note to the requesting government.

If, on the other hand, the Department of Justice recommends that the request be denied, the Department of State sends a diplomatic note to that effect to the requesting government.

(b) The most common situation in which the Executive Branch waives the rule of specialty is when new information regarding criminal conduct surfaces that was not previously available to the Requesting State at the time the extradition was sought.

Newly discovered evidence relating to conduct of which the Requesting State was aware at the time of its request for extradition may also, in some circumstances, warrant a waiver of the rule of specialty.

Additionally, the charging of lesser included offenses and additional charges based on the same conduct may warrant a waiver of the rule of specialty. (The UK treaty, like several others, makes it clear that a waiver need not be obtained if the new charge is simply a lesser included offense.)

Question. Article 23(3) provides that upon entry into force of the proposed treaty, the 1972 treaty and the 1985 Supplementary Treaty shall cease to have effect, except that the prior treaty shall apply to any extradition proceedings in which the extradition documents have been submitted to the courts of the requested state. This proviso is further qualified, however, by this statement: "except that Article 18 of this Treaty shall apply to persons found extraditable under the prior Treaty."

Is there a temporal limitation to this latter provision? In other words, does Article 18 of the proposed treaty apply only to those extradition cases pending at the time of entry into force, or does it apply to all persons who have heretofore been found extraditable under the prior treaty (as that term is defined in Article 23)?

Answer. No. Article 18 of the new treaty relating to the rule of specialty would apply to persons who have been found extraditable under the current treaty.

Question. Is there a relationship between this treaty and the U.S.-EU treaty on extradition? Please elaborate.

Answer. The extradition treaty signed by the United States and the United Kingdom on March 31, 2003, would be amended in certain respects by the extradition agreement subsequently signed by the United States and the European Union on June 25, 2003. The changes to the bilateral extradition treaty resulting from the U.S.-EU agreement are identified in a bilateral instrument signed by the United States and the United Kingdom on December 16, 2004. The resulting amended text of the extradition treaty is set out in an annex to the bilateral instrument. These agreements will be presented to the Senate for its consideration when the final set of negotiations with other EU countries are completed, which we expect will be in the near future. The changes to the bilateral treaty are as follows.

Two of the changes serve to expedite extradition procedures. One will allow supplementary extradition documents to be sent directly between the U.S. Department of Justice and the UK Home Office rather than through diplomatic channels (Article 10(2) of the Annex). A second procedural improvement—simplifying certification and authentication requirements (Article 9 of the Annex)—will be implemented only after the United Kingdom enacts implementing legislation, as indicated in an exchange of notes accompanying the signing of the bilateral instrument.

The 2003 extradition treaty also would be supplemented by the addition of a provision (Article 15 of the Annex) establishing parity between a U.S. extradition request to the UK and a request to the UK for the same person made by another ELT member state pursuant to the European Arrest warrant mechanism. Finally, the U.S.-EU extradition agreement establishes a consultation procedure (Article 8 bis of the Annex) which may be employed where the state seeking extradition contemplates including particularly sensitive personal information in the request.

Since the geographic extent of the United Kingdom for purposes of EU membership is more limited than that ordinarily reflected by the United Kingdom in its international agreements with third countries, the bilateral extradition instrument implementing the U.S.-EU agreement will not apply to the Channel Islands and the Isle of Man. Those territories would continue to be subject to the 2003 extradition treaty in its original form.

Question. Does the proposed treaty implicate the President's power under Article II of the Constitution as Commander-in-Chief of the Army and the Navy? If so, please elaborate.

Answer. Answer: No.

Question. Ms. Warlow testified that the proposed treaty eases the evidentiary burden the United States has to meet in order to seek extradition from the United Kingdom, lowering it from a standard of *prima facie.*

(a) What is the standard for obtaining extradition in the United Kingdom under the proposed treaty and the Extradition Act 2003 (U.K.)?

(b) Is it not the case that the United States is already benefiting from the lower standard by virtue of approval in the United Kingdom of the Extradition Act 2003, and the subsequent designation of the United States as a part 2 country pursuant to that Act?

Answer. The standard for obtaining extradition in the United Kingdom is defined under UK domestic law; we understand that this evidentiary standard is comparable to the U.S. "probable cause' standard.

One of the primary benefits of ratification of the new treaty is that the United States will be positioned to continue to receive the benefits of recent changes in UK extradition law, including the reduction in the evidentiary standard that the United States will be required to meet when seeking the extradition of a fugitive and the ability to submit hearsay evidence.

In concrete terms, what this favored status means for U.S. requests to the United Kingdom is that the United States need not produce first person affidavits (witness statements) with regard to each element of each offense for which extradition is sought. Thus, to meet the evidentiary threshold, the United States must produce only a prosecutor's affidavit that outlines the case. Of course, the United States will still have to produce the arrest warrant, charging documents, and other items as required by Article 8 of the new treaty. The United States has been benefiting, since January 1, 2004, from this lower standard by virtue of the UK's Extradition Act 2003, and the subsequent designation of the United States as a part 2 country under that Act.

We note that some defendants in extradition proceedings in the United Kingdom have argued that, under the provisions of the current treaty, the UK government could not legally designate the United States to receive the benefits of the lower evidentiary standard. We have been advised by our counterparts in the United Kingdom that they do not believe these arguments will be successful. We also understand from our UK counterparts that U.S. non-ratification of the new treaty is now attracting considerable parliamentary interest in the UK. Various individuals and groups have suggested that the United States be removed from this favored category. (If this were to happen, the United States' extradition documents would, once again, have to meet an onerous *prima facie* standard.) We think it is unlikely that this idea will gain political traction, at least in the near future.

Treaty between the United States of America and Germany on Mutual Legal Assistance in Criminal Matters (Treaty No. 108–27)

Treaty between the United States of America and Japan on Mutual Legal Assistance in Criminal Matters (Treaty No. 108–12)

Question. Please describe the current state of law enforcement cooperation between the United States and Japan and the United States and Germany.

Answer. The United States enjoys excellent law enforcement cooperation with both Japan and Germany. It is anticipated that the entry into force of a Mutual Legal Assistance Treaty with each country will further strengthen our bilateral law enforcement cooperation.

Question. Article 1(3) of the Treaty with Japan requires a party to provide assistance "in connection with an administrative investigation of suspected criminal conduct." Article 1(1) of the Treaty with Germany contains a similar provision, stating that assistance provided for criminal investigations includes investigations and proceedings "relating to regulatory offenses to the extent that they may lead to court proceedings or be referred for criminal prosecution in the Requesting State." Is there an understanding between the negotiating states about the scope of these provisions?

Answer. Both provisions were the subject of extensive discussion during the negotiations which resulted in a common understanding of their scope. Although the provisions of the two treaties vary somewhat, they permit requests for assistance from entities such as the Securities and Exchange Commission or the Federal Trade Commission, which investigate conduct that may also constitute a criminal offense and which have authority to refer matters to the Department of Justice for prosecution. It was also understood that for the United States' assistance also would be available for administrative investigations by state authorities, provided the particular conditions described in the applicable treaty were met.

Under the proposed treaty with Japan, the administrative investigation must be of "suspected criminal conduct." In addition, the Central Authority (for the United States, the Department of Justice) must certify that the administrative authority conducting the investigation has statutory or regulatory authority to investigate facts that could constitute a criminal offense and to refer matters investigated and results of its investigations "to prosecutors for criminal prosecution." The Central Authority also must certify that "the testimony, statements or items to be obtained will be used . . . in an investigation, prosecution or other proceeding in criminal matters, including the decision whether to prosecute."

With respect to the proposed treaty with Germany, the understanding was similarly to permit entities such as the Securities and Exchange and Federal Trade Commission or similar state authorities to obtain investigative information as long as the criteria set out in the treaty were met in the particular case. The approach under the proposed treaty with Germany is slightly different and reflects the extent to which the negotiators explored two areas of potential concern: first, some matters that were criminal in one jurisdiction were merely regulatory in the other, and, second, the different extents to which entities conducting regulatory or administrative investigations were authorized by law to refer such matters for criminal prosecution. As a solution, the negotiators defined "criminal investigations and proceedings"—for which treaty assistance is available—to encompass investigation of regulatory matters if (1) such matters could be referred for criminal prosecution or could lead to civil court proceedings, and (2) the "regulatory offense" being investigated would constitute a criminal offense in the Requested State.

Thus, through somewhat different formulas, both treaties serve to reach a balance so that the MLAT may be used to assist in administrative or regulatory investigations that focus on serious and potentially criminal conduct, without opening the

door to the treaty's use as a general instrument of information exchange in the administrative and regulatory sphere.

Question. Article 12(2) of the Treaty with Japan provides that the requested Party may provide the requesting Party with items that are in the possession of governmental departments of the requested Party to the "same extent and under the same conditions as such items would be available to its investigative and prosecuting authorities." Article 9 of the Treaty with Germany contains a similar provision, but applies it to "corresponding authorities" rather than "investigative and prosecuting authorities."

(a) Both provisions are discretionary. Please elaborate on the degree to which the U.S. government intends to provide information under these treaty provisos in light of U.S. federal laws restricting provision of such information (but permitting its provision to certain government agencies), including the Privacy Act of 1974 and Federal Rule of Criminal Procedure 6(e).

(b) Is there an understanding that these provisions will constitute a "convention . . . relating to the exchange of tax information" for the purpose of Title 26, United States Code, Section 6103(k)(4)? Or is such exchange of tax information already provided for under existing bilateral conventions for the avoidance of double taxation?

Answer. (a) As noted in the question, these provisions of the proposed Japanese and German treaties are essentially the same, and give the Requested State discretion to provide governmental information that is not publicly available to the same extent that it might be provided to its own prosecuting or investigating authorities. A similar provision is found in virtually all of our bilateral Mutual Legal Assistance Treaties.

The purpose of these treaties is to facilitate cooperation between the Parties in the investigation and prosecution of criminal offenses. The proposed treaty with Germany specifically states, in Article 1(1), that its purpose is "to afford each [Treaty partner] . . . the widest measure of mutual assistance in criminal investigations and proceedings . . . It is the intention of the U.S. Government to exercise its discretion favorably whenever possible, where information sought by a treaty partner will be important to the effective investigation or prosecution of a crime. At the same time, the treaties permit the Requested State to impose conditions of confidentiality or use restrictions equivalent to or greater than those that might apply in a domestic context, and such conditions or limitations may be imposed in order to meet legal requirements, or even if not legally mandated, as a policy choice of the Requested State. These provisions do not, however, permit disclosure of information to foreign authorities where such disclosure would be prohibited under U.S. law.

Regarding information in records maintained by a U.S. government agency that are covered by the Privacy Act, information could be provided under the treaties with Germany and Japan if disclosure of the information to foreign law enforcement officials was among the agency's published "routine uses" for such information (5 U.S.C. §552a(b)(3)), or pursuant to court order (5 U.S.C. §552a(b)(11)).

Regarding disclosure of grand jury material, it is noteworthy that Rule 6(e), F.R.Crim.P. has been amended to permit disclosure of grand jury material sought by foreign courts or prosecutors for use in a criminal investigation. However, such disclosure must be authorized by the court, and the court may impose conditions regarding such disclosure. Rule 6(e)(3)(E)(iii). These procedures would govern a request for grand jury information made by Germany or Japan under the respective Mutual Legal Assistance Treaties.

(b) The negotiators understood that these provisions would serve as a basis for exchange of tax information and that the Treaties with Germany and Japan would each constitute a "convention . . . relating to the exchange of tax information" for purposes of 26 U.S.C. §6103(k)(4). Such understandings are the rule, rather than the exception, for mutual legal assistance treaties.

The negotiators of the Mutual Legal Assistance Treaty with Germany agreed to cover assistance for tax offenses, although the United States and Germany are parties to a bilateral tax convention (1708 UNTS 3, entered into force August 21, 1991). Since investigations regarding tax offenses may include other types of crimes such as fraud, money laundering, or other unlawful activity which has produced unreported illicit income, the United States ordinarily seeks to include tax offenses within the scope of its Mutual Legal Assistance Treaties, so that investigators and prosecutors can make a single request for assistance covering the full range of offenses under investigation.

Article 25(1) of the MLAT makes it clear that the availability of "tax information" pursuant to its provisions in no way impinges on the availability to secure assistance pursuant to the tax convention (and vice versa).

Similarly, the Mutual Legal Assistance Treaty with Japan will cover assistance for tax offenses, although the United States and Japan are also parties to a bilateral tax convention (23 UST 967, entered into force July 9, 1972), for the reasons noted above with respect to the Treaty with Germany. Similarly, Article 17 of the MLAT makes it clear that the availability of tax information under the MLAT in no way impinges on the ability to obtain the same information pursuant to another applicable international agreement, such as the bilateral tax convention.

Treaty between the United States of America and Japan on Mutual Legal Assistance in Criminal Matters (Treaty No. 108–12)

Question. Article 7(2) of the Treaty with Japan permits the Central Authority of the requested Party to request that testimony or statements provided under the treaty be kept confidential or be used only subject to specified conditions, and requires the requesting Party to comply with such a request if it agrees with it. Paragraph 3 contains an exception to this requirement "to the extent that there is an obligation under the Constitution of the requesting Party to do so in a criminal prosecution."

> Does the quoted language about an obligation under the Constitution to disclose information in a criminal prosecution cover disclosure of information required under *Brady* v. *Maryland* and *Jencks* v. *United States*?

Answer. Article 7(2) recognizes a situation where the Requested Party may ask the Requesting Party to keep confidential or limit the use of certain testimony, statements, or items that the requested Party has an obligation to provide and no basis to deny under Article 3. Thus, the Requested Party intends to provide it, but wishes the Requesting Party to restrict its use. If the Requesting Party agrees to receive the assistance subject to such a restriction, it is obligated to comply with that restriction. However, Article 7(3) of the treaty provides an exception: U.S. prosecutors may make disclosures, even if contrary to restrictions the U.S. has accepted, to the extent required by *Brady* v. Maryland, which articulates a constitutionally based disclosure requirement.

Disclosure required under the Jencks Act, 18 U.S.C. § 3500, codifying the disclosure principles articulated in *Jencks* v. *United States,* is not constitutionally mandated. Therefore, the exception under 7(3) is inapplicable. Nonetheless, a restriction on disclosure imposed under the treaty does not relieve U.S. prosecutors of any disclosure obligations imposed by the Jencks Act or other U.S. law. In such a case, the U.S. prosecutor would either need to seek and obtain the permission of Japan to make the disclosure or inform the U.S. court of the prosecutor's inability to disclose, at which point it would be for the court to determine what remedy, if any, would be appropriate.

Treaty between the United States of America and Germany on Mutual Legal Assistance in Criminal Matters (Treaty No. 108–27)

Question. Article 14 of the Treaty with Germany provides that the Central Authority of the Requested State may request that evidence or information furnished under the treaty be kept confidential or used only subject to specified condition. The Requesting State is then required to use its "best efforts" to comply with the conditions. Article 15 of the Treaty provides a framework for limitation or conditions on use of information provided to the Requesting State. Article 16 contains restriction on the use of information or evidence received by the Requesting State in antitrust cases.

Please elaborate on the relationship of these three articles with the requirements of *Brady* v. *Maryland, Jencks* v. *United States,* the Jencks Act (18 U.S.C. 3500), and Federal Rule of Criminal Procedure 26.2.

Answer. Article 14(2) recognizes a situation where the Requested State may ask the Requesting State to keep confidential or limit the use of certain evidence that the Requested State has an obligation to provide and no basis to deny providing pursuant to Article 3. In this case, the Requested State intends to provide the evidence, but wishes the Requesting State to restrict its use (beyond any restriction or condition otherwise applicable under the treaty).

While the Requesting State has no obligation to accept subject to such a restriction, if it does so, then the Requesting State is obligated to use best efforts to comply. Use of best efforts does not permit the Requesting State's prosecutors to avoid

compliance with Constitutional and statutory disclosure requirements in criminal cases.

Article 15(1) of the proposed treaty recognizes a situation where the Requested State has a basis to deny assistance pursuant to Article 3 but may choose to provide the assistance subject to disclosure or use restrictions. Unlike Article 14(2), where the Requested State has no treaty basis to deny assistance and can only ask the Requesting State to accept restrictions and use best efforts to keep them, Article 15(1) requires that the Requesting State, if it has accepted conditions in order to obtain assistance that would otherwise be unavailable under the treaty, comply with those restrictions. As Article 15(4) makes clear, Article 15(1) does not affect the ability of the Requesting State's prosecutors to make disclosures required by *Brady* v. *Maryland.* However, the restrictions could affect the Requesting State's prosecutors' ability to disclose or make other uses in a manner inconsistent with the restrictions imposed and accepted (*e.g.*, compliance with the Jencks Act or the provisions of Rule 26.2, hereinafter referred to generally as "Jencks-related disclosures"). Even so, the restrictions would not relieve U.S. prosecutors of any disclosure obligations imposed by U.S. law. In such a case, the U.S. prosecutor would either need to seek and obtain the permission of Germany to make the disclosure, or inform the U.S. court of the prosecutor's inability to disclose, at which point it would be for the court to determine what remedy, if any, would be appropriate.

Article 15(2) sets out a general rule that the Requesting State may not use information obtained under the treaty, for a purpose other than that for which the information was originally sought, unless it obtains the prior consent of the Requested State. Article 15(3) provides exceptions when the Requested State's prior consent is unnecessary. Again, by virtue of Article 15(4), the general limitation of Article 15(2) does not apply where disclosure is required under *Brady.* The impact on Jencks-related disclosures may require prior consent where (1) the assistance (i.e., witness statement) to be disclosed does not relate to the purpose for which the Requesting State sought the information or assistance or (2) the disclosure does not fall within any of the exceptions set out in Article 15(3). However, since Jencks-related disclosures arise in the context of criminal prosecutions, and assistance, including the production of prior witness statements is generally available under the proposed treaty, such disclosures would ordinarily be permissible within the first exception under Article 15(3): "[t]he Requesting State may use any evidence or information obtained under this Treaty . . . . 1. for any other purpose for which assistance pursuant to this Treaty would be available. . . ."

Article 16 applies to antitrust investigations and prosecutions and obligates the Requesting State to (I) use assistance provided by the Requested State only with respect to antitrust matters and (2) protect that assistance in the same manner as evidence obtained under the Requesting State's laws. Since Article 15(4), discussed above, also applies to information provided under Article 16, a *Brady* disclosure is unaffected.

Jencks-related disclosures are permitted under Article 16, to the extent that they would occur in proceedings arising under the prosecution of antitrust offenses. However, where information was originally obtained for an antitrust proceeding under Article 16, but then became subject to Jencks-related disclosure requirements in the context of another prosecution of other offenses, prior consent of the Requested State would be required. Moreover, the exceptions under Article 15(3) to the prior consent rule, would not be applicable to evidence obtained under Article 16. Again, in such a situation the prosecutor must either obtain the consent of the Requested Party or inform the court of the inability to comply with the disclosure requirement, and in the latter case, it will be for the court to determine what remedy, if any, is appropriate.

Question. Article 12(2) of the Treaty with Germany authorizes a Party to "permit the operation in its territory of criminal investigations by law enforcement officers of the other Party acting under covert or false identity."

(a) What domestic U.S. laws govern such operations?

(b) Do any immunities, such as diplomatic immunity or the qualified immunity doctrine (under *Harlow* v. *Fitzgeraldi*), apply to German agents conducting such operations in the United States? Please elaborate.

(c) Are there any related agreements with the German government on the operation of their agents in the United States?

Answer. (a) Foreign law enforcement agents are subject to the provisions of the Foreign Agents Registration Act (18 U.S.C. §951), which are implemented in part through regulations at 28 C.F.R. §73.3. Subsections (b) and (c) of those regulations provide that foreign law enforcement agents must notify U.S. law enforcement au-

thorities or the Justice Department's Office of International Affairs, with respect to their pursuing investigative or other official actions in the United States. As a practical matter, U.S. law enforcement authorities would object to German law enforcement authorities conducting undercover activities within the United States unless such undercover activities were fully approved by and coordinated with U.S. law enforcement authorities. To the extent foreign law enforcement authorities act within the United States they are subject to United States laws.

(b) It is conceivable that a law enforcement officer of one Party accredited to that Party's Embassy or a consulate in the territory of the other Party might be authorized by the host state to participate in such an operation. In such a situation, immunities accorded to the foreign law enforcement officer under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations may be applicable to acts undertaken during the course of such an operation.

It is our understanding that a German officer operating in the United States would enjoy any qualified immunity applicable to domestic law enforcement officers only to the extent that U.S. law permitted the officer to be designated as a U.S. law enforcement official or otherwise specifically conveyed law enforcement powers or immunities upon such an officer. However, we are aware of only one provision that currently permits such designation: 19 U.S.C. § 1401(i), which permits foreign law enforcement officers to be designated to perform duties of a customs officer.

(c) We are not aware of any related bilateral agreements regarding the operation of German law enforcement agents in the United States or the operation of United States law enforcement agents in Germany. There is, however, a relevant enabling provision in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which both the United States and Germany are Parties. Article 9, paragraph 1(c), provides for possible cooperation among parties including arrangements "[in] appropriate cases and if not contrary to domestic law, [to] establish joint teams to . . . carry out [counternarcotics investigations]. Officials of any Party taking part in such teams shall act as authorized by the appropriate authority of the Party in whose territory the operation is to take place; in all such cases, the Parties involved shall ensure that the sovereignty of the Party on whose territory the operation is to take place is fully respected."

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN TO SAMUEL WITTEN, U.S. DEPARTMENT OF STATE

Protocol between the Government of the United States and the Government of the State of Israel Amending the Convention on Extradition (Treaty No. 109–3)

Question. Article 3 provides for new Article VI bis, which provides in paragraph 1(a) that extradition "shall not be granted" in one circumstance, and in paragraph 1(b) provides that extradition "may be denied" in another circumstance. Subparagraph (a) appears to be mandatory, while subparagraph (b) appears to be discretionary.

The Secretary's letter of transmittal, as set forth in Treaty Doc. 109–3, suggests that all of paragraph (I) is mandatory. It says that "[n]ew Article VI *bis* (I) bars extradition when the person sought has been convicted or acquitted in the Requested Party or another country for the same offense." (emphasis added)

Is subparagraph 1(b) mandatory or discretionary?

Answer. Subparagraph 1(b) is discretionary. Denial of extradition is mandatory under subparagraph 1(a), which addresses the situation where a fugitive has already been tried for the same offenses in the Requested Party and convicted or acquitted. Subparagraph I(b), however, is discretionary, and deals with the rather unusual situation in which the fugitive has been convicted in a third state, but has been returned to the Requested Party to serve all or part of the sentence resulting from that conviction. In this situation, the state receiving an extradition request may deny extradition if there has been a prior conviction in the third state. It is our understanding that Israel views its current laws as ordinarily requiring denial of extradition in this circumstance.

Question. What is the rationale for requiring, in subparagraph 1(b) of Article VI *bis* that the person sought for extradition serve his sentence in the Requested Party?

Answer. Subparagraph 1(b) of Article VI bis does not require the person sought for extradition to serve his sentence in the Requested Party. This Article generally deals with fact patterns concerning when a prior conviction for the same offense by

another sovereign could or should bar extradition. As noted in response to [the previous question] question 1, subparagraph 1(b) deals with what we believe would be the rather unusual situation where the person sought had previously been convicted in a third state, but had been transferred to the Requested Party (which presumably would be his state of nationality) to serve the sentence resulting from that conviction. If, thereafter, a request was made under the Protocol for the extradition of the person for the same offense, the Requested Party would have discretion to deny a request pursuant to subparagraph 1 (b) of Article VI *bis.*

Question. What is the practical implication of new Article VIII *bis*? In other words, does the law of either party require extradition to be denied under the circumstance covered by the provision?

Answer. The United States does not believe that application of the Requested Party's statute of limitation should act to bar extradition when the offense remains viable under the Requesting Party's laws regarding lapse of time. However, Israel's law currently requires extradition to be denied if an offense would have been time-barred under Israel's law had it been committed there. Because this is unambiguously Israel's current law, the negotiators included a provision (Article VIII *bis*) that explicitly permits Israel to deny extradition in such a circumstance, but only to the extent that it continues to be required under its law. Since the United States has no such legal limitation, Article VIII bis will have no practical implication in extradition proceedings within the United States. If Israel's law on this subject changes and extradition no longer is required to be denied on this basis, the exception in this article will no longer apply.

Question. New Article XI omits the following language set forth in Article XI of the current treaty: ". . . and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party."

Why was this language dropped from the proposed protocol?

Answer. The language referred to in this question is similar to that of Article VIII of the 1972 U.S.-UK extradition treaty. In both cases, this language was dropped and a more appropriate and detailed explanation of the information required for provisional arrest was substituted in the new instruments (New Article XI of the proposed U.S.-Israel Protocol and Article 12 of the proposed U.S.-UK treaty.) As explained in our answer to a question posed by Senator Biden regarding the proposed U.S.-UK extradition treaty, the provisional arrest language of the 1962 U.S.-Israel treaty has not been continued in this Protocol or other modern treaties because it does not provide sufficient guidance about what information should be provided at the provisional arrest stage—those urgent cases where it is appropriate to effect the immediate arrest of the fugitive—as opposed to the information that must be submitted with the formal extradition request to support a final judicial determination of extraditability.

The language of Article XI of the 1962 treaty states that the provisional arrest request should contain "an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party." Article V of the 1962 treaty provides that extradition shall be granted only if, in the case of a person not yet convicted, "evidence [is] found . . . sufficient . . . to justify his committal for trial. . . . " From the perspective of U.S. practitioners, the antiquated language of these provisions is not particularly helpful and would therefore not typically be included in a modem extradition treaty.

The purpose of provisional arrest is to permit, in urgent circumstances, the immediate arrest of the fugitive, pending the submission of the formal extradition documents that must be sufficient to meet all the requirements for extradition under the treaty and the domestic law of the requested country. Thus, information submitted in the context of provisional arrest is necessarily more abbreviated. The provision of the 1962 treaty gave no guidance as to what "further information," beyond the existence of a warrant and description of the fugitive, might be required and indeed suggested that no further information at all might be necessary. Article 7 of the Protocol amends Article XI of the 1962 treaty to make it clear that more information is required and provides guidance as to the several categories of information U.S. courts are likely to expect in order to issue a provisional arrest warrant.

In addition, the language of Article XI (provisional arrest) and Articles V and X (formal extradition) of the 1962 treaty is confusing because the distinction it clearly

means to draw between the abbreviated provisional arrest request made in urgent circumstances and the fully documented formal extradition request is muddied by referencing standards of proof at two stages in a domestic criminal case—arrest and committal for trial—which are not in fact different under much of modem U.S. criminal practice.

As noted above, the difficulty posed by the 1962 treaty's provisional arrest provision is addressed by the Protocol's amending Article XI to provide much greater guidance about the information to be included in the provisional arrest request. The Protocol also provides in new Article X (set out in Article 6 of the Protocol) fuller guidance as to what is to be included in the formal extradition request. The negotiators, however, retained the 1962 treaty's "committal for trial" evidentiary standard for the formal extradition proceeding, rather than substitute the "reasonable basis to believe" standard common in our modern treaties. This is because Israel continues to require a standard of *prima facie* evidence—the standard for "committal for trial" in its domestic criminal prosecutions—for purposes of formal extradition. (Israel, however, will no longer require that extradition documents conform to its hearsay or other evidentiary requirements applicable at trial (see new Article X *bis,* paragraph 2).) Retaining this language, however, will not affect U.S. extradition practice of requiring extradition evidence to meet a "reasonable basis to believe" or "probable cause" standard.

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN TO MARY ELLEN WARLOW, U.S. DEPARTMENT OF STATE

Protocol between the Government of the United States and the Government of the State of Israel Amending the Convention on Extradition (Treaty No. 109–3)

Question. In your prior response to a previous question, you discussed Articles XI and V of the 1962 convention with Israel.

In pertinent part, Article XI of the 1962 Convention provides that an application for provisional arrest—

> *shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested party.*

Article V provides that extradition shall be granted "only if the evidence be found sufficient, according to the law of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in that place . . ."

Your prior response states that from the "perspective of U.S. practitioners, the antiquated language of these provisions is not particularly helpful and would therefore not typically be included in a modern extradition treaty." You elaborate by stating that the language in the 1962 treaty is confusing because the intended distinction between the "abbreviated" provisional arrest request made under urgent circumstances and the documentation normally accompanying the formal extradition request is "muddied by referencing standards of proof at two stages in a domestic criminal case—arrest and committal for trial—which are not in fact different under much of modern U.S. criminal practice."

> (a) In the view of the Department of Justice, does the Fourth Amendment to the U.S. Constitution apply to provisional arrest under Article XI of the 1962 Convention with Israel?
>
> (b) In the view of the Department of Justice, does the Fourth Amendment to the U.S. Constitution apply to provisional arrest under Article XI of the Convention with Israel, as modified by Article 7 of the Protocol?

Answer. The Department of Justice has taken the position that the Fourth Amendment does apply in the context of the issuance of a warrant for provisional arrest pending extradition. That principle, applicable to requests under the current treaty with Israel, would continue to apply under the language of the new protocol.

Question. Do you expect that the amendment to Article XI of the Convention made by Article 7 of the Protocol will result in a substantive change in the practice of the Department of Justice with regard to the type and quantum evidence it presents to request provisional arrest warrants under the Constitution?

Answer. The Department of Justice does not anticipate any substantive change in the type or quantum of evidence that we submit to our courts in support of a request for issuance of a provisional arrest warrant.

QUESTIONS FROM SENATOR CHAFEE

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR CHAFEE TO SAMUEL WITTEN, U.S. DEPARTMENT OF STATE, AND MARY ELLEN WARLOW, U.S. DEPARTMENT OF JUSTICE

Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland (Treaty No. 108–23)

Question. I have been hearing from many Rhode Islanders who have concerns about this extradition treaty. I recently received a letter from the Ancient Order of Hibernians stating, "The responsibility for deciding whether or not an extradition request is politically-motivated is transferred from the courts to the Executive Branch of the government which we believe violates due process."

Their concerns about changes to the current treaty seem to stem from the fear that moving the decision about whether an extradition request is politically motivated from the Judicial to the Executive branch will deny them their "day in court."

Can you please explain this provision in the treaty and comment on these concerns?

Why is it appropriate to remove this decision from the purview of the Judiciary at this time?

Answer. There are two circumstances in which a defendant may assert that a purportedly political aspect of the case against him should bar his extradition.

The first concerns a claim that the offense itself for which extradition is sought is a "political offense." Under both the current and the new treaty between the United States and the United Kingdom, as well as under all of the U.S. Government's other extradition treaties, such claims are heard by the judiciary. ("Political offenses" could include, for example, non-violent speech protesting government action.) Under the current and new treaty with the United Kingdom, serious crimes of violence cannot be considered political offenses.

The second kind of "political" issue that might arise in the context of an extradition case is the "political motivation" issue referred to in the letter. This could be a claim by a fugitive sought for international extradition that he should not be extradited because the foreign government's decision to charge him or seek his extradition is illegitimate because it is motivated by the requesting country's desire to punish the person for his political views.

In U.S. practice, the question of "political motivation" is determined by the Secretary of State. This responsibility of the Secretary of State has been recognized by U.S. courts in the longstanding "Rule of Non-Inquiry," whereby courts defer to the Secretary in evaluating the motivation of the foreign government. This principle recognizes that among the three branches of the U.S. Government, the Executive branch is best equipped to evaluate the motivation of a foreign government in seeking the extradition of an individual. The U.S. Government's extradition treaties reflect the fact that the U.S. Secretary of State appropriately makes this judgment, and not the U.S. courts.

Indeed, until 1985, the issue of motivation of the Government of the United Kingdom in making an extradition request of the United States was treated the same as in all of our other extradition relationships—the courts played no role in reviewing this issue. In 1985, however, as part of an amendment of other aspects of the UK extradition relationship, the U.S. Senate developed what became Art. 3(a) of the 1972 U.S.-UK extradition treaty, as amended by the 1985 supplementary treaty, which states that extradition "shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions." This text was added pursuant to the Senate's Resolution regarding advice and consent to the 1985 supplementary treaty.

This anomalous treaty provision has led to long, difficult, and inconclusive litigation in several cases, where U.S. courts were thrust into the unfamiliar and inappropriate position of addressing motivation of a foreign government. The provision for judicial review of political motivation claims has been invoked in five cases, all

dating from the early 1990s. Four of these cases involved persons of Irish Catholic background who were convicted of crimes of violence in Northern Ireland, and who escaped from prison in Northern Ireland in 1983 and fled to the United States.

The first of these cases involved James Joseph Smyth, who had been convicted of the attempted murder of a prison guard. More than 40 witnesses were heard at his extradition hearing, and a 5-week evidentiary hearing was held. Ultimately, the record in the case exceeded 3,000 pages. In 1996, Smyth was finally extradited from the United States to the United Kingdom. He was subsequently released from prison in 1998 pursuant to an accelerated release law, the Northern Ireland (Sentences) Act 1998, that grew out of the Belfast Agreement. The next three cases involved defendants Kevin John Artt, Terence Damien Kirby, and Pol Brennan, who were arrested separately in the United States between 1992 and 1994. Their extradition cases were consolidated for consideration by U.S. courts. All had been convicted in the UK judicial system of felonies and sentenced to terms of imprisonment. Artt was convicted of murdering a prison official; Kirby was convicted of offenses. of possession of explosives and a submachine gun, false imprisonment, assault, and felony murder arising out of two separate incidents; Brennan was convicted of possession of explosives. There was extensive litigation and testimony in the U.S. District Court regarding their claims of prejudice under Article 3 of the 1985 supplementary treaty and numerous appeals. This litigation was and is unprecedented, as U.S. courts were put in the difficult position of evaluating defendants' claims of generalized, systemic bias within a foreign system of justice. In 2000, the United Kingdom withdrew its request for extradition, consistent with its announcement that it would not be seeking the extradition of persons who, if they had remained in prison in Northern Ireland, would have benefited from the 1998 early release law.

There are no pending extradition requests from the United Kingdom in connection with the conflict in Northern Ireland.

Appendix II—Additional Material Submitted for the Record

ANCIENT ORDER OF HIBERNIANS, POLITICAL EDUCATION COMMITTEE

JOHN E. MCINERNEY, *National Chairman,*
LARGO, MARYLAND,
July 22, 2004.

Hon. RICHARD G. LUGAR,
U.S. Senate, Washington, DC.

RE: PROPOSED USA-UK EXTRADITION TREATY

DEAR SENATOR LUGAR. I urge you to oppose the new extradition treaty between Great Britain and the United States which the President recently submitted to the United States Senate. The treaty was signed in March of 2003. This treaty, negotiated by U.S. Attorney General John Ashcroft and British Home Secretary David Blunkett, marks a serious unprecedented departure from two centuries of American extradition practice.

Let me assure you Senator Lugar that I read and studied this treaty in great detail and I realize that the treaty contains (1) a number of ill-considered erosions of judicial review, (2) would threaten the due process rights of Americans, and (3) seriously impact on American civil rights and civil liberties.

America has always been a refuge for those fleeing tyranny and persecution overseas. A "political offense" exception has been an essential component of every one of our extradition treaties since President Thomas Jefferson refused extradition to France of an outspoken opponent of-the French Revolution.

One of the many serious fatal flaws in this new British-American extradition treaty is that it weakens, if not eliminates, the time honored extradition safeguards that the current American-British extradition treaty includes. This proposed treaty is an unprecedented departure from two centuries of American extradition practice as far as the "political offense exception" is concerned.

The current extradition treaty, still in force, provides this very important safeguard that:

> . . . extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions . . . (Article 3(a) UK-U.S. Supplemental Treaty, 1986)

Sadly, this language is missing from the new proposed extradition treaty between Britain and the United States. Please compare the above language with the language in Article 4 of the proposed treaty.

I strongly believe this agreement would hinder our First Amendment right of free speech. if the new treaty is ratified, an American citizen who opposes British policy for example, an investigative journalist who wrote of current and past police abuses in the north of Ireland for an American newspaper—could face arrest and extradition without having any ability to challenge, in an American court before an impartial judge, whether the criminal charges are really a pretext for the punishment on account of race, religion, nationality or political opinion. This denial of due process and of our "day in court" is something so foreign to our American way of life and a serious erosion of over two centuries of freedoms every American takes for granted.

This new treaty will trample on our civil rights and civil liberties as Americans. I wish to further point out a few more major flaws in this proposed extradition treaty.

- The proposed extradition treaty transfers responsibility for determining whether the extradition request is politically motivated from the federal courts to the executive branch. (Article 4, #3) Under this provision, a person will not have the right of his or her "day in court" before an impartial judge. This will seriously impact the separation of powers that is at the heart of our American system of law.
- It allows for extradition even if no American federal law is violated. (Article 2, #4)
- The treaty will eliminate the need for any showing of the facts by the United Kingdom sufficient that the person requested for extradition to Britain is really guilty of the crime he or she is charged with. The mere unsupported allegations are sufficient for deportation to Great Britain. Never before in our nation's his-

tory has the United States government seriously considered subjecting the liberty of American citizens to the whims of a foreign government. (Article 8, #2 (b))

- The new treaty will allow for provisional arrest and detention of Americans for 60 days upon request by Great Britain with no formal extradition request providing supporting details. (Article 12) Under this provision, a person will not have the right of his or her "day in court" before an impartial judge.
- The terms of the proposed treaty will apply retroactively for offenses allegedly committed even before the treaty's ratification. No American citizen active in Irish and Irish American affairs who oppose British policy in the north of Ireland will be safe if this treaty comes into force. (Article 6)

For these and other major flaws in the proposed treaty, I strongly urge you to vote NO when this treaty comes to the floor of the United States Senate for ratification. Our government can negotiate a better treaty without signing away to Great Britain some of our basic rights and freedoms as American citizens.

Once again, I urge you to oppose the new extradition treaty and to support proper judicial review of extradition requests.

Finally, I hereby request that full public hearings be held when the Committee on Foreign Relations considers this new treaty and that this letter be made part of the printed record.

I look forward to reading your thoughts on this matter.

Sincerely,

JOHN E. MCINERNEY

P.S.: Those of us who know our proud American history remember the story of our patriot, Caesar Rodney. In July of 1776, he was aware of the importance of an unanimous vote in the Continental Congress to declare our nation's independence from Great Britain. A very sick man, he rode through the night from Delaware to Philadelphia to cast the crucial vote for Delaware for independence. I am sure if Caesar Rodney was alive today he would not cast a vote to curtail or take away the rights of American citizens in favor of Great Britain. Nor would he approve extradition on demand by Great Britain without due process.

IRISH AMERICAN UNITY CONFERENCE

A THREAT TO IRISH AMERICANS: THE NEW U.S./UK EXTRADITION TREATY

March 5, 2004

HONORABLE MEMBERS OF THE UNITED STATES SENATE: On March 31, 2003 U.S. Attorney John Ashcroft and UK. Home Secretary David Blunkett signed a new treaty, providing for extradition between the two countries of persons accused of crimes. The new treaty, which has yet to be ratified by the U.S. Senate, marks an unprecedented departure from two centuries of American extradition practice. America has always been a refuge for those fleeing tyranny overseas, and a "political offense exception" to extradition has been an essential element of every one of our extradition treaties since Thomas Jefferson refused extradition of an opponent of the French Revolution.

Although the new treaty pays lip service to the political offense exception, it removes that essential protection for those seeking refuge on our shores. Worse, it subjects U.S. citizens to extradition based solely on unproven allegations by the British government. Any American active in Irish affairs faces potential detention and transportation to the United Kingdom without any proof of guilt and without judicial review. Never before in its history has the United States government subjected the liberty of its citizens to the whims of a foreign government.

While the most immediate threat is aimed at those who reject the Good Friday Agreement (G.F.A.), this treaty is a threat to political activists across the board. In fact, the treaty appears to be an effort by the UK government to set the stage for the breakdown, of the G.F.A., allowing extradition of former activists for alleged past behavior.

Irish America strongly opposes this new extradition treaty, As professor Boyle states in the accompanying position paper, this treaty "is a British dagger pointed at Irish (and American) hearts."

We have attached for your review Professor Francis Boyle' s position paper as well as the ACLU Letter to the Senate Foreign Relations Committee.

ANDREW L. SOMERS, JR., *National President,*
Irish American Unity Conference

MATERIAL SUBMITTED BY FRANCIS A. BOYLE, PROFESSOR OF LAW, UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, COLLEGE OF LAW

Hon. RICHARD G. LUGAR, *Chairman,*
Hon. JOSEPH R. BIDEN, JR., *Ranking Member,*
U.S. Senate Foreign Relations Committee.

Re: Proposed United States-United Kingdom Extradition Treaty

DEAR SENATORS LUGAR AND BIDEN:

I.

I am in receipt of an undated document entitled "Response by the U.S. Department of State and the U.S. Department of Justice to Points Raised by the Irish-Americans Against Extradition Petition." I wish to thank you for your kind consideration in obtaining this formal Response to some of these concerns about the proposed U.S.-UK Extradition Treaty from the Department of State and the Department of Justice. As a preliminary matter, I fully concur with the 18 December 2003 Letter already sent to you by Ms. Laura Murphy, Director of the ACLU Washington Legislative Office and Mr. Timothy H. Edgar ACLU Legislative Counsel, which was also sent to all Members of the Senate Foreign Relations Committee on behalf of the American Civil Liberties Union. Articles 2 and 4 of the proposed Treaty will gut, destroy and eliminate the longstanding, time-honored, and well-grounded "political offense" exception to U.S. extradition law and practice in all but the name.

The United States of America was founded by means of a Declaration of Independence and a Revolutionary War fought against the British Crown, with which this proposed Treaty is to be concluded. But under the terms of this proposed Treaty, our Founding Fathers and Mothers such as John Hancock, George Washington, Thomas Jefferson, James Madison, Ben Franklin, John Adams, and Dolly Madison, *inter alia,* would be extradited to the British Crown for prosecution of their very revolutionary activities that founded the United States of America itself, Because of our Republic's unique historical origins and background, special care, concern, attention, and consideration must be taken with respect to the conclusion of any extradition treaty between the United States of America and the British Crown.

II.

It is obvious from the text of this proposed Treaty that it is directed primarily against Irish American citizens engaged in the lawful exercise of their constitutional rights under the First Amendment to the United States Constitution in order to protest the longstanding military occupation of six counties in Ireland by the British Crown in violation of the international legal right of the Irish People to self-determination as well as of the United Nations Declaration on the Granting of Independence to Colonial Countries and Territories, Resolution 1 514(XV) of 14 December 1960, which constitutes customary international law and jus cogens. *See* Francis A. Boyle, *The Decolonization of Northern Ireland,* 4 Asian Yearbook of International Law 25–46 (1995), a copy of which is attached. In particular, the inchoate crimes specified in article 2(2) and article 4(2)(g) of the proposed Treaty would make extraditable to the British Crown Irish American citizens who are exercising their rights under the First Amendment to the United States Constitution to protest the continued British military occupation of these six counties in Ireland as well as the deplorable human rights violations that have historically been inflicted by the British Crown upon Irish Catholics living in the north of Ireland, in the rest of Ireland, as well as within Great Britain itself and elsewhere.

Moreover, because of the court-stripping provisions found in article 2(4), article 2(5), article 4(3), article 4(4), article 5(3), article 7, article 18(1)(c), and article 18(2) of the proposed Treaty, there would be no judicial review by a U.S. Federal Court of the exercise of such First Amendment rights under the U.S. Constitution by Irish American citizens, and thus this proposed Treaty would be unconstitutional for that reason as well. Under the terms of this proposed Treaty, the First Amendment rights of Irish American citizens would be subjected to the unfettered discretion and

political biases of Executive Branch officials who in the past have shown no respect for the First Amendment rights of Irish American citizens when it came to the former's infiltration, investigation, prosecution, and persecution of perfectly lawful Irish American citizens as well as Irish American humanitarian organizations and Irish American political groups who were only exercising their First Amendment rights under the U.S. Constitution in order to protest the longstanding military occupation of six counties in Ireland by the British Crown as well as its campaign of human rights atrocities against Irish Catholics.

Moreover, the unconstitutional retroactivity of the proposed Treaty as set forth in article 22 would render Irish American citizens subject to extradition to the British Crown for their perfectly lawful exercise of First Amendment rights under the U.S. Constitution going all the way back into the indefinite past to at least the 1916 Irish Revolution for Independence against the same British Crown with which this proposed Treaty is to be concluded. This conclusion is only further confirmed and strengthened by article 6 of the proposed Treaty that unconstitutionally purports to eliminate any Statute of Limitations requirement for extradition as well.

Furthermore, such Irish American citizens would be subjected to unconstitutional preventative detention under article 12 of the proposed Treaty at the behest of the British Crown in violation of the Fifth Amendment and the Eighth Amendment to the United States Constitution. Furthermore, such Irish American citizens could be unconstitutionally seized and incarcerated pursuant to article 8(3)(c) and article 12 of the proposed Treaty at the behest of the British Crown in violation of the U.S. Constitution's Fourth Amendment prohibition on "unreasonable searches and seizures" as well as the Fourth Amendment requirement of "probable cause" for the issue of any warrants related thereto. Furthermore, such Irish American citizens would have their property unconstitutionally confiscated and transferred to the British Crown pursuant to article 16 of the proposed Treaty at the behest of the British Crown itself in violation of the "due process of law" requirement of the Fifth Amendment to the United States Constitution.

Furthermore, article 18 of the proposed Treaty eliminates in all but name the longstanding, time-honored and well-grounded Rule of Specialty for such Irish American citizens. In addition, article 18(2) of the proposed Treaty would permit Irish American citizens extradited to Britain then to be summarily shipped onward to some undesignated third state at the order of the British Crown and the political whim of the Department of State, where such Irish American citizens could readily be persecuted by that indeterminate third state. It becomes crystal clear that the primary purpose of this proposed Treaty is for the British Crown to target, threaten, intimidate, harass, persecute and terrorize Irish American citizens for exercising their First Amendment rights under the United States Constitution.

III.

Weighing most decisively against approving this proposed Treaty is the fact that since the U.S.-UK Supplementary Extradition Treaty came into force in 1986, the United States became a contracting party to the International Covenant on Civil and Political Rights in 1992, to which the United Kingdom is also a contracting party. This proposed U.S.-U.K. Extradition Treaty will violate several fundamental provisions of the Covenant that are expressly designed to protect the basic human rights of Irish American citizens, inter alia. In particular, but not limited to, I respectfully call to your attention the following treaty obligations and human rights protections under the Covenant that will be violated by this proposed Treaty:

> Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> Article 2(2): Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.
>
> Article 9(1): Everyone has the right to liberty and security of person.

Article 9(1): No one shall be subjected to arbitrary arrest or detention.

Article 9(3): Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

Article 9(3): It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial. . . .

Article 9(4): Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 9(5): Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10(1): All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 14(1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14(2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 14(7): No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15(1): No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

Article 17(1): No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation.

Article 18(1): Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 19(1): Everyone shall have the right to hold opinions without interference.

Article 19(2): Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 21: The right of peaceful assembly shall be recognized.

Article 22(1): Everyone shall have the right to freedom of association with others . . .

If the Senate were to consent to this proposed Extradition Treaty with the British Crown, that would effectively abrogate, violate, and set at naught these most basic human rights of Irish American citizens under the Covenant, to which the United States is a contracting party. Furthermore, Senate consent would also place the United States of America in breach of its solemn treaty obligations under these provisions of the International Covenant on Civil and Political Rights with respect to all the other contracting states parties as well. Such violations will render the United States subject to the treaty enforcement mechanisms of the Covenant as well as to the other ordinary enforcement mechanisms, remedies, and sanctions for violating a solemnly concluded international human rights treaty as well as the basic principle of customary international law and *jus cogens* that *pacta sunt servanda.*

IV.

Most significantly, on 18 December 2001 the British Crown formally derogated from its obligations under article 9 of the Covenant, whereas the United States of America has not so derogated. So long as that U.K. derogation to article 9 of the Covenant remains in force, there is no way the United States can lawfully extradite any Irish American citizen to the British Crown pursuant to the terms of this pro-

posed Treaty without the United States government violating its own obligations under article 2(1) of the Covenant: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. . . ." The United States cannot lawfully extradite Irish American citizens to the British Crown, which has derogated from its obligations under Covenant article 9, without the United States itself violating Covenant article 2(1) and article 9 with respect to its own Irish American citizens and also with respect to all the other contracting states parties to the Covenant.

Furthermore, as a contacting party to the Covenant, the United States is currently under an obligation not to extradite Irish American citizens to the United Kingdom where they will be subjected to gross and repeated violations of their most basic human rights by the British Crown. These facts have been most recently documented by the Nobel Peace Prize Winning Amnesty International, whose Headquarters and International Secretariat are located in London, the capital of the United Kingdom. Since Amnesty International is right there on the spot, they certainly know of what they speak. *See* International Secretariat of Amnesty International, *United Kingdom: Scrap Internment,* AI Index: EUR 45/008/2004 (23 Feb. 2004); Amnesty International, *United Kingdom: A Shadow Criminal Justice System,* AI Index: EUR 45/030/2003 (Public), News Service No: 278 (11 Dec. 2003); Amnesty International, *United Kingdom: Justice Perverted Under the Anti-Terrorism, Crime and Security Act 2001,* AI Index: EUR 451 029/2003 (11 Dec. 2003); Amnesty International Press Release, *UK: Basic Rights Denied After 11 September,* ENGEUR 45019 2002 (25 Feb. 2004); Amnesty International, *United Kingdom: Rights Denied: The UK's Response to 11 September 2001,* AI Index: EUR 45/016/2002 (5 Sept. 2002); Amnesty International, *United Kingdom: Amnesty International's Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001,* AI Index: EUR 45/017/2002 (5 Sept. 2002).

In light of this most extensive documentation by Amnesty International of massive violations of the most basic human rights of foreigners by the British Crown under the International Covenant on Civil and Political Rights, to which the United States is a contracting party, under the European Convention on Human Rights, under the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is a contracting party, and under other basic sources of both customary and conventional international human rights law too numerous to list here but identified, analyzed, and condemned authoritatively by the International Secretariat of Amnesty International headquartered in London itself, now is certainly not the time for the United States to conclude this proposed Extradition Treaty with the British Crown. According to Amnesty International, there currently exists a grave human rights emergency for foreigners in the United Kingdom that is quickly degenerating into a human rights catastrophe. Certainly the United States Senate must not subject Irish American citizens to these massive violations of their most fundamental human rights currently being inflicted on a daily basis by the British Crown against foreigners, as authoritatively documented by Amnesty International itself. And the human rights emergency/catastrophe in the United Kingdom for foreigners is getting worse every day. *See, e.g.*, Alan Cowell, *Britain, Citing Terrorist Threat, Plans to Expand Its Spy Agency,* New York Times, Feb. 26, 2004 (U.K. government proposals for secret trials and reducing the "proof beyond a reasonable doubt" standard for criminal convictions). The United States Senate must not risk subjecting Irish American citizens to secret trials, kangaroo courts, and a less-than-reasonable-doubt standard for criminal convictions by the British Crown. The odious infamy of Britain's Star-Chamber and Diplock Courts shall live forever in the annals of American Jurisprudence.

V.

Finally, even if the U.S. Senate were to amend article 3 of the proposed Treaty so as to prohibit the extradition of U.S. nationals thereunder to the British Crown, the above objections to the proposed Treaty would apply pari passu with respect to foreigners present in the United States whose extradition night be sought under the terms of the new Treaty by the British Crown, and especially for those foreigners of Irish Descent. The proposed Treaty would violate the most basic human rights of foreigners present in the United States, and especially those of Irish Descent, under the International Covenant on Civil and Political Rights. Covenant article 2(1) provides that the Covenant protects the basic human rights of everyone living in the United States, both citizens and foreigners alike: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its

territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The same can be said for those basic protections of the United States Constitution mentioned above, which apply equally to U.S. citizens and foreigners present in the United States.

Furthermore, with respect to those foreigners present in the United States, and especially those of Irish Descent, the proposed Treaty would also violate the solemn U.S. dual obligations of both (1) asylum and (2) non-refoulement as required by the 1967 U.N. Refugees Protocol, to which the United States is a contracting party, as well as under customary international law. We must never forget the grave injustices that the British Crown inflicted upon Joe Doherty with the support of the Department of State and the Department of Justice. *See United States and United Kingdom Supplementary Extradition Treaty: Hearings on Treaty Doc. 99–8 Before the Senate Committee on Foreign Relations,* S. Hrg. 99–703, 99th Cong., 1st Sess. 511 (1985). There must be no more Joe Dohertys!

CONCLUSION

For all of these reasons then, the United States Senate must refuse to give its advice and consent to the proposed U.S.-UK Extradition Treaty for any reason. There is no way this proposed Treaty can be salvaged by attaching any package of Amendments, Reservations, Declarations, and Understandings. The Senate Foreign Relations Committee must reject this Treaty outright. The currently existing bilateral and multilateral extradition treaty regime between the United States and the British Crown is more than sufficient to secure the prosecution or extradition of alleged terrorists. This proposed Treaty will only secure and guarantee the persecution of Irish American citizens, voters, and tax-payers by the British Crown. This proposed Treaty will also secure and guarantee the persecution of foreigners of Irish Descent present in the United States by the British Crown. The perfidy of this proposed Treaty cannot be overstated or underestimated. This Treaty is a British dagger pointed at the heart of Irish America.

Yours very truly,

FRANCIS A. BOYLE, *Professor of Law,*
Board of Directors, Amnesty International USA (1988–92)

TESTIMONY IN OPPOSITION TO THE RATIFICATION OF THE PROPOSED EXTRADITION TREATY BETWEEN THE UNITED STATES AND THE UNITED KINGDOM (31 MARCH 2003)

Good morning. My name is Francis Boyle, professor of law at the University of Illinois College of Law in Champaign. I have already submitted to the members of this committee a detailed memorandum of law against the ratification of this proposed extradition treaty dated 4 March 2004 that I respectfully request be entered into the formal record of these proceedings together with my written comments here today.

The United States of America was founded by means of a declaration of independence and a revolutionary war fought against the British crown. But under the terms of this proposed treaty, our founding fathers and mothers such as John Hancock, George Washington, Thomas Jefferson, James Madison, Ben Franklin, John Adams, and Dolly Madison would be extradited to the British crown for prosecution and persecution for their very revolutionary activities that founded the United States of America itself. Because of this American legacy of revolution against tyranny, the U.S. has always provided a safe haven for those seeking refuge on our shores. We have always been wary of efforts by foreign powers to transport Americans and foreigners for prosecution abroad on political charges. Indeed, in the declaration of independence itself, one of the specific complaints against British tyranny made by Thomas Jefferson was directed at the British custom of "transporting us beyond seas to be tried for pretended offences."

For that reason, several episodes in the early history of our republic such as that of citizen genet under Thomas Jefferson laid the foundation for the uniquely American notion of the "political offense exception" to extradition. In essence, the political offense exception holds that people in the United States will not be handed over to foreign governments for criminal prosecution when the crime alleged is political in nature.

The political offense exception has since become a standard part of customary international law. But the political offense exception is not some abstract notion cre-

ated by the world court, or the U.N., or any other international body. It began right here in the United States of America. And it was created by our founding fathers and mothers, who knew from personal experience, that it was outrageously unfair for a state to hand a person over to another state for political prosecution. It is a bedrock principle of American justice.

This basic principle of American justice is now under assault by means of this treaty which surely has George Washington, Thomas Jefferson as well as James and Dolly Madison turning in their graves. This new treaty marks an unprecedented departure from two centuries of American extradition practice. Although the new treaty pays lip service to the political offense exception, it effectively eliminates the political offense exception for all practical purposes. For example, the political offense exception is eliminated for any offense allegedly involving violence or weapons, including any solicitation, conspiracy or attempt to commit such crimes. As we have seen in Chicago, Florida, and New York, undercover U.S. government agents infiltrate peaceful Irish groups, suggest criminal activity, and then falsely claim that innocent members of those groups agreed with, or initiated, criminal statements. That is all it takes for solicitation or conspiracy to be extraditable under this proposed treaty.

In addition, the treaty wipes out a number of constitutional and procedural safeguards. It eliminates any statue of limitations, eliminates the need for any showing of probable cause, permits indefinite preventive Detention, applies retroactively to offenses allegedly committed before the treaty's ratification, eliminates the time-honored rule of specialty in all but name, allows for seizure of assets, and it does not matter if the behavior you are accused of is perfectly legal under united states law. Under this treaty, the heirs of George Washington could have their assets seized as proceeds of a criminal terrorist conspiracy. Even worse yet, all it would take for any of the people in this room to get extradited under this proposed treaty is a false allegation from the British government that one of its spies overheard them say something reckless about weapons or the armed struggle in Ireland that is now over. This treaty is unconstitutional under the First Amendment to the United States Constitution, which Britain does not have.

Most outrageously, responsibility for determining whether a prosecution is politically motivated is transferred from the U.S. federal courts to the executive branch of government. This means that instead of having your day in court, before a neutral. Federal judge, you will be required to rely on the not so tender mercies of the department of state, which historically has always been anglophile, pro-British, anti-Irish, and against Irish Americans and Irish America. There are now over forty million Irish American citizens, voters, and tax-payers, and we all especially like to vote. These court-stripping provisions of the treaty are unconstitutional under article iii of the United States constitution, which Britain also does not have.

As the current U.S. Irish deportation cases show, Britain can easily return Irish and British citizens to the United Kingdom. So why are the British now trying now to shift the extradition decision from the courts to the executive branch? Because you cannot deport a U .S. citizen. A U.S. citizen has to be extradited. Article 3 of the proposed treaty makes it crystal clear that her majesty's government wants to target Irish American citizens for prosecution in British courts, which have a long history of perpetrating legal atrocities against innocent Irish people.

Finally, for reasons fully explained in my 4 March 2004 memorandum to you, if the senate were to consent to this proposed extradition treaty, that would effectively abrogate, violate, and set a naught the most basic human rights of Irish American citizens under the international covenant on civil and political rights to which the United States is a contracting party. Furthermore, such senate consent to this proposed treaty would also place the United States of America in breach of its solemn treaty obligations under numerous provisions of that covenant with respect to all the other contracting states parties as well. Such violations will render the United States subject to the treaty enforcement mechanisms of that covenant as well as to the other ordinary enforcement mechanisms, remedies, and sanctions for violating a solemnly concluded international human rights treaty as well as the basic principle of customary international law and *jus cogens* that *pacta sunt servanda.*

For all these reasons the Senate Foreign Relations Committee must reject this treaty outright. There is no way this unconstitutional treaty can be salvaged by attaching any package of amendments, reservations, declarations, and understandings. The currently existing bilateral and multilateral extradition treaty regime between the United States and the British crown is more than sufficient to secure the extradition of alleged terrorists. This proposed treaty will only secure and

guarantee the persecution of Irish American citizens, tax-payers, and voters by the British crown. Thank you.

STATEMENT FOR THE RECORD SUBMITTED BY TIMOTHY H. EDGAR, NATIONAL SECURITY POLICY COUNSEL, AMERICAN CIVIL LIBERTIES UNION

On behalf of the American Civil Liberties Union and its more than 400,000 members, we are pleased to submit this statement for the record of a hearing on important revisions to the legal regime governing bilateral extradition treaties between the United States and the United Kingdom (Treaty Doc. 108–23) and between the United States and Israel (Treaty Doc. 109–3).

We urge you to delay consideration of these treaties in order to explore more fully the corrosive effect they would have on the role of the courts in extradition proceedings. The Senate should reject these treaties so they can be renegotiated to preserve the judiciary's proper role.

The new U.S.-UK extradition treaty and the proposed protocol amending the 1962 U.S.-Israel extradition treaty contain alarming court-stripping provisions, which threaten the fundamental due process rights of Americans and others accused of crimes by the British and Israeli governments.

Most troubling, article 4(3) of the proposed U.S.-UK extradition treaty and the amendments proposed by Article 3 of the protocol to Article 6(3) of the 1962 U.S.-Israel extradition treaty eliminate the American judiciary's role in determining whether an extradition request should be denied on the basis of the political offense exception. Under the treaties, the Executive Branch is given sole discretion to determine whether this exception applies.

The political offense exception to extradition has a centuries-old pedigree that protects Americans and others from political, religious or other impermissible persecution. The exception ensures that the United States does not unwittingly become the agent of punishment for a government's political opponents and dissidents. The exception also ensures the interests of the United States by safeguarding its neutrality in the political affairs of other countries. The exception is a general bar on extradition of alleged offenders who are sought for protected political activity, regardless of their ideology.

The ACLU agrees that terrorists and others who use violence against innocent civilians should find no haven in the United States. However, eliminating judicial review of the political offense exception is not necessary to ensure the extradition of suspected terrorists. American and international law provide that those who commit war crimes, crimes against humanity or who aid or commit terrorist acts against innocent civilians for political or ideological ends do not enjoy the benefits of the political offense exception.

The current extradition treaty with the United Kingdom, adopted in 1972, was amended by a Supplemental Treaty, ratified in 1986, that narrowed the political offense exception. The Supplemental Treaty, as originally proposed in 1985, would have eliminated any judicial role for determining whether any offense was a political offense. A firestorm of criticism greeted that proposal as opening the door to wholesale harassment of Irish American and other critics of British government policies, and the Senate refused to ratify it. Instead, a Supplemental Treaty was negotiated that excluded serious violent crimes from the political offense exception while ensuring judicial review to allow consideration of whether the accused would receive a fair trial in the United Kingdom.

The Senate Foreign Relations Committee described the 1986 Supplement Treaty as a successful "effort to balance anti-terrorism concerns and the right of due process for individuals."[1] Senator Biden explained, in a colloquy with Senators Kerry and Lugar that was adopted in the report accompanying the treaty, that the Senate intended the Supplemental Treaty to allow for broader judicial review:

> [T]he defendant will have an opportunity in Federal court to introduce evidence that he or she would personally, because of their race, religion, nationality or political opinion, not be able to get a fair trial because of the court system or any other aspect of the judicial system in a requesting country, or that the person's extradition has been requested with a view to try or punish them on account of their race, their religion, nationality or political opinion.[2]

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[1] *In re Smyth,* 61 F.3d 711 (9th Cir. 1995) (quoting S. Exec. Rep. No. 17, 99th Cong., 2d Sess., 3 (1986)).

[2] *Id.* (quoting S. Exec. Rept. No. 17 at 4–5).

The new U.S.-UK treaty would undo this compromise by eliminating this review. If the new treaty were ratified, an American who opposed British policy—for example, an investigative journalist who wrote of police abuses in Northern Ireland for an Irish American newspaper—could face arrest and extradition without having any ability to challenge, in an American court, whether the criminal charges are really a pretext for the punishment on account of race, religion, nationality or political opinion.

While both treaties preserve the courts' role in reviewing whether there is probable cause that the accused committed the crime, the "probable cause" standard is a low one and depends on information supplied by the foreign government. Such information may be difficult for the accused to rebut. For an extradition hearing to be meaningful, the accused must also be able to submit information about the improper political motivation of the extradition request, and an American judge must be free to consider such evidence.

Preservation of the political offense exception is an important bulwark for freedom in the world. Since the time of Thomas Jefferson, the United States has refused extradition requests for political offenses. Indeed, in the Declaration of Independence, the colonists accused King George of "transporting us beyond Seas to be tried for pretended offences." That principle applies with equal force today, no less than in 1776. No one in America should be sent to face trial in any foreign country without meaningful judicial review of all aspects relevant to extradition.

Both treaties contain other deeply troubling provisions. These include provisions which eliminate the statute of limitations as a defense to extradition (article 6 of the U.S.-UK treaty), allow for "provisional arrests" for as long as sixty days with no formal extradition request providing supporting details (article 12 of the U.S.-UK treaty; also article 7 of the Protocol amending article 9 of the 1962 U.S.-Israel treaty), and which allow for the treaty to be applied retroactively (article 22 of the U.S.-UK treaty; also article 11 of the Protocol).

Attorney General Ashcroft announced at the signing ceremony for the new U.S.-UK treaty "should serve as a model to the world" and could lead to revising other extradition treaties.[3] As a result, Senate approval of these treaties, especially without thorough review and hearings, could encourage the Administration to pursue treaties with other nations that diminish due process and meaningful judicial review.

Without a meaningful political offense exception as a part of our extradition laws, the United States could well lose its place as a haven for the persecuted. In the early days of the Cuban revolution—before the United States broke off diplomatic relations with Fidel Castro—the political offense exception pre-vented the return of Cuban dissidents to face criminal charges by the Castro regime.[4] The political offense exception also sheltered a Greek public official from being sent back to face corruption allegations that resulted from his opposition to the takeover of his town by a Communist party government.[5]

The Senate should stand in favor of meaningful judicial review of political offenses, and should reject these new extradition treaties so they may be renegotiated to protect the role of the courts.

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[3] Attorney General Ashcroft's remarks at the signing ceremony are available at: http://www.usdoj.gov.

[4] *Ramos* v. *Diaz,* 179 F. Supp. 459 (S.D. Fl. 1959).

[5] *In re Mylonas,* 187 F. Supp. 716 (N.D. Ala. 1960).

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