S. HRG. 105–730

EXTRADITION, MUTUAL LEGAL ASSISTANCE, AND PRISONER TRANSFER TREATIES

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

SEPTEMBER 15, 1998

Printed for the use of the Committee on Foreign Relations

Available via the World Wide Web: http://www.access.gpo.gov/congress/senate

U.S. GOVERNMENT PRINTING OFFICE
51–624 CC WASHINGTON : 1998

COMMITTEE ON FOREIGN RELATIONS

JESSE HELMS, North Carolina, *Chairman*

RICHARD G. LUGAR, Indiana	JOSEPH R. BIDEN, JR., Delaware
PAUL COVERDELL, Georgia	PAUL S. SARBANES, Maryland
CHUCK HAGEL, Nebraska	CHRISTOPHER J. DODD, Connecticut
GORDON H. SMITH, Oregon	JOHN F. KERRY, Massachusetts
CRAIG THOMAS, Wyoming	CHARLES S. ROBB, Virginia
ROD GRAMS, Minnesota	RUSSELL D. FEINGOLD, Wisconsin
JOHN ASHCROFT, Missouri	DIANNE FEINSTEIN, California
BILL FRIST, Tennessee	PAUL D. WELLSTONE, Minnesota
SAM BROWNBACK, Kansas	

JAMES W. NANCE, *Staff Director*
EDWIN K. HALL, *Minority Staff Director*

C O N T E N T S

EXTRADITION, MUTUAL LEGAL ASSISTANCE, AND PRISONER TRANSFER TREATIES

TUESDAY, SEPTEMBER 15, 1998

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

The committee met, pursuant to notice, at 10:06 a.m. in room SD–419, Dirksen Senate Office Building, Hon. Rod Grams presiding.

Senator GRAMS. Well, good morning. I am a little late, but I would like to get our hearing under way this morning to consider law enforcement treaties. I want to welcome Ms. Borek and also Mr. Richard here this morning. I look forward to your answers to our questions and also to your statement. But before that I just have a brief opening statement as well. So again, thank you for being here this morning.

A record 30 law enforcement treaties are being considered by this committee today: 13 extradition treaties, 16 mutual legal assistance treaties, and 1 prisoner transfer treaty. All of these treaties are designed to further law enforcement interests and generally enjoy bipartisan support.

The United States is party to more than 100 bilateral extradition treaties and, of the 13 extradition treaties, only the treaty with Zimbabwe represents a new treaty relationship. Treaties with the Caribbean countries, India, and Cyprus replace a 1931 treaty with the United Kingdom which continued to apply to these countries even after their independence. The other treaties modernize older treaties to ensure that all criminal acts punishable in both countries by 1 year in prison are covered by the treaties.

Extradition relationships have long been a basis of bilateral relationships and represents a recognition by the United States of the legitimacy of a country's judicial system. Respect for a treaty partner's judicial system is essential since the treaties permit the transfer of individuals to another country in order to stand trial for alleged crimes. The treaty with Zimbabwe therefore signals a very important advancement in the U.S. relationship with that country.

The treaties serve to create a web of relationships that make it increasingly difficult for criminals to find a safe haven from criminal prosecution.

While opportunities are created by the increasing globalization, this openness can have detrimental effects as well, most notably the easy mobility of criminals, whether by physical travel or electronic connections via the WorldWide Web. Extradition of criminals

becomes increasingly important to ensure that these wrongdoers are brought to justice.

Now, since September 1997 185 persons were extradited to the United States for prosecution for crimes committed in the United States and the United States extradited 73 individuals to other countries for prosecution.

A number of mutual legal assistance treaties are also being considered today, many of which are with the Eastern European and Caribbean countries, where fighting organized crime, drug trafficking, and money-laundering activities are high priorities for the United States. MLAT's provide for the sharing of information and evidence related to criminal investigations and prosecutions.

The need to obtain the cooperation of foreign authorities is frequently critical to effective criminal prosecution. MLAT's enable U.S. prosecutors to obtain material and statements from treaty partners in a form that comports with U.S. legal standards.

Finally, today the committee is looking at a prisoner transfer treaty between the United States and Hong Kong. That treaty facilitates the exchange of administrative responsibilities for final jail sentences and enables prisoners to serve their sentences in their home countries. This is designed to permit prisoners to be located closer to family and friends so that they may more easily visit with them.

In the case of the Hong Kong agreement, the committee will need to be assured that this transfer of prisoners will be limited to Hong Kong and not the People's Republic of China.

There is no question that these are important treaties. I believe they provide the framework for the sharing of information and transfer of criminals worldwide. It is essential, therefore, that in the wake of the Rome Treaty adopted by more than 100 countries in July to create a permanent international criminal court that the Senate clarify the relationship of these treaties with such a court.

I am concerned that these treaties could be used to facilitate both the transfer of suspects, witnesses and other information to that misconceived court. At a hearing before the International Operations Subcommittee last month, both Chairman Helms and I made clear that the United States must isolate this court and ensure that no assistance is given it. The approval of these treaties must be contingent on an understanding that no persons will be extradited to the international criminal court and that no legal assistance will be given to the court.

Last this morning, I would like to note that Attorney General Janet Reno is personally interested in these treaties and this committee will continue to work with her on important law enforcement issues as well. In fact, she is committed to appear before this committee on October the 1st to testify regarding the increasing law enforcement problem of international parental kidnapping.

Today, however, the committee will hear first from Jamison S. Borek—am I pronouncing that correctly—the Deputy Legal Adviser for the Department of State, followed by Mark M. Richard, the Deputy Assistant Attorney General for criminal matters. I want to welcome you both here this morning and you may begin your testimony. Ms. Borek, we will begin with you. Thank you again.

STATEMENT OF JAMISON S. BOREK, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

Ms. BOREK. Thank you, Mr. Chairman, I am pleased to appear before you today and I thank you and the other members of the committee and staff for holding this hearing to consider a number of very important international law enforcement cooperation treaties. As you have noted, these treaties fall into three categories.

We have a number of extradition treaties, with Antigua and Barbuda, Argentina, Austria, Barbados, Cyprus, Dominica, France, Grenada, India, Luxembourg, Mexico, Poland, Spain, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Zimbabwe. With the exception of Zimbabwe, as you have noted, these treaties seek to bring up to date and make much more effective and usable a number of treaties that date back even to the late 1800's in some cases.

We have in addition mutual legal assistance treaties with Antigua and Barbuda, Australia, Barbados, Brazil, Czech Republic, Dominica, Estonia, Grenada, Hong Kong, Israel, Latvia, Lithuania, Luxembourg, Poland, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Venezuela.

Unlike the extradition treaties, which go back almost 100 years, the mutual legal assistance treaty program is relatively new and has been started only in the last decades. We have found this a very important component, with the growth of international organized crime and transnational crime, to assist in the investigation of crimes and ultimately in their prosecution.

In addition, we have a prisoner transfer treaty with Hong Kong, which is necessary given the reversion of Hong Kong to Chinese sovereignty and the lack of continued applicability of the multilateral convention, the Council of Europe Convention on the Transfer of Sentenced Persons.

Mr. Chairman, you have covered many of the essential points in your opening statement. The negotiation of these new treaties is important given the increasing threat of transnational crime and international organized crime, particularly in priority areas such as terrorism, organized crimes, arms, and drug trafficking. We have been seeking to improve these treaty tools in countries where there are particular threats, not necessarily because of domestic crime issues, but sometimes because they are transit points or important money-laundering centers. We are also attempting to extend agreements to what were formerly Eastern European countries with whom we did not have law enforcement relations, but in light of the new realities in these countries it is an appropriate time to do so.

We are also seeking to extend and strengthen our relationships in the Asian areas as this is a new focus of activity, and also in other selected areas where there are particular problems.

With your permission, Mr. Chairman, I will not read my entire statement, but ask that it be accepted and printed in the record.

Senator GRAMS. Without objection.

Ms. BOREK. Thank you.

[The prepared statement of Ms. Borek follows:]

PREPARED STATEMENT OF JAMISON S. BOREK

Mr. Chairman and members of the Committee: I am pleased to appear before you today to testify in support of 38 treaties for international law enforcement cooperation. The treaties, which have been transmitted to the Senate for advice and consent to ratification, fall into three categories:

- extradition treaties with Antigua and Barbuda, Argentina, Austria, Barbados, Cyprus, Dominica, France, Grenada, India, Luxembourg, Mexico, Poland, Spain, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Zimbabwe.
- mutual legal assistance treaties—or "MLATs"—with Antigua and Barbuda, Australia, Barbados, Brazil, Czech Republic, Dominica, Estonia Grenada, Hong Kong, Israel, Latvia, Lithuania, Luxembourg, Poland, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Venezuela.
- a prisoner transfer treaty with Hong Kong.

The Department of State greatly appreciates this opportunity to move toward ratification of these important 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.

The negotiation of new extradition and mutual legal assistance treaties are one important part of the President's comprehensive International Crime Control Strategy, which was announced last May. That Strategy recognizes the increasing threat of international crimes such as terrorism, organized crime and arms and drug trafficking. One important measure to better address this threat is to enhance the ability of U.S. Law enforcement officials to cooperate effectively with their overseas counterparts in investigating and prosecuting international crime cases. One of the Strategy's eight goals is to deny safe haven to international criminals—and the negotiation of new extradition and mutual legal assistance treaties is one of the objectives necessary to reaching that goal. Replacing outdated extradition treaties with modern ones and negotiating extradition treaties with new treaty partners is necessary to create a seamless web for the prompt location, arrest and extradition of international fugitives. The Strategy also underscores that mutual legal assistance treaties are vitally needed to provide rapid, mutual access to witnesses, records and other evidence in a form admissible in criminal prosecutions. The instruments before you today will be important tools in achieving this goal.

EXTRADITION TREATIES

I will first address the extradition treaties currently before the Committee. As you know, under U.S. law, fugitives can only be extradited from the United States pursuant to authorization granted by statute or treaty. The treaties pending before the Committee will create new or updated treaty relationships with many important law enforcement partners.

There are sixteen comprehensive extradition treaties before the Committee. Fifteen of these treaties update outdated extradition treaty relationships in order to ensure their effectiveness. These are part of the Administration's ongoing program to review and revise older treaty relationships, many of which are extremely outdated and do not include many modern crimes or modern procedures.

- Ten of these treaties will replace existing treaty relationships between the United States and former British territories that are now based on the 1931 or 1972 U.S.-UK extradition treaties—Antigua and Barbuda, Barbados, Cyprus, Dominica, Grenada, India, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.
- Another five of the extradition treaties before the Committee are with countries with which we have other older relationships that needed to be updated—these are Austria (which is now governed by a 1930 treaty as supplemented in 1934), Luxembourg (now governed by 1883 treaty with 1935 Protocol), France (now governed by 1909 treaty as supplemented in 1970 and 1971), Poland (now governed by 1927 treaty with 1935 Protocol) and Argentina (now governed by 1972 treaty). With the passage of time, these treaties are not as effective as the modern treaties before the Committee today in ensuring that all fugitives may be brought to justice.
- Finally, the sixteenth extradition treaty before the Committee is with Zimbabwe. With this treaty we will for the first time create a bilateral extradition relationship with that country, which became independent in 1980. The U.S.-Zimbabwe treaty will be the first U.S. law enforcement cooperation treaty

with that country and over time may be a model for additional law enforcement relationships in the region.

All of the sixteen comprehensive extradition treaties contain several noteworthy provisions that will substantially serve our law enforcement objectives.

First, these treaties define extraditable offenses to include conduct that is punishable by imprisonment or deprivation of liberty for a period of one year or more in both states. This is the so-called "dual criminality" approach. Treaties negotiated before the 1970s typically provided for extradition only for offenses appearing on a list contained in the instrument. As time passed, these lists grew increasingly out of date. The dual criminality approach obviates the need to renegotiate treaties to cover new offenses in instances in which both states pass laws to address new types of criminal activity.

Second, these treaties will permit extraditions whether the extraditable offense is committed before or after their entry into force. This provision is particularly useful and important, since it will ensure that persons who have already committed crimes can be extradited under the new treaties from each of the new treaty partners after the treaty enters into force.

Third, these treaties all contain a provision that permits the temporary surrender of a fugitive to the Requesting State when that person is facing prosecution for, or serving a sentence on, charges within the Requested State. This provision can be important to the Requesting State and in some cases the fugitive for instance, so that: 1) charges pending against the person can be resolved earlier while the evidence is fresh; or 2) where the person sought is part of a criminal enterprise, he can be made available for assistance in the investigation and prosecution of other participants in the enterprise.

These treaties also address two of the most difficult issues in our extradition treaty negotiations—extradition of nationals of the Requested State and extraditions where the fugitives may be subject to the death penalty in the Requesting State.

As a matter of longstanding policy, the U.S. Government extradites United States nationals. Eleven of the sixteen comprehensive treaties before the Committee contemplate the unrestricted extradition of nationals. Specifically, the proposed extradition treaties with all ten of the former British dependencies noted above except Cyprus, plus the treaties with Argentina and Zimbabwe, provide that nationality is not a basis for denying extradition. Many countries, however, are currently prohibited by their constitutions or domestic law from extraditing their nationals. The U.S. Government has made it a high priority to convince states to change their constitutions and laws and agree to extradite their nationals. This is, however, a very sensitive and deep-seated issue and we have not succeeded in obtaining unqualified approval in all circumstances.

The treaty with Argentina is in this respect particularly significant. Paragraph 3 of the Argentina treaty provides that "[t]he extradition and surrender of the person sought shall not be refused on the ground that such person is a national of the Requested Party." This provision is especially useful since a relatively large percentage of fugitives wanted by the United States in that country are likely to be of Argentine nationality. This treaty, and our treaty with Bolivia which also permits extradition of nationals, to which the Senate gave advice and consent in 1996, represent a watershed in our efforts to convince civil law countries in the western hemisphere to oblige themselves to extradite their nationals to the United States. We are already using these treaties as precedents in our efforts with other nations in Latin America and elsewhere. In practical terms, these treaties should help the United States to bring to justice narcotics traffickers, regardless of nationality, who reside or may be found in these countries.

The treaties with Austria, Cyprus, France, Luxembourg and Poland do not require a Requested State to extradite its nationals. In each of these treaties, however, should a Requested State refuse extradition on the basis of nationality, it is obliged upon request of the Requesting State to submit the case to its competent authorities for prosecution. The U.S. delegations pursued mandatory extradition of nationals strenuously with these countries, but the domestic laws of these countries currently prohibit the extradition of nationals and those governments were therefore unable to commit to the extradition of nationals. We are continuing our efforts to convince these and all other countries to remove Constitutional and other legal restrictions on the extradition of nationals.

A second issue that often arises in modern extradition treaties involves extraditions in cases in which the fugitive may be subject to the death penalty in the Requesting State. A number of countries that have prohibited capital punishment domestically, also, as a matter of law or policy, prohibit the extradition of persons to face the death penalty. To deal with this situation, or to address the possibility that in some cases that the United States might want to seek such assurances, a

number of recent U.S. extradition treaties have contained provisions under which a Requested State may request an assurance from the Requesting State that the fugitive will not face the death penalty. Provisions of this sort appear in the extradition treaties with Austria, Argentina, Cyprus, France, India, Luxembourg and Poland. In our negotiations with Antigua and Barbuda, Barbados, Dominica, Grenada, St. Kitts and Nevis. St. Lucia, and St. Vincent and the Grenadines, and Trinidad and Tobago, it was agreed that the possibility of the death penalty would not serve as a basis for the denial of extradition.

In addition to these sixteen comprehensive treaties, that regulate all essential elements of bilateral extradition relations, there are two instruments with Spain and Mexico that supplement existing treaties with those countries.

The first of these is entitled the Third Supplementary Extradition Treaty with Spain. This Supplemental treaty will facilitate the extradition of fugitives by eliminating two impediments in U.S.-Spain extradition practice. It will remove the statute of limitations of the Requested State as a basis for denying extradition making only the statute of limitations in the Requesting State relevant. It will also provide that amnesties, which are occasionally promulgated in Spain but typically not in the United States, will not bar extradition of fugitives sought by one party for offenses that are the subject of an amnesty in the other Party.

The second supplemental treaty is the Protocol to the U.S.-Mexico Extradition treaty, which adds to the 1978 U.S.-Mexico extradition treaty a provision on the temporary transfer of persons for trial in the Requesting State of persons who have been convicted and sentenced in the Requested State. This provision is similar to those the United States has included in many of its modern extradition treaties and will facilitate the transfer of prisoners from one treaty partner to the other for trial while evidence and witnesses are still available and fresh.

MUTUAL LEGAL ASSISTANCE TREATIES

I will now comment briefly on the mutual legal assistance treaties with Antigua and Barbuda, Australia Barbados, Brazil, Czech Republic, Dominica, Estonia, Grenada, Hong Kong, Israel, Latvia Lithuania, Luxembourg, Poland, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Venezuela. The Department of Justice will speak on these treaties at greater length.

These mutual legal assistance treaties before the Committee are similar to twenty other MLATs that have entered into force with countries throughout the world. The U.S. Government's's mutual legal assistance treaty program is relatively new when compared with extradition but have fast become a central aspect of our international law cooperation program. As a general matter, MLATs obligate the Requested State to provide the Requesting State with certain kinds of evidence, such as documents, records, and testimony, provided that treaty requirements are met. Ratification of the MLATs under consideration today will enhance our ability to investigate and prosecute a variety of crimes, including violent crime, drug trafficking and terrorism offenses.

All of the MLATs require the Contracting Parties to assist each other in proceedings related to the forfeiture of the proceeds and instrumentalities of criminal activity, to the extent such assistance is permitted by their respective laws. Such assistance may prove invaluable insofar as it is used to deprive international drug traffickers and members of organized crime of the benefits of their criminal activity. The MLATs also provide that forfeited and seized assets or the proceeds of their sale may be transferred to the other Party.

As is the case with all MLATs currently in force, there are exceptions to the obligation to provide assistance. Although the language varies to a certain extent among the treaties, all of the pending MLAT provide that requests for assistance may be denied if their execution would prejudice the essential interests of the Requested State. Assistance may be postponed if the Requested State determines that execution of a request would interfere with an ongoing criminal investigation or proceeding. For all of the treaties, the provisions relating to procedures to be followed in making requests and the type of assistance to be provided track closely provisions contained in the other MLATs currently in force.

A key provision of all MLATs is the creation of "Central Authorities" to coordinate requests for assistance. For the United States, the Attorney General or her designee is the Central Authority. As the Department of Justice implements these treaties, I will defer to Deputy Assistant Attorney General Richard in describing the other specific provisions of these instruments and issues related to their implementation.

HONG KONG PRISONER TRANSFER TREATY

Also before the Committee is the U.S.-Hong Kong Prisoner Transfer Agreement. The purpose of this instrument is to facilitate the transfer of persons sentenced in the United States and in Hong Kong to their home territory to serve their sentences, as was possible when Hong Kong was part of the United Kingdom and transfers were possible under the multilateral Council of Europe Convention on the Transfer of Sentenced Persons, to which the United States and the United Kingdom are parties. The Agreement achieves this purpose by establishing procedures that can be initiated by sentenced persons who prefer to serve their sentences in their home territory. The means employed to achieve this purpose are similar to those embodied in existing bilateral prisoner transfer treaties in force between the United States and eight other countries, and in the Council of Europe Convention.

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

Senator GRAMS. Thank you very much. Mr. Richard.

STATEMENT OF MARK M. RICHARD, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. RICHARD. Thank you, Mr. Chairman. With your permission, I would like to submit my full statement for the record and merely summarize it at this time.

Senator GRAMS. Without objection.

Mr. RICHARD. Our negotiation of these extradition treaties that are before the committee is a major aspect of our efforts to deny sanctuary or safe haven to international criminals, as you have noted in your opening statement. But obtaining physical custody of the fugitives through extradition processes means little in most instances unless we have the evidence to convict them at trial.

For that purpose we must turn to processes that afford us the opportunity to acquire such evidence and to acquire it in a usable fashion. The device, the means to accomplish that objective, is in fact the mutual legal assistance treaties before the committee. They provide for assistance at all stages of the U.S. criminal investigation and prosecution, including grand jury proceedings. They also enable us, significantly, to obtain the assistance in a speedier process than otherwise available through non-treaty mechanisms currently on the books.

As Ms. Borek already indicated, the extradition treaties attempt to modernize our extradition process. The extradition treaties by and large attempt to incorporate the most modern approaches and efficient approaches to international extradition. Each of the treaties use the dual criminality approach, which permits extradition for any crime punishable in both countries by more than 1 year imprisonment. This enables us to ensure that, with the passage of new criminal statutes in both countries, that we need not come back to have protocols to the treaty in order to have those crimes covered by the extradition treaty.

The new treaties also incorporate a variety of procedural improvements. For example, they clarify the provisional arrest provisions whereby, once we identify the location of a fugitive, we can immediately seek to detain him or her while the documents are being prepared.

The treaties also allow a state to temporarily transfer a person in custody while he is serving a sentence in the state in order to expedite prosecution in the requesting country. The treaties also allow the person sought to waive extradition and expedite return

to the requesting state, thereby substantially expediting extradition in uncontested cases.

Moreover, the extradition treaties reflect our law enforcement priorities and relations. We have tried to emphasize in the negotiating process those treaties that will in fact be of paramount practical value to U.S. law enforcement. By U.S. law enforcement, I am not limiting it to just Federal law enforcement. These treaties apply to state and local authorities, enabling them to acquire prisoners and fugitives that they are interested in.

Let me turn briefly to the mutual legal assistance treaties. These treaties join 20 other MLAT's that have been ratified since 1977, beginning with the first with Switzerland. Our efforts to investigate and prosecute serious crimes must take into account the fact that critical evidence in major cases is often found abroad. Acquiring this evidence and acquiring it in a fashion that is usable in our court is not always an easy process.

I would want to emphasize, though, that these treaties we recognize are not panaceas. They can be extremely useful tools, but they will not by themselves resolve the problem of international crime. Moreover, an MLAT's effectiveness in our experience ultimately depends on the good faith and commitment of the parties, as well as on the specific language of the instrument.

Generally, these MLAT's contain the same characteristic provisions. They all create a central authority. In this case that central authority has been designated as the Attorney General and that function is in fact delegated to the Criminal Division and our Office of International Affairs. They also provide as broad a scope of coverage as possible, in order to enable us to obtain information and evidence in connection with the broadest scope of offenses. They also provide mechanisms for us to acquire information and acquire it in a fashion so as to have it usable in our courts, and this is particularly relevant in terms of affording defense an opportunity for confrontation in terms of taking depositions.

Significantly, the MLAT process we have found is far more efficient and effective, and it provides for prosecutors and investigators a level of predictability that we never had before. The alternative basis, depending on the principles of comity, never enables us with great confidence to predict whether at the time of trial we will have the evidence in a fashion that we need. Here under the MLAT we now have a heightened level of predictability and thus confidence when we bring a case that we will be able to take it to trial at the appropriate time.

Turning to the Hong Kong Prisoner Transfer Treaty just briefly, this treaty will provide a basis for us to renew the prisoner transfer relationship which we shared with Hong Kong from 1988 until 1997. Its substantive provisions are quite similar to those in our existing prisoner transfer treaties and, like those treaties, the U.S.-Hong Kong agreement permits a transfer only when both parties and the prisoner consent. This is critical because it does require the consent of the prisoner.

Finally, based on our experience with Hong Kong under the Council of Europe Treaty, we expect a relatively small number of requests for transfer under this agreement.

In conclusion, Mr. Chairman, we appreciate the committee's support in our efforts to address the problem of combating international crime and the Attorney General has asked me to express her appreciation to you for holding these hearings.

Thank you.

[The prepared statement of Mr. Richard follows:]

PREPARED STATEMENT OF MARK M. RICHARD

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 38 law enforcement treaties that have been referred to the Committee. Eighteen of the 38 treaties are extradition treaties, with Antigua-Barbuda, Argentina, Austria, Barbados, Cyprus, Dominica, France, Grenada, India, Luxembourg, Mexico Extradition Protocol, Poland, Spain Extradition Protocol, St. Kitts-Nevis, St. Lucia, St. Vincent-the Grenadines, Trinidad-Tobago, and Zimbabwe. Another 19 treaties are mutual legal assistance treaties (or "MLATs") with Antigua-Barbuda, Australia, Barbados, Brazil, Czech Republic, Dominica, Estonia, Grenada, Hong Kong, Israel, Latvia, Lithuania, Luxembourg, Poland, St. Kitts-Nevis, St. Lucia, St. Vincent-the Grenadines, Trinidad-Tobago, and Venezuela. Finally, also included is the U.S.-Hong Kong Prisoner Transfer Treaty, which enable us to renew the prisoner transfer relationship which we shared with Hong Kong, until its July 1997 reversion to the People's Republic of China.

The Department of Justice participated in the negotiation of these treaties, and today joins the Department of State in urging the Committee to report favorably to the Senate and recommend its advice and consent to the ratification. Since Deputy Legal Advisor Borek will discuss the extradition treaties in her testimony, and the Departments of Justice and State have prepared a detailed technical analysis of each of the treaties, I would like to speak today in more general terms about why we view these treaties as important instruments in investigating and prosecuting serious offenses both at the federal and state levels.

Our negotiation of these 38 treaties is a major aspect of our efforts to deny sanctuary, or "safe haven" to international criminals, no matter where they are hiding around the globe. Criminals who violate U.S. law must not be allowed to remain beyond the reach of U.S. and other law enforcement authorities. International extradition treaties remain the most effective mechanism to obtain the return of international fugitives.

However, obtaining physical custody of fugitives means little without the evidence needed to convict them at trial. Mutual legal assistance treaties—MLATs for short—provide for assistance at all stages of U.S. criminal investigations and prosecutions, including grand jury proceedings. They also enable much speedier assistance than is otherwise available through the cumbersome non-treaty mechanisms used for this purpose.

THE EXTRADITION TREATIES

The eighteen extradition treaties represent the continuing effort by the Department of Justice and the Department of State to modernize our extradition relations. Fifteen of these treaties replace extradition treaties now in force that have become outdated and obsolete. One treaty, with Zimbabwe, establishes an extradition relationship for the first time. Two of the treaties before the Committee, with Mexico and Spain, supplement treaties that are currently in force, leaving the basic structure and terms of the treaty intact.

Each of the 18 treaties before the Committee reflects our effort to conclude agreements that incorporate the most modern and efficient approaches to international extradition. In the past, extradition treaties contained a list of the crimes for which extradition may be granted; each of the new treaties eschew such lists for a "dual criminality" approach, which permits extradition for any crime punishable in both countries by more than one year's imprisonment. A dual criminality provision makes it unnecessary to renegotiate the treaty or supplement it when new crimes are enacted—an especially attractive feature in an age in which new forms of criminal behavior constantly lead to new legislation. This is especially important since the U.S. has traditionally been at the cutting edge of criminalizing newly emerging criminal activities such as money laundering, computer-related abuses, environmental crimes, to name just a few.

The new treaties also incorporate a variety of procedural improvements. For example, all of the extradition treaties clarify the procedures for "provisional arrest,"

the process by which a fugitive in flight can be detained while the documents in support of extradition are prepared. The treaties all allow each state to temporarily transfer a person while he is still serving a sentence in that State in order to expedite prosecution. The treaties also allow the person sought to waive extradition and expedite return to the requested state, thereby substantially expediting extradition in uncontested cases. Procedural improvements of this kind allow the legal framework for extradition to operate more efficiently.

The treaties also will be important precedent for us in persuading other countries to extradite their nationals to us for trial, and assuring us that countries who have extradited nationals in the past continue to do so. For example, the new treaty with Argentina requires the extradition of Argentine nationals, and it will be an important precedent that we want to use to urge other countries in Latin America and elsewhere to follow. Similarly, the new treaties with Antigua and Barbuda, Barbados, Dominica, Grenada, St. Christopher-Nevis, St. Lucia, St. Vincent-the Grenadines, Trinidad, and India all explicitly require extradition of nationals, and thereby "lock in" our treaty partner to surrendering nationals in a way not accomplished by the treaties now in force with these nations. In all, eleven of the treaties before the Committee explicitly state that extradition may not be denied on the basis of the fugitive's nationality. The other new treaties—with the exception of the French treaty—give each state the discretion to grant or deny extradition of its nationals. The U.S. delegation worked hard to insure that this discretionary approach was maintained so that extradition of nationals would remain an option, as legal and policy barriers are removed.

The extradition treaty with Argentina highlights a development in the field of international extradition. There is almost universal agreement among nations on the value of international extradition, but there is less agreement on whether nations should extradite their own nationals to other nations. Most countries with a common law tradition, like the United States, do extradite their citizens, on request, to the country where the crime was committed, provided there is a treaty in force and there is evidence to support the charges. Many countries with a civil law tradition, however, have historically refused or been reluctant to extradite their nationals. These nations typically deny extradition and offer instead to prosecute the national within their own legal system for crimes committed abroad, a process referred to as "domestic prosecution."

Our experience has been that such "domestic prosecutions" are appealing in theory but woefully ineffective and inefficient in practice. Evidence collected in one country often cannot be transferred from the country where the offense occurred to the country of the offender's nationality because rules of evidence differ, or other technical, legal, or procedural differences interfere. Witnesses and victims themselves are often unable or unwilling to travel long distances to participate in judicial proceedings whose language and procedures they do not understand. Moreover, as the Attorney General has often stated, it is more appropriate to have the defendant tried where the victims are located and where the major harm was committed.

As a matter of fundamental law enforcement policy, the Administration believes that persons should be brought before the courts in those countries which have suffered the major criminal harm and which are best positioned to ensure fair and effective prosecution. The Administration further believes that criminals should never escape justice based simply on their citizenship or nationality.

We are especially pleased to see the growing number of countries like Argentina that are willing to re-examine past policies prohibiting or discouraging extradition of nationals. For instance, Italy, faced with the serious threat to society posed by international organized crime organizations, was one of the first countries to reverse its position, and began in the 1980s to extradite its citizens to the U.S. Bolivia and Uruguay have also broken with civil law tradition and dismantled barriers to extradition of nationals, and other states such as Poland, are also re-evaluating their laws. For these reasons, the treaty with Argentina is an especially timely development, and will be an important precedent that we will encourage other Latin American nations to follow.

The extradition treaties reflect our law enforcement relations and priorities with our treaty partners. We have tried to emphasize negotiations of the extradition treaties that will be of paramount practical value to U.S. law enforcement. For example:

- The extradition treaties with Barbados, Trinidad, and the six nations that are members of the Organization of Eastern Caribbean States (Antigua-Barbuda, Dominica, Grenada, St. Kitts-Nevis, St. Lucia, and St. Vincent-the Grenadines) reflect the importance of this strategic region to U.S. law enforcement, which has found that Latin American drug rings, reacting to heightened enforcement activity on the U.S.-Mexican border and the western Caribbean, have increased

their use of the eastern Caribbean for smuggling drugs into the U.S. and Western Europe.

- The extradition treaty with Poland, like the MLAT with that state, was intended to enhance our ability to respond to growing crime problem in Eastern Europe, which spills over to the U.S. Similarly, the extradition treaty with Austria is important because Austria occupies an especially strategic location between Eastern and Central Europe.
- The extradition treaty with France will replace the current 1902 treaty. We handle a large number of extradition requests involving France, and the volume grows larger each year, so a new modern treaty is needed to enable us to process these requests more effectively and efficiently. The new treaty and the Agreed Minute accompanying the treaty will be an important step toward reciprocity by the French.
- The Extradition Protocol with Mexico is designed to create a new option in U.S.-Mexican extradition relations. All of our other recent extradition treaties permit an offender who is serving a long sentence in the Requested State to be temporarily extradited to the Requesting State for the limited purpose of trial there, while the evidence is available and the witnesses' memories are fresh, then be returned to the Requested State to complete serving the original sentence. The current treaty with Mexico, signed May 4, 1978, does not contain such a provision, a fact that has occasionally hampered effective law enforcement. One example of this problem is a recent case involving a Cuban national, Luis Martinez who was wanted in New York to face multiple murder charges, but could not be extradited immediately because he was already serving a seven year sentence in Mexico for rape. New York authorities felt that if Martinez' extradition were postponed for seven years, however, New York would not be able to prosecute Martinez at all, because of the imminent loss of the only eyewitness to the crime. Fortunately, the Government of Mexico agreed to make use of its prison parole system to expedite Martinez's eligibility for release and worked closely with the United States to arrange an expedited surrender of Martinez to New York authorities. While a miscarriage of justice was averted in the Martinez case, both the U.S. and Mexican Governments realized that the extradition treaty should be updated to provide a routine procedure in such matters. The Protocol before the Committee is the result of these efforts.

The Mutual Legal Assistance Treaties

The MLATs before this Committee will join twenty other MLATs that have been ratified since 1977, when our first MLAT, with Switzerland, entered into force. We now have MLATs in force with Switzerland, Turkey, Netherlands Italy, Canada, the Bahamas, Mexico, the U.K.-Cayman Islands, Argentina, Thailand, Morocco, Spain, Uruguay, Jamaica Panama, the Philippines, the United Kingdom, Hungary, South Korea, and Austria (which entered into force on August 1, 1998). Thus, the new MLATS before the Committee, when ratified, will double the number of MLATs in place, and enable us to greatly increase the number of successful requests to foreign countries for assistance.

Our long-term goal is to have as many MLATs as possible in force with countries that constitute U.S. law enforcement priorities, and for good reason. As the Committee knows all too well, recent years have witnessed the increasing "internationalization" of crime, especially in the areas of drug trafficking, money laundering, terrorism, organized crime, and large scale fraud. Members of drug cartels, organized crime, and terrorist networks do not respect national boundaries; in fact, they intentionally exploit national borders to impede law enforcement efforts. Therefore, our efforts to investigate and prosecute serious crimes must take into account that critical evidence in major criminal cases is often found abroad. Obtaining such evidence—especially in a form that will be admissible in our courts—is not always an easy matter. MLATs provide a more reliable and efficient means of obtaining such evidence, and thus further our investigative and prosecutive efforts. It is for this reason that negotiating and implementing MLATs have become an important part of international law enforcement efforts.

At the same time, it is important to recognize that these treaties are not panaceas. Although they can be an extremely useful tools they will not resolve the problem of international crime alone. Moreover, an MLAT's effectiveness ultimately depends on the good faith and commitment of the parties as well as on the specific language of the instrument. It is important that we have a frank and productive working relationship. Indeed, we have found this process of consultation to be so critically important to the effectiveness of the treaties that specific consultation provisions have been included in each MLAT.

While each of the MLATs now before the Committee shares certain characteristics, the specific provisions of each treaty vary. In the MLATs, as in the extradition treaties, some of the variances are minor or semantic; others are substantive. The technical analyses highlight and explain these variances among the treaties. The variances are the inevitable result of bilateral negotiations over a period of years with different countries, each of which has a different legal system and domestic interests, and with each of which the United States' law enforcement relations and priorities are different.

The MLATS before the Committee do reflect our law enforcement relations and priorities with our treaty partners.

For example, the MLAT with Israel reflects the long history of extensive and productive law enforcement cooperation than with Israel. We expect that this MLAT will enhance a relationship already distinguished by a common legal tradition and a history of successful collaboration on a wide range of important criminal matters ranging from terrorism to major white collar crime (e.g., the Eddie Antar fraud case), international drug trafficking, and organized crime. The number of U.S. requests to Israel for mutual legal assistance has grown sharply in recent years, and prompt ratification of the MLAT is essential to us in addressing the increasing workload in an efficient, effective manner.

The MLATs with Estonia, Latvia, Lithuania, Poland, and the Czech Republic reflect the strategic importance of these nations as gateways to Eastern Europe, where the expansion of Russian organized crime is a growing problem for these nations and the U.S.

The MLAT with Hong Kong is part of a package of agreements designed to maintain important law enforcement cooperation between the U.S. and this former United Kingdom colony; an extradition treaty with Hong Kong was approved by the Senate last year. The MLAT with Hong Kong will join MLATs now in force in the region with South Korea, the Philippines, and Thailand, and reflects our recognition that more effective law enforcement tools are needed with these key allies, and in the Far East generally, to combat drug trafficking, alien smuggling, money laundering, financial fraud, terrorism and other offenses.

Similarly, the MLAT with Australia provides a streamlined procedure for enhanced cooperation with an important law enforcement partner on the Pacific Rim.

The MLATs with Barbados, Trinidad, and the six nations that are members of the Organization of Eastern Caribbean States (Antigua-Barbuda, Dominica, Grenada, St. Kitts-Nevis, St. Lucia, and St. Vincent-the Grenadines), complement the new extradition treaties with these countries that I discussed, and reflect the importance of this strategic region to U.S. law enforcement.

For the benefit of the members of the Committee, I would now like to briefly explain what an MLAT is and describe its principle advantages.

Mutual legal assistance treaties are intended to enable law enforcement to obtain evidence and information abroad in a form admissible in our courts. MLATs supplement existing arrangements on international exchange of information between police agencies, such as law enforcement liaison relationships, or Interpol.

MLATs perform much the same function as letters rogatory in international cooperation. A letter rogatory is a written request from a court in one country to a court in another country asking the receiving court to aid the requesting court, as a matter of comity, in obtaining evidence located beyond the requesting court's reach. Since we have too few MLATs in force, we use letters rogatory to secure evidence from foreign countries where no MLAT or executive agreement on cooperation is in force. The MLAT provisions build on the authority given to us by Congress in 18 U.S.C. section 1782 to assist foreign countries in the gathering of evidence in the U.S.

A comparison of the way in which letters rogatory requests are made with the MLAT process illustrates the law enforcement benefits of the treaties before the Committee. In the case of letters rogatory, a prosecutor, such as an Assistant United States Attorney, must apply to the court in the U.S. for the issuance of letters rogatory. Once the letter rogatory is signed by the court, it is transmitted through diplomatic channels to the foreign country, traveling to the Department of Justice in Washington, to the State Department, to the appropriate U.S. Embassy abroad, to the Ministry of Foreign Affairs of the foreign country, then to its Ministry of Justice, and finally to the foreign court. Once the foreign court receives the letter rogatory, that court will execute it, in accordance with the foreign country's rules of evidence and procedure. The evidence obtained through the process is transmitted back to United States through the same torturous route used to present the request.

The MLAT request process is much more efficient for law enforcement purposes. Each of the MLATs establishes a Central Authority for the processing of requests, and the Attorney General is the Central Authority for the United States. By regula-

tion, the Attorney General has delegated her duties to the Criminal Division's Office of International Affairs. The prosecutor seeking evidence under an MLAT works directly with the Office of International Affairs in preparing the request, and the request is signed by the Director of that office. The signed MLAT request is sent directly from the U.S. Central Authority to the Central Authority of the MLAT partner, which will either execute the request immediately, or refer it to the appropriate court or law enforcement agency for execution. Once the requested evidence is obtained, it is returned to the U.S. by the same route.

The more streamlined handling of requests is but one reason why MLATs are superior to letters rogatory in obtaining evidence abroad. There are several other reasons.

First, an MLAT obligates each country, consistent with the terms of the treaty, to provide evidence or other assistance. Letters rogatory, on the other hand, are executed solely as a matter of comity, and often completely at the discretion of the requested country's court. Thus, predictability of the response is of critical importance in planning for an upcoming prosecution.

Second, an MLAT, either by itself or together with implementing legislation, can provide a means to overcome the bank secrecy and business confidentiality laws that so often frustrate effective law enforcement. This is especially helpful in the investigation of financial fraud, money laundering, and drug trafficking. Too often, letters rogatory are of limited utility to us because the foreign country's laws on letters rogatory do not permit piercing bank secrecy. For example, the MLAT with the Cayman Islands has been especially valuable to law enforcement in part because that MLAT coupled with the Cayman Islands' implementing legislation for it, clearly provides the terms upon which bank and business confidentiality must give way to legitimate law enforcement needs.

Third, an MLAT provides an opportunity to devise procedures that permit us to obtain evidence in a form that will be admissible in our courts The rules of evidence used in our courts may be unheard of in foreign countries, especially countries that have a civil law rather than common law legal system. MLAT negotiations permit the establishment of a procedural framework for ensuring that the evidence produced for us comport with our evidentiary requirements, such as the use of sworn certificates to authenticate bank records in accordance with Title 18, United States Code, Section 3505, or the examining and cross-examining of witnesses in depositions abroad.

THE HONG KONG PRISONER TRANSFER TREATY

The last of the treaties before the Committee is the U.S.-Hong Kong Prisoner Transfer Treaty. This treaty will provide a basis for us to renew the prisoner transfer relationship which we shared with Hong Kong from 1988 until July 1997 under the Council of Europe Convention on the Transfer of Sentenced Persons. Like our other eight bilateral treaties and the multilateral Council of Europe treaty, this agreement with Hong Kong is designed to permit the repatriation of persons convicted abroad to serve out their sentences at home Its substantive provision are quite similar to those of our existing prisoner transfer treaties, and like those treaties, the U.S.-Hong Kong agreement permits a transfer only when both Parties and the prisoner himself consent. Based on our experience with Hong Kong under the Council of Europe treaty, we expect a relatively small number of requests for transfer under this agreement.

In conclusion, Mr. Chairman, we appreciate the Committee's support in our efforts to address the problem of combating international crime. These treaties will enhance our ability to respond to current and emerging critical enforcement challenges. For that reason, we urge their speedy approval. I would be pleased to respond to the Committee's questions, including any written questions the Committee may wish to pose after the hearing today. [1]

Senator GRAMS. Thank you very much for your statements.

I have just some brief questions for each of you and maybe I'll just address all the first questions to Ms. Borek and then to Mr. Richard, so maybe divide them up that way.

To start out, Ms. Borek, the pending treaty with Zimbabwe represents a new treaty relationship and the first bilateral extradition treaty with a sub-Saharan African nation. Were there specific

[1] Time constraints did not allow for clearance of this statement by the Office of Management and Budget.

events, Ms. Borek, that led to the negotiation of a treaty with Zimbabwe rather than the other countries in the region?

Ms. BOREK. Thank you, Mr. Chairman. That is correct. In the early nineties we had two important fugitives from the United States who had fled to Zimbabwe. One was wanted to stand trial for offenses in connection with the BCCI matter. At that point it seemed prudent to negotiate an extradition treaty with Zimbabwe. We have also had an interest in that part of Africa, but basically the choice of Zimbabwe as a place to start depended on the circumstances of the time.

Senator GRAMS. Is the State Department confident that the judicial system of Zimbabwe is adequately or will adequately provide due process rights to individuals and humanitarian treatment to individuals that are imprisoned in that country? Is there that type of confidence?

Ms. BOREK. Yes, Mr. Chairman. The human rights record of the government of Zimbabwe does compare favorably with other countries with whom we would have extradition treaties. They have an independent judiciary. They do have the presumption of innocence, the right to confront and question witnesses, the right to counsel, and other fundamental rights of due process at trial. Thank you.

Senator GRAMS. Ms. Borek, perhaps the most high profile extradition case in recent years is the request for the extradition of Samuel Sheinbein from Israel to Maryland, and it highlighted the issue of some countries' refusal to extradite their own nationals. In that case Sheinbein argued that he was a dual United States and Israeli citizen and therefore could not be extradited to the United States to stand trial for the murder of another Maryland teenager.

Now, in each of the extradition treaties pending before the committee the United States commits to extradite its nationals. However, the treaties also permit some of the proposed treaty partners to refuse to extradite their own nationals. This amounts to a unilateral concession on the part of the United States.

Which of the treaties pending before the committee permit a treaty partner to refuse extradition of their nationals?

Ms. BOREK. Thank you, Mr. Chairman. This is of course an important issue. Of the treaties, the majority of them require extradition of nationals in all circumstances. However, it is discretionary in the case of Poland, Austria, Cyprus, Luxembourg, and France.

In treaties where it is discretionary, it is discretionary for both parties. So, strictly speaking, the United States would have a choice. However, it is a matter of longstanding U.S. policy that we will extradite nationals for trial for serious crimes committed overseas. This reflects two things in particular.

Many of the civil law countries have the ability to prosecute, at least in theory, based on nationality and therefore they actually have the capacity to prosecute their nationals for acts committed overseas. It is a different question whether this is always effective. But the United States often does not have that type of jurisdiction, and it has been a law enforcement judgment that we do not want any country, including the United States, to be a safe haven for criminals and that we would practice what we preach.

I think Mr. Richard would like to add to that. I think this is a very important program that we have been pursuing with other countries, not to have limitations on extradition of nationals.

Senator GRAMS. But in those cases there is the same option to the United States, then, in those treaties with those countries that refuse to extradite their nationals? We have the same option with them is what you said?

Ms. BOREK. It is discretionary. The normal provision does not differentiate between countries. It simply says that in that case it is discretionary. The only one which is actually not worded in a fully reciprocal fashion is France, but in that case it is still discretionary for the United States to surrender a national and not mandatory.

Senator GRAMS. Mr. Richard.

Mr. RICHARD. If I may add just a few points. It is, as Ms. Borek indicated, a judgment on our part that, especially in light of the fact that we do not have the jurisdictional capability of prosecuting in the United States these individuals, that the option of allowing them to go free and not be held accountable for acts committed abroad in our judgment is inappropriate. We would prefer them not being in the community, but rather to stand trial in the foreign country, the requesting country.

Moreover, we have, though, been making a major effort. The Attorney General personally as well as the President and others have been striking out on this point to change, if you will, the perception of a good portion of the world that currently rejects the notion of extraditing their nationals. I am proud to say that we have been making significant progress in my judgment.

We have, as reflected, treaties with Argentina. Other prior treaties have broken, if you will, the traditional barrier of prohibiting extradition of nationals—civil law countries in South America, Europe. Israel has recently introduced legislation which, if passed, will resume the ability of Israel to extradite its nationals.

So I think we are making progress on this front.

Senator GRAMS. Thank you.

What rationale do these countries give, Ms. Borek, for refusing extradition of their nationals?

Ms. BOREK. The primary rationale is their ability to prosecute themselves based on nationality. The difficulty in many cases that they point to is that there could be constitutional limitations, so that in some cases even if they wanted to change it it would be very difficult. Nonetheless, there are countries where it is a matter of legislation or of policy, and I think it is fundamentally a domestic point of view that prosecution should occur in the country of nationality.

But as Mr. Richard said, this is changing. I might add that, while it is only the initial judgment in the case that you mentioned, there has been an initial judgment that the individual was extraditable. Of course this will be appealed and we will have to see the course of it as it goes along.

Mr. RICHARD. If I may just add, what I hear most often across the table is the historic notion that there is something innately troublesome about having your own national have to go to a foreign country where he or she is not familiar with the process, languages

may be different, and that in theory the fact that the country of nationality can prosecute resolves the situation.

From a law enforcement point of view, frankly, one, these countries rarely prosecute their own nationals for crimes committed abroad, whether in the U.S. or other countries. When they do, it is the exceptional case, and it is particularly cumbersome and troublesome on our victims, who have to travel frequently, who have to subject themselves to the process of a foreign court if they want to see justice done.

Finally, in many of the more complex prosecutions participants, co-conspirators and the like, are not about to provide any assistance to these foreign prosecutions. So they are not easy to put together. The statistics worldwide of domestic prosecutions tends to be very low.

Senator GRAMS. I was going to follow up and say, is there any way that we have assurances, that we can hold their feet to the fire, so to speak, to do the prosecution. But you are basically saying that we do not have that type of influence.

Mr. RICHARD. Well, we are making progress along those lines. For those countries that have historical constitutional barriers to that, we have been pushing, especially in the G–7 context, that they commit separate components within their justice department, prosecutorial offices, equip them with the capability of performing nothing but addressing these domestic prosecutions, and that these prosecutions of crimes committed abroad by their nationals be afforded the same priority as their own domestic cases.

We are pushing this. The Attorney General has been pushing it. It is not a very attractive alternative in our judgment, but nevertheless until we convince them of modifying their laws and constitutions I think we warrant at least the option in a particularly heinous case to prevail upon these countries to go with the domestic prosecution.

Senator GRAMS. Ms. Borek.

Ms. BOREK. If I might just add to that, in cases where there is a discretionary provision not to extradite on the basis of nationality there is also typically an obligation that, when the country refuses extradition solely on the basis of nationality, it would submit that case, if requested, to the relevant authorities for prosecution.

So in theory the obligation exists, but, as Mr. Richard said, there are practical difficulties in making it effective. But these are being addressed at the same time as trying to promote a fundamental change in attitude about the whole question.

Senator GRAMS. Mr. Richard, when you say we're making progress in that direction, in those areas, is there an end in sight or how would that affect the treaties we are addressing here today as far as implementing any further pressures for prosecution?

Mr. RICHARD. Well, from our vantage point the ultimate objective is to have countries afford themselves the capability of extraditing their nationals. That is the end, that is the relationship that we think affords greatest opportunity to see justice done in the international arena.

We are making progress, though, in those instances, at least on the short-term basis, of countries that cannot or will not extradite their nationals of ensuring that they do afford us in those cases

that we are interested in having domestic prosecutions, that they afford us the opportunity to see a viable prosecution brought, and by the steps I have indicated are forcing them to create special units, special training in foreign law, for those prosecutors and investigators, mechanisms for us to assist in providing them with the evidence and the like.

For example, Israel currently has the so-called Begin law, which precludes extradition of Israeli nationals, but affords the Israeli prosecutor the opportunity to bring charges in Israel for crimes committed abroad. The difficulty is under Israeli law at the present time they do not have an easy way of gathering evidence abroad. So if there is a witness in the United States who for one reason or another does not want to travel to Israel, there is no easy mechanism for the Israeli prosecutors to come to the United States and take a deposition and have it admissible in court.

So our position is they must align themselves in such a way as to be able to mount an effective prosecution. Fortunately, in the case of Israel it looks like they are changing their whole law to permit extradition of nationals.

Senator GRAMS. Ms. Borek, the extradition treaties grant the Secretary of State authority to refuse where there is a concern that the request for extradition is politically motivated or for political offenses. What investigation will be undertaken prior to extradition to ensure that a request is not politically motivated? What kind of steps or procedures are in place to assure this?

Ms. BOREK. The normal procedure has two stages at which the Department of State would look at the request. Initially the requests are screened to make sure that they fit within the terms of the treaty and that there is a sufficient amount of evidence to establish a basis for proceeding.

However, the primary point at which this could become a question is in the end, after a court has found someone extraditable. It then comes back to the Department of State and any sort of individual questions that might be raised concerning the particular case, not only the political motivation, but if there are other concerns about treatment or what have you, are typically raised at that stage.

In our experience, in those cases in which there could be a political motivation it is really the defendant who is most keenly aware of that fact who brings it to the attention not only of the Department of State, but also of others, including courts at all stages in the process. So I think we have found that this is raised, if it is an issue. In some cases it might also be evident simply from looking at the request that it is not well founded. But if there is a particular hidden angle, I think the defendant is often the one to bring it out.

Senator GRAMS. Has the United States ever made a refusal on these grounds that you can think of?

Ms. BOREK. It is not uncommon for requests initially to be found lacking in sufficient documentation. In some cases that is simply because they do not really have a good case. In other cases it could be because there is really some more questionable motive. I think it is rare for a case to actually get through the whole process and only have it come out at the end.

Senator GRAMS. The India treaty contains an exchange of letters that requires consultation and agreement, in addition to the normal treaty requirements, when extradition is sought for a court, and that is apart from the ordinary criminal laws of the requesting state. But why was this exchange of notes necessary in this treaty?

Ms. BOREK. At the time this treaty was negotiated there were difficulties concerning not only terrorism but the government response to terrorism. There was a particular law, the Terrorist and Disruptive Prevention Act, which was used in connection with the detention and prosecution of persons charged with terrorist offenses.

This law has lapsed as of 1995, but it still has some retroactive effect for cases under investigation and trial prior to that time. We were concerned that this law had particular limitations upon the rights of defendants that have been the subject of criticism, not only from nongovernmental groups but also from the Department of State in the human rights reports, and we were not prepared to undertake any sort of blanket obligation to extradite if there was going to be prosecution under that law.

In fact, the presumption is that we would not extradite if there was going to be prosecution under that law. So we wanted to have an understanding, a clear understanding and arrangement with the government of India on this point.

Senator GRAMS. Under what circumstances would the United States agree to extradite an individual to such a court?

Ms. BOREK. I do not know that we can imagine the situation under this particular law, but in general I suppose if you had a situation where, for example, an individual had been responsible for a bombing along the lines of the bombings of the Embassies in Kenya and Tanzania and there was no other viable way of prosecuting the person, I suppose we would take a very serious look at how deep our concerns were and exactly what our concerns were in connection with the due process rights of the defendant.

But I do not think, since this particular law is retroactive and we know the universe of cases—at least someone theoretically knows the universe of cases—we do not anticipate it in connection with this particular treaty.

Senator GRAMS. Could any of the extradition treaties be used to extradite an individual to a multilateral criminal tribunal through one of the treaty partners?

Ms. BOREK. Not directly. The question would be whether, having extradited someone to, for example, one of the treaties that is pending now, the treaty partner would turn around subsequently and retransfer or re-extradite someone to the multilateral institution. This is covered implicitly in limitations which are typically referred to as the rule of specialty, which put certain restrictions not only on retransfer, but also on adding charges that were not contained within the original extradition request. Of course, that would also be the case in this kind of situation. It does require the consent of the extraditing state to do this. We have discussed informally the fact that, because this is implicit, it might be desirable to clarify and make it explicit in connection with this type of situation.

Senator GRAMS. Do we have any opportunity for any redress if the extradition has taken place and we find out that a prisoner is

being moved to a third country or additional charges are added? I mean, once the horse is out of the barn, so to speak, do we have any way to police that type of activity?

Ms. BOREK. I am not aware that there has ever been a problem in this area. This is one of the most fundamental undertakings in an extradition agreement. It is well accepted, I think, as established not only in U.S. practice, but generally in extradition practice. I think our experience has been that countries respect it.

In fact, it is quite common to get requests to add additional charges. So there is a history of compliance there.

Senator GRAMS. Could any of the mutual legal assistance treaties be used to provide information to a treaty partner for use in an investigation by a multilateral criminal tribunal?

Ms. BOREK. There is a standard provision in the mutual legal assistance treaty which limits the use of information. I will just sort of read one which is from the Luxembourg treaty. It says that: "The central authority of the requested state may require that the requesting state not use any information or evidence obtained under this treaty in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the requested states."

There is an exception where it has been made public, and then there is an exception which is basically for the United States, when it is required to disclose information to the defendant, for example, as exculpatory material. But the fundamental obligation is that, to the extent this is not public information, the state providing the information can require that it should not be used in any other prosecution, including other prosecutions by the state itself.

Mr. RICHARD. If I may add just a historical footnote, the use limitation has historically been used as a sword against us with respect to our ability to use information that we acquire, generally in the context of tax cases or cases involving offenses that the other party to the treaty does not necessarily want to support. So it has generally been used offensively against us, although I recognize and I am not minimizing the concern here.

Each of the treaties—the whole construct here through the central authority is to establish a relationship, if you will, between the central authorities, and I would anticipate that we would have a variety of opportunities to either attempt to block such a misuse of our information or to know it in advance and then be in a position to just simply assure that it not go over unless we had sufficient comfort that it would not be used in this distorted way.

Senator GRAMS. Mr. Richard, I have a number of questions for you. But Ms. Borek, if you would like to jump in and add anything to these questions, please feel free to do so.

Mr. Richard, in the case of Balzeese versus the United States the Supreme Court recently observed that the Fifth Amendment privilege against self-incrimination might apply in instances of multi-international or multinational law enforcement efforts. Do you anticipate that this case will have any impact on the execution of MLAT requests?

Mr. RICHARD. We have contended with this issue of attempting to invoke privileges, both domestic privileges and the privileges of the other country. We have been dealing with this situation under

existing treaties. It has not proven in my judgment to be a particularly significant impediment, if you will, to our ability to proceed.

The recent Supreme Court ruling with respect to the availability to invoke the Fifth Amendment as a result of fear of foreign prosecution I suspect will assist us, if anything, in gathering information. So I do not think it is going to be an impediment, frankly.

Senator GRAMS. Under the treaty, how do U.S. constitutional protections apply to information or evidence collected outside of the United States?

Mr. RICHARD. Let me say, the ultimate arbiter of that question is a U.S. judge. For example, if we are taking a deposition abroad and an individual seeks to invoke a privilege under U.S. law, the provisions generally provide for us to take the testimony and have that issue adjudicated at the time when we are seeking to admit the evidence in a U.S. court.

The U.S. court can rule on the validity of the invocation of the privilege. So ultimately there is evidence that will be before the court in the United States and judged as to its constitutionality by the U.S. court.

This has raised interesting questions, but with respect to issues of acquiring information and evidence pursuant to the treaty I think the Fourth Amendment reasonableness standard will be looked to heavily by the courts and if the process employed reasonable, and that it will be because it will be pursuant to the laws of the receiving country, pursuant to the treaty, I think the courts will appreciate that the process has been a reasonable one.

Senator GRAMS. According to some of the statistics that I have, although there has been an increase in extraditions to the United States, the number of extraditions from the United States has actually declined. Is it accurate that there has actually been a decline in extraditions from the United States?

Mr. RICHARD. Well, I think in terms of the actual numbers that we have managed to send out pursuant to extradition treaties, our statistics I believe do reflect a small decline. Staff brought it to our attention and we have been considering possible reasons for it. One of them, and it is pure speculation on my part at this time, is that at one time extraditions were few in number, the defense bar tended to be fairly unfamiliar with what is a fairly old and archaic process.

But those times are changing now. The extradition is being examined very closely. I think that it is taking more and more time to get them through our courts and I suspect that this may be slowing down our own process, if you will. There is more inclination to seek habeas relief when there is an extradition granted by our courts, and I do think the courts are taking a hard look at it.

As you know, they recently entertained a challenge to the entire structure of our extradition relationship in the LaBue case. Ultimately that was resolved upholding the current structure, but nevertheless that alone created a certain interest in the entire field by the legal community.

Senator GRAMS. As you stated in your testimony, Mr. Richard, the pending treaties are mainly with Caribbean countries as well as Eastern and Western Europe, and will be important to law enforcement efforts with regard to money- laundering, organized

crime, and drug trafficking. A thorny effort in the area of international criminal investigations has been the unwillingness of countries to forego bank secrecy protections.

Now, what progress do these countries make in enabling law enforcement to retrieve any bank information previously that had been protected by the bank secrecy laws before?

Mr. RICHARD. Frequently it is precisely the treaty itself that provides the mechanism to pierce the bank secrecy and other domestic confidentiality provisions. When we go under a letters rogatory process, frequently the domestic law would not permit the court on the basis of comity merely to set aside the secrecy provisions. Pursuant to the treaty, we do acquire and it is a major point of negotiations to be sure that we do have access to bank records and other similar confidential materials. These are indispensable for making money-laundering cases, drug cases, and the like.

I think the Cayman Island treaty, which has been in place for a while, is a prime example where before the treaty we had a terrible time trying to pierce bank secrecy. Under the treaty we do it routinely now. We would hope that we would continue to see good results under the treaties.

The question of money laundering is particularly acute. A lot of these countries have by reputation alone significant money laundering problems and it is precisely for that reason that we wish to have the treaty as a vehicle for trying to pierce that secrecy.

Senator GRAMS. Under a Senate condition to ratification of a bilateral tax treaty with Luxembourg, the pending mutual legal assistance treaty with that country must be first ratified. What, if any, additional law enforcement tools will that treaty provide for the investment of criminal and civil tax investigations in Luxembourg?

Mr. RICHARD. You are talking about the tax treaty?

Senator GRAMS. Yes.

Mr. RICHARD. Or the mutual legal assistance treaty? The mutual legal assistance treaty will only apply to a criminal tax matter, where the tax treaty itself applies to both criminal and civil and is much more specific and broad-based than the one with the treaty.

The current treaty in Luxembourg, mutual legal assistance treaty, provides that assistance will be granted for offenses involving value added taxes, sales taxes, excise taxes, customs duties, and any other taxes therein after agreed to by the contracting parties through the exchange of diplomatic notes.

Senator GRAMS. The mutual legal assistance treaties commit the United States to search, seizure, and delivery at the request of a foreign government and empower American courts to issue warrants and other orders necessary to execute a treaty request. Now, the Electronic Communications Privacy Act and the Foreign Intelligence Surveillance Act both reinforce the commands of the Fourth Amendment with procedural requirements that may not themselves be constitutionally required.

So does the treaty require the United States to honor a treaty request for electronic surveillance within the United States?

Mr. RICHARD. Sir, I am not aware that mutual legal assistance treaties have ever been used as a vehicle for acquiring electronic

surveillance, except at best in situations where we had independent jurisdiction of the activities. Where this is a crime committed wholly abroad and there is no jurisdictional basis for our own law enforcement, I am not aware that we have ever done that.

The whole concept of search and seizures in the mutual legal assistance area must be done in accord with U.S. domestic law. So that it is not something that, for example, both in terms of the standard and the jurisdiction, that our own courts will not scrutinize and determine if it is constitutional. The mere fact that a country is requesting it will not be dispositive of our ability to do it.

But like I say, I am not aware that we have ever done that under a mutual legal assistance treaty. Certainly this is only limited to criminal requests, so that, for example, a foreign intelligence service approaching us for assistance in connection with an intelligence matter, this treaty would not be available for that.

Senator GRAMS. In another area, the Hong Kong Prisoner Transfer Treaty that was mentioned contains a standard provision regarding the enforcement of sentences in the country receiving the transferred prisoner. Specifically, the treaty requires that the laws and procedures of the party receiving the prisoner regulate the continued enforcement of the sentence with respect to the conditions for imprisonment and any reduction of sentence, conditional release, or parole.

So how does the United States ensure that the prisoner who is transferred under similar treaties actually would finish out their sentences in prison?

Mr. RICHARD. When you say "ensure," I am not sure that we have a mechanism per se to ensure it. We are in a position to make inquiry as to what the conversion is, if you will, in terms of the sentence. At times, if we are not satisfied with what we anticipate would be the length of time, if you will, we always have the option of refusing to transfer.

I cite, for example, the Barraldini case with Italy, where that is precisely an issue between us and Italy. After the fact, of course, one of our concerns is that we not see a revolving door, if you will, we transfer a prisoner and the next moment the prisoner is released pursuant to the laws of the receiving country.

I think as a practical matter we become familiar with the processes of the host government and try to ensure that we have a fair read on what we can expect. But I have seen it work the other way, in all candor. I have seen prisoners suffering significant legal sentences abroad transferred here and, in accord with our system, the amount of time they spend in the U.S. on a converted sentence is much less than that which is imposed abroad. It is a reciprocal aspect of the situation.

But we are in a position to simply refuse if we do not think it is going to be fair and equitable under the circumstances.

Senator GRAMS. Now, what guidelines are applied in the decision, then, to consent to such a transfer so as to ensure that prisoners that have committed violence or other serious crimes are not eligible for transfer and potential release in the receiving country? So you are saying that there are guidelines or there are inquiries

made or assurances that you want to have before the transfer would actually be made?

Mr. RICHARD. Yes. Well, I do not want to suggest that in every case we seek specific assurances. We do not. We have a process in place, which I would be glad to articulate in writing to the committee. But essentially it consists of consulting with the prosecutors, consulting with the law enforcement agencies that had developed the case, interested parties, victims if necessary, to get an indication from them as to the receptivity of a transfer.

Frequently we look to issues of have they cooperated with law enforcement after their conviction, do they have any outstanding fines, have they made the restitution required, and so forth. Then we make a policy judgment in a particular case whether to grant it or not.

Where we have anticipated or a basis to believe, because of their own family ties, being in the United States, notwithstanding their citizenship, we might be very reluctant to transfer because chances are that individual once they hit the streets will try to come right back to the U.S. So it is an assessment. But I can give you a chapter and verse of how we go through the process.

Senator GRAMS. I would probably prefer that in writing if you could, just give us a short background on it.

Mr. RICHARD. Yes, I would be glad to.

Senator GRAMS. Thank you.

State law enforcement officials also have the ability to request extradition through your office as well as to seek law enforcement from a foreign country. What kinds of educational outreach does the Department of Justice do to ensure that State law enforcement officials are aware of the treaties, the benefits, and also some of the procedures for utilizing these treaties? Is there an outreach, a program that is available?

Mr. RICHARD. Yes, and one that is becoming more and more intense. We have recently begun a program whereby we bring in as a representative of State and local authorities a detailee right into our Office of International Affairs. We also participate in a variety of conferences with State and local authorities when they meet. There are annual national conferences among State extradition officials, for example. We are always in attendance and provide presentations.

We have various manuals that we have prepared on the procedures for preparing extradition packages which we send out. The Attorney General recently wrote to, I think, just about every local prosecutive agency identifying our Office of International Affairs as the vehicle for answering any of their needs in the international area on extradition and mutual legal assistance.

We are exploring additional avenues, if you will, primarily through our State and local law enforcement committees as an additional vehicle for educating State and local authorities on the process. Our objective is to bring State and local officials into the entire process. In particular, for example, we want to get their feedback as to what the priority countries should be in terms of future negotiations, for example. We want to know where they are encountering problems in acquiring evidence or fugitives fleeting

and so forth. So we want them to be partners with us in this whole international enforcement arena.

Senator GRAMS. Now, prior to extradition in capital murder cases some treaty partners seek assurances that the death penalty will not be imposed in the event of a guilty verdict. Now, the Secretary of State generally gives that assurance based on similar assurances from the U.S. State seeking extradition.

Is such an assurance from the State government sufficient for most foreign governments?

Mr. RICHARD. Maybe Ms. Borek can answer that. My understanding is that by and large, yes, although on occasion I seem to recall that sought State Department assurances themselves that this is an accurate assurance. But I would stress, though, that this is a process of consultation with the State authorities. It is their choice whether to give the assurances or not, and it is a balancing act. Do they wish to forego the extradition request, which may be the consequence of not giving the assurance, and rely on the hope that the individual might at some future time be apprehended if he or she were to leave the country or what have you and locate somewhere else?

It is a decision that frequently is a difficult one to make by the State authorities, and we work with them the best we can. At times we can convince the host government that the assurances, while not categorical, are adequate, so that they not be in effect denied, that the extradition is not denied across the board and the State interests are protected.

It is not, as I say, a situation that we necessarily endorse, although on one occasion in one of the treaties we want the capability of demanding assurances because the other country has at least the potential of having the death sentence for crimes that we would not otherwise impose the death penalty on.

Senator GRAMS. Ms. Borek, did you want to add anything?

Ms. BOREK. Thank you. I think foreign governments generally realize that having the assurance of the actual prosecuting authority is more important than having the assurance from the State Department from the practical point of view. Certainly, we always seek that as a precondition for giving any further assurances.

I think that, as Mr. Richard said, from time to time we are asked to endorse that assurance. But I think this has been generally effective, and when there has been a difficulty it is not with the source of the assurance. There have been issues with Italy about the whole system and how it works, but it certainly is not because they have any particular lack of confidence in State or local prosecuting authorities.

Senator GRAMS. Would there be any question of the method of execution?

Mr. RICHARD. That has on occasion come up, come up in the context of concerns expressed by the European court on this death row phenomenon, the individual has been on death row so long that that process itself has proven unusual in the judgment of some. So that is often the basis of an attack, if you will, on the process, not directed necessarily at death penalty concepts, but rather the process employed in this country and the length of time it takes from conviction to the execution.

So this is being raised on occasion in the European courts, but so far it has not precluded, at least to my knowledge, an extradition on that basis alone.

Senator GRAMS. What recourse does the Secretary of State have if the U.S. State does not honor its agreement to suspend the death penalty where an extradited murderer is found guilty in a capital murder case? Again a hypothetical.

Ms. BOREK. That is a question which has been the subject of considerable legal analysis. I cannot give you a definitive answer on that because, happily, it has never been an issue in a real case. I think we rely fundamentally on the validity of the assurances in the first instance. Otherwise I think we would have to seek some sort of legal action vis a vis the authorities in question and intervention via the Justice Department if necessary.

Senator GRAMS. And you would employ intervention? I mean, you would see that as a logical——

Ms. BOREK. Certainly we would want to see the assurances upheld. I think we would consider that as an absolute last resort.

Senator GRAMS. Mr. Richard, just one final set of questions here. In your testimony you referred to the United States being on the cutting edge of criminalizing newly emerging criminal activity, such as money laundering, computer-related abuses, and environmental crimes.

Mr. RICHARD. Yes, sir.

Senator GRAMS. Do each of the pending extradition treaties require extradition for these crimes?

Mr. RICHARD. I believe all of them—it is all under the dual criminality concept. When we go into extradition negotiations, we do particularly hone in on just what are the laws of the other country with respect to these kinds of offenses. It goes on: computer crimes, money laundering, conspiracy, what we call our RICO statute, our racketeering statute, and the like.

So we try to satisfy ourselves, when possible, that we have the broadest coverage as possible.

All the extradition treaties that we have before us do cover these types of offenses.

Senator GRAMS. Have mutual legal assistance treaties currently in force, have they been effective in ensuring extradition of individuals charged with these types of crimes as well?

Mr. RICHARD. That is an interesting question. I am not sure that we have ever gone back and taken a look at the evidence that we have acquired under a mutual legal assistance treaty and seen how much of that has been subsequently incorporated into an extradition request. I am not sure I can answer that.

However, I do know in many of these cases we use them in tandem, if you will, so that we are in effect requesting the extradition plus we are requesting assistance in gathering evidence from that location at the same time. At times under the extradition provisions at the time of the arrest of the individual he or she may be in possession of materials which by the terms of the extradition treaty are also seized. So they are effective vehicles, but I am not sure we collect statistics along those lines.

Senator GRAMS. Mrs. Borek, anything to add?

Ms. BOREK. No.

Senator GRAMS. Well, that is all the questions I had, but what I would like to do is leave the record open for probably the remainder of the week in case—I know other members of the committee might want to submit some questions in writing for you. If that happens, if you could answer and respond and send them back to the committee in due process, hopefully. If you have any other additional information that you would like to supply to the committee, please do that as well as in writing.

Again, I want to thank you for your time this morning and your answers, and I appreciate the responses.

Mr. RICHARD. Thank you very much, Mr. Chairman.

Ms. BOREK. Thank you.

Senator GRAMS. The hearing is now complete.

[Whereupon, at 11:12 a.m., the committee was adjourned, subject to the call of the Chair.]

APPENDIX

U.S. DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION, WASHINGTON DC 20530,
October 8, 1998.

PATRICIA MCNERNEY,
Counsel, Foreign Relations Committee,
United States Senate,
Washington DC 20510.

DEAR MS. MCNERNEY: The Department of Justice has carefully considered the proposals from the National Association of Criminal Defense Lawyers with respect to the mutual legal assistance treaties, prisoner transfer treaties, and extradition treaties now pending before this Committee. We believe that these proposals, if adopted, would hamper rather than enhance law enforcement efforts to develop effective mechanisms for securing cooperation from foreign criminal justice agencies.

I. MUTUAL LEGAL ASSISTANCE TREATIES (MLATS)

The NACDL's proposal that the Senate place language in the reports that purport to allow any of the hundreds of Federal or state judges across the country to order the Government to make MLAT requests on behalf of criminal defendants, despite the explicit language to the contrary in the treaties themselves, would be contrary to the public interest in fighting international crime effectively. This proposal strikes at a basic premise of the treaties, and in the unlikely event our treaty partners would accept such a change, could transform the MLATs from important and useful law enforcement tools into mechanisms of little value to the government which, moreover, can be used by defense attorneys to frustrate criminal prosecution.

The Department of Justice believes that the MLATs before the Committee already strike exactly the right balance between the needs of law enforcement and the interests of the defense. The MLATs were intended to be law enforcement tools, and were never intended to provide benefits to the defense bar. It is not "unfair" for MLATs to govern assistance solely between U.S. and foreign Government prosecutors and investigators, any more than it is improper for the FBI to conduct investigations for prosecutors and not for defendants. The Government has the job of assembling evidence to prove guilt beyond a reasonable doubt, so it must have the tools to do so. The defense does not have the same job, and does not need exactly the same tools.

We know that the NACDL has raised this issue repeatedly since 1988. For example, in 1992, Michael Abbell (then counsel to leaders of a Colombian drug cartel) strongly urged on behalf of NACDL that this Committee require that MLATs permit requests by private persons such as defendants in criminal cases. To our knowledge, however, no court has ever ruled that due process or fairness require that MLATs be made available to defendants. The Senate Foreign Relations Committee did not adopt NACDL's proposals in 1988 or 1992, or at any time since then, and the farthest the Committee has gone to accommodate this claim has been to comment, in connection with one MLAT in 1989:

> [C]oncern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that nothing in this treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under the treaty. (emphasis added)

The Committee has since declined to include such language with respect to any subsequent MLATs. It should be noted that the 1989 comment referred only to a court's ability to request that the prosecution make an MLAT request, and thus is much more reasonable than the NACDL's current proposal that the Committee offer an

opinion on the court's power to order the U.S. Central Authority to make such requests.

We believe that the Committee's disinclination to adopt the NACDL's suggestions have been correct for several reasons.

First, a major problem with making defense requests under MLATs is that any position we take is likely to be reciprocal. In other words, if the U.S. sends requests on behalf of criminal defendants in the U.S., we may have to execute requests made by our MLAT partners on behalf of criminal defendants abroad. This effectively will force the Department of Justice, the FBI, and other U.S. agencies to help foreign defendants (including drug traffickers like the members of the Colombian drug cartels) combat the criminal charges lawfully brought against them by our MLAT partners. This may further the interests of U.S. defense attorneys representing those persons, but it hardly serves the U.S. public interest. Indeed, in some cases, the NACDL position would place the Department of Justice in an awkward conflict of interest, because we would have to simultaneously help foreign prosecutors obtain the evidence needed to convict foreign criminals and assist those same criminals to avoid conviction.

Second, since the MLATs were not negotiated for use by the defense, they contain several provisions which make them inappropriate instruments for defense requests.

For example, the MLATs require the Requested State to pay much of the costs of executing requests for assistance. When we anticipate the costs of a proposed MLAT, we considered the likely volume of requests from U.S. and foreign law enforcement, but no assessment of possible defense requests is made. Since our treaty partners likely make the same calculation, some of them may refuse to ratify an MLAT rather than take on an obligation to assist criminal suspects as well as U.S. law enforcement.

Another, more important issue involves the processing of requests. Each MLAT names the Attorney General as Central Authority for the United States. The Attorney General has delegated many of the duties of this role to the Office of International Affairs (OIA) in the Criminal Division. The function of that Office is not merely one of a "post office" or "switchboard" for the transmission of requests, but rather involves, on a daily basis, a critical role in the prosecutive process, including consulting with and advising the prosecutors seeking assistance under the MLAT. OIA regularly resolves questions as to how best to cast a request so that it will fall within the scope of the relevant MLAT; develops strategies designed to obtain evidence in a form admissible in a U.S. court; and collaborates with the requester to present the request in the most effective form, and with the most persuasive arguments, in order to convince the requested state to provide the assistance needed. All of this requires a probing analysis of all the relevant facts in the case, and, in essence, creates an "attorney-client" relationship between the requestor and the OIA attorney. To place OIA in the position of counselling the defense in the formulation and transmittal of MLAT requests and advocating such requests to foreign officials creates a conflict of interest. (This is particularly true in Federal criminal cases, where the prosecutor and the defendant may be seeking, through OIA, to pursue evidence in the same case). It also is doubtful that the defense would wish to fully disclose the theory of its case, the evidence it already has, and its proposed trial strategy, and other extremely sensitive matters relating to its trial strategy to a federal prosecutor working for the Criminal Division of the Department of Justice. That, however, is precisely the kind of disclosure that is essential for OIA to properly and successfully pursue MLAT requests. Moreover, there is a further conflict of interest since OIA must necessarily establish a priority among the requests it receives, identifying and handling the more urgent ones earlier than the less urgent.

Finally, the MLATs before the Senate were designed to provide solutions to problems that our prosecutors encounter in getting evidence from abroad. The problems encountered by prosecutors in employing letters rogatory are most serious when seeking evidence before indictment, and criminal defendants never had those problems at all. Even post-indictment, the problems faced by the Government and the defense are not equivalent, because. The defendant frequently has far greater access to evidence abroad than does the Government, since often, it was the defendant who chose to use foreign institutions (such as foreign banks in which evidence is located) in the first place. Thus, the Government most often uses MLATs to obtain copies of a defendant's foreign bank records; in such cases, the defendant already has copies of the records, or can easily obtain them simply by contacting his or her bank directly. Similarly, the Government uses MLATs to arrange through the foreign government to question the defendant's criminal associates abroad, persons that the defendant can usually contact and speak to without foreign government intervention. In short, the NACDL proposal is a "solution" for which no serious problem has ever emerged.

II. INTER-AMERICAN PRISONER TRANSFER CONVENTION

The NACDL supports the Senate approval of the Inter-American Prisoner Transfer Convention, which was transmitted to the Senate September 30, 1996. The Departments of Justice and State also support approval of this convention, as well as approval of the Inter-American Mutual Assistance Treaty and companion Protocol on Assistance in Tax Cases; the Inter-American Convention on Firearms Trafficking; and the Inter-American Convention Against Corruption. The Committee may wish to schedule a single hearing on all of these OAS law enforcement treaties.

III. EXTRADITION TREATIES

The NACDL suggests that some of the treaties now before the Senate "contain waiver of extradition provisions that do not follow the most recent U.S. extradition treaties." In fact, the treaties before the Senate are typical of recent extradition treaties on this point. The NACDL is simply incorrect when it suggests that most recent U.S. treaties mandate that waivers occur "in a formal court proceeding . . . in which [the fugitive] is: (1) represented by counsel; (2) advised of his rights under the treaty and the laws of that country; and (3) advised as to the effect of his waiver under the laws of the requesting country." While it is true that many recent U.S. extradition treaties contain some provision for simplifying or waiving extradition, most do not specify the procedure to be followed for waivers, and none of them go into the level of detail that the NACDL suggests. In our view, it is sufficient if the treaty states that waiver may be take place, leaving the precise procedure to be followed to the law and practice of the state where the proceeding occurs.

The Administration is committed to bringing these treaties into force as soon as possible. We stand ready to respond to any further questions the Committee may have about these treaties.

Sincerely,

MARK M. RICHARD,
DEPUTY ASSISTANT ATTORNEY GENERAL.

UNITED STATES DEPARTMENT OF STATE,
WASHINGTON, DC 20520,
September 29, 1998.

THE HON. JESSE HELMS,
Chairman,
Committee on Foreign Relations,
United States Senate.

DEAR MR. CHAIRMAN: Following the September 15, 1998 hearing at which State Department officials testified, additional questions were submitted for the record. Please find enclosed the responses to those questions.

If we can be of further assistance to you, please do not hesitate to contact us.

Sincerely,

BARBARA LARKIN,
ASSISTANT SECRETARY,
Legislative Affairs.

Enclosure:
As stated.

RESPONSES OF THE DEPARTMENT OF STATE TO QUESTIONS ASKED BY SENATOR HELMS

1. During the 105th Congress, the Senate has been asked to give its advice and consent on almost as many MLATs as have entered into force in the last 20 years.

Question 1A. How many MLATS are estimated for the 106th Congress?

Answer. Based on the number of mutual legal assistance treaties currently under negotiation or recently signed, we estimate that as many as 12-15 new MLATs will be signed and sent to the Senate for advice and consent to ratification by the end of the 106th Congress.

Question 1B. How many MLAT requests did the United States receive in the last year?

Answer. The U.S. Justice Department's Office of International Affairs opened 416 cases involving requests received under the twenty MLATs now in force. A chart showing the breakdown of these cases by country is at Annex 1. Some of these cases involve multiple requests from the other country. With respect to this question and questions 1C through 1E, we note that statistics regarding formal requests reflect only one advantage of creating MLAT relationships. The relationships created between the Central Authorities enable numerous informal contacts and cooperation in law enforcement matters beyond those which are reflected in formal requests.

Question 1C. How many MLAT requests did the United States submit in the last year?

Answer. The U.S. Justice Department's Office of International Affairs opened 290 cases involving requests under the twenty MLATs now in force. The attached chart shows the breakdown of these cases by country. Several of these cases involve multiple requests to the other country. Some of these cases were opened by the Office of International Affairs but have not yet resulted in requests being made (e.g., requests may be in preparation or may not, based on available information, meet the relevant treaty's requirements)

Question 1D. How many additional MLAT requests is the United States likely to receive annually should each of the pending Treaties go into effect?

Question 1E. How many additional MLAT requests is the United States likely to submit annually should each of the pending Treaties go into effect?

Answer. It is not possible to predict with certainty the number of requests that will be received or submitted annually under a particular treaty or treaties because the number of requests is greatly affected by factors that cannot be quantified or predicted (including, for example, shifting crime trends in both the U.S. and the foreign state, the pace at which each treaty partner enacts implementing legislation, and the degree to which individual and institutional witnesses in the requested state cooperate with particular requests). The nineteen countries with MLATs now before the Senate together generated about 84 incoming cases and 42 outgoing cases in the last year under the pre-MLAT procedures now in place. It is reasonable to assume that at least that number of cases overall will be generated once the proposed MLATs enter into force.

Question 1F. What are the most common types of assistance we are asked to provide?

Answer. The most common type of assistance the United States is asked to provide under our mutual legal assistance treaties is to arrange for a statement to be taken from a person located in the United States regarding an investigation possible prosecution of that person abroad. The U.S. is frequently asked to obtain bank records or corporate documents located in the U.S. that are related to suspect financial transactions in other countries.

Question 1G. What are the most common types of assistance we request?

Answer. The most common type of assistance we request is the production of bank or business records located abroad that are related to suspect transactions being investigated or prosecuted in the United States. Other kinds of requests include requests for interviews in the foreign state with suspects or witnesses, requests for government records such as police reports or records of convictions, and requests to help arrange for witnesses to travel to the U.S. for questioning. The type of assistance requested varies with the state involved. For instance, Switzerland, the Cayman Islands, and the Bahamas are major financial centers, and a large percentage of our requests there are for bank and business records; conversely, relatively few of our requests to the Philippines have been for bank records.

Question 1H. How might the types of assistance sought and requested be expected to change in the future?

Answer. We do not expect the types of assistance to change significantly in the future, but it is almost impossible to predict this with certainty.

Question 1I. How might the types of assistance sought and requested be expected to differ under the pending Treaties should they go into effect than under existing MLATS?

Answer. We do not expect the types of assistance sought and requested to differ under the pending treaties from the overall situation under the existing MLATs. However, we expect the assistance sought and received to vary by treaty, based on the needs in individual cases.

2. The Technical Analyses accompanying various MLATs have from time to time offered an understanding of the reach of an essential interest clause or some other feature common to most MLATs or to the practices associated with their implementation.

Question 2A. To what extent do these individual understandings have general application?

Answer. The discussion of the "essential interests" clauses found in each of the Technical Analyses is intended to reflect the discussion of the relevant provision during the negotiation of that particular MLAT. The understandings reached in the negotiation of the relevant clause were generally similar among the various treaties and to that extent they are of general application. Where a particularly detailed or nuanced understanding of "essential interests" was agreed upon in a particular negotiation, that fact is reflected in the Technical Analysis (see, e.g., Technical Analysis of the U.S. Australia MLAT).

Question 2B. Under what kinds of circumstances are we likely to invoke the essential interests clause?

Answer. We would be likely to invoke the essential interests clause, for example, if executing the request would prejudice U.S. security interests, might oblige us to take action that we believe would violate the Constitution, or if executing the request would be inconsistent with an applicable proviso developed during the ratification process.

Question 2C. Under what kinds of circumstances are other nations likely to invoke the essential interests clause in response to a request from us?

Answer. None of our MLAT treaty partners has yet denied a U.S. legal assistance request on essential interests grounds. We could envision, for example, a request being denied on national security grounds or perhaps where the request involves a case or investigation for which the death penalty is possible in the United States but not in our treaty partner.

Question 2D. Would you permit one of the several States of the United States that has abolished the death penalty to decline to execute a Treaty request related to a capital offense on the basis of the essential interests clause?

Answer. Under each of the MLATs, only our Attorney General, as Central Authority, or her designee, may deny a request on the basis of essential interests. Moreover, the overwhelming majority of MLAT requests are executed by Federal officials acting under Federal law (28 U.S.C. § 1782), and state officials would not usually be involved. If for some reason state officials were called upon to execute an MLAT request, we would not expect them to decline to execute a request because it related to a capital offense, because we believe that even those states that have abolished the death penalty recognize the important public interest in efficient and effective investigation of capital cases in other nations. Indeed, states within the U.S. that have abolished the death penalty do not refuse to cooperate with other states within the U.S. that do have capital punishment, and we expect them to cooperate similarly with our MLAT partners.

Question 2E. Has the United States ever denied a request based on the "essential interests" proviso included in most MLATS? What inquiry is made to ensure the requirements of this proviso are met?

Answer. So far, the United States has not denied any requests based on the essential interests provisos. The thorough inquiry we make to ensure that the requirements of the various provisos are enforced involves the identification by the Justice Department of the relevant senior government officials who will have access to the information, and consultation with all other appropriate intelligence, antinarcotic and foreign policy agencies to make the relevant determinations.

Question 3. Does the term "person" in the locate-and-identify articles refer only to human beings? Does the term "person" in the locate-and-identify articles refer to fugitives?

Answer. The term "person" in locate and identify articles refers to both human beings and legal persons (e.g., corporations or institutions). The person could refer to a fugitive whose location we want to ascertain, but it could also be a witness we would like to interview or a person whom we wish to serve with process.

Question 4. Why is the Extradition Protocol with Spain necessary? Are there any specific cases this Protocol would affect?

Answer. The primary reason the Extradition Protocol with Spain was negotiated was that the main U.S.-Spain Treaty requires that extradition not be granted if the statute of limitations of either the Requesting State or the Requested State has expired, and this proved to be extremely difficult to implement. The Protocol substituted the much simpler rule that the statute of limitations of the Requesting State alone be applied. The Protocol also addresses the issue of amnesties by stating that amnesties in the Requested State will not bar extradition, and includes provisions on waiver of extradition and rule of specialty. The changes to the U.S.-Spain extradition relationship will be of general future application and will affect any future case brought under the treaty, as amended. The Protocol was not negotiated to address any particular pending or future case.

Question 5. Why is the Extradition Protocol with Mexico necessary? Are there any specific cases this Protocol would affect?

Answer. The primary reason for the Mexico Protocol is that the main U.S.-Mexico Extradition Treaty does not provide for temporary extradition for trial of persons whose final extradition must be deferred because they are serving long sentences in the Requested State.

An important impetus for the Protocol was the inability of U.S. and Mexican authorities under the 1978 Treaty to effect the temporary surrender to New York of a dangerous felon (Luis Martinez) wanted for prosecution there on multiple murder charges. Arranging Martinez' trial in New York, before the completion of a seven-year Mexican prison sentence he was serving, was urgent because of the imminent loss of the only eyewitness to the crime, who was planning to leave the country. Given the relatively more serious nature of the U.S. charges, Mexico eventually agreed to parole Martinez so that he could be released and surrendered to U.S. authorities. According to our most recent information, he is currently awaiting trial in New York.

Question 6. Please state for the record the countries that:

- are required by the pending treaties to extradite their nationals.
- have the discretion to extradite their nationals and the legal authority to extradite their nationals under domestic law.
- have the discretion to extradite their nationals but do not have the legal authority to extradite their nationals under domestic law.

Answer. The extradition treaties with Antigua and Barbuda, Argentina, Barbados, Dominica, Grenada, India, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago and Zimbabwe all require extradition of nationals. The extradition treaties with Austria, Cyprus, Luxembourg, and Poland give each party the discretion to extradite its nationals, but each of these nations at this time is prohibited by statute or constitution from doing so. (At the time of the negotiations, Poland apparently had the legal authority to extradite its nationals if a treaty so provided, but a subsequent amendment of its Constitution eliminated that possibility). The extradition treaty with France gives the United States the discretion to extradite its nationals to France, but does not include similar discretion for France to extradite its nationals to the United States; a 1927 statute prohibits France from extraditing French nationals.

The Mexico and Spain Protocols before the Committee do not address the issue of extradition of nationals. For the record, however, Mexico will extradite nationals under some circumstances. Spain historically has not extradited its nationals because of limitations in its national law, but a recent favorable judicial decision suggests that extradition of nationals may become possible under some circumstances.

Question 7. Please state the State Department policy with regard to making a request for extradition to countries that do not extradite their nationals.

Answer. Where an extradition treaty partner is permitted but not required to extradite its nationals, the State Department might request extradition of that country's national even if the relevant treaty partner had generally denied such requests. We might make such a request, for example, in an effort to encourage the country to exercise discretion available under its domestic law. In addition, there are provisions in the new treaties with countries that do not now extradite their nationals obligating the country, upon the U.S. Government's request, to prosecute their nationals if they are not extradited (*see, e.g.,* Art. 3(2) of Luxembourg Treaty and Art. 4(2) of Poland Treaty). The State Department in consultation with the Justice Department might in some cases seek extradition of a foreign national to trigger a prosecution under one of these articles.

Question 8. Why was an annex to the Hong Kong Mutual Legal Assistance Agreement necessary?

Answer. A general goal of U.S. MLAT negotiators is to maximize the scope of assistance that is available under an MLAT. As a result, the majority of our MLATs do not contain a dual criminality requirement. However, Hong Kong's negotiators insisted upon the inclusion of a dual criminality standard in Article 3 (Limitations on Providing Assistance) . The purpose of the Annex is to ensure that our requests will be executed, irrespective of dual criminality, in connection with a wide range of offenses that are important to us but which may not have identical counterparts in Hong Kong law. These offenses include, but are not limited to: money laundering, fraud against the government, the Foreign Corrupt Practices Act, racketeering, and criminal exploitation of children. Somewhat similar annexes accompany several other MLATs, including the MLAT with South Korea (which was approved by the Senate August 2, 1996), the Cayman Islands (approved by the Senate Oct. 24, 1989), and with Switzerland (approved by the Senate June 21, 1976).

Question 9. Does the State Department find that the Hong Kong Agreements provide precedent for treaty relationships with non-sovereign entities? If so, please explain.

Answer. The State Department has viewed Hong Kong as a unique situation in light of the autonomy of the Hong Kong criminal justice system after reversion and the importance of our law enforcement interests. The United States has a long history of direct involvement with Hong Kong as a crown colony of Great Britain, including an active law enforcement and prisoner transfer relationship which we have every reason to continue. Hong Kong enters into each of these treaties with the authorization of "the sovereign government which is responsible for [its] foreign affairs." In fact, both the United Kingdom and the People's Republic of China approved the treaties through the Sino-British Joint Liaison Group.

The upcoming reversion of Macau to the sovereignty of the PRC, in December 1999, presents another case in which we will have to address the need to continue an existing law enforcement relationship. As we begin planning for reversion, if an arrangement similar to that used for Hong Kong seems appropriate, we would consult with the Committee.

Question 10. Why do the mutual legal assistance treaties differ with respect to the inclusion of standard forms in the treaty document?

Answer. We usually seek to include provisions for use of forms in the treaty in order to ensure that evidence obtained under the MLAT (especially bank and business records) will be admissible in U.S. courts as provided by U.S. law (see 18 U.S.C. § 3505). While these forms could be developed by the Central Authorities during implementation of the treaties, we have found it extremely helpful in the implementation if the forms are agreed upon during the negotiations and contained in the treaty document itself. Thus, three such forms are found in MLATs with Antigua and Barbuda, Australia, Barbados, Brazil, Dominica, Grenada, Israel, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago; four forms are included in the MLAT with the Czech Republic; and five forms are included in the MLATs with Estonia, Lithuania, Luxembourg, and Poland. Sometimes the negotiators view the forms as a strictly administrative matter, and place them in an exchange of diplomatic notes or letters accompanying the treaty (*see, e.g.,* the Hong Kong Agreement). Sometimes, however, our treaty partners have difficulty accepting the inclusion of forms because they have no similar provisions in their domestic laws, and hence cannot utilize them as we do. Only one of the MLATs before the Senate, that with Venezuela, has no forms either included or attached.

Question 11. Why was an exchange of notes necessary with Australia regarding the definition of "essential interests"?

Answer. Article 3(1) (c) of the U.S.-Australia MLAT permits the Central Authority of the Requested State to deny assistance "if the execution of the request would prejudice the security or essential interests of the Requested State." Section 8 of Australia's Mutual Assistance in Criminal Matters Act 1987 (the "1987 Act"), which is the Australian domestic law governing mutual legal assistance, contains discretionary and mandatory bases for denial of mutual legal assistance requests, including a discretionary limit on the provision of assistance in death penalty cases. The exchange of notes, which was sought by Australia, gives Australia the discretion to refuse requests for assistance in accordance with its law by setting forth the understanding of the Parties that the term "essential interests" includes the limitations on assistance codified in Australian domestic law in Section 8 of the 1987 Act, as amended by the Mutual Assistance in Criminal Matters Legislation Amendment Act 1996, for as long as the law is in effect.

Australia also wanted the MLAT explicitly to allow it to deny assistance in cases and investigations subject to the death penalty in the United States. The United States opposed an explicit reference to the death penalty in the MLAT. Because Australia's Mutual Assistance in Criminal Matters Legislation Amendment Act 1996 amended the 1987 Act to limit assistance in death penalty cases, the delegations agreed to address this issue through the same exchange of notes. The Australian law requires denial of assistance in cases where a person is charged with or convicted of a death penalty offense unless the Australian Attorney-General determines that assistance should be granted. It also makes assistance discretionary in other cases where assistance may result in the imposition of the death penalty even where there is no charge or conviction of a death penalty offense at the time of the request. The Government of Australia confirmed by diplomatic note that it will not exercise the discretion to deny assistance in death penalty cases where requests for evidence might be exculpatory and that it would be unlikely to deny assistance at the pre-indictment phase, where the Requesting State is investigating

a crime for which no formal charges have been filed but to which the death penalty could attach.

Question 12. Please clarify your hearing testimony for the record regarding the Luxembourg MLAT. Specifically, what exchange of information provisions does this treaty require that are not provided for in the Luxembourg bilateral tax treaty? Please compare these requirements to the U.S. model for exchange of information.

Answer. Because Luxembourg tax authorities are prohibited under Luxembourg law from obtaining information from Luxembourg financial institutions for their own tax investigations and proceedings, Luxembourg was unable to agree to any provision in the U.S.-Luxembourg Tax Convention which would obligate the Luxembourg competent authority to obtain such information upon the request of U.S. competent authority for use in U.S. tax investigations or proceedings. To allow U.S. authorities another channel for obtaining information of Luxembourg financial institutions, the exchange of notes makes clear that information of Luxembourg financial institutions may be provided to U.S. authorities only in accordance with the terms of the MLAT.

During the negotiation of the MLAT, care was taken to ensure that the MLAT covers most, if not all, U.S. criminal tax offenses. Article 1 of the MLAT requires the parties to provide assistance for offenses concerning value added taxes, sales taxes, excise taxes, customs duties, and any other taxes agreed to by the parties through an exchange of diplomatic notes. Assistance for any other tax offenses, including income tax offenses, is limited to situations in which the facts establish a reasonable suspicion of "fiscal fraud," which is defined as a criminal offense in which 11(a) the tax involved, either as an absolute amount or in relation to an annual amount due, is significant; and (b) the conduct involved constitutes a systematic effort or a pattern of activity designed or tending to conceal pertinent facts from or provide inaccurate facts to the tax authorities.q" This kind of detailed formulation is not typical of U.S. MLATS, most of which do not contain limitations on the exchange of criminal tax information.

Question 13. Please clarify how the MLAT with Israel will relate to the bilateral tax treaty with Israel. Also, please clarify the universe of fiscal information that is available under the two treaties.

Answer. The U.S.-Israel MLAT obliges each party to assist the other in investigations, prosecutions, and proceedings related to criminal matters. The 1975 U.S.-Israel Income Tax Convention (with First and Second Protocols) provides for assistance in both civil and criminal tax investigations Since there is some overlap between the Tax Convention and the MLAT with respect to criminal tax matters, Israel requested that the MLAT be accompanied by an exchange of diplomatic notes that addresses the conditions under which assistance under the MLAT is available in criminal tax cases. The Parties agreed in the notes that in general the Tax Convention will be employed to obtain assistance in criminal tax matters unless certain circumstances warrant seeking assistance under the MLAT. Specifically, assistance under the MLAT will not be requested for matters within the scope of the provision for cooperation in the Tax Convention unless: (1) the form of assistance requested is not within the framework of the Tax Convention; or (2) the case concerned also includes additional serious non-tax offenses.

The first exception provides for assistance under the MLAT in criminal tax matters when the form of the requested assistance is not covered by the Tax Convention. The MLAT provides for a wide variety of forms of assistance, which are summarized in Article 2:

(a) taking the testimony or statements of persons;
(b) providing documents, records, and articles of evidence;
(c) serving documents;
(d) locating and identifying persons or items;
(e) transferring persons in custody for testimony or for other assistance under the Treaty;
(f) executing requests for searches and seizures;
(g) assisting in proceedings related to the immobilization and forfeiture of assets; and
(h) providing any other form of assistance not prohibited by the laws of the requested state.

Article 29 of the Tax Convention, as amended, provides for the exchange of "information as is pertinent to carrying out the provisions of [the Tax Convention] or preventing fraud or fiscal evasion in relation to the taxes which are the subject of [the Tax Convention]." Both the MLAT and the Tax Convention could be used (among other things) for the taking of testimony and obtaining documents such as bank records. Assistance in connection with criminal matters under the MLAT would be

more expansive in some ways than assistance under the Tax Convention. For example, the MLAT unlike the Tax Convention could be used for assistance in service of documents or a search and seizure. Since the forms of assistance provided in the MLAT but not in the Tax Convention will now be available in criminal tax cases, U.S. prosecutors in need of the service of a document or a search and seizure in Israel may request such assistance under the MLAT.

The second exception involves investigations or prosecutions in which tax offenses are accompanied by other serious non-tax offenses. Since the evidence needed for non-tax offenses would not be obtainable under the Tax Convention, the Parties agreed that it would be more efficient for the prosecutor to request all of the evidence needed, for both the tax and non-tax offenses, in one request under the MLAT.

Question 14. What is the effect of the Protocol to the Treaty with St. Vincent and the Grenadines?

Answer. The Protocol to the MLAT with St. Vincent and the Grenadines was sought by the delegation of St. Vincent and the Grenadines as a restatement of one aspect of the scope of the treaty. The Protocol, like the exchanges of diplomatic notes in the MLATs with St. Kitts and Nevis and Antigua and Barbuda, reflects the Parties' agreement that Article 1 of the MLAT excludes assistance for civil and administrative income tax matters that are unrelated to any criminal matter. Since our MLATs do not in any event apply to civil or administrative matters unrelated to any criminal matter, the Protocol does not alter or affect the scope of the MLAT.

Annex 1 (Relates to Sen. Helms Question 1)

U.S. Mutal Legal Assistance Treaty	# Cases–Incoming Requests (FY 1998)	# Cases–Outgoing Requests (FY 1998)
Argentina	47	0
Austria	14	7
The Bahamas	0	17
Canada	24	75
The Cayman Islands	2	19
Hungary	54	3
Italy	27	9
Jamaica	1	1
South Korea	2	3
Mexico	76	29
Morocco	0	0
The Netherlands	22	17
Panama	15	6
The Philippines	1	6
Spain	28	1
Switzerland	25	37
Thailand	3	5
Turkey	22	0
The United Kingdom	53	47
Uruguay	0	2

RESPONSES OF THE DEPARTMENT OF STATE TO QUESTIONS ASKED BY SENATOR BIDEN

Question 1. In cases where the United States has an existing extradition treaty in place, how many people have been extradited between the two countries within the last two years (this question applies only to those countries with which an extradition treaty was the subject of this hearing)?

Answer. Attached at Annex 1 are charts showing recent extraditions to and from the countries with extradition treaties pending before the Committee. These numbers do not include the significant number of cases that began with extradition requests, but concluded with the fugitives being surrendered by means other than formal extradition, such as expulsion or deportation. For example, in 1997 and 1998, Mexico deported to the U.S. 11 fugitives in addition to those it extradited here.

It is anticipated that the number of extraditions will increase once these new, modern treaties are in force, primarily because in many cases the new treaties, which are all based on dual criminality, will replace antiquated list treaties that do not include serious crimes such as money laundering, racketeering and alien smuggling.

Question 2. Please describe the Department of Justice's view of the state of the law regarding evidence gathered in a search involving property owned and occupied by a U.S. citizen living in the Requested State, and whether that evidence would then be admissible in a U.S. court.

Answer. We understand this question to be directed at searches conducted outside of United States at the request of the United States or in an investigation to which the United States is a joint participant. In those situations, the current state of the law is reflected in a Ninth Circuit decision. In *United States* v. *Barona,* 56 F.3d 1087 (9th Cir. 1995), *cert. denied sub nom. Bennett* v. *United States,* 116 S.Ct. 813 (1996), the United States participated with foreign officials in wiretapping the telephones of certain American citizen in Europe under investigation for narcotics offenses. The interceptions complied with foreign law, but were not conducted pursuant to warrants issued under standards set out in the federal wiretap statute. The Ninth Circuit upheld the convictions against a claim of a Fourth Amendment violation.

The Court ruled as an initial matter that the U.S. domestic wiretap law had no extraterritorial effect and did not govern the searches. It also ruled that the warrant requirement of the Fourth Amendment is impracticable in the context of foreign searches. The Court concluded, however, that the reasonableness requirement of the Fourth Amendment does apply because the wiretaps were the result of a "joint venture" search. It then held that a foreign search is reasonable if it was conducted in accordance with the law of the foreign state in which the search occurred. The court therefore rejected the defendants' Fourth Amendment claim, and upheld their convictions. This holding is consistent with the position that the government had previously argued in *United States* v. *Verdugo-Urquidez,* 494 U.S. 259 (1990); there, the Solicitor General urged that if the Fourth Amendment applies extra territorially it should only require that the foreign search be reasonable, but not pursuant to a Fourth Amendment warrant, because of practical constraints and the difficult questions of sovereignty and authority. Attached at Annex 2 is a copy of a February 3, 1998, letter from the Department of Justice Office of Legislative Affairs to the Honorable Henry J. Hyde, Chairman, House Committee on the Judiciary, which discusses this issue in detail.

U.S.-MEXICO EXTRADITION PROTOCOL (T.DOC. 105-46)

Question 1. Why was it necessary to agree that the mechanism established by the Protocol will be reserved for "exceptional situations", as explained in the Technical Analysis at page 4?

- Did the negotiators have a common understanding as to what constitutes an exceptional situation?

Answer. The temporary surrender mechanism under the U.S.-Mexico Extradition Protocol is generally the same as those in numerous other recent U.S. extradition treaties, and the intention is that it will be used in the same manner as the temporary surrender provisions in those other treaties. The statement in the Technical Analysis is not intended to reflect any different understanding, but merely to acknowledge the common practice -- *i.e.,* that temporary surrender is virtually always reserved for "exceptional situations." Given that temporary surrender is a complex process, potentially involving the interaction of federal and state judicial and prison authorities, only certain important cases would merit the expenditure of resources entailed. In fact, there have been very few cases to date under U.S. extradition treaties generally in which temporary surrender has been sought.

The negotiators of this Protocol did indeed have a common understanding of the type of case that would trigger the temporary surrender mechanism. As noted at pages 8-9 of the statement of Deputy Assistant Attorney General Mark Richard before the Senate Foreign Relations Committee, an important impetus for the Protocol was the inability of U.S. and Mexican authorities under the 1978 extradition treaty to effect the temporary surrender to New York of a dangerous felon (Luis Martinez) wanted for prosecution there on multiple murder charges. Arranging Martinez' trial in New York, before the completion of a seven-year Mexican prison sentence he was serving, was urgent because of the imminent loss of the only eyewitness to the crimes. (Martinez was charged with critically wounding that witness.) U.S. and Mexican negotiators agreed that the Martinez case exemplified the circumstances in which temporary surrender is appropriate -- i.e., those in which the interests of justice would be thwarted by any delay in prosecution.

Question 2. Please provide the text of the extradition treaty currently in force.

Answer. A copy is attached at Annex 3.

U.S.-INDIA EXTRADITION TREATY (T.DOC. 105-30)

Question 1. What is the legal status of letters exchanged on June 25, 1997 in connection with the treaty?

Answer. The letters represent the authoritative understanding and interpretation of the governments of the United States and India that a Requesting State shall make an extradition request contemplating prosecution or punishment based on laws and procedures other than the ordinary criminal laws and procedures of the Requesting State only after consultation with and upon the agreement of the Requested State. While the letters do not have the legally binding status of the treaty itself, they represent a clear and authoritative record of how the United States and India interpret and intend to implement the relevant treaty provisions.

Question 2. What are the limitations on the rights of defendants that were contained in India's Terrorist and Disruptive (Prevention) Act?

Answer. India's Terrorist and Disruptive (Prevention) Act (TADA) limited the rights of a defendant accorded under ordinary Indian criminal law in a number of important respects. These include making it more difficult for the accused to be released on bail, permitting a defendant to be detained for a year before being charged, providing for all trial proceedings to be conducted *in camera* and for the court to sit at any place (e.g., including a jail), permitting the court to keep secret the identity of witnesses, allowing the admissibility of confessions to the police, reversing the burden of proof in certain situations, and limiting the right to appeal.

Question 3. Has the Terrorist and Disruptive (Prevention) Act lapsed by its terms or was it repealed?

Answer. TADA lapsed by its own terms on May 23, 1995, and has not been replaced. It continues to have effect, however, with respect to cases that were under investigation and trial as of that date.

Question 4. Does the Executive Branch intend to deny extradition in the event a request is made involving a case under that Act or any similar law?

Answer. While we cannot rule out the possibility that a request under laws of this type might merit serious consideration, we do not anticipate being presented with such a case, at least according to the information currently available to us with respect to India. We therefore would not expect to extradite to India pursuant to TADA or a similar law.

U.S.-TRINIDAD & TOBAGO EXTRADITION TREATY (T. DOC. 105-21)

Question 1. Is an "indictable offense" as used in Article 2(1) equivalent to a felony in U.S. law?

Answer. Yes, we understand that an indictable offense in Trinidad and Tobago is roughly equivalent to a felony in U.S. law. Trinidad has several categories of offenses, with indictable offenses being particularly serious offenses triable before a high court judge and jury. As reflected in Article 2(1), offenses are extraditable under the treaty only if they are indictable offenses in Trinidad and punishable by more than one year in the United States.

U.S.-LUXEMBOURG EXTRADITION TREATY (T. DOC. 105-10)

Question 1. Does Article 2(1) (a) include aiding and abetting an offense?

Answer. Yes. During the negotiations of the U.S.-Luxembourg extradition treaty, the Luxembourg delegation explained that under Article 66 of Luxembourg's Criminal code, a "co-author" of an offense is punishable to the same extent as the principal. In addition, under Article 69 of Luxembourg's Criminal Code, one convicted of being an accomplice or accessory to the crime is punishable by a sentence "one grade less than that which could be imposed on the principal." Our delegation concluded that these provisions of Luxembourg domestic law cover the same liability as 18 U.S.C. § 2.

Question 2. The Technical Analysis related to Article 2(6) states that the Secretary of State makes the decision whether to grant or deny extradition in case where the prosecution is barred by the statute of limitations in the Requested State.

- Please provide the legal authority for the Secretary to make this decision.
- Why would this determination not be one for the court to make?

Answer. Article 2(6) of the Luxembourg extradition treaty states that extradition may be denied if prosecution is barred by the statute of limitations in the Requested State. In this article, like others where discretion is vested in the Requested State, it is appropriate for this decision to be vested in the Secretary of State. Under U.S. law, the Secretary of State, rather than a court, would ultimately exercise discretion as to whether extradition would be granted or denied. *See* 18 U.S.C. §§ 3184, 3186. Although a court might address the threshold factual question of whether the U.S.

statute of limitations has expired, this treaty provision addresses the sovereign act of granting or denying extradition. In this connection, we note that U.S. extradition treaties increasingly do not include the statute of limitations of the Requested State as a ground for denial of extradition, and that we expect that, barring unusual circumstances, the United States would usually extradite if the only bar to extradition were the statute of limitations in this country as Requested State.

Question 3. The Technical Analysis with regard to Article 5(3) states that the parties agreed that the drug trafficking offense, crime of violence, or other crime, must be "particularly serious" to fall within this paragraph.

- Why was this agreement between the parties necessary?
- Is not a drug trafficking offense ipso facto a "particularly serious" offense?

Answer. Article 5 on "Fiscal Offenses" resulted from extensive negotiations as to whether tax offenses should be extraditable under the U.S.-Luxembourg extradition treaty. Luxembourg wanted to exclude tax offenses from the scope of the treaty altogether. In deference to U.S. concerns, the language ultimately adopted permits (but does not require) denial of extradition for fiscal offenses; which are defined in Art. 5(2) as offenses related to reporting and payment of taxes or customs duties or relating to currency exchange control. Article 5(3) also specifically states that the Requested State may consider an offense that falls within the definition of Art. 5(2) not to be a fiscal offense if the offense relates to drug trafficking, a crime of violence, or other criminal conduct of a particularly serious nature. (In short, the U.S. delegation persuaded Luxembourg to make short, the U.S. delegation persuaded Luxembourg to make denial of fiscal offenses discretionary rather than mandatory, and to consider foregoing denial where the fiscal offense is related to a serious crime.)

Answer. The U.S. believes that drug trafficking is inherently a serious offense. Nevertheless, the technical analysis reflects recognition by the U.S. delegation that Luxembourg probably would not apply subparagraph (3) if the tax, customs, or currency exchange offense in the case related to a crime (including a drug crime) that Luxembourg did not consider particularly serious.

Question 4. Who will represent the United States in cases in Luxembourg courts? Who will pay for such representation?

Answer. Luxembourg's domestic law does not contemplate "representation" of the United States by Luxembourg in its courts in the manner in which many of our other extradition partners represent the United States. Instead, U.S. extradition requests will be presented in writing by the Luxembourg Ministry of Justice to an appropriate Luxembourg court with a Justice Ministry recommendation on the disposition of the request. It is therefore not contemplated that any costs for representation will be incurred by the United States.

U.S.-Poland Extradition Treaty (T. Doc. 105-14)

Question 1. Please describe the "association to commit offenses" under the law of Poland (referred to in Art. 2(2)).

- Is it similar to accomplice liability in U.S. law?
- Does Polish law provide for conspiracy liability in any respect?

Answer. Polish law does not have a general conspiracy statute similar to 18 U.S.C. § 371. Article 123 of the Polish Penal Code only penalizes conspiracies in national security cases, i.e., conspiracies "... to deprive the Republic of Poland of its independence, to detach a portion of its territory, to overthrow by force its system or to weaken its defenses generally..."

Answer. The closest Polish analogue to our general conspiracy offense appears to be "association to commit offenses" under Article 276 of the Polish Penal Code. This statute reads:

> "1. Whoever participates in an association having for its purpose an offense shall be subject to the penalty of deprivation of liberty for from 6 months to 5 years.
>
> "2. If the association has an armed character, the perpetrator shall be subject to the penalty of deprivation of liberty for from 1 to 8 years.
>
> "3. Whoever establishes an association specified in paragraph 1 or paragraph 2 or directs it shall be subject to the penalty of deprivation of liberty for from 2 to 10 years.

Because the crimes of conspiracy in the U.S. and association to commit offenses in Poland are not identical, Article 2(2) of the Treaty provides that a conspiracy in violation of U.S. law and an association to commit offenses under Polish law are extraditable if the underlying crime is one for which dual criminality exists, and does not require dual criminality for the conspiracy charge itself or the association to commit offenses charge itself.

Question 2. The Technical Analysis regarding Article 8 states that the "article indicates that the Requested State should not deny the request if the statute of limitations expires after the Requested State receives the request."

- By its terms, the Article provides no such indication. In what manner does the article so indicate? Is this assertion based on the negotiating record?

Answer. It is accurate that Article 8 itself does not contain the quoted language. The technical analysis should have referred to the understanding reached between the negotiators rather than the article itself.

U.S.-ZIMBABWE EXTRADITION TREATY (T.DOC 105-33)

Question 1. The Department of State Country Reports on Human Rights Practices for 1997 states that in Zimbabwe the "Government still enjoys a wide range of legal powers under the Official Secrets Act and the Law and Order Maintenance Act (LOMA) ." (p.386)

- Please summarize the legal powers that the government has under these laws.
- Are there provisions of these laws that would not meet the dual criminality standard?

Answer. The Law and Order Maintenance Act (LOMA) was promulgated by the government of then-Southern Rhodesia in 1960 and was retained by the new government after Zimbabwe gained independence in 1980. We understand that the Government of Zimbabwe is considering repealing and replacing the LOMA but that no final decisions have been made by the Zimbabwean parliament.

The LOMA gives the Government of Zimbabwe extraordinary powers to regulate and/or prohibit certain public processions, gatherings and meetings, and to prohibit the printing, publication, distribution, sale or reproduction of publications that the President determines are likely to be contrary to the interests of public safety or security. It authorizes the Postmaster-General to detain and examine packages suspected to contain any prohibited publication. The LOMA also creates various other security-related crimes such as interfering with essential services, undermining the authority of the police or of the President, making subversive statements, and participation in terrorism or sabotage.

The Official Secrets Act (OSA) dates back to 1970 and gives the Government broad powers to proscribe the disclosure of information which might be useful to an enemy for purposes prejudicial to the safety or interests of Zimbabwe. It prohibits obtaining or disclosing official secrets, including information relating to or used in a "prohibited place," which includes defense installations and other places determined by the President. Unauthorized persons are prohibited from entering, creating sketches, plans, or models regarding, and, upon a request to disperse, loitering in the vicinity of such places. The OSA also criminalizes the failure to report known information on anyone who intends to violate the act.

Many of the offenses thus created under LOMA and OSA would not be extraditable under the U.S.-Zimbabwe Treaty because they would not be offenses under U.S. law. Article 2 of the Treaty defines extraditable offenses as those that are "punishable under the laws in both Contracting States by deprivation of liberty for a period of more than one year or by a more severe penalty." In determining whether this requirement is satisfied in a particular case, U.S. courts look to the underlying act upon which the charge of the requesting state is based. The dual criminality standard is met if this act is also proscribed by a law of the United States. *See, e.g., Demjanjuk v. Petrovsky,* 776 F.2d 571, 579 (1985), *cert. denied* 475 U.S. 1016 (1986).

If the Government of Zimbabwe were to request the extradition of a person for an offense under the LOMA or OSA, the United States would review the underlying act upon which the charge or conviction was based. While some offenses under LOMA and OSA may also be punishable under U.S. law and thus be found to be extraditable, many others would not be. For instance, certain offenses under LOMA might also violate U.S. gun control laws, and some offenses involving prohibited publication or disclosure of information could be punishable under our national security laws covering classified information. On the other hand, the broad reach of outlawed activity that we would consider to be protected by the First Amendment, including e.g., constraints on publication and public gatherings and prohibitions on undermining the authority of the police or the President, means that many offenses under these Acts would not satisfy dual criminality and would not be extraditable. Finally, we note that many of the offenses identified in this statute appear to be punishable by less than one year's imprisonment and would therefore not in themselves be extraditable.

Apart from the dual criminality limitations, the Zimbabwe treaty, like all of the other treaties before the Committee, also contains exceptions to the obligation to extradite for political offenses and politically motivated prosecutions.

Question 2. The Human Rights Report also states that "well over 90 percent of defendants in magistrates' courts go unrepresented," and that "(m)agistrates, who are part of the civil service rather than the judiciary, hear the vast majority of cases and are sometimes subject to political pressure." (p.387)

- What is the scope of the jurisdiction that magistrates have? Do they hear criminal cases involving deprivation of liberty for a period of more than one year or by a more severe penalty?

Answer. Zimbabwe's Magistrates Court Act establishes ordinary, senior, provincial, and regional magistrates with varying types of jurisdiction, ranging from the authority to impose punishments not exceeding one year to the authority to impose punishments not exceeding seven years of imprisonment. The magistrates courts do not have jurisdiction over murder and treason cases or any capital crime. Only the regional magistrates courts have jurisdiction over serious rape cases.

Any defendant convicted by a magistrates court has the right to appeal to the High Court against his sentence and the right to appeal to the Supreme Court against his conviction. In addition, the High Court automatically reviews magistrates' sentences of unrepresented individuals who have been sentenced to over six months in prison or fined over one thousand dollars. The High Court also reviews, upon request, similar sentences of corporate defendants and those represented by counsel at trial, as well as lesser sentences of unrepresented individuals. Sentences of unrepresented individuals by ordinary, senior or provincial magistrates courts to more than three but less than six months in prison or to fines of more than five hundred but less than one thousand dollars that are not otherwise reviewed by the High Court are automatically reviewed by a regional magistrate, who may then refer the case to the High Court for review.

U.S.- ZIMBABWE EXTRADITION TREATY (T.DOC 105-33)

Question 3. How many fugitives from U.S. courts are currently in Zimbabwe?

- Please provide information about (a) what criminal charges they face; (b) the sentence they have received (if applicable); and (c) where these charges were pending or sentences (if applicable) were imposed.

Answer. The Justice Department does not currently have any open federal cases involving fugitives it knows are in Zimbabwe. This, however, does not mean that there are no U.S. fugitives in that country and does not foreclose the possibility that extradition requests will be made after the treaty enters into force. With the growth of narcotics trafficking and other transnational crime in the region we expect more cases to arise in the future for which there is U.S. federal jurisdiction. Since the U.S. currently has no extradition treaty in force with Zimbabwe, federal and state prosecutors and investigators interested in seeking extradition from Zimbabwe would probably elect not to submit extradition requests to the Department of Justice or Department of State, so we would have no record of these fugitives.

U.S.-CYPRUS EXTRADITION TREATY (T. DOC. 105-16)

Question 1. Article 8(6) provides that in the case of a person found guilty in absentia, the executive authority may refuse extradition unless "the Requesting State provides the Requested State with information which demonstrates that the person was afforded an adequate opportunity to present a defense."

- Does this therefore obligate the Requested State to extradite if the requisite information is provided?
- Would the Requested State have an obligation to extradite if the Requesting State provided that the defendant will be afforded an adequate opportunity to present a defense (i.e., if the jurisdiction in the Requesting State provides assurances that a new trial will be held)?

Answer. U.S. courts generally require that if the person sought for extradition was convicted *in absentia* in the Requesting State, the person is treated as one merely charged with an offense purpose of considering extradition. In addition, in *in absentia* cases the State Department typically requires the foreign state to agree to give the person sought a new trial after extradition (*see, e.g., Gallina v. Fraser,* 278 F.2d 77, 78 (2d Cir.), *cert. denied,* 364 U.S. 851, *rehear'g denied,* 364 U.S. 906 (1960)) except where the person sought had a full opportunity to defend himself on the merits during the *in absentia* proceedings. For example, the Secretary of State has extradited fugitives convicted *in absentia* who knew of all proceedings against them and were represented by counsel of their own choosing at those proceedings.

The language of Article 8(6) of the Cyprus Extradition Treaty reflects this exception. Under the language of this provision, the Requested State would not be permitted to deny extradition based on the *in absentia* nature of the conviction if the

person sought had an adequate opportunity to present a defense during the proceedings. However, it is not necessarily enough that the Requesting State provide information on the issue; the Requested State must assess the information and be convinced that it meets the standards in the treaty.

U.S.-SPAIN EXTRADITION SUPPLEMENTARY TREATY (T. DOC. 105-15)

Question 1. Please provide the current extradition treaty and supplementary treaties or protocols.

Answer. A copy is attached as Annex 4.

U.S.-HONG KONG PRISONER TRANSFER TREATY (T. DOC. 105-7)

Question 1. How many prisoner transfers with Hong Kong were carried out in the past three years under the previous prisoner transfer treaty?

Answer. In 1995-1997, one United States national was transferred from Hong Kong to the United States, and one Hong Kong resident was transferred from the United States to Hong Kong.

Question 2. Please provide the applicable Justice Department regulations or guidelines relevant to the transfer of prisoners to other countries pursuant to prisoner transfer treaties and 18 U.S.C. Section 4100 et seq.

Answer. Attached at Annex 5 are the Justice Department Guidelines for Administration of Prisoner Transfer Treaties and Implementation of 18 U.S.C. §§ 4100 et seq. These guidelines, which were written in February 1989, are currently being revised.

Question 3. Will the diplomatic channel for this treaty be the government of Hong Kong?

Answer. Yes, we understand the reference in Article 12 to use of the diplomatic channel for settlement of disputes to refer to communications between the United States and Hong Kong, the two signatories to the treaty. This reflects the fact that the issue of transfer of prisoners falls within the autonomy of Hong Kong under the Joint Declaration and Basic Law. It is also consistent with the designation of Central Authorities in the United States and Hong Kong for implementation of the treaty in Article 3.

Question 4. Please describe how provisions analogous to Article 8(3) in existing prisoner transfer treaties work in practice.

- How is a sentence "adapted"?
- Is the transferring Party notified when a sentence is so adapted?

Answer. Adaptation of sentence (or "conversion" of sentence, as it is termed in the Council of Europe Convention on the Transfer of Sentenced Persons) occurs when a prisoner is brought before a court in the receiving country and given a new sentence. Adaptation of sentence also occurs in the absence of court ruling when the receiving country advises us that its laws will not permit the prisoner to serve a sentence as lengthy as was imposed in the United States.

In the few cases where adaptation has occurred, the process has worked as follows: our approval of an outgoing prisoner transfer is considered to be a preliminary approval. After we have given preliminary approval, the receiving country advises us, based on the limits of its law and its experience in similar cases, what new sentence the prisoner is likely to receive after transfer. If there is a substantial variance between the sentence which the prisoner received in the United States and the sentence which he or she is expected to serve after transfer, the case will be reconsidered within the Department of Justice. In most cases (particularly where the disparity is not extreme) we decide to go forward with the transfer, reasoning that the person has already been determined to be a good candidate for transfer by both countries and understanding that in many cases it is appropriate to defer to the standards of the receiving country. After the transfer has taken place and the new sentence has been set, the receiving country advises us what sentence will be served.

ANNEX 1 (RELATES TO SEN. BIDEN GENERAL QUESTION 1)

COUNTRY	Extraditions TO the U.S.	
	Cumulative: 1997–98	Cumulative: 1990–98
Antigua & Barbuda	0	2
Dominica	0	2
Grenada	0	1
St. Kitts & Nevis	0	0
St. Lucia	0	0
St. Vincent & The Grenadines	0	0
Argintina	5	15
Austria	1	13
Barbados	0	7
Cyprus	2	4
France	4	35
India	1	3
Luxembourg	0	5
Mexico	21	61
Poland	0	3
Spain	4	32
Trinidad & Tobago[1]	0	4
Cumulative Totals	38	187

COUNTRY	Extraditions FROM the U.S.	
	Cumulative: 1997–98	Cumulative: 1990–98
Antigua & Barbuda	0	0
Dominica[1]	0	0
Grenada	0	0
St. Kitts & Nevis	0	1
St. Lucia	0	0
St. Vincent & The Grenadines	0	0
Argintina	2	14
Austria	2	14
Barbados	0	2
Cyprus	0	0
France	0	19
India	3	3
Luxembourg	0	1
Mexico	26	73
Poland	0	1
Spain	4	5
Trinidad & Tobago[2]	0	0
Cumulative Totals	37	133

[1]extradition in 1984; None since that time.
[2]extradition in 1987 and 1 in 1988; None since that time.

Statistics derived from Justice (OIA) and State (LEI) Records Numbers include ONLY extraditions and waivers. Does not include deportation or expulsion transfers.

ANNEX 2 (RELATES TO SEN. BIDEN GENERAL QUESTION 2)

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
February 3, 1998.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
U.S. House of Representatives,
Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter on behalf of Congressman Bob Livingston, forwarding a letter from Brian Leighton on behalf of Richard Horn, concerning the Fourth Amendment rights of citizens overseas and a lawsuit in which

Mr. Leighton represents Mr. Horn. You have requested information concerning the Department of Justice's involvement with regard to Fourth Amendment protections and related court cases.

Mr. Leighton's letter to Congressman Livingston refers to the only current litigation of which we are aware involving the applicability of the Fourth Amendment to U.S. citizens overseas. The case was brought by Mr. Horn, a Drug Enforcement Administration agent, against other U.S. government officials in their individual capacities under *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971). Mr. Horn alleged that, while he was stationed overseas, other employees of the U.S. government conducted electronic surveillance on him in his government-leased quarters. The district court denied the defendants' motion for summary judgment on qualified immunity grounds (the court's opinion is sealed). In his letter to Congressman Livingston, Mr. Leighton expressed concern that the district court's decision was being appealed. Although a protective notice of appeal was filed in the ordinary course, the Department of Justice has determined not to pursue an appeal at this time, and the case remains in the trial court for further proceedings.

While the *Bivens* case was pending, Mr. Horn filed another action, styled as a class action, against the Secretary of State, the Director of Central Intelligence and the Director of the National Security Agency, in their official capacities, alleging that these agencies have a pattern and practice of conducting electronic surveillance against other employees of the U.S. government overseas. This latter case has been consolidated with the *Bivens* case.

Both cases are now proceeding in the district court. As you know, we are constrained in our ability to comment further on specific matters in litigation.

More generally, the Department of Justice has expressed its views concerning the applicability of the Fourth Amendment abroad in briefs filed in some recent criminal cases in the Supreme Court. In the government's brief in *United States* v. *Verdugo-Urquidez,* 494 U.S. 259 (1990), a case involving a search abroad of a foreign national by both American and foreign officials, the United States took the position (Government's Brief at 17) that "[t]he Constitution does not apply across the board to every person and in every setting overseas" (emphasis in original). Instead, following the suggestion of Justice Harlan's concurring opinion in *Reid* v. *Covert,* 354 U.S. 1 (1957), the government advocated case-by-case judgments, based on the application of three general factors: (1) whether the United States exercises significant sovereignty in the particular territory; (2) the nature of the underlying right, that is, whether the right can readily be applied in a foreign setting; and (3) the relationship of the claimant to the United States (Brief at 17–23).

The government argued in the *Verdugo* case that "the text and purposes of the Fourth Amendment suggest that the underlying right has little, if any, extraterritorial force, particularly when urged on behalf of a foreign national" (Brief at 23). The government further took the general view that, even if the Fourth Amendment applied extra territorially, it required only reasonableness; imposing the warrant requirement on overseas searches and seizures would be impracticable (Brief at 31–40). "Because of the unusual practical constraints, as well as difficult questions of sovereignty and authority, agents conducting investigations overseas should at most be bound by the more flexible Fourth Amendment requirement of reasonableness" (Brief at 39).

The Supreme Court agreed with the government's argument in *Verdugo* that the Fourth Amendment does not apply to foreign searches of foreign nationals, and it held that as to a search in Mexico of a citizen and resident of Mexico, "the Fourth Amendment has no application." (494 U.S. at 274–275.

In another case, *United States* v. *Barona,* 56 F.3d 1087 (9th Cir. 1995), cert. denied, *Bennett* v. *United States,* 116 S. Ct. 813, 1996), the United States had participated with Danish and Italian officials in wiretapping the defendants' telephones in Europe. Three of the defendants were American citizens. The court of appeals upheld all the convictions against a claim of a Fourth Amendment violation, and the United States opposed certiorari. The government's brief in opposition argued that the "special needs" that exist in the context of foreign searches make the warrant requirement impracticable in that setting; rather, the United States asserted, "a foreign 'joint venture' search of an American citizen that conforms to the requirements of foreign law should be accepted as reasonable within the meaning of the Fourth Amendment" (Brief in Opposition at 10).

I appreciate the inquiry on behalf of Mr. Leighton and his client. Do not hesitate to contact me should you, your office, or a constituent need additional information or assistance.

Sincerely,

ANDREW FOIS,
Assistant Attorney General.

ANNEX 3 (RELATES TO SEN. BIDEN MEXICO EXTRADITION PROTOCOL QUESTION 2)

Treaties and Other International Acts Series 9656

EXTRADITION

Treaty Between the

UNITED STATES OF AMERICA AND MEXICO

ENGLISH ONLY

SIGNED AT MEXICO CITY MAY 4, 1978

MEXICO

EXTRADITION

Treaty signed at Mexico City May 4, 1978;
Ratification advised by the Senate of the United States of America November 30, 1979;
Ratified by the President of the United States of America December 13, 1979;
Ratified by Mexico January 31, 1979;
Ratifications exchanged at Washington January 25, 1980;
Proclaimed by the President of the United States of America February 6, 1980;
Entered into force January 25, 1980

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Extradition Treaty between the United States of America and the United Mexican States was signed at Mexico City on May 4, 1978, the text of which, in the English and Spanish languages, is hereto annexed;

The Senate of the United States of America by its resolution of November 30, 1979, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty;

The Treaty was ratified by the President of the United States of America on December 13, 1979, in pursuance of the advice and consent of the Senate, and was duly ratified on the part of the United Mexican States;

It is provided in Article 23 of the Treaty that the Treaty shall enter into force on the date of exchange of the instruments of ratification;

The instruments of ratification of the Treaty were exchanged at Washington on January 25, 1980; and accordingly the Treaty entered into force on that date;

NOW, THEREFORE, I, Jimmy Carter, President of the United States of America, proclaim and make public the Treaty, to the end that it be observed and fulfilled with good faith on and after January 25, 198O, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY THEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this sixth day of February in the year of our Lord one thousand nine hundred eighty and of the Independence of the United States of America the two hundred fourth.

[SEAL]

JIMMY CARTER

By the President:
CYRUS VANCE
Secretary of State

EXTRADITION TREATY BETWEEN

THE UNITED STATES OF AMERICA AND

THE UNITED MEXICAN STATES

The Government of the United States of America and the Government of the United Mexican States;

Desiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition;

Have agreed as follows:

ARTICLE 1

Obligation to Extradite

1. - The Contracting Parties agree to mutually extradite, subject to the provisions of this Treaty, persons who the competent authorities of the requesting Party have charged with an offense or have found guilty of committing an offense, or are wanted by said authorities to complete a judicially pronounced penalty of deprivation of liberty for an offense committed within the territory of the requesting Party.

2. - For an offense committed outside the territory of the requesting Party, the requested Party shall grant extradition if:

a) Its laws would provide for the punishment of such offense committed in similar circumstances, or

b) the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.

ARTICLE 2

Extraditable Offenses

1. - Extradition shall take place, subject to this Treaty, for willful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both contracting Parties by deprivation of liberty the maximum of which shall not be less than one year.

2. - If extradition is requested for the execution of a sentence, there shall be the additional requirement that the part of the sentence remaining to be served shall not be less than six months.

3. - Extradition shall also be granted for willful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.

4. - Subject to the conditions established in paragraphs 1, 2 and 3, extradition shall also be granted:

a) For the attempt to commit an offense; conspiracy to commit an offense; or the participation in the execution of an offense; or

b) When, for the purpose of granting jurisdiction to the United States government, transportation of persons or property, the use of the mail or other means of carrying out interstate or foreign commerce, is also an element of the offense.

ARTICLE 3

Evidence Required

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.

ARTICLE 4

Territorial Application

1. - For the Purposes of this Treaty, the territory of a Contracting Party shall include all the territory under the jurisdiction of that Contracting Party, including airspace and territorial waters and vessels and aircraft registered in that Contracting Party if any such aircraft is in flight when the offense is committed.

2. - For the purposes of this Treaty, an aircraft shall be considered to be in flight at any time from the moment when all its external doors are closed following the embarkation until the moment when any such door is opened for disembarkation.

ARTICLE 5

Politiclal and Military Offenses

1. - Extradition shall not be granted when the offense for which it is requested is political or of a political character.

If any question arises as to the application of the foregoing paragraph, the Executive authority of the requested Party shall decide.

2. - For the purpose of this Treaty, the following offenses shall not be considered to be offenses included in paragraph 1:

a) The murder or other willful crime against the life or physical integrity of a Head of State or Head of Government or of his family, including attempts to commit such an offense.

b) An offense which the Contracting Parties may have the obligation to prosecute by reason of a multilateral inter national agreement.

3. - Extradition shall not be granted when the offense for which extradition is requested is a purely military offense.

ARTICLE 6

Non bis in idem

Extradition shall not be granted when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is requested.

ARTICLE 7

Lapse of Time

Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested Party

ARTICLE 8

Capital Punishment

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE 9

Extradition of Nationals

1. - Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

2. - If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

ARTICLE 10

Extradition Procedures and Required Documents

1. - The request for extradition shall be made through the diplomatic channel.

2. - The request for extradition shall contain the description of the offense for which extradition is requested and shall be accompanied by:

a) A statement of the facts of the case;

b) The text of the legal provisions describing the essential elements of the offense;

c) The text of the legal provisions describing the punishment for the offense;

d) The text of the legal provisions relating to the time limit on the prosecution or the execution of the punishment of the offense;

e) The facts and personal information of the person sought which will permit his identification and, where possible, information concerning his location.

3. - In addition, when the request for extradition relates to a person who has not yet been convicted, It shall be accompanied by:

a) A certified copy of the warrant of arrest issued by a judge or other judicial officer of the requesting Party;

b) Evidence which, in accordance with the laws of the requested Party, would justify the apprehension and commitment for trial of the person sought if the offense had been committed there.

4. When the request for extradition relates to a convicted person, it shall be accompanied by a certified copy of the judgment of conviction imposed by a court of the requesting Party.

If the person was found guilty but not sentenced, the extradition request shall be accompanied by a certification to that effect and a certified copy of the warrant of arrest.

If such person has already been sentenced, the request for extradition shall be accompanied by a certification of the sentence imposed and a statement indicating which part of the sentence has not been carried out.

5. - All the documents that must be presented by the requesting Party in accordance with the provisions of this Treaty shall be accompanied by a translation in the language of the requested Party.

6. - The documents which, according to this Article, shall accompany the request for extradition, shall be received in evidence when:

a) In the case of a request emanating from the United States, they are authenticated by the official seal of the Department of State and legalized by the manner prescribed by the Mexican law;

b) In the case of a request emanating from the United Mexican States, they are certified by the principle diplomatic or consular officer of the United States in Mexico.

ARTICLE 11

Provisional Arrest

1. - In the case of urgency, either Contracting Party may request, through the diplomatic channel, the provisional arrest of an accused or convicted person. The application shall contain a description of the offense for which the extradition is requested, a description of the person sought and his whereabouts, an undertaking to formalize the request for extradition, and a declaration of the existence of a warrant of arrest issued by a competent judicial authority or a judgment of conviction issued against the person sought.

2. - On receipt of such a request, the requested Party shall take the necessary steps to secure the arrest of the person claimed.

3. - Provisional arrest shall be terminated if, within a period of 60 days after the apprehension of the person claimed, the executive authority of the requested Party has not received the formal request for extradition and the documents mentioned in Article 10.

4. - The fact that the provisional arrest is terminated pursuant to paragraph 3 shall not prejudice the extradition of the person sought if the request for extradition and the necessary documents mentioned in Article 10 are delivered at a later date.

ARTICLE 12

Additional Evidence

If the Executive authority of the requested Party considers that the evidence furnished in support of the request for extradition is not sufficient in order to fulfill the requirements of this Treaty, that Party shall request the presentation of the necessary additional evidence.

ARTICLE 13

Procedure

1. The request fur extradition shall be processed in accordance with the legislation of the requested Party.
2. - The requested Party shall make all arrangements necessary for internal procedures arising out of the request for extradition.
3. - The competent legal authorities of the requested Party shall be authorized to employ all legal means within their power to obtain from the judicial authorities the decisions necessary for the resolution of the request for extradition.

ARTICLE 14

Decision and Surrender

1. - The requested Party shall promptly communicate to the requesting Party its decision on the request for extradition.
2. - In the case of complete or partial rejection of a request for extradition, the requested Party shall give the reasons on which it was based.
3. - If the extradition is granted, the surrender of the person sought shall take place within such time as may be prescribed by the laws of the requested Party. The competent authorities of the Contracting Parties shall agree on the date and place of the surrender of the person sought.
4. - If the competent authority has issued the warrant or order for the extradition of the person sought and he is not removed from the territory of the requested Party within the prescribed period, he shall be set at liberty and the requested Party may subsequently refuse to extradite him for the same offense.

ARTICLE 15

Delayed Surrender

The requested Party, after granting the extradition, may defer the surrender of the person sought when that person is being proceeded against or is serving a sentence in the territory of the requested Party for a different offense, until the conclusion of the proceeding or the full execution of the punishment that has been imposed.

ARTICLE 16

Requests for Extradition Made by Third States

The requested Party, in the case of receiving requests from the other Contracting Party and from one or more third States for the extradition of the same person, be it for the same offense or for different offenses, shall decide to which requesting State it shall grant the extradition of that person.

ARTICLE 17

Rule of Speciality

1. - A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

a) He has left the territory of the requesting Party after his extradition and has voluntarily returned to it:
b) He has not left the territory of the requesting Party within 60 days after being free to do so; or
c) The requested Party has given its consent to his detention, trial, punishment or extradition to a third State for an offense other than that for which the extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.
2. - If, in the course of the procedure, the classification of the offense is changed for which the person requested was extradited he shall be tried and sentenced on the condition that the offense, in its new legal form:

a) Is based on the same group of facts established in the request for extradition and in the documents presented in its support: and

b) Is punishable with the same maximum sentence as the crime for which be was extradited or with a lesser sentence.

ARTICLE 18

Summary Extradition

If the person sought informs the competent authorities of the requested Party that he agrees to be extradited, that Party may grant his extradition without further proceedings, and shall take all measures permitted under its laws to expedite the extradition. In such cases Article 17 shall not be applicable.

ARTICLE 19

Surrender of Property

1 - To the extent permitted under the law of the requested Party and subject to the rights of third parties, which shall be duly respected, all articles, instruments, objects of value or documents relating to the offense, whether or not used for its execution, or which in any other manner may be material evidence for the prosecution, shall be surrendered upon the granting of the extradition even when extradition cannot be effected due to the death, disappearance, or escape of the accused.

2. - The requested Party may condition the surrender of articles upon a satisfactory assurance from the requesting Party that the articles will be returned to the requested Party as soon as possible,

ARTICLE 20

Transit

1. - The right to transport through the territory of one of the Contracting Parties a person who is not a national of that Contracting Party surrendered to the other Contracting Party by a third State shall be granted on presentation made through the diplomatic channel of a certified copy of the decision on extradition, provided that reasons of public order are not opposed to the transit.

2. - The authorities of the transit State shall be in charge of the custody of the extradited person while that person is in its territory.

3. - The Party to which the person has been extradited shall reimburse the State through whose territory such person is transported for any expenses incurred by the latter in connection with such transportation.

ARTICLE 21

Expenses

The requested Party shall bear the expenses of the arrangements referred to in Article 13, with the exception that the expenses incurred for the translation of documents and, if applicable, for the transportation of the person ordered extradited shall be paid by the requesting Party.

ARTICLE 22

Scope of Application

1. - This Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force.

2. - Requests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 February, 1899,[1] and the Additional Conventions on Extradition of 25 June 1902,[2] 23 December 1925,[3] and 16 August 1939.[4]

---

[1] TS 242; 31 Stat. 1818.
[2] TS 421; 9 Bevans 918.
[3] TS 741; 44 Stat. 2409.
[4] TS 967; 55 Stat. 1133.

ARTICLE 23

Ratification, Entry into Force, Denunciation

1. - This Treaty shall be subject to ratification; the exchange of instruments of ratification shall take place in Washington as soon as possible.

2. - This Treaty shall enter into force on the date of exchange of the instruments of ratification.

3. - On entry into force of this Treaty, the Treaty of Extradition of 22 February 1899 and the Additional Conventions on Extradition of 25 June 1902, 23 December 1925 and 16 August 1939 between the United States of America and the United Mexican States, shall cease to have effect without prejudice to the provisions of Article 22.

4. - Either Contracting Party may terminate this Treaty by giving notice to the other Party. The termination shall take effect six months after the receipt of such notice.

Done In two originals, in the English and Spanish languages. both equally authentic at Mexico City this fourth day of May, one thousand nine hundred and seventy eight.

Cyrus Vance
For the Government of the
United States of America

S. Roel
For the Government of the
United Mexican States

APPENDIX

1. Murder or manslaughter: abortion.
2. Malicious wounding or injury.
3. Abandonment of minors or other dependents when there is danger of injury or death.
4. Kidnapping; child stealing: abduction: false imprisonment.
5. Rape; statutory rape; indecent assault, corruption of minors, including unlawful sexual acts with or upon children under the age of consent.
6. Procuration; promoting or facilitating prostitution.
7. Robbery, burglary; larceny.
8. Fraud.
9. Embezzlement.
10. An offense against the laws relating to counterfeiting and forgery.
11. Extortion.
12. Receiving or transporting any money, valuable securities, or other property knowing the same to have been unlawfully obtained.
13. Arson; malicious injury to property.
14. Offenses against the laws relating to the traffic in, possession, production, manufacture, importation or exportation of dangerous drugs and chemicals, including narcotic drugs. cannabis, psychotropic drugs. opium, cocaine, or their derivatives.
15. Offenses against the laws relating to the control of poisonous chemicals or substances injurious to health.
16. Piracy.
17. Offenses against the safety of means of transportation including any act that would endanger a person in a means of transportation.
18. An offense relating to unlawful seizure or exercise of control of trains, aircraft, vessels, or other means of transportation.
19. Offenses against the laws relating to prohibited weapons, and the control of firearms, ammunition, explosives, incendiary devices or nuclear materials.
20. An offense against the laws relating to international trade and transfers of funds or valuable metals.
21. An offense against the laws relating to the importation, exportation, or international transit of goods, articles, or merchandise, including historical or archaeological items.
22. Violations of the customs laws.
23. Offenses against the laws relating to the control banking institutions, or other corporations.
24. Offenses against the laws relating to the sale of securities, including stocks, bonds and instruments of credit.

25. Offenses against the laws relating to bankruptcy or rehabilitation of a corporation.
26. Offenses against the laws or unfair transactions.
27. Offenses against the laws property or copyright.
28. Offenses against the laws relating to abuse of official authority.
29. Bribery, including soliciting, offering and accepting bribes.
30. Perjury; false statements to any governmental authority. Subornation of perjury or false statements.
31. Offenses against the laws relating to obstruction of justice, including harboring criminals and suppressing evidence.

ANNEX 4 (RELATES TO SEN. BIDEN SPAIN EXTRADITION SUPPLEMENTARY TREATY QUESTION 1)

SPAIN

EXTRADITION

Treaty signed at Madrid May 29, 1970;
Ratification advised by the Senate of the United States of America February 17, 1971;
Ratified by the President of the United States of America March 1, 1971;
Ratified by Spain May 8, 1971;
Ratifications exchanged at Washington June 16, 1971;
Proclaimed by the President of the United States of America July 2, 1971;
Entered into force June 16, 1971.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Treaty on Extradition between the United States of America and Spain was signed on May 29, 1970, the original of which Treaty is annexed hereto;

The Senate of the United States of America by its resolution of February 17, 1971, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty;

The Treaty was ratified by the President of the United States of America on March 1, 1971, in pursuance of the advice and consent of the Senate, and has been duly ratified on the part of the Government of Spain;

The respective instruments of ratification were exchanged at Washington on June 16, 1971;

It is provided in Article XVIII of the Treaty that the Treaty shall enter into force upon the exchange of ratifications;

NOW, THEREFORE, I, Richard Nixon, President of the United States of America, proclaim and make public the Treaty, to the end that it shall be observed and fulfilled with good faith on and after June 16, 1971 by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this second day of July in the year of our Lord one thousand nine hundred seventy one and of the Independence of the United States of America the one hundred ninety-fifth.

[SEAL]

RICHARD NIXON

By the President:

WILLIAM P. ROGERS
Secretary of State

TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND SPAIN

TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND SPAIN

The President of the United States of America and the Chief of State of Spain, desiring to make more effective the cooperation of the two countries in the repression of crime through the rendering of maximum assistance in matters of extradition,

Have decided to conclude a Treaty and to this end have named as their representatives:

The President of the United States of America, The Honorable William P. Rogers, Secretary of State,

The Chief of State of Spain, His Excellency Señor Gregono Lopez Bravo de Castro, Minister of Foreign Affairs, who have agreed as follows:

ARTICLE I

In accordance with the conditions established in this Treaty, each Contracting Party agrees to extradite to the other, for prosecution or to undergo sentence, persons found in its territory who have been charged with or convicted of any of the offenses mentioned in Article II of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article III.

ARTICLE II

A. Persons shall be delivered up according to the provisions of this Treaty for any of the following offenses provided that these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year:

1. Murder; infanticide; patricide; manslaughter.
2. Abortion.
3. Rape; statutory rape; indecent assault, including sodomy and unlawful sexual acts with or upon minors under the age specified by the penal laws of both Contracting Parties.
4. Aggravated injury or mutilation.
5. Procuration.
6. Willful nonsupport or willful abandonment of a child or spouse when for that reason the life of that child or spouse is or is likely to be endangered.
7. Bigamy.
8. Kidnapping or abduction; child stealing; false imprisonment.
9. Robbery or larceny or burglary; housebreaking.
10. Embezzlement; malversation; breach of fiduciary relationship.
11. Obtaining money, valuable securities or property, by false pretenses, by threat of force or by other fraudulent means including the use of the mails or other means of communication.
12. Any offense relating to extortion or threats.
13. Bribery, including soliciting, offering and accepting.
14. Receiving or transporting any money, valuable securities or other property knowing the same to have been obtained pursuant to a criminal act.
15. Any offense relating to counterfeiting or forgery; making a false statement to a government agency or official.
16. Any offense relating to perjury or false accusation.
17. Arson; malicious injury to property.
18. Any malicious act that endangers the safety of any person in a railroad train, or aircraft or vessel or bus or other means of transportation.
19. Piracy, defined as mutiny or revolt on board an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel, any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft or vessel.
20. Any offense against the bankruptcy laws.

21. Any offense against the laws relating to narcotic drugs, psychotropic drugs, cocaine and its derivatives, and other dangerous drugs, including cannabis, and chemicals or substances injurious to health.
22. Any offense relating to firearms, explosives, or incendiary devices.
23. Unlawful interference in any administrative or juridical proceedings by bribing, threatening, or injuring by any means, any officer, juror, witness, or duly authorized person.

B. Extradition shall also be granted for participation in any of the offenses mentioned in this article, not only as principal or accomplices, but as accessories, as well as for attempt to commit or conspiracy to commit any of the aforementioned offenses, when such participation, attempt or conspiracy is subject, under the laws of both Parties, to a term of imprisonment exceeding one year.

C. If extradition is requested for any offense listed in paragraphs A or B of this article and that offense is punishable under the laws of both Contracting Parties by a term of imprisonment exceeding one year, such offense shall be extraditable under the provisions of this Treaty whether or not the laws of both Contracting Parties would place that offense within the same category of offenses made extraditable by paragraphs A and B of this article and whether or not the laws of the requested Party denominate the offense by the same terminology.

D. Extradition shall also be granted for the above mentioned offenses, even when, in order to recognize the competent federal jurisdiction, circumstances such as the transportation from one State to another, have been taken into account and may be elements of the offense.

ARTICLE III

A. For the purposes of this Treaty the territory of a Contracting Party shall include all territory under the jurisdiction of that Contracting Party, including airspace and territorial waters and vessels and aircraft registered in that Contracting Party if any such aircraft is in flight or if any such vessel is on the high seas when the offense is committed. For purposes of this Treaty an aircraft shall be considered to be in flight from the moment when power is applied for the purpose of takeoff until the moment when the landing run ends.

B. Without prejudice to paragraph A, 1 of Article V, when the offense for which extradition has been requested has been committed outside the territory of the requesting Party, extradition may be granted if the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances, and if the person whose surrender is sought is not also the subject of a request from another State whose jurisdiction over the person may take preference for territorial reasons and in respect of which there exists an equal possibility of acceding to a request for extradition.

ARTICLE IV

Neither of the Contracting Parties shall be bound to deliver up its own nationals, but the executive authority of the United States and the competent authority of Spain shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.

ARTICLE V

A. Extradition shall not be granted in any of the following circumstances:

1. When the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested Party for the offense for which his extradition is requested.

2. When the person whose surrender is sought has been tried and acquitted or has undergone his punishment in a third State for the offense for which his extradition is requested.

3. When the prosecution or the enforcement of the penalty for the offense has become barred by lapse of time according to the laws of either of the Contracting Parties.

4. When the offense in respect of which the extradition is requested is regarded by the requested Party as an offense of a political character, or that Party has substantial grounds for believing that the request for extradition has been made for the purpose of trying or punishing a person for an offense of the above mentioned character. If any question arises as to whether a case comes within the provisions of

this subparagraph, the authorities of the Government on which the requisition is made shall decide.

5. When the offense is purely military.

B. For the purposes of the application of subparagraph A, 4 of this article, the attempt, whether consummated or not, against the life of the Head of State or of a member of his family shall not be considered a political offense or an act connected with such an offense.

C. For the same purposes of application of subparagraph A, 4 of this article an offense committed by force or intimidation on board a commercial aircraft carrying passengers in scheduled air services or on a charter basis, with the purpose of seizing or exercising control of such aircraft, will be presumed to have a predominant character of a common crime when the consequences of the offense were or could have been grave. The fact that the offense has endangered the life or jeopardized the safety of the passengers or crew will be given special consideration in the determination of the gravity of such consequences.

ARTICLE VI

If a request for extradition is made under this Treaty for a person who at the time of such request is under the age of eighteen years and is considered by the requested Party to be one of its residents, the requested Party, upon a determination that extradition would disrupt the social readjustment and rehabilitation of that person, may recommend to the requesting Party that the request for extradition be withdrawn, specifying the reasons therefore.

ARTICLE VII

When the offense for which the extradition is requested is punishable by death under the laws of the requesting Party, extradition shall be denied unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE VIII

The requested Party may, after a decision on the request has been rendered by a court of competent jurisdiction, defer the surrender of the person whose extradition is requested when that person is being proceeded against or is serving a sentence in the territory of the requested Party for an offense other than that for which extradition has been requested until the conclusion of the proceedings and the full execution of any punishment he may be or may have been awarded.

ARTICLE IX

The determination that extradition based upon the request therefore should or should not be granted shall be made in accordance with this Treaty and with the law of the requested Party. The person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law.

ARTICLE X

A. The request for extradition shall be made through the diplomatic channel.

B. The request shall be accompanied by:

1. A description of the person sought;

2. A statement of the facts of the case;

3. The text of the applicable laws of the requesting Party including the law defining the offense, the law prescribing the punishment for the offense, and the law relating to the limitations of the legal proceedings or the enforcement of the penalty for the offense.

C. 1. When the request relates to a person already convicted, it must be accompanied by:

When emanating from the United States, a copy of the judgment of conviction and of the sentence, if it has been passed; or

When emanating from Spain, a copy of the sentence.

2. In any ease, a statement showing that the sentence has not been served or how much of the sentence has not been served shall accompany the request.

D. When the request relates to a person who has not yet been convicted, it must also be accompanied by a warrant of arrest issued by a judge or other judicial officer of the requesting Party.

The requested Party may require the requesting Party to produce prima facie evidence to the effect that the person claimed has committed the offense for which extradition is requested. The requested Party may refuse the extradition request if an examination of the case in question shows that the warrant is manifestly ill-founded.

E. If a question arises regarding the identity of the person whose extradition is sought, evidence proving the person requested is the person to whom the warrant of arrest or sentence refers shall be submitted.

F. The documents which, according to this article, shall accompany the extradition request, shall be admitted in evidence when:

In the case of a request emanating from Spain they bear the signature of a judge or other juridical or public official and are certified by the principal diplomatic or consular officer of the United States in Spain; or

In the case of a request emanating from the United States they are signed by a judge, magistrate or officer of the United States and they are sealed by the official seal of the Department of State and are certified by the Embassy of Spain in the United States.

G. The documents mentioned in this article shall be accompanied by an official translation into the language of the requested Party which will be at the expense of the requesting Party.

ARTICLE XI

A. In case of urgency a Contracting Party may apply to the other Contracting Party for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. This application may be made either through the diplomatic channel or directly between the respective Ministries of Justice.

B. The application shall contain a description of the person sought, 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 or sentence against that person, and such further information, if any, as may be required by the requested Party.

C. On receipt of such an application the requested Party shall take the necessary steps to secure the arrest of the person claimed.

D. A person arrested upon such an application shall be set at liberty upon the expiration of 30 days from the date of his arrest if a request for his extradition accompanied by the documents specified in Article X shall not have been received. However, this stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.

ARTICLE XII

If the requested Party requires additional evidence or information to enable it to decide on the request for extradition, such evidence or information shall be submitted to it within such time as that Party shall require.

If the person sought is under arrest and the additional evidence or information submitted as aforesaid is not sufficient or if such evidence or information is not received within the period specified by the requested Party, he shall be discharged from custody. However, such discharge shall not bar the requesting Party from submitting another request in respect of the same or any other offense.

ARTICLE XIII

A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

1. He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;

2. He has not left the territory of the requesting Party within 45 days after being free to do so; or

3. The requested Party has consented to his detention, trial, punishment or to his extradition to a third State for an offense other than that for which extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.

ARTICLE XIV

A Party which receives two or more requests for the extradition of the same person either for the same offense, or for different offenses, shall determine to which of the requesting States it will extradite the person sought, taking into consideration the existing circumstances and particularly the possibility of a later extradition between the requesting States, the seriousness of each offense, the place where the offense was committed, the nationality of the person sought, the dates upon which the requests were received and the provisions of any extradition agreements between the requested Party and the other requesting State or States.

ARTICLE XV

The requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition.

In the case of a complete or partial rejection of the extradition request, the requested Party shall indicate the reasons for the rejection.

If the extradition has been granted, the authorities of the requesting and requested Parties shall agree on the time and place of the surrender of the person sought. Surrender shall take place within such time as may be prescribed by the laws of the requested Party.

If the person sought is not removed from the territory of the requested Party within the time prescribed, he may be set at liberty and the requested Party may subsequently refuse to extradite that person for the same offense.

ARTICLE XVI

To the extent permitted under the law of the requested Party and subject to the rights of third Parties, which shall be duly respected, all articles acquired as a result of the offense or which may be required as evidence shall, if found, be surrendered upon the granting of the extradition request.

Subject to the qualifications of the first paragraph, the above mentioned articles shall be returned to the requesting Party even if the extradition, having been agreed to, cannot be carried out owing to the death or escape of the person sought.

ARTICLE XVII

Expenses related to the transportation of the person sought shall be paid by the requesting Party. The appropriate legal officers of the country in which the extradition proceedings take place shall, by all legal means within their power, assist the requesting Party before the respective judges and magistrates.

No pecuniary claim, arising out of the arrest, detention, examination and surrender of persons sought under the terms of this Treaty, shall be made by the requested Party against the requesting Party.

ARTICLE XVIII

The ratifications of this Treaty shall be exchanged in Washington as soon as possible.

This Treaty shall enter into force upon the exchange of ratifications and will continue in force until either Contracting Party shall give notice of termination to the other, which termination shall be effective six months after the date of receipt of such notice.

This Treaty shall terminate and replace the Extradition Treaty between the United States and Spain signed at Madrid June 15, 1904 and the Protocol thereto signed at San Sebastian August 13, 1907;[1] however, the crimes listed in that Treaty and Protocol and committed prior to the entry into force of this Treaty shall nev-

[1] TS 492; 35 Stat 1947, 1955.

ertheless be subject to extradition pursuant to the provisions of that Treaty and Protocol.

IN WITNESS WHEREOF the Plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

DONE in duplicate, in the English and Spanish languages, both equally authentic, at Madrid this twenty-ninth day of May, one thousand nine hundred seventy.

FOR THE UNITED STATES OF AMERICA:

WILLIAM P. ROGERS

[SEAL]

FOR SPAIN:

GREGORIO LÓPEZ BRAVO

[SEAL]

59

TREATIES AND OTHER INTERNATIONAL ACTS SERIES 8938

EXTRADITION

Supplementary Treaty

Between the

UNITED STATES OF AMERICA

and SPAIN

AMENDING THE TREATY OF

MAY 29, 1970

Signed at Madrid January 25, 1975

NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89–497, approved July 8, 1996 (80 Stat. 271; 1 U.S.C. 113)

"... the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence ... of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof of authentication thereof."

SPAIN

EXTRADITION

Supplementary treaty amending the treaty of May 29, 1970.
Signed at Madrid January 25, 1975;
Ratification advised by the Senate of the United States of America June 21, 1976;
Ratified by the President of the United States of America August10, 1976;
Ratified by Spain October 10, 1975;
Ratifications exchanged at Washington June 2, 1978;
Proclaimed by the President of the United States of America June 27, 1978.
Entered into force June 2, 1978.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Supplementary Treaty on Extradition between the United States of America and Spain was signed at Madrid on January 25, 1975, the text of which Supplementary Treaty, in the English and Spanish languages, is hereto annexed;

The Senate of the united Sates of America by its resolution of June 21, 1976, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Supplementary Treaty;

The Supplementary Treaty was ratified by the President of the United States of America on August 10, 1976, in pursuance of the advice and consent of the Senate, and was duly ratified on the part of Spain;

It is provided in Article II of the Supplementary Treaty that the Supplementary Treaty shall enter into force upon the exchange of instruments of ratification;

The instruments of ratification of the Supplementary Treaty were exchanged at Washington on June 2, 1978; and accordingly the Supplementary Treaty entered into force on that date;

NOW, THEREFORE, I, Jimmy Carter, President of the United States of America, proclaim and make public the Supplementary Agreement, to the end that it shall be observed and fulfilled with good faith on and after June 2, 1978, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY THEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-seventh day of June in the year of our **[SEAL]** Lord one thousand nine hundred seventy-eight and of the Independence of the United States of America the two hundred second.

JIMMY CARTER

By the President:
CYRUS VANCE
Secretary of State

Supplementary Treaty on Extradition Between
THE UNITED STATES OF AMERICA AND SPAIN

The President of the United States of America and the Chief of the State of Spain, desiring to make more effective the cooperation of the two countries in the repression of crime through the rendering of maximum assistance in matters of extradition,

Have decided to conclude a Supplementary Treaty on Extradition to amend the Treaty of Extradition signed at Madrid on May 29, 1970,[1] hereinafter referred to as the 1970 Treaty, and to this end have named as their representatives:

---

[1] TIAS 7136; 22 UST 737

The President of the United States of America:
Samuel D. Eaton, Esquire, Charge d'Affaires ad interim,
The Chief of State of Spain:
His Excellency Senor D. Pedro Cortina Mauri, Minister of Foreign Affairs,
who, after having exchanged their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

Paragraph D of Article XI of the 1970 Treaty is revised as follows: "A person arrested upon such an application shall be set at liberty upon the expiration of 45 days from the date when the Embassy of the country seeking extradition is informed through diplomatic channels of the fact of this arrest if a request for his extradition accompanied by the documents specified in Article X shall not have been received. However, this stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received."

ARTICLE II

This Supplementary Treaty is subject to ratification and the instruments of ratification shall be exchanged in Washington as soon as possible.

This Supplementary Treaty shall enter into force upon the exchange of instruments of ratification and shall cease to be effective on the date of the termination of the 1970 Treaty.

63

TREATES AND OTHER INTERNATIONAL ACTS SERIES 7136

EXTRADITION

Treaty Between the

UNITED STATES OF AMERICA

and SPAIN

Signed at Madrid May 29, 1970

English Text Only

NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89497, approved July 8, 1966 (80 Stat 271; 1 U.S.C 113)—

"... the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence ... of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof."

SECOND SUPPLEMENTARY TREATY

ON EXTRADITION BETWEEN

THE UNITED STATES OF AMERICA

AND

THE KINGDOM OF SPAIN

The United States of America and the Kingdom of Spain;

Desiring to make more effective the Treaty on Extradition between the Contracting Parties, signed at Madrid on May 29, 1970, as amended by the Supplementary Treaty on Extradition, signed at Madrid on January 25, 1975 (hereinafter referred to as "the Extradition Treaty");

Have resolved to conclude a Second Supplementary Treaty and have agreed as follows:

ARTICLE 1

Article I of the Extradition Treaty is deleted and replaced by the following:

Pursuant to the provisions of this Treaty, the Contracting Parties agree to extradite to each other for prosecution or to undergo sentence persons sought for extraditable offenses.

ARTICLE 2

Article II of the Extradition Treaty is deleted and replaced by the following:

A. An offense shall be an extraditable offense if it is punishable under the laws in both contracting parties by deprivation of liberty for a period of more than one year or by a more severe penalty, or in the case of a sentenced person, if the sentence imposed was greater than four months.

B. Extradition shall also be granted for participation in any of these offenses, not only as principals or accomplices, but as accessories, as well as for attempts to commit or conspiracy to commit any of the aforementioned offenses, when such participation, attempt or conspiracy is subject, under the laws of both Parties, to a term of imprisonment exceeding one year.

C. For the purposes of this Article, an offense shall be an extraditable offense whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology.

D. If extradition has been granted for an extraditable offense, it shall also be granted for any other offense specified in the request even if the latter offense is punishable by less than one year's deprivation of liberty, provided that all other requirements for extradition are met.

E. Extradition shall also be granted for these offenses, even when, in order to recognize the competent federal jurisdiction, circumstances such as the transportation from one State to another, have been taken into account and may be elements of the offense.

ARTICLE 3

Article IV of the Extradition Treaty is deleted and replaced by the following:

Neither of the Contracting Parties shall be bound to deliver up its own nationals, but the Executive Authority of the United States and the competent authority of Spain, unless prohibited by their domestic legislation, shall have the power to deliver them up if, in their discretion, it be deemed proper to do so. If extradition is refused solely on the basis of the nationality of the person sought, the requested Party shall, at the request of the requesting Party, submit the case to its authorities for prosecution.

ARTICLE 4

Article V, paragraphs B and C of the Extradition Treaty are deleted and replaced by the following:

B. For the purpose of this Treaty, the following offenses shall not be deemed to be offenses of a political character within the meaning of subparagraph A of this Article:

(1) a murder or other willful crime against the person of a Head of State of one of the Contracting Parties, or of a member of the Head of State's family;

(2) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for the purpose of prosecution;

(3) murder, voluntary manslaughter and voluntary assault and battery inflicting serious bodily harm;

(4) an offense involving kidnapping, abduction, the taking of a hostage, or any other form of illegal detention;

(5)an offense involving the placement or use of an explosive, incendiary or destructive device or substance, as well as the use of automatic weapons, to the extent that they cause or are capable of causing serious bodily harm or substantial property damage;

(6) an attempt to commit one of the above-mentioned offenses or the participation as co-author or accomplice of a person who commits or attempts to commit such an offense;

(7) illicit association or bands formed to commit any of the foregoing offenses under the laws of Spain, or a conspiracy to commit any such offenses as provided by the laws in the United States.

ARTICLE 5

Article VIII of the Extradition Treaty is deleted and replaced by the following:

A. If the extradition request is granted in the case of a person who is being proceeded against or is serving a sentence in the requested State, the requested Party may temporarily surrender the person sought to the requesting Party for the purpose of prosecution. The person so surrendered shall be kept in custody in the requesting state and shall be returned to the requested state after the conclusion of the proceedings against that person, in accordance with conditions to be determined by agreement of the contracting Parties.

B. The requested party may postpone the extradition proceedings against a person who is being prosecuted or who is serving a sentence in that State. The postponement may continue until the prosecution of the person sought has been concluded and any sentence has been served.

ARTICLE 6

Article X, paragraph D of the Extradition Treaty is deleted and replaced by the following:

When the request relates to a person who has not yet been convicted, it must also be accompanied by a warrant of arrest issued by a judge or other judicial officer of the requesting party and such information as would justify the committal for trial of the person if the offense had been committed in the requested State. The requested Party may refuse the extradition request if an examination of the case in question shows that the warrant is manifestly ill-founded.

ARTICLE 7

Article XI, paragraph A of the Extradition Treaty is amended by adding the following third sentence:

The facilities of the International Criminal police organization (Interpol) may be used to transmit such a request.

ARTICLE 8

Article XV of the Extradition Treaty is deleted and replaced by the following:

The requested party shall communicate to the requesting Party as soon as possible through the diplomatic channel the decision on the request for extradition.

In the case of a complete or partial rejection of the extradition request, the requested Party shall indicate the reasons for the rejection.

The surrender shall be subject to the laws of the requested Party.

If the extradition has been granted, the authorities of the requesting and requested Parties shall agree on the time and place of the surrender of the person

sought. Surrender shall take place within such times as may be prescribed by the laws of the requested Party.

If the person sought is not removed from the territory of the requested Party within the time prescribed, he may be set at liberty and the requested Party may subsequently refuse to extradite that person for the same offense.

ARTICLE 9

1. The extraditions requested after the entry into force of this Supplementary Treaty shall be governed by its provisions, whatever the date of the commission of the offense may be, except that in the case of offenses not covered by the 1970 Treaty, this Supplementary Treaty will only be applicable if the requested person is found in the requested State forty-five (45) days after the entry into force of this Supplementary Treaty.

2. The extraditions requested before the entry into force of this Supplementary Treaty shall continue to be processed and shall be resolved in accordance with the provisions of the Treaty of May 29, 1970.

ARTICLE 10

(1) This supplementary Treaty shall the Extradition Treaty.

(2) This Supplementary Treaty shall be subject to ratification and the instruments of ratification shall be exchanged at Washington as soon as possible. It shall enter into force thirty days after the exchange of instruments of ratification. It shall be subject to termination in the same manner as the Extradition Treaty.

IN WITNESS WHEREOF, the plenipotentiaries have signed this Supplementary Treaty.

DONE at Madrid this 9th day of February, 1988, in duplicate, in the Spanish and English languages, both texts being equally authentic.

ANNEX 5 (RELATES TO SEN. BIDEN HONG KONG PRISONER TRANSFER TREATY QUESTION 2)

GUIDELINES FOR ADMINISTRATION OF PRISONER TRANSFER TREATIES AND IMPLEMENTATION OF 18 U.S.C. 4100, ET SEQ.

I. GENERAL CONSIDERATIONS

A. *Background*

The United States of America became a signatory to treaties with the United Mexican States, and Canada, in 1976 and 1977 respectively, for the transfer of prisoners and the execution of penal sentences. Since 1977 the United States has become a signatory on prisoner transfer treaties with Bolivia (1978), France (1983), Panama (1979), Peru (1979), Turkey (1979) and the Council of Europe Convention (1983).

Pursuant to the treaties with Mexico and Canada, and in contemplation of future treaties and the Council of Europe Convention, the Congress of the United States enacted legislation regarding the transfer of prisoners, found at 18 U.S.C. 4100, *et seq*. The implementing legislation, specifically 18 U.S.C. 4102(4) authorizes the Attorney General of the United States to make regulations for the proper implementation of such treaties and to make regulations for the implementation of this specific legislation. 18 U.S.C. 4102(11) authorizes the Attorney General to delegate his authority, conferred by this legislation, to officers of the Department of Justice. This authority was delegated to the Senior Associate Director, Office of Enforcement Operations, Criminal Division, Department of Justice.

These guidelines set forth the criteria to be considered by the Department of Justice in implementing the specific legislation and, thereby, the treaties for prisoner transfer.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any person in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigation prerogatives of the Department of Justice. Rather, these guidelines are intended to ensure that responsible officials, in the exercise of their discretion, treat prisoners fairly and not capriciously. These guidelines may be altered, modified, amended or changed, at any time, without notice.

B. *Application*

Section 4100, *et seq.,* of Title 18 and these guidelines allow the Department to transfer prisoners, convicted of a crime in a foreign country, to serve the sentence imposed in their home country when appropriate treaties allowing such transfers exist. Because the transfer of said prisoners must be determined on a case-by-case basis, sound judgment will be required in making transfer decisions. In order to appropriately assess an individual for transfer purposes, information will be obtained from a variety of sources including the prisoner and the sentencing state. All efforts shall be made to minimize delays in obtaining this information.

C. *Responsibilities*

The decision to transfer or not to transfer a prisoner from the United States to the prisoner's home country and the decision to accept or reject the application of a United States citizen for transfer from a foreign prison are the sole responsibility of the Senior Associate Director, Office of Enforcement Operations, Criminal Division, or in his absence, the Director of that office.

II. PROCEDURES FOR DETERMINING THE ELIGIBILITY OF AMERICAN CITIZEN PRISONERS REQUESTING TRANSFER FROM FOREIGN PRISONS TO UNITED STATES PRISONS

A. In addition to specific criteria set forth in the treaty, statutes and legislative history authorizing the transfer of an individual to the United States from a foreign prison, the Office of Enforcement Operations shall determine whether an individual is eligible for transfer after considering the following:

1. whether the individual has paid any and all fines and/or restitution ordered by the foreign court;
2. whether the offender has fulfilled the conditions of 18 U.S.C. 4100, *et seq.,* and the conditions of the treaty pursuant to which the transfer was requested;
3. whether the return of the offender to the United States would so outrage public sensibilities because of the extremely serious nature of the offender's crime or circumstances surrounding it as to outweigh the rehabilitation considerations;
4. whether the return of the offender to the United States would constitute a threat to a citizen of the United States or to the security of the United States;
5. whether there is reason to believe that the offender would, on the offender's return to the United States, engage in any activity that would be part of a pattern of criminal activity planned and organized by a number of persons acting in furtherance of any offense that may be punishable under any of the laws of the United States;
6. whether the offender is actively under investigation, by either the United States or the sentencing country, for criminal activity;
7. whether the offender is capable of providing information, to either the United States or the sentencing country, regarding any matter under investigation and whether the offender has or will provide information;
8. whether the offender has transferred before pursuant to a prisoner transfer treaty;
9. the relative accessibility of the sentencing country's borders;
10. whether the offender is sentenced due to an immigration-related offense or the purely military laws of a country;
11. whether the offender is a career criminal and whether the offender is likely to be rehabilitated while incarcerated;
12. such other factors as may be appropriate given the specific nature of the case or the defendant.

B. The criteria set forth herein are intended to serve as general guidelines for the exercise of discretion in implementing 18 U.S.C. 4100 and the administration of the prisoner transfer treaties. Nothing contained herein shall be construed as a limitation upon the discretion of the Attorney General or his designee.

III. PROCEDURES FOR DETERMINING ELIGIBILITY OF FOREIGN NATIONAL PRISONERS REQUESTING TRANSFER FROM U.S. PRISONS

A. In addition to specific criteria set forth in the treaty, statutes and legislative history authorizing the transfer of an individual from the United States to a foreign country, the Office of Enforcement Operations shall determine whether an individual is eligible for transfer after considering the following:

1. whether the offender has paid any and all fines and/or restitution ordered by the United States Court as part of the offender's sentence;

2. whether the offender has fulfilled the conditions of 18 U.S.C. 4100, *et seq.,* and the conditions of the treaty pursuant to which the transfer was requested;
3. whether the return of the offender to a foreign country would so outrage public sensibilities because of the extremely serious nature of the offender's crime or the circumstances surrounding the offender's crime, as to outweigh the rehabilitation considerations;
4. whether the return of the offender to a foreign country would inhibit or interfere with law enforcement activities within the United States;
5. whether the return of the offender to a foreign country would be contrary to the public policy of the United States;
6. whether the return of the offender to a foreign country would constitute a threat to a citizen of the United States or to the security of the United States;
7. whether there is reason to believe that the offender would, on the offender's return to a foreign country, engage in any activity that would be part of a pattern of criminal activity planned and organized by a number of persons acting in furtherance of any offense that may be punishable under any of the laws of the United States;
8. whether the offender is actively under investigation, by either the United States or the foreign country, for criminal activity;
9. whether the offender is capable of providing information, to either the United States or foreign country, regarding any matter under investigation and whether the offender has provided said information;
10. whether the offender has transferred before pursuant to a prisoner transfer treaty;
11. the relative proximity of the foreign country's natural borders to the United States' borders;
12. whether the offender is sentenced due to an immigration offense;
13. whether the offender is a career criminal;
14. whether the offender is likely to be rehabilitated while incarcerated;
15. such other factors as may be appropriate given the specific nature of the case or the defendant.

B. The criteria set forth herein are intended to serve as general guidelines for the exercise of discretion in implementing 18 U.S.C. 4100 and the administration of the prisoner transfer treaties. Nothing contained herein shall be construed as a limitation upon the discretion of the Attorney General or his designee.

C. In addition to the criteria set forth in III(A) above, if the offender is seeking to transfer to a foreign country from a state prison in the United States, the following criteria shall be applied or considered:

1. whether or not the state which sentenced the offender has been authorized by state legislation to transfer prisoners of foreign nationality to the countries of their citizenship under treaties between the United States and foreign countries;
2. whether the offender has complied with the requirements set forth in the specific states' legislation regarding prisoner transfers;
3. whether the individual state has approved the offender's requested transfer to the country of citizenship;
4. whether the transfer of the offender would interfere with state law enforcement investigations;
5. whether the transfer of the offender would outrage the sensibilities of the public of that state due to the egregious or serious nature of offender's crime or the circumstances surrounding offender's crime.

IV. The guidelines and criteria contained herein are complementary to the treaties and conventions entered into by and between the United States and other countries or nations. Nothing in this agreement shall be construed to expand, contradict, contravene or enlarge upon the laws the United States of America, its states, provinces, territories or political subdivisions.

V. PROCEDURES FOR REVIEW OF OFFENDER'S REQUEST FOR TRANSFER

In addition to procedures and requirements set forth in 18 U.S.C. 4100, *et seq.,* and the specific treaty pursuant to which transfer is requested, the following procedures shall be followed in reviewing an offender's request for transfer to or from the United States.

A. Upon receipt of an offender's request to transfer to the United States from a foreign prison;

1. Inquiry shall be made of the foreign country with regards to the statute under which the offender was sentenced, the sentence received by offender;

remission credits earned to date; the prosecution's version of the crime, and any other information that the Office of Enforcement Operations deems relevant to a proper review of the request;

2. Inquiry shall be made of any and all appropriate United States investigative agencies for information regarding the offender, the instant offense and the past criminal history of the offender;
3. Once all necessary information has been obtained, the request and information shall be reviewed by the Office of Enforcement Operations after which the Senior Associate Director shall render a decision.
4. The Senior Associate Director of the Office of Enforcement Operations shall make a decision to approve or deny the offender's request for transfer;
5. The offender and the foreign country shall be promptly advised of the decision of the Senior Associate Director of the Office of Enforcement Operations;

B. Upon receipt of an offender's request to transfer from the United States to the offender's country of citizenship.

In addition to the procedures set forth in V (A) 1–6, above, inquiry shall be made of the appropriate agencies in order to obtain a complete overview of the crime with which the offender has been convicted.

VI. PROCEDURES IN THE EVENT OF A DENIAL OF OFFENDER'S REQUEST FOR TRANSFER

A. Upon being informed of a denial of offender's request to transfer the offender may:

1. Re-apply no less than one calendar year after date of denial.
2. Seek review of denial, at any time, if offender obtains new information which may impact upon the decision of the Senior Associate Director of the Office of Enforcement Operations.

○