

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Adviser Samuel Witten by
Senator Richard Lugar (#1)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Why is the Administration urging Senate approval of the U.S.-UK Extradition Treaty now? Is it because of political pressure from the United Kingdom?

Answer:

Entry into force of this treaty is a priority for the Administration because the treaty offers significant benefits to the United States and not because of political pressure from the Government of the United Kingdom. The arrests last week by the United Kingdom of more than twenty persons allegedly planning coordinated in-flight bombings of multiple U.S. passenger aircraft illustrate the critical nature of our law enforcement partnership and the importance of having a modern extradition relationship with the United Kingdom that incorporates the same strengths as our other modern treaties with so many other partners abroad.

The treaty will provide a full array of measures designed to combat crime with international implications, including terrorism,

narcotics trafficking, and serious organized crime. Benefits of the new treaty include a lower standard of proof for the U.S.

Government's extradition requests to the United Kingdom, dual criminality, temporary surrender of fugitives for trial in U.S. courts, a new ability to submit provisional arrest requests directly between the Department of Justice and the relevant authority in the United Kingdom, and a clear ability for the United States to seek a waiver of the rule of specialty in appropriate cases.

The United States seeks these types of provisions in all of our modern extradition treaties precisely because they enhance U.S. law enforcement efforts. We have comparable modern provisions in most of our major extradition relationships, and it is anomalous that we do not benefit from such a modern treaty with our close ally the United Kingdom.

The Administration witnesses noted in their testimony to the Committee some recent political developments in the United Kingdom that relate to extradition of fugitives to the U.S. from the United Kingdom. Specifically, a majority in the House of Lords reacted to the delay in U.S. approval of this treaty by voting on July 12 to rescind certain benefits the United Kingdom had provided to the

United States in advance of our ratification on the assumption that we would approve the treaty promptly. If the United Kingdom were to remove the preferential designation that the United States currently has under UK law, the United States would once again have to meet the more onerous prima facie evidentiary standard in our extradition requests to the United Kingdom. Such a change would impede our ability to obtain fugitives wanted for serious offenses in the United States.

The Administration also described increasing public criticism in the United Kingdom regarding the absence of U.S. ratification because our inaction is now threatening what is perhaps the strongest international partnership of the United States on law enforcement issues at a time when transnational criminal threats are on the rise throughout the world. Through inaction on updating this basic tool of international law enforcement cooperation, the United States runs the risk of weakening this steadfast partnership by failing to ratify an important, and frankly typical, modern treaty on extradition. Our good faith as an ally has been called into question on the basis of misinformed fears and misleading assertions. Thus, while the Administration urges Senate approval of the treaty because of its

substantive benefits to the United States, the Administration urges Senate approval now because the situation in the United Kingdom, and the world, counsel against further delay.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Adviser Samuel Witten by
Senator Richard Lugar (#2)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Critics of the proposed treaty have asserted that it would allow the United Kingdom to obtain extradition of persons from the United States for publicly speaking in opposition to British policy in Northern Ireland. How does the proposed treaty ensure that the United States would not extradite individuals to the United Kingdom for political speech? Please be specific, and include descriptions of any relevant treaty provisions.

Answer:

Several provisions in the treaty would preclude extradition where the conduct for which extradition is sought constitutes political speech.

First, Article 2 of the treaty contains a standard “dual criminality” clause, which provides that offenses are extraditable only if the conduct on which they are based is punishable in both States by imprisonment for a period of at least one year. In the United States, conduct protected as political speech by the First Amendment to the U.S. Constitution cannot be criminalized, and, as a result, there would

be no dual criminality and the United States could not extradite someone to the United Kingdom on the basis of such conduct.

Second, political speech would also be protected as a political offense under Article 4 of the treaty. Extradition could not be granted if the conduct for which extradition was sought consisted of non-violent political speech. Under both the current and the proposed extradition treaty, U.S. federal courts are responsible for enforcing this mandatory bar to extradition.

Finally, even if the dual criminality standard were met, and the conduct for which extradition was sought did not constitute a political offense under the treaty, the Secretary of State would have the ability to refuse to surrender the individual if she determined that a particular request for extradition is politically motivated. Although the Supplementary Treaty of 1985 provided that courts would make this determination in some cases, Article 3(b) of that Treaty specified that judicial review could be invoked only in cases involving certain violent offenses, such as murder, kidnapping, and offenses involving the use of a bomb. Thus, any assertion of political motivation with respect to an offense involving political speech, which by definition is a non-violent activity, would be determined by the Secretary of State

under the proposed treaty in the same manner as it would be under the current 1972 Treaty and 1985 Supplementary Treaty.

In sum, the proposed treaty's dual criminality requirement provides complete protection from extradition for political speech that is protected by the First Amendment. Moreover, even if we assume for the sake of argument that there could be a case involving protected political speech that passed the dual criminality requirement, the political offense bar to extradition would apply. The Executive Branch's discretionary power to refuse surrender in cases where a request is politically motivated supplies additional protection for other crimes.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Adviser Samuel Witten by
Senator Richard Lugar (#3)
Senate Foreign Relations Committee
July 21, 2006**

Question:

During the Committee hearing on July 21, 2006, certain witnesses expressed concern regarding the lack of an explicit reference in the proposed treaty to the role of the judiciary. Please explain in detail the functions that the judiciary would perform under the proposed treaty in determining whether individuals may be extradited, as well as the legal basis for this role.

Answer:

The treaty will not alter longstanding U.S. law, including the provisions of Title 18, Chapter 209 of the U.S. Code relating to extradition (18 U.S.C. §§ 3181 et seq.), which provide for judicial determinations at successive steps in the extradition process:

Arrest: A judge must determine whether there is a sufficient basis to issue a warrant for the arrest of the person sought for extradition.

Bail: The person sought may apply to the court for release pending the extradition hearing. It is for the judge to determine whether release is appropriate under U.S. law and the circumstances of the case, and if so what conditions of release may be appropriate.

The extradition hearing: The extradition hearing is before a judge, who must, in order to find the person extraditable, determine that there is probable cause to believe the crime for which extradition is sought has been committed and that the person sought committed that crime; that the offense is one for which extradition is provided under the treaty; that the conduct charged would also constitute an offense in the United States (dual criminality); and that, if raised by the fugitive, there is no defense to extradition under the applicable treaty. If the judge so finds, then he or she “certifies” that the person is extraditable. While the final decision to surrender a fugitive rests with the Secretary of State, such a judicial certification of extraditability is required before the Secretary may act to surrender the fugitive.

Review of the finding of extraditability: If the person sought has been found extraditable by the judge at the extradition hearing, he or she may seek judicial review of that decision in the District Court through habeas corpus proceedings. If the District Court denies the habeas petition, then the person sought may seek further judicial review by appealing the decision of the District Court.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Adviser Samuel Witten by
Senator Richard Lugar (#4)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Would the proposed treaty be subject to the U.S. Constitution?
Would the proposed treaty alter the U.S. legal requirement, set forth in 18 U.S.C. § 3184, of a judicial hearing to determine extraditability?

Answer:

As is the case with any treaty, the proposed treaty with the United Kingdom is subject to the U.S. Constitution. In the U.S. domestic system, the U.S. Constitution takes precedence over treaties, as it does over statutes. Thus, a treaty cannot authorize an action that would violate the U.S. Constitution.

The legal requirement set forth in 18 U.S.C. § 3184 of a judicial hearing to determine extraditability is not altered by the proposed treaty.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Adviser Samuel Witten by
Senator Richard Lugar (#5)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Article 18 of the proposed treaty, regarding the rule of specialty, differs from the treatment of the rule of specialty in Article XII of the existing U.S.-UK extradition treaty. How is the new article beneficial to the United States?

Answer:

By expressly allowing a waiver of the rule of specialty in Article 18, the proposed treaty provides the United States a treaty basis on which to request that the United Kingdom waive the rule of specialty in appropriate cases. The United States might seek waiver, for example, in cases where it learned after extradition of additional conduct that is subject to U.S. criminal laws and sought to try the extradited individual for those additional offenses. Because the United States is already prepared to waive the rule of specialty in appropriate cases upon requests from our treaty partners under our standard practice, this change would benefit the United States.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Adviser Samuel Witten by
Senator Richard Lugar (#6)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Please clarify the testimony provided by Mr. McNulty at the hearing on July 21, 2006, regarding the treatment under the proposed treaty of crimes for which there is extraterritorial jurisdiction.

Answer:

The proposed treaty permits a two-pronged approach with respect to offenses that are applied extraterritorially. As with all offenses, there must first be a finding of dual criminality. Thus, for example, in the case of an offense involving kidnapping, the requirement of dual criminality would be fulfilled since the law of both the United States and the United Kingdom punish kidnapping as a serious criminal offense. If, however, the kidnapping has occurred outside the territory of the Requesting State, then there can be a further inquiry as to whether the Requested State would be able to exercise extraterritorial jurisdiction in similar circumstances. The United States and the United Kingdom approach this issue differently

and the language of Article 2, paragraph 4, is specifically intended to accommodate the different approaches.

Where the United Kingdom is the Requested State, i.e., the State considering an extradition request from the United States, current UK extradition law requires, with respect to extraterritorial offenses, that in addition to a finding of dual criminality there also be a finding that UK law would permit an exercise of extraterritorial jurisdiction in similar circumstances. In our experience, the United Kingdom is among the limited number of countries that require this additional finding with respect to extraterritorial jurisdiction.

(Another is Israel, and a similar provision regarding extraterritorial jurisdiction is set out in the 1962 U.S.-Israel extradition treaty; this provision is unchanged by the Protocol to that treaty that was recently approved by the Foreign Relations Committee.)

The majority of countries, including the United States, do not require such a finding of duality of jurisdiction with respect to extraterritorial offenses. Thus, for the United States, if the United Kingdom were to seek extradition for an offense committed outside its territory for which the United States would not be able to exercise extraterritorial jurisdiction, the United States would have the

discretion to deny extradition, but it would not be required to do so.

We note, however, that as a general matter, the current approach of U.S. and UK criminal law to extraterritorial jurisdiction is similar and remains relatively more restrictive than that of countries with a civil law tradition.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Joseph Biden (#1)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Your testimony today referenced the case of Abu Hamza. In what district has he been charged, and what are the precise charges in the indictment? Have extradition proceedings commenced in the United Kingdom, and what is the current status of the case?

Answer:

Mustafa Kamel Mustafa, also known as Abu Hamza, is wanted in the Southern District of New York on various charges including (1) conspiring to take sixteen hostages in Yemen in 1998; (2) conspiring to create a jihad training camp in Oregon; and (3) conspiring to send one of his supporters to Afghanistan to engage in violent jihad training and fighting.

Specifically, Hamza is charged as follows:

Count One: Conspiracy to take hostages (the attack in Yemen), in violation of Title 18, United States Code, Section 1203; Count Two: Hostage-Taking (the attack in Yemen), in violation of Title 18, United States Code, Sections 1203 and 2; Count Three: Conspiracy to

provide and conceal material support and resources to terrorists (the Bly, Oregon Jihad Training Camp), in violation of Title 18, United States Code, Section 371; Count Four: Providing and concealing material support and resources to terrorists (the Bly, Oregon Jihad Training Camp), in violation of Title 18, United States Code, Sections 2339A and 2; Count Five: Conspiracy to provide material support and resources to a foreign terrorist organization (the Bly, Oregon Jihad Training Camp), in violation of Title 18, United States Code, Section 2339B(a)(1); Count Six: Providing material support and resources to a foreign terrorist organization (the Bly, Oregon Jihad Training Camp), in violation of Title 18, United States Code, Sections 2339B(a)(1) and 2; Count Seven: Conspiracy to provide and conceal material support and resources to terrorists (facilitating violent jihad in Afghanistan), in violation of Title 18, United States Code, Section 2339A; Count Eight: Providing and concealing material support and resources to terrorists (facilitating violent jihad in Afghanistan), in violation of Title 18, United States Code, Sections 2339A and 2; Count Nine: Conspiracy to provide material support and resources to a foreign terrorist organization (facilitating violent jihad in Afghanistan) in violation of Title 18, United States Code, Section 2339B(a)(1); Count

Ten: Providing material support and resources to a foreign terrorist organization (facilitating violent jihad in Afghanistan), in violation of Title 18, United States Code, Sections 2339B(a)(1) and 2; Count Eleven: Conspiracy to supply goods and services to the Taliban (IEEPA violations), in violation of Title 18, United States Code, Section 371; Title 50, United States Code, Section 1705(b); and Title 31, Code of Federal Regulations, Sections 545.204 and 545.206(b).

In 2004, the United States sought Abu Hamza's extradition but, just before the extradition hearing date, the United Kingdom brought domestic criminal charges against Abu Hamza. He has been found guilty in the United Kingdom of offenses relating to incitement to commit terrorist acts and sentenced to seven years in prison. Abu Hamza is appealing his conviction, and the appeal in his case has been scheduled for October 2006. The extradition process has been placed on hold, pursuant to UK law, until the domestic case has concluded. Under the current treaty, Abu Hamza cannot be extradited, even temporarily, to the United States until he has completed his UK sentence.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Joseph Biden (#2)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Mr. Witten discussed the case of *Berenguer v. Vance*, 473 F. Supp. 1195 (M.D. Pa 1979), with regard to the rule of specialty. Please elaborate on how this case is applied by the Department of State in reviewing requests to waive the rule of specialty.

Answer:

In *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979), the U.S. District Court for the District of Columbia upheld the power of the U.S. Executive Branch to consent, without a subsequent judicial hearing, to the prosecution of an extradited individual for a crime other than that for which he was surrendered. The court noted that the rule of specialty is not a right of the defendant, but rather a privilege of the requested state by which its interests are protected. *Id.*

The decision in *Berenguer* informs the consideration of whether to waive the rule of specialty in a particular case. Generally, the factors to be taken into account in evaluating a request from a treaty partner to waive the rule of specialty are whether the failure to include an offense in the original extradition request is justified because it was

not previously possible to do so for legal or practical reasons, and whether there is sufficient evidence to meet the probable cause standard regarding the offense for which the request is made. If the request fails to meet these criteria, the request is denied.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Joseph Biden (#3)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Please provide data on the number of pending extradition requests submitted by each party under the current extradition treaty.

Answer:

a. There are approximately 33 pending U.S. extradition requests to the United Kingdom. (This does not include cases where the U.S. has made a request but the fugitive could not be located.)

Three of these cases have been deferred pending the disposition of UK charges and/or the completion of a UK sentence.

b. There are approximately 6 pending UK extradition requests to the United States. (This does not include cases where the UK has made a request but the fugitive could not be located.) Of the 6 cases, three are not yet the subject of judicial proceedings in the United States and three are for fugitives who are in custody pending disposition of U.S. charges and/or the completion of a U.S. sentence.

c. A general breakdown of pending U.S. extradition requests to the United Kingdom by types of crimes, together with their approximate numbers, is as follows:

Fraud, theft and tax offenses: 14

Terrorism, homicides, and robberies: 13

Narcotics offenses: 4

Sex offenses: 2

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Joseph Biden (#4)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Please update your answer to question 16 submitted after the November 2005 hearing with regard to waivers of the rule of specialty. That is, at that time there were 8 cases pending. How many of them have since been resolved? How many were granted and how many were denied? How many new requests have been submitted to the Department?

Answer:

Since our response to question 16 after the November 2005 hearing, the United States has received 5 requests for waiver of the rule of specialty. These 5, and the 8 requests noted in our prior response, remain pending. Thus, from 1991 to the present, the Department of State has received 35 requests for waiver of the rule of specialty. Of these, 17 were granted, 5 were denied, and 13 are pending.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Joseph Biden (#5)
Senate Foreign Relations Committee
July 21, 2006**

Question:

In the United Kingdom, Part 10 of the Criminal Justice Act 2003 provides for retrial in some cases where there has been an acquittal. Article 5(1) of the proposed treaty bars extradition where the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested. Paragraph 2 of Article 5 permits the requested state to refuse extradition when the person sought has been convicted or acquitted in a third state in respect of the conduct for which extradition is requested. But there is no provision that addresses the possibility of a case in which the person sought for extradition has been acquitted in the *requesting* state of the same offense.

- a. Why is there not such a provision?
- b. If a person is sought for extradition by the United Kingdom has been acquitted, and such a person is being sought for retrial pursuant to Part 10 of the Criminal Justice Act 2003, would the United States be justified in denying extradition? What treaty or other basis would there be to do so?

Answer:

All of our modern extradition treaties contain provisions comparable to Article 5(1) of the proposed U.S.-UK Extradition Treaty, which bars extradition if the person has been convicted or acquitted in the requested state. The issue of whether a person sought for extradition has a valid defense to criminal prosecution based on a

prior conviction or acquittal in the requesting state is appropriately adjudicated in the courts of that state.

Generally, U.S. extradition courts do not inquire into questions of application and propriety of foreign procedural laws and rights or require that they comport with our own. This is true even with respect to procedural guarantees, such as our double jeopardy rules. *See Neely v. Henkel*, 180 U.S. 109 (1901). Moreover, it would be both difficult and inappropriate to strictly apply U.S. law regarding double jeopardy in the extradition context because there is considerable variation among nations in how and when double jeopardy concepts may apply. For example, while U.S. double jeopardy concepts bar the government from appealing a judgment of acquittal, such appeals by the prosecution are in fact quite common abroad, particularly among countries with a civil law tradition. *See, e.g., Sidali v. Immigration & Naturalization Service*, 107 F.3d 191 (3d Cir. 1997). Thus, U.S. courts have correctly held that even where foreign procedures would have violated our double jeopardy bar had they occurred in the context of a U.S. criminal prosecution, this was not a basis for denying extradition. *U.S. ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 927-28 (2d Cir. 1974) (affirming extradition to Canada where

Canadian trial court had dismissed charges against defendants after presentation of all evidence, but prosecution appealed and appellate court entered judgment of conviction).

Thus, neither the terms of the proposed treaty or any other U.S. extradition treaty, nor U.S. caselaw, would *per se* bar extradition because procedures in the UK (or other foreign state) would not comport with U.S. double jeopardy requirements. On the other hand, a fugitive may always raise for consideration by the Secretary of State a significant concern about improper motivation for the extradition request or fundamental unfairness in the criminal procedures he may face.

The treaty, of course, in no way eliminates or alters in any way a defendant's ability to raise the defense of a prior prosecution or acquittal in the courts of the requesting state after he or she has been extradited.

b. The United States has not received an extradition request from the United Kingdom for a person who has been acquitted but is being sought for retrial pursuant to Part 10 of the Criminal Justice Act 2003. We understand that the provision has been invoked by the UK only one time, in a case still pending in UK courts. It is difficult to

speculate on how the United States would handle such a request. In all cases, the Executive Branch retains the authority, as reflected in Title 18 of the U.S. Code and relevant federal case law, to determine whether a fugitive who has been found extraditable by a U.S. court should or should not be surrendered to the requesting state. The Department of State considers the entire record of the judicial proceedings, the documentation submitted by the requesting state, and any arguments made by the defendant, his counsel, and other interested parties in determining what recommendation to make to the Secretary of State with respect to a possible extradition. As part of this determination, the Secretary of State would also consider any claim of fundamental unfairness regarding the criminal procedures in the state seeking extradition.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Joseph Biden (#6)
Senate Foreign Relations Committee
July 21, 2006**

Question:

In the prior response to question # 13 (posed after the November 2005 hearing), the Executive Branch discussed Article VIII(1) and Article VII(3) of the current treaty.

In pertinent part, Article VIII(1) of the current treaty provides that an application for provisional arrest --

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

Article VII(3) provides that extradition shall be granted “only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party...”

The prior response states that from the “perspective of U.S. practitioners, the antiquated language of these provisions is not particularly helpful and would therefore not typically be included in a modern extradition treaty.” You elaborate by stating that the language in the current treaty is confusing because the intended distinction between the “abbreviated” provisional arrest request made under urgent circumstances and the documentation normally accompanying

the formal extradition request is “muddied by referencing standards of proof at two stages in a domestic criminal case – arrest and committal for trial – which are not in fact different under much of modern U.S. criminal practice.”

a. In the view of the Department of Justice, does the Fourth Amendment to the U.S. Constitution apply to provisional arrest under Article VIII of the current treaty with the United Kingdom?

b. In the view of the Department of Justice, does the Fourth Amendment to the U.S. Constitution apply to provisional arrest under Article 12 of the proposed treaty?

2. Do you expect that the change in the language on provisional arrest will result in a substantive change in the practice of the Department of Justice with regard to the type and quantum evidence it presents to request provisional arrest warrants under the Convention?

Answer

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

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

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Christopher Dodd (#1)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Article 2(4) – how is it consistent with dual criminality?

Article 2(4) grants discretion to the United States and the U.K. to approve extraditions for offenses committed outside the territory of the requesting state in third countries under certain circumstances, even if the laws of the requested state do not provide for the punishment of such conduct committed outside of its territory in similar circumstances.

How does this provision comply with the dual criminality requirement in paragraph 1 of Article 2?

Answer:

The principle of dual criminality requires that both States would view the conduct at issue as a criminal offense; it does not require that both States would exercise jurisdiction over that offense in exactly the same circumstances. For the United States and most other countries, there is no requirement in the extradition context of a finding, in addition to a finding of dual criminality, of equivalence of extraterritorial jurisdiction. Thus, provisions such as Article 2(4) do not appear at all in many extradition treaties. However, the United

Kingdom and some other countries do condition extradition not only on a finding of dual criminality but also, with respect to extraterritorial offenses, on a finding that the United Kingdom could also have exercised jurisdiction in similar circumstances.

To accommodate this difference, Article 2(4) gives the Requested State the discretion to deny a request for extradition where it would not have had similar authority to exercise extraterritorial jurisdiction. (Israel's extradition law is similar to the United Kingdom's in this respect, and a similar provision can be found in Article III of the 1962 U.S.-Israel extradition treaty, which is unchanged by the Protocol recently approved by the Foreign Relations Committee.)

Thus, Article 2(4) addresses a jurisdictional issue that may be considered pursuant to the extradition law of the United Kingdom, whereas Article 2(1) addresses dual criminality, i.e., the criminal nature of the conduct itself.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Christopher Dodd (#2)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Article 3 of the Supplementary Treaty

Article 3 of the 1985 Supplementary Treaty provided for judicial review of the political motivation question. Many senators on this Committee worked together – at that time, also under the Chairmanship of Senator Lugar – to draft this provision.

I understand it has been used in only three cases involving five fugitives.

I realize it was an unusual provision, but the supplementary treaty was itself unusual. And I am just a little bit surprised that you chose to dispense with this provision in the new treaty without having bothered to consult closely with this Committee before you did so.

- a. When was the last time that the provision was invoked?
- b. In the last five years, you have indicated to us that there were 33 requests from the U.K. to the United States. Was the Article 3 claim made in any of these cases?
- c. So what is the problem that you were trying to solve?

Answer:

- a. The provision was last invoked by Terence Damien Kirby, who was arrested in the United States in 1994. His case was

consolidated with two previously arrested defendants who also invoked this provision, Kevin John Artt and Pol Brennan.

b. The Article 3 claim was not raised in any cases where a fugitive's extradition was sought by the United Kingdom from the United States in the last five years.

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

Indeed, until 1985, the issue of motivation of the Government of the United Kingdom in making an extradition request of the United States was treated the same as in all of our other extradition

relationships – the courts played no role in reviewing this issue. In 1985, however, as part of an amendment of other aspects of the UK extradition relationship, the U.S. Senate developed what became Article 3(a) of the 1972 U.S.-UK extradition treaty, as amended by the 1985 Supplementary Treaty, which states that extradition “shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.” This text was added pursuant to the Senate's Resolution regarding advice and consent to the 1985 Supplementary Treaty. Since that time, the Senate has approved thirty new extradition treaties or protocols to existing extradition treaties, but none has included a provision similar to Article 3 of the 1985 Supplementary Treaty with the United Kingdom.

This anomalous treaty provision has led to long, difficult, and inconclusive litigation, where U.S. courts were thrust into the unfamiliar and inappropriate position of addressing motivation of a

foreign government. The provision for judicial review of political motivation claims has been invoked in five cases, all dating from the early 1990s. The first involved Curtis Andrew Howard, who claimed he would be prejudiced in legal proceedings in the United Kingdom because of his race. He was extradited in 1993. The other four cases involved persons of Irish Catholic background who were convicted of crimes of violence in Northern Ireland, and who escaped from prison in Northern Ireland in 1983 and fled to the United States.

The first of these cases involved James Joseph Smyth, who had been convicted of the attempted murder of a prison guard. More than 40 witnesses were heard at his extradition hearing, and a 5-week evidentiary hearing was held. (Ultimately, the record in the case exceeded 3,000 pages.) In 1996, Smyth was finally extradited from the United States to the United Kingdom. He was subsequently released from prison in 1998 pursuant to an accelerated release law, the Northern Ireland (Sentences) Act 1998, that grew out of the Belfast Agreement. The next three cases involved defendants Kevin John Artt, Terence Damien Kirby, and Pol Brennan, who were arrested separately in the United States between 1992 and 1994. Their extradition cases were consolidated for consideration by U.S. courts.

All had been convicted in the UK judicial system and sentenced to terms of imprisonment. Artt was convicted of murdering a prison official; Kirby was convicted of offenses of possession of explosives and a submachine gun, false imprisonment, assault, and felony murder arising out of two separate incidents; Brennan was convicted of possession of explosives. There was extensive litigation and testimony in the U.S. District Court regarding their claims of prejudice under Article 3 of the 1985 Supplementary Treaty and numerous appeals.

This litigation was and is unprecedented, as U.S. courts were put in the difficult position of evaluating defendants' claims of generalized, systemic bias within a foreign system of justice. In 2000, the United Kingdom withdrew its request for extradition, consistent with its announcement that it would not be seeking the extradition of persons convicted of offenses committed before 1998 who, if they returned to Northern Ireland and made a successful application under the 1998 early release law, would have little if any of their time left to serve.

The extraordinary litigation generated by Article 3 demonstrated the difficulty presented to our courts in adjudicating

allegations of improper motivation or prejudice by the government requesting extradition. Moreover, the other key aspect of the 1985 Supplementary Treaty, excluding serious crimes of violence from being considered protected “political offenses,” was at that time a novel provision for a U.S. extradition treaty. It was in that setting, combined with other circumstances of the era, that the Committee considered that it might be appropriate to shift to the judiciary review of questions of political motivation or prejudice that had traditionally been reserved to the Secretary of State. However, in the ensuing twenty years, years in which international terrorism has unfortunately burgeoned as a threat to the United States and its allies, excluding violent crimes from consideration as protected “political offenses” has become increasingly common in our bilateral extradition treaties and in multilateral counterterrorism treaties. During the same period, the longstanding division of responsibility between the judiciary and the Secretary of State that applies in all our other extradition relationships has operated well. Thus, the experience of more than two decades demonstrates that the approach of Article 3 is neither helpful nor necessary, and that this anomaly, unique to our extradition

relationship with the United Kingdom, one of our most important and reliable allies and law enforcement partners, should end.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Christopher Dodd (#3)
Senate Foreign Relations Committee
July 21, 2006**

Article 4 -- Exceptions to the political offense exception

a. Article 4(2)(f) of the proposed treaty indicates that possession of certain explosive devices would not be considered a political offense. In response to an earlier question for the record to Senator Biden, you indicated that there is no such provision in any other extradition treaty of the United States. You further indicated that it was designed to “address the problem of an extremely narrow U.S. judicial interpretation of the more general language of the current U.S. treaty. But the opinion you cited in the case – the *Artt* case in the 9th Circuit -- was withdrawn, and the entire case was later dismissed as moot. So the opinion that supposedly led to this provision has no precedential effect. Why then, is this provision necessary?

Answer:

a. In the extradition case involving Pol Brennan, the United Kingdom sought the extradition of Brennan, who was arrested with a companion in downtown Belfast on the early afternoon of a business day in possession of an armed 23 pound bomb, which they intended to plant in a shop. Brennan was subsequently convicted in the United Kingdom of the offense of possession of explosives with intent to endanger life or injure property, escaped from prison and was subsequently arrested in the United States. *Matter of Artt*, 972 F. Supp. 1253, 1260-62 (N.D. Cal. 1997). In the course of the U.S.

extradition case against Brennan, the Court of Appeals for the Ninth Circuit reversed the decision of the District Court and held that this offense did not constitute an “offense involving the use of a bomb” excluded from consideration as a protected political offense under Article 1(d) of the Supplementary Treaty. *Matter of Artt*, 158 F.3d 462, 471-73 (9th Cir. 1998). Although the decision has been dismissed and, therefore, cannot be cited as controlling precedent in future cases, this result only emphasizes the fact that the argument can be raised again in other extradition cases. The language of the new treaty is necessary because it makes clear that such an explosives offense is not to be considered a “political” offense for which extradition is barred.

Question (cont.):

b. To be specific, among the offenses excluded from the political offense exception in Article 4(2)(f) “possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage.”

i. Is simple possession of such devices a felony offense under U.S. law? If not, why would it be an extraditable offense?

ii. Is it your position that if the offense is a crime in any one state of the United States, that suffices for dual criminality?

iii. Does the individual who is being sought for extradition have to reside in the State where the felony exists for this to meet test?

iv. Under British law, is simple possession of a firearm the equivalent of a felony offense?

v. Based upon Ms. Warlow's testimony, wouldn't that make simple possession of a firearm an extraditable offense in the United States in the case of the proposed treaty because the dual criminality test could be met by reference to District of Columbia law which makes possession of a firearm within the city limits punishable by up to a year in jail?

Answer:

i. There are certain offenses under U.S. law that criminalize possession of explosives and other dangerous items, particularly in settings where danger to public safety is heightened. For example, it is a felony to possess an explosive in an airport (18 U.S.C. § 844(g)), or to transport a hazardous material aboard a civil aircraft (49 U.S.C. § 46312). It is also a felony to possess stolen explosives (18 U.S.C. § 842(h)); to possess explosives during the commission of another federal felony (18 U.S.C. § 844(h)); to possess explosive or incendiary missiles designed to attack aircraft (18 U.S.C. § 2332(g)); to possess radiological dispersal devices (18 U.S.C. § 2332h); or to possess nuclear materials (18 U.S.C. § 831). Possession of explosives or similar materials may also be an offense under the laws of individual U.S. states. See, for example, Chapter 21, Article 37, Section 3731(a) of the Kansas criminal code, which states that

“[c]riminal use of explosives is the possession, manufacture or transportation of commercial explosives; chemical compounds that form explosives; incendiary or explosive material, liquid or solid; detonators; blasting caps; military explosive fuse assemblies; squibs; electric match or functional improvised fuse assemblies; or any completed explosive devices commonly known as pipe bombs or Molotov cocktails.”

ii. Under U.S. law, courts, in assessing dual criminality, consider whether acts are “unlawful under federal statutes, the law of the state where the accused is found, or the law of the preponderance of the states.” *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1114 (7th Cir. 1997); *see also Brauch v. Raiche*, 618 F.2d 843 (1st Cir. 1980). Thus, if the offense is not a federal offense and is a crime in only one state, the dual criminality test can be satisfied if the fugitive is located in that one state.

iii. The dual criminality test will be satisfied if the conduct for which extradition is sought is a felony in the state where the fugitive is located. Even if the conduct is not a crime in that state, the test will also be satisfied if the conduct is a felony under either (1)

federal law or (2) the law of a preponderance of states. (See answer to ii above.)

iv. We have been advised by the UK that, under Article 3(1)(a) of the Firearms Northern Ireland Order 2004, it is an offence to possess a firearm without a Firearms Certificate. Pursuant to Article 70 of the 2004 Order, the penalty is as follows: for someone over the age of twenty-one, there is a minimum sentence of 5 years and an unlimited fine, and in the case of someone under twenty-one but over sixteen, the penalty is 3 years and an unlimited fine.

v. As noted above, under U.S. law, there are three situations in which the dual criminality test can be satisfied: if there is an analogous crime under federal law, if the majority of states criminalize the conduct, or if the conduct is criminalized in the State where the fugitive is found. Thus, in the example given, if a fugitive charged with simple possession of a firearm is located in the District of Columbia, where such conduct is an offense punishable as a felony, dual criminality can be satisfied, even if the same conduct would not be similarly punishable under the law of a preponderance of the states. (We note this would be the same result under all of our extradition treaties where dual criminality is the test for whether conduct

constitutes an extraditable offense, and thus would be the result for all of the dozens of extradition treaties approved by the U.S. Senate in recent years.) However, if the fugitive is located in another state that does not so criminalize simple possession of a firearm, then dual criminality cannot be satisfied by recourse to the law of the District of Columbia.

If the majority of states were to punish simple possession of a firearm by imprisonment of a year or more, dual criminality would be met even if the state where the fugitive was found did not so criminalize firearm possession. In this regard, we understand from information provided by the Bureau of Alcohol, Tobacco, Firearms and Explosives, that only the District of Columbia bans simple possession as a felony. Several other jurisdictions punish carrying a concealed firearm without a permit or license by a maximum punishment of a year or more of imprisonment (e.g., Delaware, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Connecticut, Nebraska, Kansas and Iowa), but as of now they do not constitute a majority of the states.

Thus, the law of the District of Columbia penalizing simple possession of a firearm as a felony, which does not reflect the law in

the majority of states, can be relied on to satisfy a dual criminality requirement only as to fugitives who are found in the District of Columbia; it may not be imported to satisfy the dual criminality requirement as to fugitives found in other jurisdictions.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Christopher Dodd (#4)
Senate Foreign Relations Committee
July 21, 2006**

Question:

State of Justice System in Northern Ireland.

The Northern Ireland Justice system is very similar to that of England and Wales. Most lesser offenses are prosecuted by the police. Serious crimes are prosecuted by the Director of Public Prosecution. Jury trials are normal practice except for offences involving terrorism. Under the Northern Ireland (Emergency Provisions) Act of 1996, in deliberating offenses covered by Schedule One of that Act (terrorism related offenses) judges sit alone, without juries, in so called diplock courts.

Do provisions of the Northern Ireland (Emergency Provisions) Act of 1996 still apply with respect to individuals charged with offenses under Schedule One of that act being denied jury trials?

Have human rights organizations criticized this practice?

Was the issue of the diplock courts a subject of US court deliberations in considering the UK extradition requests for Kevin Artt, Paul Brennan and Terence Kirby which dragged on for years until the UK withdrew its extradition requests in 2000?

Under the proposed treaty would it be appropriate for the US courts to look at the issue of the diplock courts in determining whether to approve extradition or would that be the role of the Secretary of State to make a judgment on?

Answer:

We note for clarification that we have been informed by the Government of the United Kingdom that the police do not prosecute lesser offenses in the UK; all prosecutions are now conducted by the Public Prosecution Service.

We have been advised by the Government of the United Kingdom that the current statutory provisions underlying the “Diplock Court” system -- the system of non-jury trials for certain specified offenses -- are set out in sections 65 to 80 of the Terrorism Act of 2000 (and its Schedule 9), which repealed the Northern Ireland (Emergency Provisions) Act of 1996. The legislation establishes a system of non-jury trials for a specified list of offenses, unless the Attorney General directs that the case be tried by a jury. The system of non-jury trials arose from concern that, with respect to certain offenses committed in Northern Ireland, the integrity of the jury process could be seriously undermined by risk of juror intimidation or partisanship. Although the procedures for Diplock Courts have been modified over the years, the Diplock Courts, i.e., courts without a jury, continue to sit, now hearing around 60 cases a year. This reflects a continuing trend away from use of the Diplock Court system: more

than 300 cases a year were heard in Diplock Courts in the mid 1980s; today, the Attorney General “deschedules” 85-90% of eligible cases so that they are removed from the Diplock system. In addition, each year, there is a review of whether there continues to be a need for the Diplock system by both the Government and by an Independent Reviewer.

The Government of the United Kingdom has further advised us that on August 1, 2005, the Secretary of State for Northern Ireland announced a program of security normalization that includes a commitment to repeal all counterterrorism legislation particular to Northern Ireland, including the Diplock Court system, by July 31, 2007. As part of this process and the ongoing review of the potential for juror intimidation, the Secretary of State for Northern Ireland, on August 10th of this year, tabled for “consultation” (what we would call public comment) proposals for a program that would presumptively favor jury trials, although permit a non-jury trial in specific circumstances and pursuant to a procedure subject to judicial review, coupled with measures to reduce the potential for juror intimidation. The “Consultation Paper,” which describes these proposals and solicits comment, and provides background on the

Diplock Court system over the years, as well as the most recent report of the Independent Reviewer, is attached for the Committee's reference. We understand it is also available on the Northern Ireland Office website (www.nio.gov.UK).

As to the second part of the question, we understand that the Diplock Courts have been the subject of criticism by some human rights organizations in the past, particularly by organizations that object to the lack of a trial by jury.

We note that the fact that a foreign jurisdiction does not provide for trial by jury -- what we understand is currently the central characteristic of the Diplock Court system that distinguishes it from the trial of serious offenses elsewhere in the United Kingdom -- is not a bar to extradition from the United States. *See Neely v. Henkel*, 180 U.S. 109, 122-23 (1901). Indeed, many foreign countries with which the United States has extradition treaties do not have trial by jury at all, or include a limited number of "lay judges" to serve with professional judges as triers of fact only with respect to the most serious offenses.

Artt, Brennan, and Kirby were all convicted in Diplock Courts, and we understand that Artt and Kirby, and to a lesser extent Brennan,

raised the procedures of the Diplock Court system, as well as claims that they would suffer abuse or other forms of persecution by the government on account of religious or political factors. A discussion of the issues raised is set out in *Matter of Artt*, 158 F.3d 462 (9th Cir. 1998).

Under the new treaty, the Secretary of State, and not U.S. courts, would review issues about the particular court systems where a fugitive might be tried after extradition. This would be consistent with the current allocation of responsibility among the branches of the federal government under longstanding U.S. law and other extradition treaties. Thus, if, for example, a fugitive sought by the United Kingdom for extradition were to raise concerns or questions about Diplock Courts, these matters would be considered by the Secretary of State.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Christopher Dodd (#5)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Removal of the Statute of Limitations as a bar to Extradition

The current U.S.-UK treaty provides, in Article 5(1)(b), that extradition shall not be granted if barred by the statute of limitations according to the law of the “requesting or requested party.” In other words, the statute of limitations of either country would apply. The proposed treaty, in Article 6, provides that the decision to grant extradition shall be made without regard to any statute of limitations in either State.

I recognize that a lot of recent treaties have included this provision, and that the statute still applies in the country where the person will be tried. But numerous treaties approved by the Senate in the last decade – including with such countries as France, Hungary, Poland, and South Africa – *have included* some kind of provision on statutes of limitation.

The absence of the requirement that an offense must be within the statute of limitations of both states makes it more difficult for those with concerns about the proposed treaty to accept the removal of a role for the U.S. judiciary in making a determination about the political motivations of the requesting state.

Irish Americans have expressed concerns that the removal of the statute of limitations provision puts them in jeopardy to be prosecuted for political acts dating back to the 1970s and 1980s when the criminal justice system in Northern Ireland was terribly flawed and biased against Catholics.

a. Why was the statute of limitations provision excluded altogether? Which country sought it?

b. Tell me about the statute of limitations in the United Kingdom, particularly under Northern Ireland law.

c. What protection exists against politically motivated extradition requests under the proposed treaty?

d. How often does the Secretary deny a request based on political motivation?

Answer:

a. The United States sought the deletion of the provision on statute of limitations, as we do in all of our modern extradition treaties. We believe that the issue of whether a person sought for extradition has a valid defense to criminal prosecution based on the passage of time is appropriately adjudicated only in the courts of the country seeking extradition. It is inherently difficult for the courts of one nation to adjudicate the technical foreign law and factual issues of when the statute of limitations in another country has been tolled, or when relevant time frames begin and end in a foreign jurisdiction.

While not every country agrees to the preferred formulation on this issue that is found in Article 6 of the new U.S.-UK extradition treaty, obtaining this provision is a negotiating objective for the United States and we seek it in every bilateral negotiation. Several other treaties

recently approved by the Senate and now in force for the United States, including our extradition treaties with Sri Lanka, Belize and Lithuania, have a provision analogous to the provision in Article 6 of the new U.S.-UK treaty.

b. Statutory limitations exist under UK law and are applicable to Northern Ireland, but apply only to less serious offenses, where complaints must be made within 6 months of when the offense was committed. In the case of more serious offenses (such as rape, murder and grievous bodily harm) there is no statute of limitations.

Notwithstanding the lack of a statute of limitations for these serious criminal offenses, we understand there are protections under UK law that could apply in a case where there was an unjustifiable delay in prosecuting an individual. First, the UK Government has advised us that the right to a fair trial under Article 6 of the European Convention on Human Rights (to which the UK is a party and the provisions of which are legally binding on the UK) entitles a person charged to a fair and public trial within a reasonable time; that the right to a trial within a reasonable time would be implicated where the delay was of such an order as to make it unfair that the proceedings should continue. Second, the UK Government has indicated that the

more general protection against "abuse of process" could apply. It is our understanding that the "abuse of process" protection prevents a person from being prosecuted in circumstances where it would be seriously unjust to do so, and that it extends both where the defendant did not receive a fair trial and where it would be unfair for the defendant to be tried. The latter application would include cases where the prosecution may have manipulated or misused the process of the court in such a way that it would be contrary to the public interest and the integrity of the criminal justice system that a trial should take place. Our colleagues in the United Kingdom were not aware of any case in which there had been a delay of prosecution to which the abuse of process principle had been applied, but indicated that this principle could also offer a remedy were there a claim of unfairness by the defendant of serious, unjustifiable delay by the prosecution in bringing a case.

c. Consideration of whether a request for extradition is politically motivated begins when it is first received by the Department of State from the foreign government. We have found that requests that the Department of State believes may be politically motivated are generally also insufficient as a technical matter, for

example, the facts and evidence provided by the Requesting State do not meet the probable cause standard, the proper documentation has not been provided, the papers have not been appropriately certified, or the dual criminality requirement is not met. This circumstance is not surprising given that these types of requirements in extradition treaties are designed, in part, to ensure a robust level of integrity in the extradition process.

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

After a fugitive has been found extraditable and committed to the custody of the U.S. Marshal, and all appeals in U.S. courts have been exhausted, the Department of State reviews the record of the case as certified by the District Court to the Secretary of State. This record normally consists of the Magistrate's Certification of Extraditability and Order of Commitment, any related orders or

memoranda issued by the Magistrate, all court orders issued in the course of any appellate proceedings, the transcript of the extradition proceedings before the Magistrate, and the documents submitted by the requesting State. In addition, it is the Department of State's policy to accept and review written argumentation against extradition submitted by the fugitive or his counsel if received in time to be included with the Department's final review of the case. Also, members of the fugitive's family or other interested parties may make written representations, which are usually of a humanitarian nature, on behalf of the fugitive. All are taken into consideration by the Department of State with a view to determining what recommendation to make to the Secretary of State with respect to a possible extradition.

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

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Christopher Dodd (#6)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Double jeopardy

A recently-enacted law in the United Kingdom, the Criminal Justice Act 2003, provides in Part 10 for retrial in certain cases, even though there has been an acquittal. How does this comport with U.S. standards of due process, including the double jeopardy clause of the Fifth Amendment to the Constitution? What is your understanding of the degree to which this provision for retrial has been used in the United Kingdom?

Answer:

In the United States, the re-prosecution of an individual after he or she had been acquitted would be barred by the double jeopardy clause of the Fifth Amendment. The Government of the United Kingdom has advised us that the cited provision of the 2003 Criminal Justice Act permitting retrial has been invoked only once. However, we understand that that case is still pending, so there has been no judicial decision on the use of that provision.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Christopher Dodd (#7)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Waiver of Rule of Specialty

The “Rule of Specialty” is time-honored provision in extradition practice, designed to ensure that a fugitive surrendered for one offense is not tried for other crimes, and to ensure that the request is not used as a subterfuge.

Many recent treaties, including this one, however, allows for the waiver of the rule if the executive of the requested state consents. I understand from a prior answer that this is rarely done. Since 1991, the Department of State has received 30 requests for waiver, and of these, 17 requests were granted, 5 were denied, and 8 are still pending.

What kinds of cases are these where the rule is waived? Do the requests for waiver always relate to the same offense or act, or do they sometimes involve a new offense or act?

Answer:

Since our responses to the Committee’s questions for the record after the November 2005 hearing, the United States has received 5 requests for waiver of the rule of specialty. Thus, from 1991 to the present, the Department of State has received 35 requests for waiver, and, of these, 17 were granted, 5 were denied, and 13 are pending.

When the State Department receives a request for a waiver of the rule of specialty, it will take into consideration the following factors in determining whether to grant the waiver: whether the failure to include an offense in the original extradition request is justified because it was not previously possible to do so for legal or practical reasons, and whether there is sufficient evidence to meet the probable cause standard regarding the offense for which the request is made. Our experience is that in some cases the request for waiver relates to the same offense or act, and in other cases the request may apply to a new offense or act. In either event, the factors identified above would be taken into account.

As an example of the kinds of cases in which waivers are sought, we have granted a request from Germany for waiver of the rule of specialty in a case where an individual was extradited for robbery. Based on testimony provided in the subsequent trial, which revealed that the defendant may have been involved in two additional, separate robberies, Germany requested that the United States waive the rule of specialty so that the defendant could be prosecuted for those additional crimes. Because the German authorities did not know of the two additional robberies until after the defendant was

extradited, and because we were satisfied that probable cause existed,
we consented to waiver of the rule of specialty.

**Questions for the Record Submitted to
Deputy Attorney General Paul J. McNulty and
Deputy Legal Advisor Samuel Witten by
Senator Christopher Dodd (#8)
Senate Foreign Relations Committee
July 21, 2006**

Question:

Extradition treaty with the European Union

In a response to a prior written question, you stated that the 2003 Extradition Treaty will be supplemented, pursuant to the new treaty on extradition between the United States and the European Union. One addition will involve the addition of a provision establishing parity between a U.S. extradition request to the United Kingdom, and a request United Kingdom for the same person made by another EU member state pursuant to the European Arrest Warrant mechanism.

a. Please elaborate on what this means. Does it alter the standard for the amount of evidence the United States must present in an extradition request to the United Kingdom?

b. Can you provide the bilateral instrument on this issue that the United State and the United Kingdom signed on December 16, 2004? Does that treaty involve an amendment to this treaty now before the Senate?

c. When do you expect to submit the U.S.-EU treaty to the Senate?

Answer:

a. On December 16, 2004, the United States and the United Kingdom signed a bilateral extradition instrument that would implement the provisions of the 2003 United States-European Union

Extradition Agreement. Article 10(2) and (3) of the U.S.-EU Agreement specifies a procedure for an EU member state to follow if it receives competing requests from the United States pursuant to the bilateral extradition treaty and from an EU member state pursuant to the European Arrest Warrant (EAW). The effect of this provision is to create parity, as a matter of international law, between a U.S. extradition request to an EU member state and an EAW request. Neither Article 10 nor any other provision of the U.S.-EU Agreement would have an effect on the quantum of evidence required to support an extradition request made under the 2003 U.S.-UK bilateral extradition treaty currently under consideration by the Senate.

b. A copy of the 2004 U.S.-UK bilateral extradition instrument is attached for the Committee's information. The effect of the bilateral extradition instrument would be to supplement and, in certain instances, to amend the 2003 U.S.-UK bilateral extradition treaty currently under consideration by the Senate. In addition to the provision on competing requests described above, there would be new provisions relating to: mode of transmission of requests for extradition and provisional arrest; certification, authentication or legalization

requirements; channel for submission of supplementary information; and submission of sensitive information in a request.

c. The U.S.-EU Extradition Agreement, together with bilateral instruments with all 25 EU member states, is expected to be submitted to the Senate in the near future. (The submittal of the related U.S.-EU Mutual Legal Assistance Agreement and its implementing bilateral instruments will occur at the same time.)