

U.S.-U.K. EXTRADITION TREATY

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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JULY 21, 2006
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U.S.-U.K. EXTRADITION TREATY

FRIDAY, JULY 21, 2006

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

The committee met, pursuant to notice, at 10:00 a.m. in Room SD-419, Dirksen Senate Office Building, Honorable Richard G. Lugar, chairman of the committee, presiding.

Present: Senators Lugar and Dodd.

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

The CHAIRMAN. This hearing of the Senate Foreign Relations Committee is called to order. The committee meets today to hear testimony on the Extradition Treaty between the United States and the United Kingdom.

Within the Congress, the Senate Foreign Relations Committee is charged with the unique responsibility of reviewing treaties negotiated by the administration. Our colleagues in the Senate depend on us to make timely and judicious recommendations on treaties. In addition to the treaty before us today, the committee is working hard to advance several other important treaties, including the Cybercrime Convention, the Corruption Convention, the Israel Extradition Protocol, the Convention on Supplementary Compensation for Nuclear Damage and the Uruguay Bilateral Investment Treaty. I'm hopeful the Senate will be able to act on these measures this year.

The United Kingdom is one of this country's closest allies, with them we enjoy a deep cultural affinity and an excellent partnership. The British Government and people have taken a leadership role on numerous foreign policy challenges, including stabilizing Iraq, protecting democracy and pluralism in Afghanistan, working for nuclear non-proliferation in Iran, fighting disease and poverty in Africa, and improving global cooperation on climate change. These contributions and many others have been crucial to international security and order.

This new extradition treaty with the United Kingdom is designed to update our existing extradition relationship, bringing it into line with other modern U.S. extradition treaties. Upon entry into force, the new treaty would replace a treaty that dates back to 1972. Extradition treaties are critical tools for United States law enforcement in combating transnational crime, as they ensure that those who commit crimes in this country cannot escape justice by fleeing to other countries.

Among other provisions, the new treaty would adopt a modern dual criminality standard for extradition, allowing extradition for offenses that are punishable by one year or more in both countries. It would also ensure the continued application of a new, less burdensome evidentiary standard for extradition requests by the United States to the United Kingdom. Moreover, it would permit the temporary surrender for trial of fugitives who are serving sentences in the requested state.

The committee held a first hearing on the treaty on November 15 of last year, at which time we heard from the administration. Today, the committee is joined by three witnesses from outside of our government. We welcome Mr. Jack Meehan, President of the Ancient Order of Hibernians; Dr. Robert Linnon, President of the Irish American Unity Conference, and Professor Madeline Morris of Duke University Law School. Professor Francis Boyle of the University of Illinois College of Law at Urbana-Champaign was also invited to testify—we've been informed that the sudden thunderstorms that hit the Midwest yesterday resulted in numerous canceled flights, and as a result he has not been able to reach Washington this morning. He has provided extensive written testimony in advance of the hearing which will be made available to members, and it will be included in the hearing record in full.

[The information referred to appears in Appendix II of this hearing print.]

The CHAIRMAN. Following the first panel, the administration will have an opportunity to update the information it provided to the committee in November. We also want to give members who were not present at the first hearing a second opportunity to question the administration about the treaty or to raise concerns about individual provisions. We are pleased to welcome Deputy Attorney General Paul McNulty, representing the Department of Justice, and Deputy Legal Adviser Samuel Witten, representing the Department of State.

We look forward to the contributions of all of our witnesses today, as the committee continues its consideration of this treaty. I will ask the witnesses to deliver the statements in the order that I have mentioned them in this introduction. If you are summarizing your statement, let me simply state the entire text of your presentation will be included in the hearing record in full, and so you need not ask for permission, that will be granted in advance, and you will be asked to proceed however you would wish.

So I note that our colleague, Senator Dodd is on the way and we waited a few moments, and when he comes we will recognize him for an opening statement, if he has one, so that our record will be complete with that testimony. But at this point, we would like to proceed.

Well, Senator Dodd has arrived, just at the right time. Senator Dodd, I just indicated that we were anticipating your presence and I would recognize you for an opening statement, just having delivered one myself.

**OPENING STATEMENT OF HONORABLE CHRISTOPHER J.
DODD, U.S. SENATOR FROM CONNECTICUT**

Senator DODD. Very good, Mr. Chairman, my apologies to all of you for being a couple of minutes late, but I'm very grateful to the Chairman for his willingness to reschedule this morning's hearing on the 2003 U.S.-U.K. Extradition Treaty. It was originally scheduled—as all of you are probably aware—to be held earlier this week so that I am able to actually attend that. I'm grateful to you, again, Mr. Chairman for that.

Recognizing that the committee has already held one hearing on this treaty—last November—I'm very grateful that the Chairman decided to hold a second hearing on the treaty so that the committee can have an opportunity to hear from additional witnesses, including representatives of certain Irish-American organizations.

The 2003 U.S.-U.K. Extradition Treaty was signed on March 31, 2003 and transmitted to the Senate on April 19, 2004. If ratified, this treaty would replace a 1972 treaty as modified by the highly controversial 1985 Supplementary Treaty.

Other than last year's hearing on the proposed treaty, the last time the subject of extradition came before this committee relative to the United States and the United Kingdom was two decades ago. At that time, you were Chairman, Mr. Chairman, and I was a freshman United States Senator, new to the committee. And I had black hair in those days, as I recall.

The committee's consideration of the 1985 Supplementary Treaty was the subject of intense review and scrutiny. It was the subject of three hearings and two markups, over the course of roughly twelve months—with more than twenty witnesses heard by this committee. Ultimately, of course, this body gave its advice and consent, but not before adopting three amendments and a declaration relative to the treaty, including an amendment related to the political offense exception to extradition.

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

In addition to our public panel, I believe is was extremely wise of you to invite the administration witnesses—and I thank you for doing that—back to testify again after the public panel, so that they will have an opportunity to comment on their testimony. I believe there are a number of very important questions raised by the pending treaty.

Among the most important are why was Article 3 of the Supplementary Treaty removed? And what is the cumulative effect of that change coupled with the elimination of the statute of limitations requirements related to extraditable offenses that exists in the current treaty?

Article 3 was added by this committee in 1986, and was the subject of painstaking negotiations. It bars extradition if the person sought establishes that the extradition request has been made with a view to try an individual on account of race, religion, nationality

or political opinions, or that if surrendered, that individual would be prejudiced at trial or punished because of those reasons. This provision also provides for judicial review of these questions, a provision unique to our bilateral extradition treaties. I recognize that it is unique proviso—but there were unique reasons for its inclusion twenty years ago.

I understand that there have been only a handful of cases in which Article 3 of the treaty has been invoked related to incidents involving the Northern Ireland conflict, and that none are pending now.

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

Since the signing of the Good Friday Accords in 1998, the British authorities have taken a number of legal steps to address legal questions related to that sectarian conflict. In 1998 the U.K. introduced an early release program whereby IRA and Loyalist prisoners could apply for release on probation after they had served two years in prison. Four hundred and forty seven individuals have been released under this scheme; however, some fugitives remain outside the early release program—namely those who went “on the run” before trial or escaped from prison before serving two years of their sentences. Legislative efforts to deal with these individuals have thus far been unsuccessful and therefore at least some remain in limbo despite the Good Friday Accords. These are important legal steps that have been taken since the committee considered the 1985 Supplementary Treaty.

Full implementation of the Good Friday Accords is still a work in progress. As many in this room, I’m sure, are aware, Northern Ireland is once again being governed from London following the suspension of the Northern Ireland Assembly in 2003. Efforts to stand up that assembly and select an executive directorate are now ongoing. I’m very hopeful that those efforts will be successful by the November deadline set by the British and Irish Governments, however, absent full implementation of the peace process, past grievances, fears and suspicions will remain fresh in the minds of Irish activists on both sides of the Atlantic.

So it is in this context and climate that we must review the proposed treaty. Our administration witnesses need to help this committee and the public at large understand how the provisions of the new treaty compare to the new treaty with the United Kingdom, why changes were made, and whether those changes will create new potential legal jeopardy for Americans who have been politically active in their opposition to the British rule in Northern Ireland should the treaty be ratified in its current form.

What benefits will the United States gain, in its effort to obtain the extradition of suspects to the United States? In other words, to state it plainly, what is in it for this Nation if we approve this trea-

ty? All of this information will be of enormous help to this committee in its consideration of the treaty.

I apologize for taking so much time, Mr. Chairman, to raise these issues, and again let me express my deep gratitude to you on a Friday here, when we're out of session, the Chairman of this committee holding this special hearing and allowing us to hear these witnesses and the administration to comment on that is something that I'm very, very grateful to Dick Lugar for. He's been a great Chairman of this committee, we've served together now for a quarter of a century, and I'm not surprised he would do this, but I want all of this room to know what a special debt of thanks we owe to Dick Lugar, the Chairman of this committee.

The CHAIRMAN. Well, Chris, you're most generous and I appreciate that, but I'm very glad we had your important opening statement, because it does set historical record as we listen to our witnesses.

Now, we appreciate very much your coming and accommodating the change of schedule of the committee. I would like to now call upon Mr. Jack Meehan for his testimony, to be followed by Dr. Linnon, and then Professor Boyle. Mr. Meehan?

STATEMENT OF JOHN J. MEEHAN, JR., NATIONAL PRESIDENT OF THE ANCIENT ORDER OF HIBERNIANS, QUINCY, MASSACHUSETTS

Mr. MEEHAN. Distinguished members of the U.S. Senate Foreign Relations Committee, guests, and others present.

My name is John Meehan, I reside at 60 Longwood Road, Quincy, Massachusetts. I am the National President of the Ancient Order of Hibernians in America, the oldest, largest, and only nationally represented Irish Catholic fraternal organization in the United States. The Ancient Order of Hibernians is widely recognized as the quintessential Irish American organization and the most highly respected voice of the Irish in America. As National President, I am authorized to speak on behalf of the approximately 80,000 members of our noble order, the vast majority of whom are American citizens and voters in the 46 states in which we are represented. Thousands of our members are also veterans of the United States armed forces.

Although I have a deep and abiding love for Ireland and her people as evidenced by the fact that I am also a citizen of Ireland, a property owner there, and a speaker of the Irish language, whose late wife and current wife were both born there, there is no doubt that my first allegiance is to the country of my birth and in whose armed forces I very proudly served. That country is, of course, the United States of America.

And now, if I may, let me cut right to the chase and give you some background on what we, the members of the Ancient Order of Hibernians, do. Are we primarily activists in issues that affect Irish Americans and Catholics? The answer is clearly yes. Have we spoken out in opposition to documented human rights violations by the British Government in the North of Ireland throughout the recent conflict from 1968 to the present? The answer is clearly yes.

The human rights violations to which I refer were perpetrated on the Catholic Nationalist minority community on a regular basis

during the conflict and verified by such respected human rights advocacy groups as Amnesty International, the European Court of Human Rights, and Human Rights Watch.

Do we advocate violence? The answer is absolutely not. As a matter of fact, we are bound by the Preamble to our National Constitution which requires us to, and I quote, "to aid and advance by all legitimate means the aspirations and endeavors of the Irish people for complete and absolute independence, while promoting peace, justice, and unity for all of the people of Ireland."

We are on record as solidly supporting the full implementation of the Good Friday Agreement including all of the policing reforms recommended by the Patten Commission. We are also on record as having recommended complete disarmament by the Irish Republican Army long before that became a reality.

Now let me give you some reasons why we, as American citizens and voters, vehemently oppose the acceptance of this treaty by our government. We can not overemphasize the fact that contrary to the opinion of some persons who should know better, this is not an Irish issue. Our position is that any treaty which negatively impacts American citizens is an American issue, pure and simple.

There is already an extradition treaty in existence between the United States of American and the British Government. It has, for all intents and purposes, served both nations well for quite some time, while at the same time, not sacrificing the rights guaranteed to American citizens in our most cherished document, the Constitution of the United States of America. The proposed treaty does not include these constitutional guarantees.

Why would the United States Government need this proposed treaty in order to extradite anyone we seek in fighting the war on terror? Have we not already extradited a number of people under the British Extradition Act of 2003? It would appear then that the only logical reason for ratification of this proposed treaty is to make it easier for the British Government to extradite American citizens. Are we wrong in making this assumption? We don't believe that we are.

Further, British subjects extradited to the United States are guaranteed the right to a trial, the right to remain silent, the presumption of innocence and all of the other rights guaranteed to American citizens by our Constitution. However, if this proposed treaty is ratified, American citizens extradited to Britain are not guaranteed those same rights that we grant to British subjects. Is this not a true statement?

Why, then, would the United States Senate, a legislative body elected by the citizens of the United States, even consider ratification of a treaty which ensures our constitutional rights to persons from foreign countries that are extradited here, while denying those same rights to United States citizens who face trial overseas?

Is it not a true statement that this treaty proposes surrendering the constitutional rights of United States citizens for the sole purpose of avoiding political embarrassment for the British Government ahead of their upcoming elections?

At the prior hearing on this treaty which was held on November 15, 2005, Senator Lugar, the chairman of the committee clearly stated that: "The committee will consider this treaty and expects

to hold an additional hearing next year from witnesses outside our government. Today we want to establish a record of the administration's views on the treaty to which the committee and all interested parties can refer as we continue our deliberations." With all due respect to Chairman Lugar, I certainly hope that the good citizens giving testimony today, in opposition to the administration's position on ratification of this treaty are not considered "witnesses outside our government." If so, one would have to wonder what became of the phrase we all learned as schoolchildren, "government of, for, and by the people."

Can we live with a document between our country and Britain that transfers the sole responsibility for determining whether an extradition request is politically motivated, or not, from the Federal courts to the executive branch thereby denying American citizens their right to have their day in court before an impartial judge? The answer is clearly no. Never before in our Nation's history has our government even considered subjecting the liberty of American citizens to the whims of a foreign government.

Can we live with a document that allows for the provisional arrest and detention of American citizens for 60 days upon request by the British Government without even submitting a formal extradition request providing the details supporting the reason for their request? The answer is clearly no.

The proposed treaty permits retroactive application. Simply stated, this means that the terms of the proposed treaty will apply retroactively for offenses allegedly committed before the treaty's ratification. It also provides that American law need not have been violated in order for extradition to take place.

If this treaty is ratified, no American citizen who is or ever has been active in Irish political affairs and who has publicly spoken in opposition to British governmental policy in the North of Ireland will be safe from the possibility of being extradited to Britain for merely exercising his right to free speech guaranteed under the First Amendment of the Constitution of the United States of America.

It is a sad day, indeed, when the United States of America, the greatest democracy the world has ever known, would allow the pacification of any foreign government, regardless of how close an ally they may be perceived to be, to take precedence over protecting the constitutional rights of American citizens.

Whether one agrees or disagrees with our country's involvement in the war in Iraq and Afghanistan, the fact is that thousands of true American heroes are over there fighting to protect our beloved country and the cherished ideals enshrined in our United States Constitution. It is incomprehensible to me that we, the beneficiaries of their sacrifice, could even think of compromising those time honored ideals when these valiant young men and women are sacrificing so much to protect them and our American way of life.

It is worthy to note upon closing that over the last few weeks there has been a hue and cry by rank and file British citizens and voters urging their government to scrap this treaty as they have determined that it unfairly impacts on their citizenry. Perhaps it is time that we adopt this same conclusion with regard to the potentially devastating effect that this proposed treaty could have on

our American citizens who have rightfully criticized the many documented human rights violations perpetrated by the British Government and their military units on the Catholic Nationalist minority community in the North of Ireland.

We urge the members of the United States Senate to very carefully study the possible detrimental effects that this proposed treaty might impose on United States citizens and vote to soundly reject the acceptance of Treaty Document 108-23.

May I take this opportunity to extend my personal thanks, as well as those of the entire membership of the Ancient Order of Hibernians to the United States Foreign Relations Committee for allowing me to express our opposition to the acceptance of this very dangerous treaty in this open forum.

Distinguished members of the committee, as a footnote to my statement, I believe I should tell you very frankly, that unlike some of the other persons giving testimony here today, I am neither a professor, nor an attorney. I am a person who is fiercely proud of his heritage and deeply concerned about the human rights violations that have taken place in Ireland over the last 35 years. But more importantly than that, I am an American citizen, a veteran, and a political activist. As such, I believe I have every right to express my opinion, whether or not it is in concert with that of the British Government in their policies with regard to the North of Ireland, without fear of reprisal. That right is guaranteed me in the United States Constitution. Under no circumstances will I stand idly by, and watch the rights and privileges that are guaranteed to American citizens in the Constitution of the United States to be eroded, in order to pacify a foreign government.

Thank you very much, Mr. Chairman, thank you very much, Mr. Dodd.

[The prepared statement of Mr. Meehan follows:]

PREPARED STATEMENT OF JOHN J. MEEHAN, JR.

Distinguished members of the U.S. Senate Foreign Relations Committee, guests, and others present, my name is John J. Meehan Jr. I reside at 60 Longwood Road Quincy, MA. I am the National President of the Ancient Order of Hibernians in America, the oldest, largest, and only nationally represented Irish Catholic fraternal organization in the United States. The Ancient Order of Hibernians is widely recognized as the quintessential Irish American organization and the most highly respected voice of the Irish in America. As National President, I am authorized to speak on behalf of the approximately 80,000 members of our noble Order, the vast majority of whom are American citizens and voters in the 46 states in which we are represented. Thousands of our members are also veterans of the United States armed forces.

Although I have a deep and abiding love for Ireland and her people as evidenced by the fact that I am also a citizen of Ireland, a property owner there, and a speaker of the Irish language, whose late wife and current wife were both born there, there is no doubt that my first allegiance is to the country of my birth and in whose armed forces I very proudly served. Thaw country is, of course, the United States of America.

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The human rights violations to which I refer were perpetrated on the Catholic Nationalist minority community on a regular basis during the conflict and verified by such respected human rights advocacy groups as Amnesty International, the European Court of Human Rights, and Human Rights Watch.

Do we advocate violence? The answer is absolutely not.

As a matter of fact we are bound by the Preamble to our National Constitution which requires us "to aid and advance by all legitimate means the aspirations and endeavors of the Irish people for complete and absolute independence, while promoting peace, justice, and unity for all of the people of Ireland."

We are on record as solidly supporting the full implementation of the Good Friday Agreement including all of the policing reforms recommended by the Patten Commission. We are also on record as having recommended complete disarmament by the Irish Republican Army long before that became a reality.

Now let me give you some of the reasons why we, as American citizens and voters, vehemently oppose the acceptance of this treaty by our government.

We can not overemphasize the fact that contrary to the opinion of some persons who should know better this is not an Irish issue. Our position is that any treaty which negatively impacts American citizens is an American issue, pure and simple.

There is already an extradition treaty in existence between the United States of America and the British Government. It has for all intents and purposes served both nations well for quite some time while, at the same time, not sacrificing the rights guaranteed to American citizens in our most cherished document, the Constitution of the United States of America. The proposed treaty does not include these constitutional guarantees.

Why would the United States government need this proposed treaty in order to extradite anyone we seek in fighting the war on terror? Have we not already extradited a number of people under the "British Extradition Act of 2003?"

It would appear then that the only logical reason for the ratification of this proposed treaty is to make it easier for the British Government to extradite American citizens. Are we wrong in making this assumption? We don't believe that we are.

Further, British subjects extradited to the United States are guaranteed the right to a trial by jury, the right to remain silent, the presumption of innocence, and all other rights guaranteed to American citizens by our Constitution.

However, if this proposed treaty is ratified, American citizens extradited to Britain are not guaranteed those same rights that we grant to British subjects. Is this not a true statement?

Why then would the United States Senate, a legislative body elected by the citizens of the United States, even consider ratification of a treaty which ensures our constitutional rights to persons from foreign countries that are extradited to our country, while denying these same rights to United States citizens sent to face trial overseas?

Is it not a true statement that this treaty proposes surrendering the constitutional rights of United States citizens for the sole purpose of avoiding political embarrassment for the British Government ahead of their upcoming elections?

At the prior hearing on this treaty which was held on November 15, 2005, Senator Lugar, the Chairman of the committee clearly stated that: "The committee will consider this treaty and expects to hold an additional hearing next year from witnesses outside our government. Today we want to establish a record of the administration's views on the treaty to which the committee and all interested parties can refer as we come continue our deliberations."

With all due respect to Chairman Lugar, I certainly hope that the good citizens giving testimony today, in opposition to the administration's position on ratification of this treaty are not considered "witnesses outside our government." If so, one would have to wonder what became of the phrase we all learned as school children, "government of, for, and by the people."

Can we live with a document between our country and Britain that transfers the sole responsibility for determining whether an extradition request is politically motivated, or not, from the federal courts to the executive branch thereby denying American citizens their right to have their day in court before an impartial judge? The answer is clearly no.

Never before in our Nation's history has our government even considered subjecting the liberty of American citizens to the whims of a foreign government.

Can we live with a document that allows for the provisional arrest and detention of American citizens for 60 days upon request by the British Government without even submitting a formal extradition request providing details supporting the reason for the request. The answer is clearly no.

The proposed treaty permits Retroactive Application. Simply stated this means that the terms of the proposed treaty will apply retroactively for offenses allegedly

committed before the treaty's ratification. It also provides that American law need not have been violated in order for extradition to take place.

If this treaty is ratified, no American citizen who is or ever has been active in Irish political affairs and who has publicly spoken in opposition to British governmental policy in the North of Ireland will be safe from the possibility of being extradited to Britain for merely exercising his right to free speech guaranteed under the First Amendment of the Constitution of the United States of America.

It is a sad day, indeed, when the United States of America, the greatest democracy the world has ever known, would allow the pacification of any foreign government, regardless of how close an ally they may be perceived to be, to take precedence over protecting the constitutional rights of American citizens.

Whether one agrees or disagrees with our country's involvement in the war in Iraq and Afghanistan, the fact is that thousands of true American heroes are over there fighting to protect our beloved country and the cherished ideals enshrined in our United States Constitution. It is incomprehensible to me that we, the beneficiaries of their sacrifice, could even think of compromising those time honored ideals when these valiant young men and women are sacrificing so much to protect them and our American way of life.

It is worth noting, upon closing, that over the last few weeks there has been a hue and cry by rank and file British citizens and voters urging their government to scrap this treaty as they have determined that it unfairly impacts on their citizenry.

Perhaps it is time that we adopt this same conclusion with regard to the potentially devastating effect that this proposed treaty could have on our own American citizens who have rightfully criticized the many documented human rights violations perpetrated by the British Government and their militant units on the Catholic Nationalist minority community in the North of Ireland.

We urge the members of the United States Senate to very carefully study the possible detrimental effects that this proposed treaty might impose on United States citizens and vote to soundly reject the acceptance of Treaty Document 108-23.

May I take this opportunity to extend my personal thanks as well as those of the entire membership of the Ancient Order of Hibernians to the U.S. Senate Foreign Relations Committee for allowing me to express our opposition to the acceptance of this very dangerous treaty in this open forum.

The CHAIRMAN. Well, thank you very much, Mr. Meehan, we appreciate your testimony and your thoughtfulness as you've proceeded. We look forward, now, to hearing from Dr. Robert Linnon. Would you please proceed, doctor?

STATEMENT OF PROFESSOR ROBERT C. LINNON, Ph.D., IRISH AMERICAN UNITY CONFERENCE, WASHINGTON, D.C.

Dr. LINNON. Thank you, Mr. Chairman. I'd like to express my greetings to all of the other members of the committee who are here, to other witnesses, and especially to the audience, which includes my wife. So, I had to make sure I included her.

Now, what is the Irish American Unity Conference? It's devoted to a peace and justice in the United Ireland, through non-violent means. We send no money to Ireland, and we have never done that. We never want to be accused of supporting the armed conflict in Ireland, we simply don't do it.

Now, I was informed that you'd let me just summarize my written testimony. And I can do that in two words: grossly unfair. These are the points in my written testimony.

It ignores the separation of powers, which is at the heart of our Constitution. It's supposed to keep things balanced. And yet, some presidents, I've been led to believe, abuse their presidential powers. I'm not referring, of course, to the current administration, but it is something that has to be considered in the approval of this treaty. It denies those charged with having a day in court. That is so fundamental to our basic way of life here in America. I can't conceive

of why the United States Senate would even consider any treaty which denies the right of an American citizen to go before an impartial judge and make his case.

Thirdly, it allows for provisional arrest of up to 60 days. Do you know what can happen when you arrest a person for 60 days? Put him in jail, his reputation is ruined. Secondly, he could lose his job in that time, it can cause many financial problems, and it's simply unfair without just cause. And just cause comes from the supposition of a foreign government. Which, incidentally, has no Constitution, and no Bill of Rights. That's the government that's asking us to take rights away from our own citizens for their benefit. Very important consideration.

It also provides that American law need not be violated, which impacts on our First Amendment rights of free speech. And, the retroactive application. If that is approved, it can even apply to activity before the approval of this treaty. I mean, that's grossly wrong.

And I do want to stress that our testimony here today is simply an effort to preserve our basic Constitutional rights and civil liberties.

I want to tell you, when I graduated from high school in 1955, the United States was in an international conflict to preserve all of the freedoms that we enjoy. I volunteered for service in the United States Navy and I served two years and never, never in my wildest imagination would I dream that the United States Senate would consider taking away such basic rights. That's the way I feel about this treaty.

The United Kingdom in Northern Ireland has a terrible, atrocious record of human and civil rights violations. I could enumerate them, but surely you're aware of them. And I know many of those subjected to those abuses personally. I mean, I don't speak in an abstract sort of way here. I know what goes on in Northern Ireland, I've seen it so many times, and it's essentially wrong.

Now, one of our members wrote to a member of this committee some time ago, and the Senator wrote back. And I will read you part of his letter to his constituents. He says, "The United States has a long history of protecting persons within its borders from extradition for politically motivated crimes. It is important to me that the proposed treaty with the United Kingdom continues this tradition." It doesn't. It doesn't, and it frightens me to think that the United States Senator and this committee wrote that to one of his constituents. I find that very difficult to understand.

I'd just like to point out a couple of other things. The United Kingdom recently sent two females over to this country to address many of you Senators and this committee. And I can understand what happens there, women with a charming British accent, and the epitome of respectability appeal to the Senators, and the basic facts are overlooked, and that's why we're here today—to make sure that they are not overlooked. I was President of the Irish American Unity Conference in 1985 when the previous Supplemental Extradition Treaty was approved. And at that time, I thought we conceded many points we didn't want to concede, but we were convinced that maybe as a tradeoff there was a balance,

and we should go with it. Senator Lugar, I'm sure that you remember all of that.

Now, here we are again, facing further erosion of our basic rights. I beg you, I beg you not to approve this treaty. Even right now, what's happening in Northern Ireland is, it's just so typical of the way the United Kingdom has treated one of its colonies, that it prefers to keep as a colony for numerous reasons.

The Good Friday Agreement was mentioned earlier, approved in 1998—where is it now? In limbo. Why is it in limbo? Because the British Government accused the IRA of having a spy ring in the assembly. And so it suspended the Good Friday Agreement. Was anyone ever prosecuted or charged with that crime? All charges were dropped. And it turns out later that one of their key witnesses in that debacle was a spy for the British Government. I mean, does it appear like an inside job to have this spy ring revealed and exposed so that the assembly could be dissolved? Subsequent to that there was, I guess you could say, a bar fight, and a couple of members of the IRA who were there—not in the capacity of being an IRA member, but simply for a few drinks—got in a fight and they killed another bar patron. That also became a reason to, not to re-install the Good Friday Agreement, and the assembly and the executive. Did the IRA have anything to do with that? No, absolutely not.

This—all these years now since that spy ring case about 8 years ago—the assembly has not been operating again. I mean, we asked for our own government—I won't say we as in me—but that's our position. Every state, whatever you want to call it, it's only six counties, would like to have their own government. But because of gerrymandering and manipulating, they haven't got it. Even—and this came as a complete shock to me—my first trip to Northern Ireland was 1973. I found out at that time that if you didn't own property in Northern Ireland, you couldn't vote. And if you were a Catholic, you couldn't get a good job, you were hired occasionally, low man on the totem pole, and when things got tough, you were let go.

Now, how can you buy a home, how can you buy a piece of property when you can't even get a job? And so therefore, they couldn't vote. The city of Derry has had a Catholic majority forever. They never had a Catholic mayor until just very recently. Because of the gerrymandering that took place.

Those are the things that are grossly unfair, and they have all been perpetrated by this United Kingdom, the government that is asking our United States Senate to relinquish our Constitutional rights. Thank you, gentlemen.

[The prepared statement of Dr. Linnon follows:]

PREPARED STATEMENT OF PROFESSOR ROBERT C. LINNON, PH.D.

I am very grateful for the opportunity to express my concerns with the pending United States–United Kingdom Extradition Treaty now being considered for ratification by the United States Senate. I am here today to express my opposition to the proposed treaty for a variety of reasons. Since I don't want to speak in generalities I would now like to enumerate those objections.

Article 2, section 4, page 4 allows for extradition even if no United States federal law has been violated.

Article 4, pages 5 and 6, basically removes the political exception protections. The current extradition treaty, still in force, provides the very important safeguard that:

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

This protective language is missing from the new proposed extradition treaty between the United States and Great Britain.

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

Article 4, sections 3 and 4, page 6. The last two sentences of these sections remove the role of the judiciary from the extradition process. These sentences transfer responsibility for determining whether the extradition request is politically motivated from the federal courts to the executive branch. Under this provision a person will not have the right of his or her “day in court” before an impartial judge. This will seriously impact the separation of powers that is at the very heart of our American system of law.

Article 6, page 6. The terms of the proposed treaty will apply retroactively for offenses allegedly committed even before the treaty’s ratification. No American citizen active in Irish and Irish American affairs who oppose British policy in the north of Ireland will be safe if this treaty comes into force.

Article 12, page 9. The new treaty will allow for provisional arrest and detention of Americans for 60 days upon request by Great Britain with no formal extradition request providing supporting details. Under this provision, a person will not have the right of his or her “day in court” before an impartial judge.

Article 16, page 11 and 12. The new treaty allows for the seizure of our assets in the United States by the British Government.

In conclusion I am strongly opposed to this treaty because so much of what is being proposed ignores and rebuts our Constitution and the Bill of Rights. It is suspected that this treaty is, in large part, intended to stifle Irish-American support for the full and rapid implementation of the Good Friday Agreement which could facilitate a full democracy in the partitioned six counties and for any active support for a united Ireland.

This treaty:

1. Ignores the separation of powers because it transfers responsibility from the federal courts to the executive branch;
2. Denies those charged with having a day in court;
3. Allows for provisional arrest;
4. Provides that American law need not be violated; and
5. Permits retroactive application to alleged activity conducted even before the treaty’s ratification.

This effort on our part has nothing to do with Homeland Security or partisan politics. It is solely an effort to preserve our basic constitutional rights and civil liberties.

This treaty could, and undoubtedly will release American citizens to a government with no constitution and no bill of rights, and with a terrible record of human and civil rights. There are numerous cases on record of confessions being extracted by torture or threats to one’s family if the suspect would not confess. These are not from the time of our American Revolution against the very same country that is now trying to gain by diplomacy what they could not gain by force, they are of very recent vintage.

I implore you not to open this door to gross injustices. I implore you to defeat this treaty.

The CHAIRMAN. Thank you very much, Dr. Linnon, for your testimony. I’d like to call now on Professor Morris. Please proceed.

**STATEMENT OF MADELINE MORRIS, PROFESSOR, DUKE
UNIVERSITY LAW SCHOOL, DURHAM, NORTH CAROLINA**

Professor MORRIS. I must say, and I wasn't planning to say, that I've been very moved by the testimony that I've heard so far, and by the enormous recognition given to the value of our basic rights and our Constitution and protections that we enjoy under it—I just couldn't possibly agree more and I felt very, very, as I said, touched in hearing that. And I would oppose the treaty if I had the view of it at all that it put into question or into any kind of jeopardy those rights that we all do value.

I think there are misunderstandings about the effects of the treaty and about what the treaty does and doesn't do. And for that reason, and only that reason, I don't think that it ought to be rejected on the grounds that have been raised, and I will explain why, of course.

Before doing that, I need to correct one point on the record. It's been suggested by Professor Boyle in various contexts that I work for the State Department. I do not have that honor, and I've never had that honor, and so that is a mistake that ought to be recognized as such.

In the brief time that we do have, I'd like to address two of the concerns that have been voiced, or two sets of concerns, about rights Constitutional and other general human rights internationally, that it is said would be violated by adoption and ratification of this treaty.

It's been suggested first that the treaty violates rights that are protected under the International Covenant on Civil and Political Rights, the ICCPR. And second, it's said that the treaty would violate the prohibition against the retroactive application of criminal laws. That has been posed in a number of different ways, and I will address each of the different scenarios that are presented for how we would end up with—if we were to have this treaty in force, with retroactive criminalization.

First, the treaty as I've said, is purported to be unlawful under the International Covenant on Civil and Political Rights. For example, one of the documents that you have before you for this hearing is a letter by Professor Boyle, who unfortunately is not with us, dated March 4, 2004 to Senators Lugar and Biden stating that the proposed treaty would violate 19 specified provisions of the ICCPR. Exactly how or in just what ways the treaty would violate those provisions isn't addressed in the letter.

Also not addressed in the letter is the complex and just fundamental threshold question of which ICCPR provisions would obligate, or states which of the parties in an international extradition proceeding would be bound by which of the Covenant provisions. Obviously that question would need to be answered before we could determine whether the treaty would violate any U.S. obligations under the ICCPR. If we look at the ICCPR carefully, we see that some of the provisions are, in their terms, applicable to only the requested state or to only the requesting state, so we would have to sort out which obligations fall to which states before even producing a genuine analysis of whether and when this treaty would violate the provisions of the ICCPR.

That said, I'm going to—in order to fully address the substantive concerns, the concerns going to the basic fundamental rights—I'm going to proceed as though all of the ICCPR provisions did apply to this treaty, because again the rights that are implicated are what need to be addressed, even without regard to whether U.S. obligations under the ICCPR specifically are violated from a legal point of view.

It appears to me that even if we assume, for argument, that the 19 cited provisions allegedly violated by the new treaty, that those provisions actually would not be violative of the ICCPR and not unlawful under the ICCPR in any way. My analysis that leads me to that conclusion is as follows: Five of the 19 ICCPR provisions purportedly violated by the treaty concern the rights of freedom of religion, opinion, expression, assembly and association. Obviously the rights also protected by our own first amendment to the U.S. Constitution. Nothing in the proposed treaty threatens or impinges on the peaceful exercise of those civil and political rights. To the contrary, the treaty provides explicit protection of those rights in the context of extradition. Article 4 of the treaty states that, "extradition shall not be granted if the offense for which extradition is requested is a political offense." By doing that, the treaty prohibits extradition for political crimes such as treason or sedition—again, crimes constituted by their political content.

Article 5 of the treaty further protects those rights by requiring "extradition shall not be granted if the competent authority of the requested state determines that the result was politically motivated." So that even in a situation like the one described, in which there was a bar fight, a regular common crime of murder was committed, that crime would not have been considered a political crime and therefore exempted from extradition, because it wasn't committed for political purposes, however, after the treaty gets through the question of if it's a political offense, the treaty then also has provision for a questioning of the political motivation for the prosecution. So that if it were the case that those prosecutions that you spoke of were motivated because of the fact that they were IRA members, that also would be looked at. So, you have two different kinds of protection if the offense itself is political, or if the prosecution decision is politicized. Both of those protect the underlying civil and political rights at issue here, and they need to be understood as distinct protections and protections that provide for a sophisticated political analysis as well, to be provided as another part of the protection against violation in the extradition context of the principles covered by the First Amendment.

Even while providing those protections for the peaceful exercise of civil and political rights, the treaty explicitly excludes from the definition of "political crimes" grave violent crimes and weapons offenses. Under the treaty, those crimes are recognized for their violent nature regardless of whether that violence was driven by political beliefs or otherwise. Fully in accordance with the ICCPR and other multilateral conventions, the U.S.-U.K. Extradition Treaty does not accord to alleged perpetrators of alleged serious violent crimes, the protections afforded to those accused of political crimes that are a peaceful, if forceful, exercise of political rights. As the ICCPR itself states: "Nothing in the present Covenant may be in-

terpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein. . . .” Similarly, under the multilateral conventions on hijacking and other crimes on aircraft, hostage-taking and other violent crimes that typically are committed for political purposes, the covered crimes are subject to prosecution “without exception whatsoever” and they’re not considered political offenses.

In the same vein, the U.N. General Assembly in its 1986 resolution asks states to “cooperate in combating terrorism through the apprehension and prosecution or extradition of terrorists, and the conclusion of treaties regarding the extradition or prosecution of terrorists.” And it provides no protection in terms of treating violent crime as a political—coming under the political exception to extradition, and therefore as an exception to these provisions that require states to extradite or prosecute individuals suspected of terrorist offenses. And so the treaty before you does not violate the protected civil or political rights reflected in our First Amendment or our International Covenant by excluding crimes of the greatest violence from the political offense classification.

Also among the rights provisions that this treaty purportedly would violate are provisions articulating a set of rights protecting criminal suspects and defendants. Of course, extradition proceedings aren’t criminal proceedings, and so the rights applicable to criminal proceedings don’t properly apply to this extradition treaty, but nonetheless if we were to entertain an analogy between extradition proceedings and criminal proceedings it is not clear how the treaty would violate the rights in question: rights to a speedy, fair, public trial or extradition hearing; to a presumption of innocence; to freedom from arbitrary arrest and the like. The treaty—especially when put together with the body of U.S. law governing extradition—provide multiple safeguards going to due process, sufficiency of the evidence, authentic documentation and the like. And then to foster the efficacy of those safeguards, habeas corpus review is available to detainees pending extradition. For those reasons, if the rights applicable to criminal proceedings were, in fact, applicable to this treaty—which they are not—nevertheless the treaty would satisfy them, and the treaty satisfies the underlying principles embodied in the ICCPR provisions.

There’s also complained of, a violation of the general rule of the ICCPR favoring the pre-trial release of individuals subject to guarantees to appear for trial. Again, that refers to a criminal trial—not an extradition proceeding—but using our analogy, it’s important to note that in the United States, U.S. courts can and sometimes do grant bail pending extradition hearings, and U.S. Supreme Court has indeed upheld the right of courts to grant bail in that context.

The other rights, the other main rights objection or complaint that has been raised about the proposed treaty goes to the idea that the treaty would criminalize conduct retroactively, and that is an important point that has been raised in a number of different—with reference to a number of different treaty provisions—and so I would like to go through those separately in order to address them. It’s a terribly fundamental concept for a constitutional sys-

tem that we can't have conduct criminalized after it's already been performed. And so I will address the three ways that this treaty would purportedly permit that, but where I don't think that is actually the case.

The ICCPR provision on retroactivity—just to lay out the rule—is that “no one shall be held guilty of any criminal offense . . . which did not constitute a crime at the time when it was committed.” The principle is well known and is embodied, of course, in the *ex post facto* clause of the U.S. Constitution.

Now it's claimed that articles 2, 6 and 22 of the proposed treaty each violate this rule against retroactivity. In fact I believe that none of those provisions do violate the retroactivity rule.

Article 2(4) of the treaty governs cases in which the substantive elements of a crime meet the dual criminality standard, but the jurisdictional elements differ in that the law of the requesting state provides for extraterritorial jurisdiction over that crime, while the law of the requested state does not. Article 2(4) provides that under those circumstances, the requested state may, at its discretion, grant extradition.

It's asserted that that permits retroactive criminalization. The assertion in the documents I've read is not accompanied by a fully articulated argument, but my understanding is that the outline of that argument would be something like the following: First, the argument is necessarily premised on the proposition that jurisdictional differences defeat dual criminality, which is inaccurate. States are very different in their treatment of jurisdictional provisions when they evaluate the, when they try to equate or find different, the criminal statutes of two different states in order to make a dual criminality determination. The practice of the United States has tended to consider dual criminality requirements satisfied, notwithstanding differences in the scope of jurisdiction exercised over that crime by the respective states. Even within the treaty we're looking at that you have before you, in which Article 2(4) is being questioned in this respect, if you look at the preceding paragraph, under Article 2(3), we say there that we will consider dual criminality to be met even if the U.S. Federal law in question requires use of the Federal mails or other hooks with Federal jurisdiction, even if those jurisdictional provisions aren't in place in our extradition partner's law. Nevertheless, we say that's merely jurisdictional, just as Article 2(3) says here, and we nevertheless find that dual criminality is met. And in the domestic context in the U.S. we do the same.

So, jurisdictional differences don't necessarily defeat dual criminality, but nevertheless, based on that premise, the argument seems to go forward that if we then allow extradition in that context, where jurisdictional differences exist between the two criminal statutes in the two states, that then somehow that means that conduct that was, that the conduct being prosecuted is being retroactively criminalized in the requested state, and that's simply flawed in its logic regardless of differing jurisdictional scope, and regardless of whether dual criminality is met or not.

Under Article 2(4) of the treaty, the alleged perpetrator is held liable only if he committed the conduct while in the jurisdiction in which he committed that conduct, that conduct constituted a crime

at the time of its commission. He is only being extradited for having committed a crime that, where he committed it was indeed a crime at the time of its commission. As long as that's so in the requesting state, the state where the crime occurred, extradition by the requested state does not retroactively criminalize the conduct—the requested state is not prosecuting, and has therefore not imposed any criminal liability at all. The requesting state is prosecuting based upon criminal provisions that were in place at the time of the conduct, so that neither state violates the retroactivity rule.

It's claimed that Article 6 of the treaty constitutes yet another violation of the rule against retroactive criminalization, by saying that "The decision by the requested state whether to grant the request for extradition shall be made without regard to any statute of limitations in other State." But Article 6 doesn't criminalize anything, retroactively or prospectively.

Now, as it happens, Article 6 also doesn't abolish statutes of limitations. The statutes of limitations in the requesting state, the place where the prosecution will occur remain in place just as they normally would in any prosecution. All the treaty says is that it is that state that will make a determination of the application of the statute of limitations in that particular instance.

But even if it did eliminate a statute of limitations, even if Article 6 were to have said "whenever we extradite under this treaty, no statutes of limitations will apply," it still wouldn't retroactively criminalize any conduct in each case—the conduct in question has to have been in place at the time that the conduct was committed.

Article 22 of the treaty, which is the last of the three articles which it is said leads to a retroactivity violation states, "this treaty shall apply to offenses committed before, as well as after, the date it enters into force." It is said that by applying the treaty retroactively, as it were, somehow this is criminalizing conduct retroactively. That is not the case. Article 22 presents and refers to a framework to govern extradition for crimes that were committed when they were already criminalized in the jurisdiction where they were committed, so the conduct was criminal at the time, and the treaty applies a framework for extraditing only for conduct that was criminal at the it was committed.

And so in my view, no article of this treaty violates the rule against retroactive criminalization. I understand the various ways that it has been said to do that, but in my view, and on serious consideration, I don't think that it does that, and I don't think that it, therefore, suffers from various serious constitutional impediment that would exist if it did.

In my view, also, as I went through at the beginning of my remarks, no article of the treaty indeed violates the other rights protected by the ICCPR and our Constitution that have been the articles that have been called into scrutiny in that respect in the context of this treaty.

Thank you for the opportunity to address these matters, and of course, I welcome your questions.

[The prepared statement of Ms. Morris follows:]

PREPARED STATEMENT OF PROFESSOR MADELINE MORRIS, DUKE LAW SCHOOL

Mr. Chairman, ranking member Biden, and other members of the committee:

In the brief time that we have, I would like to address two concerns that have been voiced with respect to the lawfulness of the proposed U.S.-U.K. Extradition Treaty.¹

It has been suggested: first, that the treaty violates rights that are protected under the International Covenant on Civil and Political Rights ("ICCPR");² and second, that the treaty violates the prohibition against the retroactive application of criminal laws.³

It is suggested that the treaty is unlawful under the International Covenant on Civil and Political Rights. For example, Professor Boyle's March 4, 2004 letter to Senators Lugar and Biden states that the proposed extradition treaty would violate nineteen specified provisions of the ICCPR.⁴ How or in what ways the new treaty would violate those provisions is not addressed in the letter.

The May 4, 2004 letter does not raise the complex threshold question of which ICCPR provisions obligate which state or states in the course of an international extradition. That question, obviously, would need to be answered before determining whether the treaty would violate any U.S. obligations under the ICCPR. For today, I will only note that critical issue in passing. In order to address fully the substantive concerns that have been raised, I will proceed as if each of the nineteen ICCPR provisions cited were in fact relevant to U.S. obligations under the ICCPR in the context of international extradition. It appears to me that, even if we were to assume *arguendo* that the nineteen cited provisions do apply, the treaty would not be unlawful under the ICCPR. My analysis is as follows.

Five of the nineteen ICCPR provisions purportedly violated by the treaty concern the freedoms of religion, opinion, expression, assembly, and association⁵—rights also protected under the First Amendment to the U.S. Constitution. Nothing in the proposed treaty threatens or impinges upon the peaceful exercise of those civil and political rights. To the contrary, the treaty provides explicit protection of those rights in the context of extradition. Article 4 states that "[e]xtradition shall not be granted if the offense for which extradition is requested is a political offense." The treaty thereby prohibits extradition for political crimes such as treason or sedition. Article 5 of the treaty provides further protection of those rights by requiring that "extradition shall not be granted if the competent authority of the requested state determines that the result was politically motivated."

Even while providing those protections for the peaceful exercise of civil and political rights, the treaty explicitly excludes from the definition of "political crimes" grave violent crimes and weapons offenses. Under the treaty, those crimes are recognized for their violent nature regardless of whether that violence was driven by political beliefs or otherwise. Fully in accordance with the ICCPR and other multilateral conventions, the U.S.-U.K. Extradition Treaty does not accord to alleged perpetrators of serious violent crimes the protections afforded to those accused of political crimes that are a peaceful, if forceful, exercise of civil and political rights. As the ICCPR states: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein . . ."⁶ Similarly, under the multilateral conventions on hijacking and other crimes on aircraft,⁷ hostage-taking,⁸ and other violent crimes that typically are committed for political purposes, the covered crimes are subject to prosecution "without exception whatsoever" and are not considered political offenses. In the same vein, the U.N. General Assembly in its 1986 resolution asks states to "cooperate in combating terrorism through the apprehension and prosecution or extradition of terrorists, and the conclusion of treaties regarding the extradition or prosecution of terror-

¹ Extradition Treaty Between the United States and the United Kingdom, 31 March 2003 (Treaty Doc. 108-23).

² International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) of 16 Dec. 1966 (hereinafter "ICCPR").

³ See, e.g., ICCPR, *supra* note 2, art. 15; U.S. Constitution, art. 1, sec. 9 (*ex post facto* clause).

⁴ Letter from Prof. Francis Boyle to senators Lugar and Biden, 3/4/04 (on file with author).

⁵ ICCPR, *supra* note 2, arts. 18, 19, 21, 22.

⁶ ICCPR, *supra* note 2, arts. 5.

⁷ Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974, U.N.T.S. 177.

⁸ International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11, 081, 1316 U.N.T.S. 205.

ists.”⁹ The treaty before you thus does not violate protected civil or political rights by excluding crimes of the gravest violence from the political offense classification.

Also among the nineteen ICCPR provisions that this treaty purportedly would violate are the provisions articulating a set of rights protecting criminal suspects and defendants.¹⁰ Extradition proceedings, of course, are not criminal proceedings. So the rights applicable to criminal proceedings do not apply to this extradition treaty.

If we were, nevertheless, to entertain an analogy between extradition proceedings and criminal proceedings, it is not apparent how the treaty would violate the rights to a speedy, fair, and public trial hearing, to a presumption of innocence, or to freedom from arbitrary arrest.¹¹ The treaty and the U.S. law governing extradition¹² provide multiple safeguards going to due process, sufficiency of the evidence, authentic documentation, and the like. To foster the efficacy of those safeguards, habeas corpus review is available to detainees pending extradition.¹³ For these reasons, if the rights applicable to criminal proceedings were applicable to this treaty—which they are not—the treaty would satisfy them.

The availability of habeas review satisfies another of the nineteen ICCPR provisions cited as being violated by the treaty. This provision articulates the right “to take proceedings before a court [to] decide without delay the lawfulness of [one’s] detention. . . .”¹⁴ Habeas review, clearly, is precisely what is required.

The list of nineteen also includes an ICCPR provision that recommends a “general rule” permitting pre-trial release “subject to guarantees to appear for trial.”¹⁵ Again, an extradition is not a criminal trial and so this ICCPR provision is, in fact, inapplicable.

Nevertheless, it is worth noting that U.S. courts can and sometimes do grant release on bail pending extradition hearings. Indeed, the U.S. Supreme Court has specifically upheld the courts’ authority to do so.¹⁶

It also has been asserted that, in violation of the ICCPR, this treaty would criminalize conduct retroactively. This brings me to the second issue that I will address: retroactive criminalization. It is claimed that the treaty would violate the rule against retroactive criminalization in three separate ways.

The ICCPR provision on retroactivity states that, “[n]o one shall be held guilty of any criminal offense . . . which did not constitute a crime at the time when it was committed.”¹⁷ The principal is well known and is embodied, of course, in the *ex post facto* clause of the U.S. Constitution.¹⁸

It is claimed that articles 2, 6 and 22 of the proposed treaty each violate this rule against retroactivity in criminal law. In fact, I believe, none of those provisions violates the retroactivity rule.

Article 2(4) of the treaty governs cases in which the substantive elements of a crime meet the dual criminality standard but the jurisdictional elements differ in that the law of the requesting state provides for extraterritorial jurisdiction over that crime while the law of the requested state does not. Article 2(4) provides that, under these circumstances, the requested state may, at its discretion, grant extradition.

It is asserted that this provision permits retroactive criminalization. The assertion is not accompanied by a fully articulated argument. It seems, though, that the outlines of the argument are as follows.

First, the argument is necessarily premised on the proposition that jurisdictional differences defeat dual criminality. That premise is inaccurate in many or most cases. States vary in their treatment of jurisdictional differences in evaluating dual criminality. The practice of the United States has tended to consider the dual-criminality requirement satisfied notwithstanding differences in the scope of jurisdiction exercised over the crime by the respective states. The paragraph preceding article 2(4) (article 2(3)) is typical of U.S. treaties on this issue. Article 2(3)(b) provides that an offense shall be extraditable “whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being jurisdictional only.”

⁹G.A. Res. 61, 40 U.N. GAOR Supp. No. 53 (1986).

¹⁰ICCPR, *supra* note 2, arts. 9, 10, 14, 15.

¹¹These rights appear in ICCPR, *supra* note 2, arts. 9, 14.

¹²See 18 U.S.C. Sec. 3181 *et seq.*

¹³See RESTATEMENT OF THE LAW 3D, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 478, Comment C; *id.* at Reporters’ Note 2 (1987).

¹⁴ICCPR, *supra* note 2, art. 9(4).

¹⁵ICCPR, *supra* note 2, art. 9(3).

¹⁶*Wright v. Henkel*, 190 U.S. 40, 63 (1903).

¹⁷ICCPR, *supra* note 2, art. 15.

¹⁸U.S. Constitution, *supra* note 3, art. 1, sec. 9.

In the domestic context as well, U.S. law typically treats jurisdictional provisions very differently from the other elements of a crime. Mens rea requirements provide a good example. U.S. courts have frequently held that the mens rea (mental state) requirement for conviction of a given crime (i.e., negligence, recklessness, knowledge or purpose) applies to all of the elements of a crime except the jurisdictional elements. Those are frequently described as “jurisdictional only.”¹⁹

Notwithstanding its flawed premise, the retroactivity argument concerning art. 2(4) goes on from here. It appears to reason, implicitly, that if, because of jurisdictional differences in the two states’ statutes on the crime, the requested state would not have jurisdiction to prosecute but the requesting state would, then extradition for that crime retroactively creates criminal liability for that crime in the requested state.

That reasoning is flawed. It conflates the dual-criminality requirement with the non-retroactivity requirement. It does so by, first, assuming that dual-criminality is not met if there are jurisdictional differences in the two states’ provisions and then by further assuming that, if dual-criminality is not met, then extradition constitutes retroactive criminalization in the requested state. Neither assumption is correct. Regardless of differing jurisdictional scope, and regardless of whether dual criminality is met or not, under article 2(4) of the treaty, the alleged perpetrator is held liable only if he committed the conduct while in the jurisdiction in which that conduct constituted the crime at that time. As long as that is so in the requesting state, extradition by the requested state does not retroactively criminalize the conduct. The requested state is not prosecuting and has, therefore, not imposed any criminal liability at all. The requesting state is prosecuting based on criminal provisions that were in place at the time of the conduct. Neither state violates the retroactivity rule.

It is claimed that article 6 of the treaty constitutes yet another violation of the rule against retroactive criminalization. Article 6 reads: “The decision by the requested state whether to grant the request for extradition shall be made without regard to any statute of limitations in either State.” Article 6 criminalizes nothing, retroactively or prospectively. As a matter of fact, Article 6 does not abolish the operation of the applicable statutes of limitations; it merely leaves to the prosecuting state the application of the statute of limitations required under its own laws. But even if article 6 did abolish a statute of limitations, it still would not violate the prohibition against criminalizing conduct that did not constitute a criminal offense at the time the conduct occurred.

Article 22 of the treaty states: “This treaty shall apply to offenses committed before as well as after the date it enters into force.” This article too is asserted to violate the rule against retroactive criminalization. But Article 22, like Article 6, criminalizes nothing, retrospectively or prospectively. Article 22 concerns the framework governing extradition for crimes that constituted crimes at the time of their commission. Article 22 in no way conflicts with the rule against retroactive criminalization.

In sum, no article of the new treaty violates the rule against retroactive criminalization articulated in the ICCPR and in the U.S. Constitution. And no article of the treaty violates the other rights protected by the ICCPR that have come under scrutiny in this context.

I thank for the opportunity to address these matters and welcome your questions.

The CHAIRMAN. Well, thank you very much, Professor Morris. I will now proceed to questions of the panel of witnesses. At our first hearing on this treaty, the committee heard testimony from the administration, and used that opportunity to seek the administration’s views regarding several concerns that have been raised by opponents of the treaty. There are a number of points on which the testimony the committee has received from the panel today diverges from the testimony the committee received from the administration. In order to ensure a comprehensive record for the committee’s consideration, I’m going to use much of our time here today to explore these areas of divergence with our witnesses. Many of the areas for discussion today are raised by the written testimony of Professor Boyle. Unfortunately, as I mentioned in my opening statement, Professor Boyle is not able to join us. In order

¹⁹See Wayne R. LaFare, Vol. 1 SUBSTANTIVE CRIMINAL LAW, Sec. 4.1(b); *id.* at Sec. 5.1(b) n. 13 (2d ed. 2003).

to make good use of the hearing, however, I will take up issues raised in his written testimony, and seek the views of our other witnesses on these points.

Let me just say that we will alternate between my questions—and they are extensive, simply to make certain that our record is complete as possible—and questions that Senator Dodd may raise, and after I've proceeded for awhile, Chris, I will defer to you to take up the slack, and then I will be back at it again.

Now, for all three of the witnesses, I have this question. Mr. Meehan has testified that the proposed treaty “provides that American law need not have been violated in order for extradition to take place.” Likewise, Dr. Linnon has indicated in his testimony that the treaty “allows for extradition even if no United States federal law has been violated.” The administration has testified that extradition could only take place under the proposed treaty for conduct that is criminalized in the United States. However, given the Federal system in the United States, the conduct could be criminalized under either U.S. Federal law or state law. The administration further noted that “this is an established practice in extradition law . . . because we do not have a full Federal criminal code.”

Now, Mr. Meehan, or Dr. Linnon, do either of you wish to respond to the administration's testimony on this issue? And then, following Mr. Meehan and Dr. Linnon's comments, Dr. Morris, would you care to comment?

Mr. MEEHAN. Mr. Chairman, I've asked for permission to utilize the services of our national legal counsel, Mr. Jim Magee, to answer questions of a legal nature. He is eminently more qualified to do so than I am, and I thank you for the opportunity to allow him to do that.

The CHAIRMAN. Yes, sir.

Mr. MAGEE. Thank you, Mr. Chairman. I believe your question was, the treaty as we understand it proposes to allow for criminality in the United Kingdom where criminality would not exist in this country. And I think that position has been addressed fairly well by Professor Boyle in both his March 4 letter, as well as his statement that would have been presented here today where he talks specifically—I believe we're talking about the concept of conspiracy that would not have otherwise been included in this country in reference to prior acts—that existed prior to the treaty. Whether it be criminalization in the United Kingdom would not be criminal here, and would in fact require this country to extradite a United States citizen.

The CHAIRMAN. Thank you. Dr. Linnon, do you have a further comment on this issue?

Dr. LINNON. Not on this issue, sir, thank you.

Senator DODD. I have sort of a similar question, and maybe if we could move this along a little bit.

The CHAIRMAN. Very well.

Senator DODD. Just as a practical matter, let me raise this with you, because this is a concern. Because this has been the answer I think the administration's response to a question regarding the earlier testimony suggested that, in fact, that if a state law—was not Federal law—but was a state law created a certain crime that

would qualify, then as an extraditable offense, we agree on that point. We have situations, for instance, where the District of Columbia—possession of a firearm you get, is it 12 years? Twelve months in jail. Britain has a similar provision. Now, presumably, someone that was apprehended in the District of Columbia where that statute existed, or that ordinance exists, would then be qualified as an extraditable offense. And that's where the concern comes in here—that you would be using a jurisdictional provision which may not, in fact very limited in the United States, may only exist in certain areas. In fact, this particular provision, I know, that is something that was highly objected to by the National Rifle Association—you can imagine, then, the suggestion that someone would be extraditable in some of the states where a provision in North Carolina, for instance, might have different views on the possession of a firearm than they do in the District of Columbia. Yet, if a person were here in the District of Columbia where that was an offense, that would become an extraditable offense, because Britain has a similar national law in that regard. That is a concern that people have about this. How do you address that?

Professor MORRIS. Yes, I'd be happy to address it.

Senator DODD. Did you understand the point that I made?

The CHAIRMAN. I think that I do, perhaps Professor Morris does. Would you please proceed?

Professor MORRIS. Thank you. There are two ways in which that potential problem is eliminated, or virtually eliminated. One is by operation of law itself. It is not necessarily the case that the law of the state or jurisdiction where the suspect is found, not necessarily the case that that's the law that will then be compared with foreign law in order to determine dual criminality.

Senator DODD. The residence?

Professor MORRIS. It may not necessarily be the state with which the subject has nexus, if the state with which the suspect has nexus is, if that state's law on the subject is in some sense anomalous, another option which is sometimes applied is to look at the laws that exist in most, or many, states. And that is a choice to be made.

Senator DODD. Isn't that an unequal application of law? I mean, if I live in the District of Columbia, I'm extraditable, if I live in Maryland or Virginia, I'm not.

Professor MORRIS. Well, that's what I'm saying is remedied. I'm sorry, I haven't been clear enough. The point, precisely, is that it need not necessarily be the law in the District of Columbia that is applied, it's sometimes, it's the law where there's, the place where there is nexus, and sometimes instead, a general survey of state law on the subject is undertaken and some rough estimation of what most U.S. law is with reference to this crime is what is used instead as the baseline for a number of reasons, including to avoid anomalous situations where you have a suspect that is unfortunate enough to have showed upon the wrong jurisdiction.

Senator DODD. Doesn't this raise the problem, potentially, of forum-shopping by the Justice Department, in a sense? Where you go around in order to get an extraditable offense, you would find a state that had an extraditable offense that the U.K. would have as well and the danger of forum-shopping for that purpose? I don't

want to dwell on it, I think it's an interesting point, but it just raises concerns with me about an unequal application of law here.

Professor MORRIS. I guess that would be true of any extradition treaty.

Senator DODD. Thanks. Indeed, did you want to comment on that? Did you have any comments on this?

Dr. LINNOR. I see your point, Senator, but I don't see how it's easily resolved if the legislation is different in different jurisdictions.

The CHAIRMAN. Very well. We'll try another question. Mr. Meehan explained in his testimony that he opposes the treaty in part because he believes it would allow persons to be extradited to the United Kingdom, and I quote "for merely exercising their right to free speech, guaranteed under the First Amendment of the Constitution." Professor Boyle has similarly asserted in his written testimony that this treaty would violate the United States Constitution by permitting the extradition of U.S. citizens for conduct protected under the First Amendment.

The committee raised this very serious matter with the administration witnesses at the November hearing. The administration explained as follows, and I quote, "the treaty requires the finding that the conduct at issue would constitute a criminal offense punishable by a sentence of one year or more if committed in the United States. Since engaging in constitutionally-protected free speech cannot be punished in the United States, this test of dual criminality would fail, and therefore the conduct in question would not be extraditable."

Now, Mr. Meehan, how do you respond to the administration's statement?

Mr. MEEHAN. Mr. Chairman, my understanding is that any speech, any opposition to British policy in the North of Ireland would be extraditable under this new treaty. That's the understanding that I have, and that is why I made that statement. I hope that answers your question.

The CHAIRMAN. Well, it explains at least your view, and your belief about the subject. I'm not here to argue with you, we're really trying to establish—

Mr. MEEHAN. Absolutely not, Mr. Chairman, I'm not trying to be argumentative, I'm merely stating my position.

The CHAIRMAN. I understand, and I asked you to do that. Dr. Linnor, would you like to comment further on this issue?

Dr. LINNOR. No, thank you, Senator.

The CHAIRMAN. Professor Morris, what is your view of the issue? Do you believe the dual criminality test adequately shields conduct that is protected by the First Amendment from being extraditable under this treaty? And what other protections does the treaty provide for such conduct?

Professor MORRIS. The dual criminality requirement provides enormous protection for First Amendment rights, and maybe alone would be enough. But it is not alone. There are protections for the same principles embodied in the political offense exception and the political motivation enquiry. The dual criminality requirement, in effect, prohibits extradition for prosecution of conduct that would receive protection under the U.S. Constitution, in other words,

under dual criminality, the U.S. can only extradite if we would be able to prosecute here for the conduct in question. We can't prosecute here for conduct that is protected by the First Amendment, so the dual criminality requirement provides enormous, virtually complete protection in that way.

But then there is the possibility of manipulation of exceptions, and so the political offense exception to extraditability takes up the slack there.

The CHAIRMAN. Now, specifically, if Mr. Meehan was in a public forum in the United States as a citizen, he makes some comments about Northern Ireland, about politics, about the administration of justice, about whatever—now he's concerned, and we would be too, that these comments about Northern Ireland, about politics, about British administration of justice or whatever would lead him to potentially being extradited to the United Kingdom for prosecution. Now, that is the concern as I understand it, and now you're asserting that he could not be extradited—do I hear you correctly?

Professor MORRIS. Yes, he absolutely could not be extradited under American law in those circumstances, if the supposed crime were limited to political speech, to an expression of opinion about a political topic with regard to the United States or anywhere else in the world. If that were the conduct constituting the purported crime, then that individual could not be under U.S. Constitution and statutory law, extradited for that offense for the reasons both that they couldn't be prosecuted here for saying that, and so dual criminality is not met, and also because, if the offense were limited to political speech, does it include violence and so on? And then it would be a political offense under the treaty, and therefore, not be subject to extradition.

If all of that failed, and somehow there were some prospect of extradition, then presumably a political motivation would be identified that would also provide discretion, at least, to prevent that extradition. But it wouldn't get that far. The fact of the matter is that if we couldn't prosecute here because of the First Amendment, then we can't extradite for that very conduct because of the First Amendment.

The CHAIRMAN. Mr. Meehan?

Mr. MEEHAN. Excuse me, Mr. Chairman, but I seem to understand that these determinations up to this point have been made in a court of law. And the new treaty removes that determination factor from a court of law and turns it over to the executive branch, who is to determine whether the executive branch follows through on the rule of law in the same way that a court would follow through on a question of this nature? These are some of the things that scare us.

The CHAIRMAN. Does anyone have a response?

Dr. LINNON. If I could make a comment, Mr. Chairman. Article 4, sections 3 and 4—the last two sentences of these sections remove the role of the judiciary, and it turns it over to the executive branch, so Professor Boyle is talking about current law, the law is going to change when this treaty is approved—that is my concern.

The CHAIRMAN. Well, we probably should raise that later with the administration. Is the executive branch not subject to the law and to the courts? My guess is, as an American citizen, probably

so. But nevertheless, it's important, the binding aspects of the treaty. Yes, Professor Morris?

Professor MORRIS. I think this is one of the points that requires clarification. The determination of extradition, the determination of whether there is sufficient evidence, the determination of whether the offense is political, remains with the courts. That was true before, that is true now. The Judiciary conducts a hearing in which those conditions are addressed. If we look at the conditions for the political offense exception under Article 4, we see that it is the judge or magistrate carrying out the hearing that determines not only whether there is sufficient evidence presented, but whether the offense was political, and therefore exempt from extradition. Where the Executive comes in and why this treaty is different from the Supplementary Treaty of 1985 is that it is the Secretary of State and the judge that determines the political motivation. Where there is no political exception for extradition, the person would be perfectly extraditable, the only remaining protection is the question, is the requesting state doing this in order to prosecute this person for political purposes? That question has been taken from the judicial realm to the Secretary of State where it is for all other U.S. extradition treaties. I understand the argument that this is different, but it's been taken there, not in order to limit the judicial. Well, what it doesn't do is to limit the judicial inquiry, but it adds another level of inquiry that brings to bear the resources of the U.S. State Department—its expertise, its access to intelligence information, the entire Executive apparatus for understanding the motivations of a foreign government, which presumably can't be well-analyzed by a judge or a magistrate after hearing witnesses at an extradition hearing. So, it doesn't diminish, I believe, the judicial goal in an inappropriate way, but does bring in the resources of the executive branch to evaluate again whether this is a proper extradition request or prosecution-based extradition request.

The CHAIRMAN. Mr. Meehan?

Mr. MEEHAN. Under Article 4, item 3 it clearly states "notwithstanding the terms of paragraph 2 of this article, extradition shall not be granted if the competent authority of the requested state determines that the request was politically motivated." In the United States, the executive branch is the competent authority for purposes of this article, that is, in the new proposed reading, it clearly removes the determination as to whether an offense is politically motivated from the courts to the executive branch. That scares me, I don't know about anybody else.

Dr. LINNON. That's my position also, Senator.

The CHAIRMAN. Ms. Morris?

Professor MORRIS. There's a difference between a crime's political character—whether something is a political offense and whether it is a perfectly common crime, something that someone would be extradited for in any other circumstance, except that the requesting state is motivated by political persecution motives in its request. So that when we look at Article 4, first we see that the judge may not extradite if the offense is one of the ones listed as a political offense, or rather, pardon me—if the judge determined, pardon me—that the crime is a political offense. Article 4 goes on to say that

if it involves this kind of violence, it's not a political offense but the judge determines, other than the excluded violent crimes here, whether the crime is the basis for the extradition request is a political offense. The judge did that before, the judge does that in the new treaty. The judge cannot extradite if he determines the offense in question is a political one. That's Article 4(1) and (2).

And then as you refer us to Article 3, Article 3 adds yet another layer of review. It says that after the judge has finished with that inquiry and has said "No, the crime charged is not a political offense." If he says it's a political offense, the inquiry is over. If he says it's not a political offense, if he says, "This person can be extradited" in terms of those aspects of the question, then the Secretary of State takes another look at it and determines another separate questions which is, "Well, even if it's not a political offense, even if this involved killing someone, nevertheless, is the requesting state asking for this person to be extradited because they want to persecute the person?" They have some other agenda going for asking for this extradition.

The CHAIRMAN. Let me just say, the purpose of the hearing is to get these views in front of us. The Senate is finally going to have to make a decision. While we're attempting to get informed views, and we'll have some more, and maybe perhaps Senators will want to discuss this particular issue at greater length, and I think you illuminated it—I don't want to cut off the debate on this particular issue, but I would just say that we're not going to try to resolve this between Senator Dodd and myself today. We will make this hearing record available to all of our colleagues, as well as to staff and to others, to examine carefully, but obviously the issue has been raised and views have been expressed about it. Yes, Senator Dodd?

Senator DODD. Yes, what I hear you saying, Ms. Morris, is actually what this provision is is a protection against those people who might otherwise be extraditable because a court has ruled them not to qualify under the political exception, and that by providing a provision that would then turn it over to the Secretary of State that actually provides some protection. If the reverse were true that the court has ruled that the political exception applies—is there, can they then, the government in this case, appeal to the Secretary of State to reverse the decision by the court, to conclude in fact that it is not politically motivated? And thus make the person extraditable?

Professor MORRIS. That would not be possible, the terms of the treaty give that power to the judiciary. If the judiciary at the hearing, if the judge or magistrate determines that it is a political offense, that is the end of the matter.

Senator DODD. So, it's really only designed to provide a protection from the person being extradited when the courts have ruled that they are extraditable, in your opinion?

Professor MORRIS. Precisely. One way to look at it is to say that as a matter of law, they are extraditable. Now we're going to look at it from a political point of view, is there something going on that is wrong here? And that is best done by the Secretary of State, and not by a magistrate in an extradition hearing.

Dr. LINNON. But if the Secretary of State has the right to overturn an extraditable offense, wouldn't he also have the same right to overturn a non-extraditable offense?

Senator DODD. That was my question, and she says no.

The CHAIRMAN. Apparently the Secretary of State, at least from Senator Dodd's questioning, is another court of appeal. In other words, you're protected by the court and if you win there, that is it. Now, if you lose in the court, the Secretary of State can still say, "No, we're not going to extradite you, Mr. Meehan, because we suspect that the reason for this request for you to go somewhere is political. And that's my understanding, is that is an extra protection for you, rather than one in which you overturn the court with the Secretary. But I appreciate Senator Dodd raising the question, we will all circle around that again, because it's a very important issue which is raised quite correctly.

Dr. LINNON. Senator? The thing that bothers me about this, first of all, Professor Morris talked about the intent—is it the intent of the requesting state—intent is an extremely difficult thing to prove, legally, as any attorney knows. And secondly, as I mentioned before, Sections 3 and 4, the last two sentences transfer responsibility for determining whether the extradition request is politically motivated to the Executive. Well, that takes the judge out of it. That takes the judge out of it, and that's frightening.

The CHAIRMAN. What we're hearing, Dr. Linnon, is the judge is very much in it. If the judge has made a determination that the person can't be extradited, now that's the end of the affair. Now let's say the judge has ruled that a person can be extradited, then the question is, can the Secretary of State then overrule the judge to prevent the person from being extradited? And that is the issue.

Dr. LINNON. Senator, remember the case of Joe Dougherty?

The CHAIRMAN. I don't remember the case.

Senator DODD. I remember the case.

Dr. LINNON. The judge ruled he was not extraditable. He was sent back to Northern Ireland. He wasn't extradited back there, he was sent back there as an illegal immigrant. So, you see, there's a way around it. He had such a marvelous case, every aspect of it was justifiable, but he went back anyway. That's the sort of thing that frightens me.

Senator DODD. Let me just, if I can, I've raised the issue one way, but let me raise it another way, because I think it's important. Under the existing treaty, of course, the Supplemental Treaty of 1985, we don't go to the Secretary of State, appeal matters, even to the fact situation I've described, when determined by a court of law, appealed judicially. There is the issue—and I don't deny this at all—but once you get into the, move into the "political realm" of the decision-making process here, even under a fact situation that the courts have ruled that someone is extraditable, that when you go up to the political world, the Secretary of State, in deciding whether or not a matter between our country and other countries is going to be determined has to consider a lot of factors. There are a lot of things going on—who's an ally in our present conflict? Whose not? What are the considerations on trade? There are all sorts of things, like you're getting advice from a lot of people telling you what the implications are going to be—politically—of your deci-

sion. Whereas, in court of law, we like to think of a judge making a decision based upon strictly what the law is, regardless of what the other implications may be. While it may be offensive to the country who is seeking extradition, while it may hurt your trade politics and may cause you to lose a vote in the United Nations because they're upset about it, a judge will make a decision based upon what they think the law is. There is a danger, and I'll say this to the Chairman, once you've asked someone whose portfolio is much larger than just deciding what the law is, then you run into the further complications in making that decision, and these are matters of law as to whether or not these person's rights, their rights and liberties are being violated. And therefore, I think that more thought needs to be given to this question.

I wonder if you want to comment on this, I don't want to delay this, we have a lot of questions, but there is the problem—do you understand? That when you're asking the Secretary of State, and I'm not talking about Condoleezza Rice, but any Secretary of State, and the question of Great Britain—Great Britain is a great ally, in many cases they were one of the few countries that supported the United States in Iraq. There are all sorts of votes that come up in the United Nations, and we're not unmindful of those considerations when the Secretary of State is making decisions, and so even though the courts have said someone is extraditable, and even though the Secretary of State may think, "You know, I think that was a bad decision, but I've got all of these other matters in front of me, I've got the President telling me how important this relationship is, I've got everyone else telling me how important it is, maybe my decision on this matter is going to be colored by other factors other than just what these individual's rights are, as I understand them to be." That's the danger, I think, about moving from the court of law to an otherwise political position to make a determination, I think that is the concerning thing expressed, if I may say so, by others.

Dr. LINNON. That is correct.

The CHAIRMAN. Professor Morris?

Professor MORRIS. My point is only that each of these provisions within Article 4 is a negative—is a showstopper. First, the judiciary has a crack at it in a context in which the judicial function is best exercised. If the judiciary says, "It ends here." It ends there. It's not that the Secretary of State can reverse that. Then we have another negative provision, that extradition shall not be granted if, in each case "extradition shall not be granted" so if it goes from the judiciary to the Secretary of State, as we've said, the Secretary of State can't then, for political reasons, nevertheless extradite, so the only slippage, the only conceivable loss, I think, in judicial power that you're talking about is, if the judiciary said, "Well, it's not a political offense, but now it's our job to decide whether it's politically motivated." Then I suppose you're suggesting that the judiciary might have a lesser set of factors of political considerations that would be applied than the Secretary of State, but that has to be balanced against the fact that the judiciary has a less perspicacious view about politics so that, the Judiciary is not in much of a position to make that evaluation, the Secretary of State is in a better position, it is conceivable, that the Secretary of State

would inappropriately ask a different question. Ask the question of what was good with regard to some other political matter, but under the treaty, the question is supposed to be, this particular extradition request isn't motivated for reasons of political persecution.

Senator DODD. Thank you.

The CHAIRMAN. Very well. Yes?

Mr. MAGEE. If I could just interject briefly, Article 8 of the treaty provides for the extradition procedures and required documents and as I read the treaty from cover to cover, maybe Professor Morris will be able to help me understand where the judiciary is interjected into this procedure at all. It's purely a State Department function when it makes reference to extradition requests being supported, they're talking in terms of the requesting State would need a request, or an arrest issued by a judge or other competent authority. Well, that order of arrest coming our way would be from somebody in the United Kingdom that would come through diplomatic channels and be acted upon by the State Department. I don't see where we have the judicial safeguards that are guaranteed in the Constitution anywhere in this Article. And that's the main concern that we have as American citizens, is that when you take in whether you're looking at the retroactivity, the removal of the statute of limitations, Joe Dougherty was mentioned briefly, there's a big hurrah ten, fifteen or twenty years ago, actually, back during the time of the 1985, 1987, 1990 hearings. As I read this treaty, if I aided and abetted and assisted Joe Dougherty in avoiding British authorities, with the passage of this treaty, I could now be extradited to the United Kingdom for something that occurred more than 20 years ago. Again, without any judicial determination.

The CHAIRMAN. Professor Morris?

Professor MORRIS. When an extradition request is received by the United States through diplomatic channels, it goes through the following process: the State Department checks it for compliance with the treaty, if it's in compliance with the treaty, it's then sent to the Justice Department to check for the legality of whether everything is in order with regard to the lawfulness of the request. If the Justice Department determines the request is lawful, it's passed through a judge or magistrate. A judge or magistrate in a judicial forum, to then hold an extradition hearing in a judicial manner, in which it will be determined whether the evidence is sufficient and whether the crime that the person is accused of is a political offense. That takes place in a judicial context, and only after that determination is made in the judiciary, does it then go back to a final check with the Secretary of State. That is the operation of this treaty, together with the provisions of the United States extradition law, which unfortunately do not appear in this treaty.

The CHAIRMAN. Very well. Well, we'll leave it at that, that there is a body of law, and there is this treaty, but now we'll all circle around and make certain that the safeguards that are being asserted here, in fact appear to work that way.

Let me ask another question—Professor Boyle has asserted in written testimony that under the proposed treaty the Department of State, not a U.S. Federal judge, would adjudicate First Amendment issues. We're back to this problem again, in a way. However,

the administration has testified the U.S. Federal courts will determine both whether the dual criminality requirement is satisfied and whether the political offense exception is applicable. The administration stated in its testimony, "U.S. extradition proceedings are undertaken pursuant to Title 18 of the United States Code, Section 3184, which provides that a U.S. judge or magistrate judge determines whether there is sufficient evidence to make a finding of extraditability. . . . The Court also determines whether the offense for which extradition is sought is an extraditable offense under the treaty. In the case of the new treaty, the relevant question would be whether dual criminality exists. That is, whether the conduct at issue is punishable under the laws in both states by deprivation of liberty by a period of one year or more, or by a more severe penalty. In this context, the court would also consider any claims raised by the fugitive that the offense is a political offense." End of quote from the administration. Now, this explores much the same territory we've just been talking about. On the other hand, I would ask once again to Mr. Meehan and Dr. Linnon—do you have comment, or your attorney, on this point?

Mr. MAGEE. If I can, I think again this is just what we've been addressing, as this treaty is read in its four corners, there is no safeguard, there are no safeguards which may or may not be provided under Section 18, I believe it's Section 18 that's reciting Title 18, and I think the concern that we have is that, does this treaty, in fact, override the provisions once it is passed into law, so that we will have a situation where there's now a conflict between the treaty and the statute?

Dr. LINNON. Senator, my only concern is that the provisions that Professor Morris mentions are not in the treaty when I look at this. And I'm not an attorney, but when I look at this, and they are absent, and it says, "The decision will remain with the executive branch," that, to me, is frightening.

The CHAIRMAN. Well, without re-writing the treaty, it seems what we all are saying is that essentially—and the administration has testified that we have a body of law now—that extradition proceedings, Title 18 and so forth that governs extraditions now the treaty is on top of this. You mentioned, however, you look at the treaty by itself, you don't find Title 18 and therefore how do you know that Title 18 and all of this pertains to this. Now, maybe they are all good answers to this, and it's an interesting question, as a layman, and I'm not an attorney either, and we're all thinking about this together today, but I understand your concern, and there may be a good answer to that. But that seems to be a question—how do you take this block of law as to how you are to be extradited into consideration of the treaty?

Mr. MEEHAN. I think, Mr. Chairman, we've all at one time or another heard the statement "Show it to me in writing." Would that not apply here? If we don't see it in writing, it is not there.

The CHAIRMAN. Fair enough, we're just sort of wandering around. Now let me ask another question. Professor Boyle has provided testimony that the proposed treaty would "effectively eliminate the political offense exception for all practical purposes" and I quote, "the political offense assumption is eliminated for any offense allegedly involving violence or weapons, including any solici-

tation, conspiracy or attempt to commit such crimes.” Mr. Meehan, Dr. Linnon, Professor Morris, do you have any comments about that idea of Professor Boyle’s?

Mr. MEEHAN. I have nothing to say about that, sir.

Dr. LINNON. The only thing I would like to say with regard to that, Senator, is that is there a possibility that written questions could be put to Professor Boyle, since these are his comments and he could answer them for the committee?

The CHAIRMAN. We could do that, and we should do that, we’re attempting to get as complete a record as we can, and that is why we’re exhausting all of you. Not to be tedious, but this is an attempt, really, to make a comprehensive search.

Dr. LINNON. And we appreciate it, don’t get me wrong.

The CHAIRMAN. Good point. So we will ask Professor Boyle to respond to his own question, but he will say, “Well, I have in my testimony.” that is the reason that I raise his quote. Nevertheless, good point. Now finally, Professor Boyle has offered testimony that the proposed treaty would, “eliminate the need for any showing of probable cause.” However, the administration testifies as follows, “The United States constitution, together with Federal case law, provides the standard used by the court to evaluate the sufficiency of foreign evidence provided in support of an extradition request—probable cause to believe the person who is before the court is the person charged or convicted in the foreign country and in those cases where the person has not been convicted, probable cause to believe that person committed the offenses for which the extradition is sought,” end of quote by the administration.

Once again, I suppose we have a question of what the treaty has to say and what the Constitution has to say and how the two are melded and how they’re referred to that they may be too oversimplifying the case, but it appears once again that we have a disconnect in terms of our thinking today, thinking about the law, Title 18 to begin with, of the Constitution here. I don’t mean to oversimplify it, but do any of you have further comment on Professor Boyle’s statements in this respect, or the administration’s response?

Senator DODD. I was going to suggest, Mr. Chairman, in this regard what we may want to do at the appropriate time, I think all of us probably agree this treaty should not, in any way, supersede first of all, the Constitution, and secondly, statutory law, at least that is my view. I can’t imagine us adopting a treaty that would undermine Title 18. It might be important to adopt an understanding to the resolution of ratification to clarify that the nothing in this treaty would, in any way, subvert or whatever the proper language of Title 18, the language to that effect, nor the Constitution, for that matter. That may help any future adjudication here to make it quite clear that none of us on this committee nor the Senate would be ratifying a treaty that in any way undermined Title 18 or the Constitution of the United States. That’s just an idea we might want to consider.

The CHAIRMAN. Do you have an idea about that, Professor Morris?

Professor MORRIS. I have an idea about that idea. Congressional legislation about how to implement a treaty is dispositive as to the

way that treaty will be implemented. And so if there is legislation in Title 18 about what we do when we are acting pursuant to an extradition treaty, then that tells us what we do when we're going to implement an extradition treaty. It is not in conflict with the treaty, but it does answer a lot of questions along the way about exactly how we're going to do this, and under Title 18, we're going to do it in that very way. So, the treaty doesn't provide the details for its own implementation, but the Congressional legislation is binding on that. Certainly one could add a proviso that this treaty will not be interpreted or applied to be violative of the United States Constitution or Title 18, maybe you want to say Title 18 as it exists, or may be amended in the future.

The CHAIRMAN. All right, well that's roughly what Senator Dodd, I think, is saying.

Senator DODD. Are you saying it's self-executing?

Professor MORRIS. I'm saying it's not self-executing, that's exactly what I'm saying, I'm saying implementing the legislation in Title 18 is binding.

Senator DODD. That is the point, you want to make it clear, then. That is my point, that it isn't self-executing, therefore you'd be avoiding Title 18.

Professor MORRIS. You could say that this treaty is not self-executing, as Congress has done so many times, so there would be no harm in that.

The CHAIRMAN. Very well. Well, than Senator Dodd and I will be so advised, and sort of think our way through how we may clear what I think is the evident unanimity of our panel here today, however we approach this, that the Constitution applies, Title 18 applies and then finally we get to this treaty, but we still have those basic elements of Constitutional law and statutory law.

Thanks, Senator Dodd for making that very wise suggestion, thank you, Senator.

Senator DODD. As a fellow Irishman, I appreciate that.

[Laughter.]

Senator DODD. We don't often compliment one another. George Mitchell once said we're the only race that would go 50 miles out of our way to receive an insult.

[Laughter.]

The CHAIRMAN. I will second the commendation to my colleague.

Well, we thank this panel very much, you've been most patient.

Senator DODD. Just one basic question, and I thank the Chairman, I'm going to address some of the questions that have been raised here to our administration witnesses, but as I hear the panel here—aside from the obvious questions, the legal question that has been raised here is—and correct me if I'm wrong—but the fear, I think, aside from Professor Morris, is that this treaty is going to be used to go back and deal with past offenses. Sort of disregarding the Good Friday Accords and other things that have been adopted by the United Kingdom since 1985. That the fear is this is going to be a reaching back, Mr. Chairman. Am I articulating that fear? Is that the basic concern?

Mr. MEEHAN. Yes, it is.

Senator DODD. You're not objecting, necessarily, although obviously from other places to future matters in light of what's been

adopted by the United Kingdom as a result of certain actions that have been taken over the last 20 years, it's really more of a concern about reaching back.

Mr. MEEHAN. Correct.

Senator DODD. We'll be looking at, there are a series of steps that have been taken, some which I mentioned in my opening statement, which have released programs and the like, which we applaud and we commend, but they raise certain other issues as well about reaching back. So that is a worthwhile document to have as a part of this record, I think.

Mr. MEEHAN. I would have to respond to that, Senator, by saying that if this is true, then why is there a hue and cry by the British public? Ordinary rank and file voters in Britain are screaming for the scrapping of this treaty. They feel that their citizenry is being adversely affected by it as well?

Senator DODD. I raise the issue, the only other point I wanted to raise with you, Professor Morris, is this—and that is clearly the 1985—and I just ask you whether or not you agree or disagree, I don't want to get into a long answer here, but clearly there were—we went through elaborate processes, as we mentioned, to get through that 1985 agreement, the Chairman was tremendously forthcoming, and many members who were involved here in the crafting of that agreement. Would you not agree that this agreement, what we're about to adopt here or may adopt here, certainly is going to retreat from the rights that were extended in the 1985 agreement? There are fewer rights extended under this proposal than exist in the 1985 agreement, is that not true?

Professor MORRIS. That is not true, I don't agree with that.

Senator DODD. You don't agree with that?

Professor MORRIS. No. We could go through point by point where that is supposed to have happened, and in each case, I would disagree.

Senator DODD. I was just curious.

Professor MORRIS. May I address the "hue and cry" point for one moment?

The CHAIRMAN. Fine.

Professor MORRIS. The hue and cry, as I understand it, arising in the U.K. about this treaty, is that we have been in the U.S. receiving the benefit of the treaty, even though the U.S. hasn't ratified it yet, and as time has gone on, that has been viewed as unfair and unequal and disadvantageous to the U.K. that they're giving us the benefit of a treaty that we haven't ratified and therefore, are not providing the benefit of, that I understand to be the basis of the debate in the U.K. Not that, if ratified, this treaty works some injustice on U.K. citizens or persons present in the U.K. Many of the newspaper articles that I've read recently would fly in the face of that opinion, I would say.

Senator DODD. By the way, would you address the question I've raised with Professor Morris, it is the opinion of you, Mr. Meehan, and Professor Linnon, that in fact the protections that were provided in the 1985 have been eroded with this proposal, that is your conclusion?

Dr. LINNOR. That's correct, yes sir. I would just like to say that even though Professor Morris states that it's the feeling it's unfair

and that's why they're opposed to it. There's currently an extradition request of a United States citizen by the United Kingdom, so I mean, they're not totally inactive about it.

The CHAIRMAN. Thank you. Well, we thank you all three, very much.

Dr. LINNOR. Thank you, Senator.

Mr. MEEHAN. Thank you, Mr. Chairman, thank you, Senator Dodd.

The CHAIRMAN. We would like to call our second panel of witnesses, the Honorable Paul McNulty, Deputy Attorney General, United States Department of Justice, and Mr. Samuel M. Witten, Deputy Legal Adviser of the Department of State.

Gentlemen, we welcome you to the Senate Foreign Relations Committee hearing today, and I want to ask that you testify in the order that I introduced you, and that would be, first of all, Deputy Attorney General, Mr. McNulty, and then Mr. Witten. Will you please proceed, Mr. McNulty?

STATEMENT OF PAUL J. McNULTY, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. McNULTY. Good morning, Mr. Chairman, Senator Dodd. I'm pleased to appear before you today to present the views of the administration and the Department of Justice regarding the 2003 U.S.-U.K. Extradition Treaty.

Mr. Chairman, I'm here to reiterate the importance of this treaty to U.S. national security and law enforcement. And I also would like to briefly rebut some of the statements which I believe are misleading, and inaccurate, as criticisms of this important treaty.

Mr. Chairman, Senator Dodd, approval of this treaty is an urgent priority for the administration. As the Deputy Attorney General, I know firsthand that we face increasing need for cooperation and assistance from the international community in the investigation of terrorism, violent crime, trafficking in persons, drugs and firearms, large-scale financial crimes and other offenses. This treaty would further the goal by modernizing our extradition relationship with the United Kingdom.

On the other hand, failing to approve this treaty will have serious negative consequences for the American people. The United Kingdom House of Lords last week overwhelmingly voted to rescind its designation of the U.S. under the U.K.'s 2003 Extradition Act for relief from the onerous *prima facie* evidence standard for extradition. The House of Commons has also begun to take steps in that regard. This action is in response to increasing pressure in the U.K.—in some political circles, the business community and the press—to correct a perceived “imbalance” in the current U.S.-U.K. extradition relationship resulting from the fact that the U.K. has approved the treaty, but the U.S. has not. If this rescission ultimately were to take effect, it would mean, among other things, that the United States would be subject to the pre-2003 extradition requirements of submitting *prima facie* evidence of guilt in our extradition applications. As a result, it would be much harder to extradite terrorists, violent criminals, drug traffickers, white collar criminals and others. We would be forced to meet a very high standard.

Now, this is something that I personally experienced as a United States Attorney in Eastern Virginia from 2001 to 2006. We had cases in our jurisdiction involving individuals in the U.K., in one case in particular, the case began, the largest hacking case in United States' history began prior to 2003. And to meet the standard at that time required a stack of documents at least this tall or higher [indicating]. We had to basically prepare the entire case as though it was going to court.

After 2003, that extradition process was reduced substantially in terms of burden, where we now meet the probably cause standard, rather than the *prima facie* standard. And what was lost in perhaps the previous discussion was this: the benefits of this treaty are enormous for the United States because we have to meet a burden over there. And while the U.K. has enacted the treaty there, and we can now enjoy those benefits, and are enjoying it through the extradition of terrorists back to the United States, we stand a real possibility of losing that benefit if we do not carry through on our end of ratifying this treaty.

Even if the United Kingdom does not ultimately rescind its favorable designation of the U.S. under its Extradition Act, continuing delay in the United States' approval of this treaty would still have serious consequences in our law enforcement cooperation, particularly in terrorism cases. For example, the United States is seeking the extradition from the U.K. of Abu Hamza on charges of kidnaping U.S. and other Western tourists in Yemen, sending recruits to Afghanistan for terrorist training, and conspiring to establish a jihad training camp in the United States. Abu Hamza is currently serving a sentence in the U.K. for incitement of racial hatred. If the new treaty were in effect, the U.K. would be able to send Hamza to the U.S. for trial under the treaty provision permitting "temporary surrender."

Absent temporary surrender, we will have to wait to try him until he completes his sentence in the United Kingdom, and there are real risks in substantially delaying a trial of this nature.

Mr. Chairman, over the past two decades, this committee has approved a series of new extradition treaties that have significantly improved our ability to deny terrorists and criminals safe haven from facing justice in U.S. courts. Surely, our law enforcement relationship with the U.K., one of the most critical and most successful partners in preventing and prosecuting terrorism and other crimes, should benefit from the same extradition regime, the same modern regime that we share with so many other countries.

As I noted earlier, one of the primary benefits of the new treaty is that it removes the *prima facie* evidence requirement imposed by the U.K. in extradition cases and replaces it with a less stringent standard under the U.K. extradition laws. In addition, the treaty is a dual criminality treaty, which is a significant improvement over the pre-2003 treaty. As a result, the treaty expands the scope of extraditable offenses well beyond those specifically recognized in the existing treaty's list, or in domestic U.K. extradition law.

Accordingly, the treaty automatically applies to new felonies enacted into law. The new treaty will allow us a faster, more direct channel for requests for provisional arrests. Provisional arrests are used in urgent circumstances to prevent the flight of serious felons,

or to promptly detain dangerous and violent suspects. These requests can be made directly between the Department of Justice and an authority designated by the United Kingdom, thus obviating the need to go through formal diplomatic channels in order to secure emergency assistance.

Mr. Chairman, those provisions and others will significantly advance the law enforcement interests of the United States. I would, however, like to rebut briefly the primary objections that have been put before this committee by various groups and individuals, including the witnesses who appeared before this committee this morning.

I must refute in unequivocal terms the suggestion of the opponents that the United States has entered into this treaty in order to collude with the United Kingdom in a campaign of retaliation against Irish-American citizens. The heated rhetoric, the idea that this would strip away Constitutional rights, is simply not true. It is not at all accurate. The purpose of this treaty is to enhance law enforcement cooperation between the U.S. and the U.K. for the benefit of the American and the British people. There is no erosion of rights.

Mr. Chairman, as this committee well knows, we face an increasing need for cooperation and assistance from the international community in the investigation of terrorism, violent crime and other offenses. This treaty would further that important national security and law enforcement goal by modernizing our extradition relationship with the United Kingdom, while protecting the Constitutional rights of all Americans. In the end, the harm that the opponents say will occur if the committee approves this treaty are illusory and purely hypothetical. In fact, every one of the provisions in this treaty has an analog in other modern extradition treaties that this committee has approved and which have been administered consistent with the United States Constitution.

There's a well-established framework already in existence that allows for the application of these treaties, with the working of the United States Code for the implementation of those treaties. As I have emphasized today, the new treaty with the United Kingdom is entirely consistent with other modern extradition treaties. Our law enforcement relationship with the United Kingdom is one of our most important, and it should benefit from the same sort of modern extradition treaty that we have with so many other of our significant allies is in combating terrorism and crime. Yet, we're not at the stage where further delay in approving this treaty is threatening an unnecessary strain if not a step backwards in our critical law enforcement dealings with the United Kingdom.

Mr. Chairman, Senator Dodd, just about a month ago I was in London meeting with my law enforcement counterparts there. And this concern was expressed repeatedly to me, and as you know, the Deputy Secretary, Home Secretary was in the country last week, met with the Attorney General and myself to discuss this concern. And I saw firsthand the concern that's in existence now that there will be a movement backwards if we are not able to ratify this treaty.

The Department of Justice believes this treaty will improve our extradition relationship with the United Kingdom and protect our

citizens without undermining in any way the commitment of the United States to the protection of Constitutional rights for all Americans. The Department, therefore, respectfully urges this committee to approve the treaty as soon as possible.

I would be happy to answer any questions the committee has for me. Thank you very much.

[The prepared statement of Mr. McNulty follows:]

PREPARED STATEMENT OF PAUL MCNULTY

I. INTRODUCTION

Mr. Chairman and members of the committee, I am pleased to appear before you today to present the views of the administration and the Department of Justice regarding the 2003 United States–United Kingdom Extradition Treaty. This morning, I would like to reiterate the importance of this treaty to U.S. national security and law enforcement interests. I would also like to rebut some of the false and inaccurate criticisms that have been leveled against this important treaty.

Approval of this treaty is an urgent priority for President Bush and the Attorney General. I do not need to tell this committee that we face an increasing need for cooperation and assistance from the international community in the investigation of terrorism, violent crime, trafficking in persons, drugs and firearms, large-scale financial crimes and other offenses. This treaty would further that goal by modernizing our extradition relationship with the U.K.

On the other hand, failing to approve this treaty will have serious negative consequences. For example, the U.K. House of Lords last week overwhelmingly voted to rescind its designation of the U.S. under the U.K.'s 2003 Extradition Act for relief from the onerous *prima facie* evidence standard for extradition. The House of Commons has also begun to take steps in that regard. This action is in response to increasing pressure in the U.K.—in some political circles, the business community and the press—to correct a perceived “imbalance” in the current U.S.-U.K. extradition relationship resulting from the fact that the U.K. has approved the treaty but the U.S. has not. If this rescission ultimately were to take effect, it would mean, among other things, that the U.S. would be subject to the pre-2003 extradition requirements of submitting *prima facie* evidence of guilt in our extradition applications. As a result, it would be much harder to extradite terrorists, violent criminals, drug traffickers, white collar criminals and others.

Even if the U.K. Government does not ultimately rescind its favorable designation of the U.S. under its Extradition Act, continuing delay in the United States' approval of this treaty would still have serious consequences in our law enforcement cooperation, particularly in terrorism cases. For example, the United States is seeking the extradition from the U.K. of Abu Hamza on charges of kidnapping U.S. and other western tourists in Yemen, sending recruits to Afghanistan for terrorist training, and conspiring to establish a jihad training camp in the United States. Abu Hamza is currently serving a sentence in the U.K. for incitement of racial hatred. If the new treaty were in effect, the U.K. would be able to provide Hamza to the U.S. for trial under the treaty provision permitting “temporary surrender.”

In the absence of the new treaty, however, the U.K. Home Office has indicated that the U.K. will refuse to extradite Abu Hamza based on their view that, although the U.K. could “temporarily surrender” Abu Hamza to the U.S. prior to the expiration of his U.K. sentence (because they have ratified the treaty), the U.S. could not return him to the U.K. to finish serving his U.K. sentence after his U.S. trial (because we have not yet ratified the treaty). The result is that the U.S. will not be able to try Hamza until he is extradited following his U.K. sentence. This delay, which is likely to be for several years, may have serious consequences: it will render it more difficult for the U.S. to try an individual who has been charged as a dangerous terrorist.

Mr. Chairman, over the past two decades, this committee has approved a series of new extradition treaties that have significantly improved our ability to deny terrorists and other criminals safe haven from facing justice in U.S. courts. Surely, our law enforcement relationship with the U.K.—one of our most critical and successful partners in preventing and prosecuting terrorism and other crimes—should benefit from the same modern extradition regime. That is why approval of this treaty is such an urgent national security and law enforcement priority for the administration. On behalf of the administration and the Department of Justice, I respectfully urge this committee to approve this treaty as soon as possible.

II. LAW ENFORCEMENT BENEFITS OF THE TREATY

Before I address the inaccurate assertions about this treaty, let me briefly reiterate how the treaty improves law enforcement cooperation with the U.K.

One of the primary benefits of the new treaty is that it removes the “prima facie” evidence requirement imposed by the U.K. in extradition cases and replaces it with a less stringent standard under new U.K. domestic extradition laws. After the treaty was signed, the Government of the United Kingdom undertook as of January 2004 to designate the United States for favored treatment under its domestic legislation—in particular, to permit the United States to meet the lower standard of proof—even though the United States ratification process was not yet complete. This designation has made the preparation of extradition requests far easier and, in some cases, allowed us to proceed with cases that we might earlier have declined to pursue.

Unfortunately, as time has passed since the administration first presented this treaty to the committee, the Government of the United Kingdom has been the recipient of increasingly sharp criticism in the press and in Parliament over having given the United States the beneficial designation without a showing of reciprocal support for an improved extradition relationship through United States approval of the new treaty.

Additionally, a number of significant defendants in pending extradition cases from the United States are starting to raise the allegation of a “flawed” designation process in the lower courts and on appeal. Most notably, three U.K. bankers who are defendants in Enron-related proceedings opposed extradition on those grounds, among others. The so-called “NatWest 3” were extradited to the U.S. last week, but their case has received significant attention in the British press and has stirred up significant support for suspending the U.K.’s current extradition relationship with the U.S.

In addition to eliminating the *prima facie* requirement, the treaty is a “dual criminality” treaty, which is a significant improvement over the pre-2003 treaty. As a result, the treaty expands the scope of extraditable offenses well beyond those specifically recognized in the existing treaty’s list or in domestic U.K. extradition law. Additionally, the treaty automatically applies to new felonies enacted into law.

The new treaty will also allow a faster, more direct channel for requests for provisional arrest. Provisional arrests are used in urgent circumstances to prevent the flight of serious felons or to detain promptly dangerous and violent suspects. These requests can be made directly between the Department of Justice and an authority to be designated by the United Kingdom, thus obviating the need to go through formal diplomatic channels in order to secure emergency assistance.

As noted above, another provision in the new treaty of particular significance is that authorizing “temporary surrender.” Under the current treaty, the extradition of an individual who is being prosecuted or serving a sentence in one country must be deferred until the completion of the trial and any sentence imposed. Such a deferral can have disastrous consequences for a later prosecution due to lapse of time, the absence or death of witnesses, and the failure of memory. The new provision will allow the individual being tried or punished in one country to be sent temporarily to the other for purposes of prosecution there and then returned to the first country for resumption of the original trial or sentence.

III. CRITICISMS OF THE TREATY ARE UNFOUNDED

I would, however, like to rebut briefly the primary objections that have been put before this committee by various groups and individuals, including objections Professor Boyle expressed in his March 2004 letter to the committee and which I understand are reiterated in his testimony today.

At the outset, I must refute in unequivocal terms the suggestion of Professor Boyle and others that the United States has entered into this treaty in order to collude with the United Kingdom in a campaign of retaliation against Irish American citizens. This is false. This is a treaty, like all other extradition treaties to which the United States is a party, concerned with crimes recognized as such under the laws of the United States. The United States has entered into this treaty because it benefits the law enforcement interests of the United States, and those interests extend to protecting all our citizens who may fall victim to crime. Every one of its provisions has an analogue in other modern extradition treaties that this committee has approved, and which have been administered in conformity with United States laws and the United States Constitution. There is no basis for Professor Boyle’s claims to the contrary.

A. Political Speech, Political Offense and Political Motivation

One of Professor Boyle's central criticisms of the treaty has been his view, as articulated in his March 2004 letter, that it is "directed primarily against Irish American citizens engaged in the lawful exercise of their constitutional rights under the First Amendment" and that it would make them "extraditable to the British Crown ... [for] exercising their rights under the First Amendment ..." The treaty does no such thing. Speech protected by the First Amendment is not, and cannot be, recognized as a criminal offense under U.S. law. Conduct that does not constitute an offense under U.S. law fails the core dual criminality test of the new treaty, the current treaty, and all other extradition treaties to which the United States is a party. Therefore, extradition simply is not permitted with respect to speech protected under the First Amendment.

Critics also claim that the new treaty with the U.K. represents a dramatic departure in the treatment of political offenses, for which extradition is barred, and of assertions that a particular request for extradition is motivated by a desire to punish an individual for his or her political beliefs. Contrary to these claims, the new treaty is completely in accord with other modern extradition treaties, and U.S. law.

First, the new treaty, like the 1985 Supplementary Treaty now in force, makes it clear that persons engaged in serious crimes of violence, including crimes involving explosives and firearms, may not avoid extradition by invoking the political offense doctrine. As the committee well knows, this provision, which has now become a standard, was a reaction to terrorism and the potential for abuse of the political offense doctrine by terrorists as a means to avoid extradition. Put simply, this treaty, like so many others, does not countenance a terrorist asserting that he can evade justice because his designs of murder and mayhem were motivated by his political objectives. Other than these specific exclusions, however, it will remain for the courts to determine whether the offense constitutes a political offense for which extradition is barred.

Second, the treaty deals with the question of "political motivation"—a claim that a request for extradition is in fact motivated by the Requesting State's desire to punish the person for his political views—in the same manner as virtually every other extradition treaty, and in the same manner specified by longstanding U.S. court decisions, All U.S. courts, and every extradition treaty that addresses the issue, adhere to the rule of "judicial non-inquiry," reserving such questions for decision by the executive branch. The only departure, and one never repeated since, was the 1985 Supplementary Treaty with the U.K.

Although no defendant has ever succeeded under the current treaty in defeating his extradition to the U.K. on the basis of political motivation, the years of litigation generated as our courts grappled with these claims demonstrated that under the U.S. system, such issues are better reserved, as for all other treaty partners, for decision by our Secretary of State. Thus, it is wrong to suggest that the 2003 treaty somehow reverses "centuries" of treaty precedent. It does nothing of the kind—the new treaty will simply restore the legal standard applicable in every other U.S. extradition treaty.

B. Other Objections

I would like to address, briefly, a number of other criticisms of the treaty. First, there is no basis for claims that the provisional arrest provisions of the treaty either violate the Fourth Amendment or provide for indefinite detention. As the Department of Justice has made clear in prior testimony and questions for the record, the Fourth Amendment does apply to the issuance of a warrant for provisional arrest. The provisional arrest language of the new treaty is entirely consistent with that of numerous extradition treaties that have been approved by the committee and that have been applied by U.S. courts in conformity with constitutional requirements. Moreover, the provisional arrest article, like that in all other treaties, sets a time frame in which the formal request for extradition must be submitted. Should that fail to be done, the U.S. court may then release the defendant. This is not indefinite detention.

There is no basis for the claim that the treaty eliminates statutes of limitation. The treaty has no impact on application of statutes of limitations. Rather, it preserves for the courts where the case is to be tried the determination whether the applicable statute of limitations would bar the prosecution, rather than calling on the extradition court to interpret a foreign statute of limitations, or to try to engraft its domestic statute of limitations on the foreign charge. This approach is reflected in many of our modern extradition treaties.

There is no basis for the claim that the treaty eliminates the necessity of a showing of probable cause. Both the treaty and longstanding U.S. law make it clear that a U.S. court must make a determination that there is sufficient information in the

extradition request to find probable cause that a crime has been committed and that the fugitive committed that crime before the fugitive may be ordered surrendered to face trial in the foreign country.

There is no basis for the claim that the treaty permits prosecution in violation of the *ex post facto* clause of the Constitution. This treaty, like the 1985 Supplementary Treaty, makes it clear that the treaty may apply to offenses committed before it enters into force. This is a standard treaty provision, and it does not permit a retroactive application of the underlying criminal statute for which the fugitive has been charged or convicted.

There is no basis for the claim that the treaty permits extradition for conduct that is not considered an offense in the United States. Article 2 of the treaty makes it clear, as do all other treaties, that extradition is permitted only if the conduct charged in the U.K. would also constitute an offense under U.S. law. Because federal criminal jurisdiction is limited, many common offenses, such as murder, sexual assault, burglary and theft are ordinarily punishable under State law, rather than federal criminal law. Thus, for purposes of assessing the core requirement of dual criminality, U.S. courts have long held that they may look to state law as well as federal law to assess this requirement. This approach, which is simply reflective of the United States' unique federal system, in no way undermines the fundamental requirement of dual criminality that is enshrined in this and other U.S. extradition treaties.

Finally, as explained in our prior submissions to the committee, the treaty does not eliminate the rule of specialty. To the contrary, this principle, which limits the prosecution of a person for offenses other than those for which he or she has been extradited, is fully preserved in Article 18 of the treaty. The only substantive variation from the current treaty is that it provides an explicit provision for the extraditing state to waive the rule of specialty, if in its discretion and considering the particular circumstances of the case, it deems it appropriate to do so. This sort of clause has been a standard treaty provision for years. And although such an explicit provision for waiver is not necessary for the United States, it was necessary for the United Kingdom.

IV. CONCLUSION

Mr. Chairman, as I have emphasized today, the new treaty with the United Kingdom is entirely consistent with other modern extradition treaties. Our law enforcement relationship with the United Kingdom is one of our most important, and it should benefit from the same sort of modern extradition treaty that we have with so many other of our significant allies in combating terrorism and crime. We are now at the stage where further delay in approving this treaty is threatening an unnecessary strain, if not steps backward, in our critical law enforcement dealings with the United Kingdom.

We have appreciated the opportunity—in the prior hearing, in our responses to the thoughtful questions for the record posed by members of the committee, and in my testimony today—to respond to the various objections and criticisms of the treaty. I believe that each of these has now been addressed, and should not prevent this committee from approving the treaty. The Department of Justice believes that this treaty will significantly improve our extradition relationship with the United Kingdom—and protect our citizens—without undermining in any way the commitment of the United States to the protection of constitutional rights for all Americans. The Department therefore respectfully urges this committee to approve the treaty as soon as possible.

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

The CHAIRMAN. Thank you very much for that testimony. Mr. Witten, we would like to hear from you now.

STATEMENT OF SAMUEL M. WITTEN, DEPUTY LEGAL ADVISER, U.S. DEPARTMENT OF STATE, WASHINGTON, D.C.

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

Mr. Chairman, and Senator Dodd, I'm pleased to appear before you today to testify once again in support of Senate's advice and consent to ratification of the U.S.-U.K. Extradition Treaty. I will take the opportunity today to bring to the committee's attention developments that make entry into force of this key law enforcement

treaty a matter of even greater urgency than when I testified in favor of Senate approval on November 15, 2005.

As reflected in Mr. McNulty's comments, the United Kingdom of course is one of our closest partners in the war on terrorism. The new, modern treaty before the Senate has the key provisions found in virtually all of our modern treaties and reflects this close relationship. I will discuss briefly in this testimony the key benefits that will accrue to the United States from this treaty, but before doing so, I need to highlight for the committee several additional challenges that have emerged from the delay in entry into force of this treaty.

In 2003, the U.K. adopted domestic legislation simplifying its extradition practice, and in a show of good faith in anticipation of this new treaty coming into force, it applied the benefits of its new domestic law to the United States. The British Government was accused in Parliament of acting prematurely, with critics saying that this change should wait until the Senate ratified the Extradition Treaty. The British Government answered that criticism by stating that it anticipated quick ratification by the United States.

Our delay in ratification has become a major political issue in the United Kingdom. The issue is being seen by the British media and public as a question of good faith on the part of the United States. Inaction on our part now not only threatens the favorable treatment we receive in extradition matters, but it is undermining British public opinion that we are a reliable ally. Recent editorials and articles in the *London Times*, for example, reflect the sentiment held by many in the U.K. that justice is not being done for the United Kingdom. A June 28, 2006 *London Times* article notes that the treaty has been cited by Prime Minister Blair's critics as an example of U.S. government indifference to the United Kingdom.

Under the changes to the U.K. domestic law brought about by the 2003 U.K. Extradition Act, the U.S. received preferential designation in the British system as a "part 2 country." The most significant result of this favorable designation is that, when seeking the extradition of a fugitive, we benefit from an evidentiary standard that is analogous to the U.S. probable cause standard that is imposed on the United Kingdom for requests to the United States. The United States also can use hearsay evidence in British courts. This change greatly facilitates the presentation of extradition request from the United States to the U.K., and enhances our ability to obtain fugitives wanted for trial in the United States on a range of serious offenses.

Recently, however, the U.K. executive branch has been facing increasing pressure from those who complain of a lack of "reciprocity" in the U.S.-U.K. extradition relationship because the U.S. Senate still has not approved this treaty and the executive branch has therefore not been able to bring it into force. As a result of this criticism, amendments have been proposed to the U.K. Extradition Act that would remove the preferential treatment currently afforded the United States in advance of the treaty's entry into force, and the good faith of the United States has been called into question by members of the British Parliament. Indeed, as Mr. McNulty mentioned, just last week, the House of Lords voted by a wide margin to strip the United States of its preferred status under the Ex-

tradition Act. It was a source of sadness that one of the members voting to restore the more burdensome extradition arrangements with the U.S. was former Prime Minister Margaret Thatcher, a staunch ally of the United States. Following the vote in the House of Lords, an equally fierce debate on the issue took place in the House of Commons. A binding vote on the proposed amendments may take place later this year, and could undermine major interests of the United States and erode our credibility further in the United Kingdom. The risk of this adverse result increases with each passing week and month of inaction on the part of the United States, and debate in the United Kingdom about the good faith of the United States is doing immeasurable harm to our reputation and standing.

In addition to these potential adverse changes in U.K. law and ongoing criticism of the United States that result from our delay, the U.S. of course can not benefit from the provisions of the new treaty not otherwise addressed in U.K. law that, once in force, would meaningfully advance some of our most important law enforcement efforts. For example, the new treaty has, like most modern extradition treaties, a provision allowing for the temporary surrender for prosecution in the Requesting State of a fugitive who has already been proceeded against, or is serving a sentence in the Requested State. There's no such provision in the current treaty. Temporary surrender would be critical to many of our terrorism-related prosecutions and would allow us to try expeditiously fugitives such as Abu Hamza, who is currently serving a prison sentence in the U.K. but is wanted to stand trial in the U.S. on a range of charges, including providing material support to terrorist organizations and attempting to set up a terrorist training camp in the U.S. Without the new treaty, there is no mechanism for the United States to obtain custody of individuals like Hamza for the purpose of prosecution until they have completed their sentence in the U.K.

The importance of improving our law enforcement relationship with the United Kingdom is therefore even more pressing now than it was when we testified in November, 2005. The United States should benefit from the best possible extradition relationship with the United Kingdom. Ratification of this treaty would significantly further such efforts.

As I noted in my prior testimony to this committee, and in my responses to the committee's questions for the record. This new treaty will strengthen and modernize our extradition relationship with the U.K. and will bring significant advantage to U.S. and U.S. law enforcement efforts. Among the other provisions in the treaty that will benefit the United States are provisions on dual criminality, temporary surrender, the U.S. will not have to face the more onerous prima facie standard when submitting extradition requests to the U.K. These and other improvements in the treaty will enhance the efforts of the United States as it confronts increasing transnational criminal threats, including those related to international terrorist activities.

For these reasons, entry into force of this treaty is one of the administration's highest law enforcement priorities. Finally, I think it is very important to address the unfounded claims made by some groups and that we've noted, we've heard today that this new trea-

ty with the United Kingdom is somehow specifically targeted to the Irish-American community. These arguments are simply not accurate. There's nothing in this treaty that justifies these misinterpretations that have been thrust upon it by these critics. To the contrary, this treaty is no different in its scope of application than any of our other extradition treaties, and it is entirely consistent with U.S. obligations under relevant law. It applies to a full range of criminal conduct and crimes, it does not target any particular group, and contains all of the protections that are expected under U.S. law and practice, including the fundamental protections contained in the Bill of Rights.

The treaty modernizes one of our most important law enforcement relationships. It's critical to the continued efforts of the United States in the global war on terrorism and should be ratified forthwith.

Mr. Chairman and Senator Dodd, we very much appreciate the committee's decision to consider this important treaty, I will also be happy to answer any questions the committee may have.

[The prepared statement of Mr. Witten follows:]

PREPARED STATEMENT OF SAMUEL M. WITTEN

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I am pleased to appear before you today to testify once again in support of Senate advice and consent to ratification of the U.S.-U.K. Extradition Treaty. I will take the opportunity today to bring to the committee's attention developments that make entry into force of this key law enforcement treaty a matter of even greater urgency than when I testified in favor of Senate approval on November 15, 2005.

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Our delay in ratification has become a major political issue in the U.K. The issue is being seen by the British media and public as a question of good faith on the part of the United States. Inaction on our part now not only threatens the favorable treatment we receive in extradition matters, but it is undermining British public opinion that we are a reliable ally. Recent editorials and articles in the *London Times*, for example, reflect the sentiment held by many in the U.K. that justice is not being done for the United Kingdom. A June 28, 2006 *London Times* article notes that the treaty has been cited by Prime Minister Blair's critics as an example of U.S. government indifference to the U.K.

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Recently, however, the U.K. executive branch has been facing increasing pressure from those who complain of a lack of "reciprocity" in the U.S.-U.K. extradition relationship because the U.S. Senate still has not approved this treaty and the executive

branch has therefore not been able to bring it into force. As a result of this criticism, amendments have been proposed to the U.K. Extradition Act that would remove the preferential treatment currently afforded the United States in advance of the treaty's entry into force, and the good faith of the United States has been called into question by members of the British Parliament. Indeed, we understand that just last week the House of Lords voted by a wide margin to strip the United States of its preferred status under the Extradition Act. It was a source of sadness that one of the members voting to restore the more burdensome extradition arrangements with the U.S. was former Prime Minister Margaret Thatcher, a staunch ally of the United States. Following the vote in the House of Lords, an equally fierce debate on the issue took place in the House of Commons. A binding vote on the proposed amendments may take place later this year, and could undermine major interests of the United States and erode our credibility further in the United Kingdom. The risk of this adverse result increases with each passing week and month of inaction on the part of the United States, and debate in the United Kingdom about the good faith of the United States is doing immeasurable harm to our reputation and standing.

In addition to these potential adverse changes in U.K. law and ongoing criticism of the United States that result from our delay in bringing the treaty into force, the U.S. of course cannot benefit from provisions of the new treaty not otherwise addressed in U.K. law that, once in force, would meaningfully advance some of our most important law enforcement efforts. For example, the new treaty has, like most modern extradition treaties, a provision allowing for the temporary surrender for prosecution in the Requesting State of a fugitive who is already being proceeded against or serving a sentence in the Requested State. There is no such provision in the treaty currently in force. Temporary surrender would be critical to many of our terrorism-related prosecutions and would allow us to try expeditiously fugitives such as Abu Hamza, who is currently serving a prison sentence in the U.K. but is wanted to stand trial in the U.S. on a range of charges, including providing material support to terrorist organizations and attempting to set up a terrorist training camp in the U.S. Without the new treaty, there is no mechanism for the United States to obtain custody of individuals like Hamza for the purpose of prosecution until they have completed their sentences in the U.K.

The importance of improving our law enforcement relationship with the United Kingdom is therefore even more pressing now than it was when we testified in November, 2005. The United States should benefit from the best possible extradition relationship with the United Kingdom. Ratification of the U.S.-U.K. Extradition Treaty would significantly further such efforts.

Turning to the treaty itself, in my testimony before this committee in November of last year, I emphasized the very strong interest of the administration in bringing this treaty into force quickly. I have testified in detail to this committee already on the importance of this treaty and therefore will just highlight several key reasons here.

- Once the treaty is ratified, the United States will be certain to receive the benefits of the 2003 changes in U.K. law, including the reduction in the evidentiary standard that the United States is required to meet when seeking the extradition of a fugitive from the United Kingdom, thereby making it easier to bring fugitives to justice in the United States. The new treaty makes the evidentiary standard required by both sides broadly comparable.
- The proposed treaty defines conduct as an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty. This kind of pure "dual criminality" clause will be an improvement over the treaty regime currently in place, which lists categories of offenses plus other offenses listed in relevant U.K. extradition law and considered felonies under U.S. law. It will put the U.S.-U.K. relationship on a par with virtually all of our other major extradition relationships that have been updated in the last thirty years. As with all of our dual criminality treaties, this provision means that the United States would not be required to extradite a fugitive where the U.K. charge would not be a crime if committed in the United States. Because of the protections of dual criminality, it is simply not possible, as some opponents of the treaty have argued, that an individual could be extradited from the United States if the conduct for which extradition is sought is protected by the U.S. Constitution.
- The treaty requires that extradition be denied if the competent authority of the Requested State determines that the request is politically motivated. Like all other modern U.S. extradition treaties, the new treaty grants the executive

branch rather than the judiciary the authority to determine whether a request is politically motivated. This change makes the new treaty consistent with U.S. practice with respect to every other country with which we have an extradition treaty. U.S. courts will of course continue to assess whether an offense for which extradition has been requested is a political offense. The proposed treaty deals with the treatment of the statute of limitations in away that is consistent with most of our new extradition treaties. The party that receives an extradition request does not decide on the statute of limitations that applies to the crime, but leaves that to the courts and legal system of the state that has brought the criminal charges. Contrary to the claims of some, therefore, the proposed treaty does not eliminate statutes of limitations, but rather reserves their interpretation to the courts most equipped to do so.

- The treaty sets forth a clear “Rule of Specialty” which provides, subject to specific exceptions, that fugitives can only be tried for the charges for which they were extradited, absent specific consent by the State that has extradited the fugitive. The current U.S.-U.K. treaty does not contain a provision for waiver of the rule of specialty, and the proposed provision is substantially the same as the parallel provision in our modern extradition treaties. It serves an important purpose in rare cases where, for example, evidence of other extraditable offenses surfaces after extradition.
- The treaty also includes modern provisions on provisional arrest, which is limited to a specific period of time during which a formal extradition request is to be submitted, and application of the treaty to conduct prior to entry into force that, contrary to the claims of critics, does not allow the United States to seek extradition for conduct that was not criminalized in the U.S. at the time it took place. These provisions will put our relationship with the United Kingdom on a par with our other major allies and treaty partners.

After the hearing before this committee in November 2005, the committee submitted certain questions for the record to me and to the Department of Justice witness, Mary Ellen Warlow. We were pleased to provide answers to all of those important questions and, in doing so, address particular concerns of the committee in relation to the treaty. For example, we explained the reasons for modifying the exceptions to the political offense clause under the new treaty.

We also explained why the new treaty does not include Article 3 of the 1985 supplementary treaty, which allowed fugitives to avoid extradition if they could establish before a U.S. court that the request for extradition was politically motivated. We explained that, in U.S. law and practice, questions of political motivation are determined by the Secretary of State, in recognition of the principle that the executive branch is best equipped to evaluate the motivation of a foreign government in seeking an individual's extradition. Article 3 of the supplementary treaty, which undermined this longstanding Rule of Non-Inquiry, led to long, difficult, and inconclusive litigation in several cases where U.S. courts were thrust into the unfamiliar and inappropriate position of addressing the motivation of a foreign government, as well as claims of generalized bias within a foreign system of justice. We explained in detail the circumstances of each of those cases, and noted that none remained pending at this time. Our experience with Article 3 of the supplementary treaty confirmed the need to exclude this anomalous provision from our bilateral extradition treaties.

We also explained provisions in the treaty relating to extraterritorial jurisdiction, provisional arrest, probable cause, and the search and seizure of items. We further explained the circumstances making it appropriate to include in the treaty the possibility of waiver of the rule of specialty. As we explained in detail in our responses to the committee's questions, all of these changes were meant to modernize and strengthen the ability of the United States to seek and grant the extradition of fugitives wanted for serious crimes, all within the framework of well-established U.S. law and procedure.

Finally, I note that in addition to the matters addressed in our questions for the record, there have been some unfounded claims that this new treaty with the United Kingdom is somehow specifically targeted to the Irish-American community. These arguments are simply not accurate. There is nothing in this treaty that justifies these misinterpretations that have been thrust upon it by these critics. To the contrary, this treaty is no different in its scope of application than any of our other modern treaties, and it is entirely consistent with U.S. obligations under relevant law. It applies to a full range of criminal conduct and crimes, does not target any particular group, and contains all of the protections that are expected under U.S. law and practice. The treaty modernizes one of our most important law enforcement

relationships, is critical to the continued efforts of the United States in the global war on terrorism, and should be ratified forthwith.

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

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

The CHAIRMAN. Well, thank you very much for that testimony, Mr. Witten. The committee has invited testimony from the administration today in order to create a full record for the committee's consideration, including the administration's views on recent developments in the United Kingdom related to the treaty.

Before we get to that issue, we will ask witnesses to comment on some of the same issues we discussed with the first panel of witnesses.

First of all, Professor Boyle has indicated in his written testimony his view that transferring to the executive branch the authority to determine whether an extradition request is politically motivated would be unconstitutional. What is the administration's reaction to this assertion?

Mr. McNULTY. Mr. Chairman, thank you.

We would strongly disagree with that characterization. In fact, the only treaty in U.S. history to ever have given that authority to the U.S. District Courts was the 1985 Supplemental Treaty with the United Kingdom, and it did so for a specific set of offenses. The suggestion that this treaty somehow reverses centuries of precedent is completely wrong. In reality, it follows the longstanding U.S. judicial precedent and treaty practice.

It's important to note that while no defendant has ever succeeded in defeating his extradition to the United Kingdom, in the judicial process, we can see from those that have occurred the difficulty and the length of time that is involved in watching courts grapple with this kind of question. The issue is better reserved, that is the question of political motivation, just as you and Senator Dodd sorted it out with the previous panel—it's better reserved for the Secretary of State. Now, Senator Dodd, in your questions to the panel, you noted that there was an issue of a question of law that the court might be the appropriate body to deal with.

And I think that's why this provision again, consistent with all of the other modern extradition treaties is the way it is, because it recognizes this isn't a question of law, this is really a question of fact. It's a factual issue concerning whether or not political motivation does play a role in the requesting country's request for extradition, and that question—after all of the other judicial process has taken place, which was laid out quite nicely by Professor Morris—after all of that judicial process has taken place, including the issue of the political offense defense, now you get to the question of appealing to the Secretary of State on political of motivation, and that—the Secretary of State is in a better position from a factual basis—to be able to know all of the circumstances which exist that would shed any light on the question of whether or not such an objection or a defense is valid.

And so I think that the concerns about this not being a judicial process were certainly not a constitutional question, but as a policy matter, it's much better to have the Secretary of State do it, as in all of the other cases.

And finally, I would say this relates to the larger issue of having a day in court, and it's clear through what has been said so far today that there is a day in court, this is all about the judicial process. But you finally get to this one question at the end of that lengthy judicial process that does exist.

The CHAIRMAN. Senator Dodd?

Senator DODD. Just to follow up, and I appreciate it, I agree, this was an unusual provision included in the 1985 agreement. No one has suggested that this was a decades-old precedent, but what we're suggesting, what's been suggested in this treaty was an exception to what has historically been the rule, but I think it is worthy of note, and you suggested as much in your comments here—I went back over and reviewed the times that this matter in the last 21 years, that people have invoked the Article 3 claim. And last time it was invoked was sometime in the 1990's. I think there have been about three cases, and of the 33 matters—and correct me if I'm wrong—among the 33 cases for a request from the United Kingdom to the United States for extradition, Article 3 claims were made in not a single one of those cases.

Now granted, it is unusual, but I don't understand what the problem has been. It seems to me you have to make a better case of changing this than the fact that it's a little different. We understood it was a little different, but in the 20 years it's been in existence, in the 33 cases brought by the U.K. in not a single one of those cases has anyone used the Article 3 claim, so what is the problem? Practically, what is the problem? That's 33 cases in the last five years, I'm corrected.

Mr. WITTEN. Well, Senator Dodd, I will address this question.

There are really two parts to your question of what is the problem here. One part is that there is a history here of years and years of litigation in which fugitives accused of crimes that would fall within Article 3 of the Supplementary Treaty sought to impugn the motives of the United Kingdom in seeking their extradition by resorting to U.S. courts admitting evidence. These cases were in litigation at the District Court level, the appellate court level, ultimately the individuals were not extradited, and after the Good Friday Agreement—

Senator DODD. You're suggesting that all of those judges were politically motivated in all of the decisions they made on those cases?

Mr. WITTEN. No, I didn't say that at all. What I'm saying is that judges were put in the unfamiliar and inappropriate place because of Article 3 of the Supplementary Treaty of having to judge issues within the United Kingdom that in every one of our other 125–130 extradition treaty relationships all reserve to the executive branch. It's not that the judges were politically motivated and taking their time, the judges were faced with a decision that is not a decision—it was a matter of inquiring into the conditions of prisons outside of the United States, it was a matter of examining how and why the British Government believed that these individuals should be returned for extradition. The Justice Department had teams of people that had to present and defend, had to present evidence and defend the United Kingdom against claims of unfairness and it's so anomalous and it's so inappropriate for one government to be. The

second part is, so that answers the question about what's the big deal, the big deal is that our courts were put in this position, and individuals were not extradited for crimes for which they should have been extradited.

But then there's the broader issue, Senator Dodd, of the U.K. Government being put in this difficult and anomalous position, and the United States, frankly, being put in an anomalous position vis-à-vis the U.K. that we don't subject all of our other extradition partners to this additional level of judicial scrutiny.

As reflected in the Deputy Attorney General's comments, and in Professor Morris's comments earlier today, the U.S. courts have a vital role to play, they filter out cases based on dual criminality, they filter out cases based on political offense and quantity of evidence and quality of evidence—

Senator DODD. Do you know how many cases we're talking about here in 21 years?

Mr. WITTEN. I know that the number is not huge.

Senator DODD. Five fugitive cases, two were extradited, three people in one case took years then reviewed their request after the Good Friday Accords—I just think you could make a better case, here, you have to make a better case for the problem. I realize it was different, there's no question about it—it was different. If there's a case to be made—

Mr. WITTEN. Let me posit an example of the problem. Let's say that this next week there were to be a horrible terrorist attack in London, akin to the July 2005 subway bombings. This is all hypothetical, fortunately, but let's say next week there's another Al Qaeda attack. You have fugitives from that attack that find their way into the United States, the British Government seeks their extradition. The British Government supplies all of the necessary documentation and satisfies the State and Justice Departments that there is a quantum of evidence relative to the standards of the treaty and applicable to U.S. law. And then the individuals are arrested, and are brought before the courts and begin litigating before our courts the motivation of the U.K. Government. "Their coming after me because I'm Muslim, because I'm of a certain ethnic character, because they don't like something about me, because conditions there are discriminatory," all of those issues would be handled by U.S. courts for the U.K., but if the same events had happened in Spain, in Madrid, for example, another treaty partner, in Paris—U.S. courts would not have to be seized of these dramatic issues of the motivation of the requesting country.

Mr. McNulty can address the practical consequences of having to litigate this, but when you think about it, it is striking and frankly inappropriate that the United Kingdom, after an Al Qaeda attack, would have to have this additional layer and burden in order to show justice to their people.

Senator DODD. I hear you, I don't want to dwell on it, I hear you. The problem is, I know, and I appreciate it—we all are doing everything we can to defeat terrorism here. But we are a nation of laws, we're a nation of laws, and we have a great ally and a great friend in Great Britain, but we need to remind ourselves in all of this that we are a nation of laws. And while people may be wrong and may have done terrible things, the idea of presenting evidence and so

forth is something we kind of cherish in this country. We better be careful as we go forward here that we don't just abandon, in a sense, I'm more than anxious to find out ways to make this work, and work well, but I get uneasy when I hear people suggest somehow that those provisions ought to be sort of set aside because of the allegations made here, and you can create a fact situation hypothetically that could certainly make all of us very uneasy, but I think we ought to be careful about creating hypotheticals which would suggest, somehow, that people's rights in this country are somehow going to be abdicated because of the nature of the alleged crime committed here. So, I think there is an argument to be made here, but be careful. And all I'm trying to raise with you here is—what is the problem with this, in effect, based on 21 years of experience? And I don't see much. Now, you can hypothetically go forward and create situations, but that's the only question I have here.

Mr. McNULTY. Senator, can I make one more response?

We talked here about the fact that on this question—so, you first make a point about the rights—we're all in agreement with that. That we all have to proceed under the rule of law, and that we're not going to affect rights of anyone. The question we're dealing with right now is whether or not after all the procedures are followed and all of the rule of law is adhered to, whether or not a person can then still get relieved from extradition based on political motivation, and how that should be done. And you've made the point—and I understand it—it's a fair question, but there has been a limited number of cases where this special, anomalous situation that the U.K. faces where their requests to us would go before—and the issue of political motivation—would go before a judge rather than the executive branch. That in that one case, that's it's only been a certain number, the judges eventually find their way through it or change it.

Senator DODD. But the political motivation works both ways, I just listened to Mr. Witten give a very strong argument, the bulk of his argument was our friends in Parliament over there are upset with us, and that the political dimension of this debate gets highlighted by the argument presented—with all due respect to Maggie Thatcher and so forth—I've got to all of a sudden adopt a treaty here and ratify it because some members of the House of Lords dislike Tony Blair and want to embarrass him to some degree. There's a political motivation behind the pressure here for us to ratify something.

Now, I'm anxious to hear what they have to say, but as one member of this body, I'm not going to ratify a treaty—with all due respect to my friends in the British Parliament—because they want me to. I've got an obligation to my constituents and my Constitution which is different then theirs. They can say all they want, but in the final analysis, I have an obligation to people here. I have an obligation to people here—the political dimension to this, you've highlighted the problem in a sense—if our argument is we ought to do this because our friends in Great Britain are demanding it of us, then that in fact corroborates the concern being raised by people that if, in fact, it ends up being a political question in the

end, the motivation, we're more apt to make a decision in favor of them, and WINPACs may point otherwise.

Mr. McNULTY. It's that obligation that you have that brings me here today. Because it's the obligation to protect the American people and to have treaty obligations in place in the United Kingdom affecting our request for extraditions from the United Kingdom back here, that is the whole reason why we're doing this. This anomalous situation involving political motivation is a piece of a larger agreement, and to treat this country the way we treat all of the others is a necessary step in order for us to enjoy the benefits of this treaty, first and foremost being return of terrorists who have attacked Americans without having to go through years of litigation in the United Kingdom. And that is what we at the Department of Justice faced before 2003. Apart from the question of what litigation goes on here, but it's the litigation we face there that changed so dramatically by not having to have a prima facie standard.

Senator DODD. That's a good point, and I hear you, and I'll move on here. But we can't go over how we're sort of tailoring our own laws because other countries are threatening us with actions they may take that may make it more difficult for us—that's a dangerous precedent to set around the world, and if it becomes well-established that that is how we write our laws based upon whether or not we're going to get cooperation elsewhere, we could find ourselves doing some things here we might regret. I hear what you're saying.

Mr. McNULTY. I fully agree with you, Senator, if I thought that was true, but we're not talking about tailoring our own laws, but bring the one particular provision in conformity with our laws that we have with every other country.

Senator DODD. Thanks.

The CHAIRMAN. Let me just add something that is not as potent as the argument about terrorists, but as I heard in our first panel, the gentleman suggesting that if he had made comments in a public forum with regard to Northern Ireland and Great Britain and these sorts of things, that he might be extradited for that. Essentially, we tried to establish in the first panel that there's a lot of protections because the case of extradition goes through Title 18, through the judicial system—therefore if a court of law indicates that he is not going to be extradited there is not any additional review by the Secretary of State that says you are going to be extradited. In other words, there's not double jeopardy. That was, I think, the concern of the gentleman who believed he might have made some comments in the course of the last 20 years about problems in Ireland and the United Kingdom as many, many others have in the United States.

So, I think Senator Dodd suggested perhaps that we may make a statement or have an addendum or something that indicates that that is clearly, the Constitution applies, so does Title 18—it's not been stripped away and that, in fact, this gentleman has an extra appeal in this case through the Secretary of State who may say, "Well, the court didn't understand, but in fact, this is a politically motivated thing, and therefore we're not going to extradite." And

I mention that simply because that is one whole raft of concerns, I believe, that come along through this debate.

Well, let me go on to question two—Professor Boyle has offered testimony the United States would violate its obligations under the International Covenant on Civil and Political Rights if it were to ratify the proposed treaty. Professor Morris has addressed this issue in her testimony in some detail earlier this morning. What is the administration's view on the potential violation of the International Covenant on Civil and Political Rights?

Mr. WITTEN. Mr. Chairman, we have reviewed these allegations, which were set forth in a letter that Professor Boyle sent to the Foreign Relations Committee in, I believe, April of 2004, where he lists a series of provisions from the International Covenant on Civil and Political rights, and asserts that entering the treaty would violate them. We've reviewed this issue, and as you noted, Professor Morris has addressed it in great technical detail, so I'll just really summarize.

The United States would not violate its obligations under the International Covenant on Civil and Political rights if it were to ratify the proposed Extradition Treaty with the United Kingdom. We agree with the testimony you've already heard that the proposed treaty and U.S. extradition procedures, as you've noted, Mr. Chairman, in Title 18 are entirely consistent with the protections enshrined in the International Covenant.

Second, we note that some critics have suggested—without basis or explanation—that the U.K. is in violation of its obligations. We do not see merit in those claims, but even if there were a claim that the U.K. were somehow in violation of its ICCPR duties, U.S. obligations under this covenant would still not be implicated for two reasons.

First, as reflected in the negotiating history of the Covenant, and consistent positions taken by the United States in all of the years since, our obligations relate to conduct by the U.S. solely in its territory.

Second, our obligations under the covenant certainly do not apply to the conduct of other sovereign governments within their own territory. So I guess, to summarize, Mr. Chairman, we of course take any allegation of a treaty violation very seriously. We've reviewed it, we've read Professor Boyle's letter carefully, we simply don't see merit to it and Professor Morris went into it at great detail, and I understand her testimony is part of the record.

The CHAIRMAN. Senator Dodd, do you have any comment on this issue?

Senator DODD. Well, no, I think it is a good point—I wonder if you might just go on to a related matter, because it gets to this question—kind of two issues. One has to do with the double jeopardy provision, I presume you're both aware of this thing that recently the U.K. enacted a law, a Criminal Justice Act 2003, provides in part for the re-trial in certain cases—even though there's been an acquittal—I wonder how that would comport with U.S. standards of due process, and whether or not that raises the questions about the duality issue where you would have had a case, I presume, and I'm trying to imagine a fact situation where they would have tried a case that, for whatever reason, the matter

would have been acquitted because new evidence emerges, they retry the case, and therefore you could end up with a duality—does that pose any issues that you think ought to raise concerns with members of this committee?

Mr. WITTEN. Mr. Chairman, we are aware of the law, I'm not an expert in U.K. domestic law, so I don't know how that provision will actually be construed, I know that in some systems, jeopardy attaches at different times in the process, so I don't know in the hypothetical case how it could come up. In any case, we would evaluate any extradition request to be sure that they meet the requirements of the treaty.

Senator DODD. Let me—on a related matter, and again, this gets very technical and esoteric to some degree, but they are important questions to people—the Rule of Specialty, which is another matter of concern. And for those—and believe me, until I got into this I wasn't sure what the Rule of Specialty is aside from what I have in front of me—but apparently it is a time-honored tradition of extradition practice designed to ensure that a fugitive surrendered for one event 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, allow for waivers of the rule if the Executive requested State consents. I understand from a prior answer this is rarely done since 1991, the Department of State has received thirty requests for waivers, and of these 17 requests were granted, five were denied and eight are pending. I wonder if you might share with us a little more what sort of cases are these where the rule is waived and will the request of waiver usually related to the same offense or act in some way, can you comment on this?

Mr. WITTEN. I can, Senator. First, in a general sense, you're accurate—this is a typical provision in modern treaties. The older U.S. treaties dating back to the first part of the century, or even the 1972 U.K. treaty has a Rule of Specialty provision, but it doesn't explicitly state that it can be waived by the requested state. This treaty provision in the 2003 treaty brings the U.K. standard the same as a number of other countries, and I would just note, Argentina and Austria are some recent treaties that the committee has approved, that it has the waiver clause, but more generally, the treaties in the past ten or fifteen years have had that in terms of how it works, the requesting state—after an extradition request has been made and acted on, then gets custody of the fugitive through the extradition process. It may be the case that other conduct came to light after the extradition had taken place and there could be—in the U.S. there's a District Court case called *Berenger v. Vance* where the issue was litigated and there are certain standards to U.S. law that set the parameters to when the State Department will consent to a request to a waiver of the Rule of Specialty. Typically, I remember the banner requirement being that at the time the initial request was made, the government did not have in its possession information, the ability to request extradition at the time, and it had—I think it's phrased as “just cause” for failing to make the request. For example, if they were in the middle of the investigation of the other conduct, and then the person is extradited, and then the state that then has custody of the fugitive following the extradition seeks a waiver of the Rule of Specialty, it

will present evidence sufficient to convince the requested state that it will, that extradition would have met the requirements of the treaty had it been made. And the purpose of the protection, as you may know, is to be sure that Country A doesn't ask Country B for extradition for one crime, but secretly they have indictments for 10 others, and they didn't want to mention it because there would be a concern there would be a problem with extradition for the others.

The CHAIRMAN. Thank you very much. Now, let me just ask the general question—where I turn to current events to interview and to comment on any other issues discussed with the first panel, I think we've touched upon several of those, but if you have any additional comment, this would be an appropriate time to make that comment.

Senator DODD. I have a couple of specific questions maybe at the appropriate time, Mr. Chairman. I'd just like to raise the issue of the dual criminality issue—you heard us discuss awhile ago and I raised a fact situation and Ms. Morris responded to me by saying there would more, but better, rather than picking out one statute in one place I used the District of Columbia possession of a firearm law as an example of where duality of criminality might raise some concerns, when you're looking at a State or in this case the District of Columbia having a provision not typical in the majority of jurisdictions in the country, but would I presume, qualify for dual criminality for purposes of extradition. And it seems to me this needs some clarity because if it's just one jurisdiction, it could be a city ordinance of the same and it might qualify. As for dual criminality, I don't know if we were specific about state and Federal—I presume Federal—to what extent do you have to have a pattern, and to what extent this contributes to forum shopping in a sense by the Justice Department looking to find some place that would qualify for duality in terms of qualifying for political motivations, let's say here, and that worries me here a little bit. Federal law, I have no problem with that, that seems to be the natural one where the United Kingdom is seeking extradition from the United States—duality, I presume, would apply to the national laws of the United Kingdom alongside the national laws of the United States. If it comes down to some local jurisdiction's criminal statute—and I guess you would have to be a state to have a criminal statute, I don't know if a city can have a criminal statute or criminal ordinance—you understand the hypothetical I'm engaging in and suggesting to you here, and what is the answer to it? We obviously know the issue—how does it work?

Mr. McNULTY. We both can respond on this. First I want to say that initially, of course, the Federal law is going to govern, and Federal law is broad in many ways, and so it's going to cover, as you know that even Federal laws applied to lands like Indian reservations, so we have several laws on the books that cover murder and kidnapping and other violent crimes, so that is the first requirement.

Secondly, when the hearing occurs, the action of the court takes place, it occurs in the jurisdiction where the person is found so that the government can not—as you have said, I think earlier in the other panel, some concerns about choosing a forum that might be

favorable to the dual criminality test—and that is not going to be possible, it's going to be based, again, on where that individual is.

Of course the defendant will have—or the person being requested—will have the right to raise any appropriate defense in the course of the extradition process, and could challenge this question on the dual criminality issue, which is one of the key things the court must look at for purposes of making the determination of extradition.

Mr. WITTEN. Senator Dodd, I think the question came up in an unusual way, and I'll try to address that, but let me talk for just a minute about dual criminality and the way it works in practice, in my experience, with the extradition practice of the United States. Often the issue is not at all hard—if it is a list treaty, you look to the list to see if the conduct is criminalized and subject to the list. The U.K., as you know, the current treaty does have a list of offenses, and it has an additional provision at the end which indicates that extradition is also possible for conduct that is a felony, or punishable by more than a year in prison. The old treaty, before the 1970's, our extradition practice just listed offenses, so the test between the governments was the list.

This treaty with the U.K. is a dual criminality, it's what we call a "pure dual criminality" treaty so we don't have to go through the list of offenses and worry about, is it criminalized here or there—you have a different test, and whether it's criminalized in both systems, and I'll try to address that, although as I say, in my twelve years of dealing with this issue in the U.S. extradition program, the issues are generally pretty straightforward. Our Federal law is so comprehensive that we rarely have to look at the laws of individual states to see if conduct is dually criminal—most of our extraditions are for crimes of violence that are criminalized at the Federal level. Issues have come up through the years with issues like the word "kidnapping" doesn't include parental kidnapping and so forth. But by and large, it's a straightforward Federal law, typically that would address the crimes for which extradition is sought, or extradition is requested.

The cases that, I think, the first panel got into a little bit involves the rare case where a foreign government has a crime on its books, there is no Federal parallel to that crime, to the conduct—it is not necessarily the term of years, but what is the conduct for which they're seeking extradition. And then there's no U.S. Federal law, someone is held for extradition, and then litigates—there's no Federal law. And then there are some Federal court cases and perhaps we should prepare a paragraph or two for the record to address this question, because I don't know that I'll get it all right but I think there's a multitude test where the jurisdiction where the fugitive is located would look to a majority of U.S. states, or possibly the state where the fugitive was arrested to see if there's no federal law that matches up with the foreign jurisdiction's law—what would happen in that court? And let me suggest, if it's all right with you and the Chairman, that maybe we'll do a paragraph on this rare case where there's no Federal law, and that extradition is sought from the United States and you have to look at state laws.

Senator DODD. It needs some clarity, I think. And we're setting some precedents here, and I presume we're going to be applying this to other treaties that may come along with extradition, and I think clarity on this or you're going to run into a buzz saw, I can tell you, just on the issue of the possession of firearms, I cited one organization that I suspect may have some real concerns about a provision like that and whether it applies, but that situation I'm talking about, where they arrest someone in Texas for extradition. There's a law in Oklahoma on the possession of explosives that would comply with the duality of criminality. In the fact situation—could you take the Oklahoma law and apply it to the standard of dual criminality even though the person wasn't from Oklahoma, wasn't in Oklahoma when they were arrested, but the statute exists in Oklahoma, does that meet the standard?

Mr. WITTEN. I want to clarify one point, and then I would like to submit something for the record.

Senator DODD. We appreciate that.

The CHAIRMAN. We would be pleased to have that for the record.

Mr. WITTEN. Why don't we prepare something on this rare issue of where extradition is sought and you have to look at the non-Federal information.

Mr. WITTEN. I just want to clarify one point—we are setting a precedent within the U.S.-U.K. context, this will be new for that. But I just want to return to the theme that this treaty with the United Kingdom is substantially the same as all of our modern treaties—it has a unique history because of the 1985 Supplementary Treaty, but what we're doing here is nothing more than attempting to bring the U.K. relationship in line with other modern treaties.

Senator DODD. I appreciate that, and I would appreciate having something submitted on it and you understand I'm not trying to create totally bizarre—but you can understand how this might happen under a different year's—someone looking ahead and forum-shopping.

Mr. WITTEN. We will submit something on this.

Senator DODD. Let me if I just can, just quickly raise two other questions, if I can. And one has to do with the Northern Ireland justice system, and it's of course very similar to that of England and Wales—most lesser offenses are prosecuted by the police in Northern Ireland, serious crimes are prosecuted by the Director of Public Prosecution, jury trials are normal practice except for offenses involving terrorism or allegations of terrorism under the Northern Ireland Emergency Provisions Act of 1996 and deliberating offenses covered by Schedule One of that Act, judges sit alone without juries in the so-called Diplock courts, and I'm just curious—do provisions of the Northern Ireland Act of 1996 still apply with respect to individuals charged with offenses under Schedule One of that Act being denied jury trials? Number two, have any human rights organizations criticized this practice? I presume some have. And was the issue of the Diplock courts a subject of U.S. court deliberations in considering the U.K. extradition requests for Kevin Art, Paul Brennan, Clarence Kirby—which dragged on for years until the U.K. withdrew its extradition request in the year 2000. And under the proposed treaty, would it be appropriate for

U.S. courts to look at the issue of the Diplock courts in determining whether to approve extradition, or would that be a goal for the Secretary of State—I guess in this case it would be under, it would be proper—there are about three or four questions there.

Mr. WITTEN. Senator Dodd, of the questions you asked, actually it may be prudent for me to work with the Justice Department and submit information. On the last of your questions, would it be appropriate for the U.S. to extradite into a particular court system? I think the premise there is sort of the same as some of the other discussions that we've had in that the question of conditions in a certain jurisdiction or the motivation of those seeking, or what will happen after extradition, and in the view of the administration should be handled by the Secretary of State and by the executive branch as opposed to the courts. So, the answer is, would it be appropriate to review those issues? I think we need a little more—we look into the first two or three questions and get you a more structured answer about the generic issue of conditions and motivations and things like that, we would view as something that could be considered, but not in the way it is now available to be considered in U.S. Courts.

Senator DODD. Take a look at that one, too, and I'll give you a chance to maybe give me a more concise and direct answer on that one, too.

Mr. WITTEN. So, you'll be rephrasing?

Senator DODD. I will give you the questions, I'll submit the questions to you. I realize that—I don't expect you to, I'd like you to go back and review, and make sure the policy—I'm very interested in this, because it is a process, it is a procedure and I would presume if we weren't talking about the United Kingdom where there's a certain high degree of respect for processes and procedure, we're talking about some other place, how people would be tried, under what circumstances would be a very important matter.

Mr. WITTEN. We will answer any questions.

Senator DODD. So, I'd be interested in that.

The last issue I want to raise with you is the statute of limitations as a bar to extradition under the current treaty—of course extradition should not be granted or barred by the statute of limitations according to the laws requesting all requested parties, and that's in 1985—in other words, statute of limitations of other courts would apply, the proposed treaty Article 6 provides the decision to grant extradition “shall be made without regard to any statute of limitations in other states.” And I recognize a lot of treaties have included this provision, again this has been sort of more of the norm and yet 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 such countries as France, Hungary, Poland and South Africa, have included some kind of provisions on statute of limitations in both states makes it more difficult, obviously, for those with concerns about the proposed treaty to accept the removal of a role for the United States' judiciary to make a determination about political motivations, in a sense. I'm just curious why the statute of limitations was excluded altogether, again going back, because that's where most of them are, that is the precedent, and I wonder if you might talk about the statute of limitations in

the United Kingdom, particularly on the Northern Ireland law and what it is, because that still would apply, obviously, whatever the statute of limitations would be in the requesting country would apply. What is it in the United Kingdom? I don't know what it is in Northern Ireland, and what protections against politically motivated extradition requests under the proposed treaty would insist in the proposed treaty?

Mr. McNULTY. Let me take on at least two-thirds of that question.

First of all, with regard to the statute of limitations, it's not at all eliminated by this treaty with regard to its being a defense, what the treaty seeks to do, as you say, as with the case of other treaties is to put that question as to whether or not the statute of limitations is a factor in going forward in the appropriate tribunal. So, it says that the decision by the requesting, or the requested, excuse me, the requested country, will not turn on whether or not the requesting country's statute has a statute of limitations issue, or there is a question of a statute of limitations, but instead, it will be decided based upon the dual criminality standard we've talked about today.

Once the individual is returned, and that's the appropriate place for the statute of limitation issue to be raised, and it puts that in the appropriate tribunal, the appropriate court, where the expertise on whether or not there is a statute of limitations issue there will be resolved and litigated.

So, that's the thinking behind how the statute of limitations issue will be addressed, and making the court that is best equipped to interpret the issue the one that will consider it.

As to—I can't speak to the particular issues involving Northern Ireland, but I will be able to provide that information to you as a part of the information that is coming forward—the last point is—

Senator DODD. What is it in the United Kingdom?

Mr. McNULTY. It would differ with every different offense, like our statute of limitations work.

Senator DODD. Do they have, are there statutes of limitations under British law?

Mr. McNULTY. I'm not positive about that. I would have to get back to you on that.

Senator DODD. There's a woman behind you, I think, who has that.

Mr. McNULTY. We're going to check it before we say anything.

Senator DODD. Can you tell me why in the other cases of Poland and France and Hungary and so forth why we retained provisions dealing with the statute of limitations in those particular treaties, and here is, this is apparently the case again. I don't claim personal knowledge of those treaties, I'm being told that language exists in those treaties, and they're fairly recent. Once we've ratified, why we've retained it there and not here? Using precedent and so forth as our argument, we're taking it out of here, why do we keep it there?

Mr. WITTEN. Our preferred provision on statute of limitations is the one in the U.K. treaty where there is not an adjudication—as Mr. McNulty mentioned—there's not an adjudication in the courts

of the requested state on the statute of limitations in the requesting state when it may have been tolled, how it would work in practice, when does it start, when does it end and so forth? Simply because that is not an issue in the expertise of the requested state. I have several examples, there are examples in all different directions, Senator, you're exactly right, and that's a function because each of these treaties are negotiated individually. And we come to the table—I've come to the table many times in extradition bilateral negotiations with a preferred provision, sometimes other countries have domestic laws that prevent them from agreeing with us, but from our perspective the rest of the treaty is good, and we're willing to live with some adjudication of statute of limitations. In this case, in the other examples—Lithuania, Sri Lanka, Belize are three that we just found this morning in anticipation of a possible question—so our preferred provision, as explained by Justice, is clear and it fits that and it is appropriate in this relationship. Thank you.

Senator DODD. I will submit for the record here, we have Hungary which was approved in the 104th Congress, France in the 105th Congress, Poland in the 105th, India in the 105th, Austria in the 105th, South Korea in the 106th Congress, South Africa in the 106th—all have statute of limitations bars on extradition.

Mr. WITTEN. Senator Dodd, can I just add one brief comment, and I know that we've gone on a long time. I just want to make clear that in a treaty like the U.K. and the several others that I've mentioned where this treaty doesn't have anything on statute of limitations, that of course, doesn't mean that the individual can't raise statute of limitations claims when they are returned, if they are returned to the country seeking extradition.

Senator DODD. This goes right to the heart when I asked the question, and why I'm dwelling on this. When I asked the first panel "What are you really worried about here?" And what they're really worried about is that this treaty is going to be used to reach back despite the efforts that's been made after the Good Friday Accords to move beyond that. You might say, listen, that's a totally legitimate concern, you've read the letter from the home Secretary and others on this point—she's listed out the various things and I hear you say that.

But I think it's fair to also take into consideration people who've been through an experience where it's very rough on them and they want to know that this is prospective, we're not looking back, and so the statute of limitations issue can really reassure constituency here that are very worried about what may happen. Even though all of us are saying—this is not going to happen, don't worry about it, it's not going to be the case—we ratify this and find out it happens. And then if we're taking statute of limitations provisions and other matters, how much of a problem is it really here, and I would like you to address that at some point, because it's an issue, I think colleagues are going to raise. Again, if you sat here and told me, "Look, we don't want to apply this anymore, anywhere at all," but if you've got seven or eight treaties that have been ratified with it here, we need to take that into consideration. If it does nothing else but allay the fears that this is not going to be a reaching back to

the 70's and 80's, to twenty-five, thirty years ago. That's all of the concern.

Mr. McNULTY. Two quick points, Senator and Mr. Chairman. First of all, the reason why, as a former Federal prosecutor on the front line as opposed to being Deputy Attorney General, we have issues where this issue of statute of limitations gets a little complicated even when everybody in the jurisdiction thinks they know the law. And you'll charge someone, and they'll come forward and say, "I've got a statute of limitations defense," and the government will have a different way of reading the application of that, and it will be litigated, the court will decide.

So, if the question is going to be resolved, it's best to have it resolved by the court that has this expertise, rather than trying to decipher it from the requested country as to what the requesting country's statute of limitations are. And in the case of the U.K., we talked about how this is dealt with in regard to other countries. We have seen, in the recent years in terms of the terrorist cases and some significant white collar crime cases that there's a lot of activity here in terms of extradition requests.

And so if there's ever a place where we would want to be able to not create more confusion, delay and litigation over statute of limitations arguments, it's in the relationship with a country where we have seen criminals flee or the other jurisdiction that we're trying to get them back from for trial.

So, I think there's an argument for it's being—and this one in particular.

Senator DODD. That's a good case for a prosecutor to make—I'm a Senator, I have to vote on ratification of treaties, I have to listen to what you're saying, but also have to listen to what is on the other side of this. I appreciate your point.

Mr. McNULTY. And finally, just on this—

Senator DODD. Just tell me what's going on here, I don't claim to know, but it is a mixed bag, and if we kind of lay the concerns—as I mentioned earlier, and it doesn't complicate your life too much—then I'd be interested in doing something about it.

Mr. McNULTY. The last point I would be able to make is they would be able to make that statute of limitations argument when they're in the requesting country.

The CHAIRMAN. I would concur with Senator Dodd—I think a couple of points, just as a layperson looking at this—when is the reaching back, a history not of terrorists in the current era, but of Irish and British conflict, and difficulties that have come over here. So as a practical matter, as a political matter, this sort of thing that comes before Senators that really has to be met, and we're trying to do that in a common sense way. So I think Senator Dodd and I—we don't want a reaching back for 20 years of some such situation with somebody who is a person in the United States now feels they made some statement with regard to Irish-American affairs or Irish-British affairs a long time ago, and somehow he goes back for trial.

The other point is that the Constitution still applies, and the relevant law, Title 18, still applies. That this is not now an arbitrary affair of the Secretary of State—this making political, discretionary arguments to humor either Great Britain or somebody else. And

these are two practical items that I hope we can address. And where Senator Dodd's questions to you on the technical matters as well as these broad concerns I'm talking about in terms on some sort of a statement of how we feel about this, maybe we can do that. But I think the hearing has been useful in bringing to the fore if we need to allay concerns in these areas that is something to do about the history of Great Britain and Ireland and the United States and how we get to that point.

But now let me just finally say, that now the recent history—and I don't want to dwell on this—is that a lot of attention, as you pointed out in the British press, generated by the high-profile extradition of three British bankers in the Enron case, and the House of Lords and the House of Commons debated that business. And they have brought to the fore some issues.

Now, let me just say that among the issues—it's been alleged, is it true that the conduct alleged in the case, that is the Enron case—took place solely in the United Kingdom? And, if so, how is the issue handled by the United Kingdom in this case? Explain how the proposed treaty would address offenses over which a party exerts extra-territorial jurisdiction—would such offenses be extraditable and under what circumstances, and how does dual criminality apply in such cases?

Finally, the British case of the bankers has brought forward quite a debate about whether the proposed treaty is unbalanced or asymmetrical with regard to standards of evidence applicable to extradition cases in the United States and the United Kingdom. Can you talk about the evidentiary standards in addition to the question of what happened in Great Britain with regard to the Enron people, and why are they being extradited to the United States?

Mr. McNULTY. Yes, Mr. Chairman. With regard to that particular case, I'm going to have to limit what I have to say just because it is an ongoing matter and don't want to get into the specific facts of what we call the Nat West case. I can, however, tell you that this was litigated extensively in the United Kingdom courts, and they ultimately found that there was a sufficient nexus to U.S., I mean to the United States and conduct committed in the United States, and that's why the United Kingdom did extradite those individuals to the U.S. And that they found that they would have jurisdiction to prosecute the alleged crimes under similar circumstances. So it satisfied the tests that exist pursuant to the 2003 treaty that has been ratified in the United Kingdom. And they specifically had to litigate and deal with the question of the jurisdictional issue in the United States. So we believe that extradition was proper and that is now proceeding forward here.

On the question you raise about the extraterritorial jurisdiction. This provides for extraterritorial jurisdiction and it works in such a way that the requested country would have to have jurisdiction over the matter according to its laws, just as the requesting country would have jurisdiction over the matter.

So, for example, suppose an individual was kidnapped in a third country, and U.S. law covers that conduct, and there is a basis for jurisdiction over the kidnapping, and bringing those individuals back to the United States for prosecution. So long as the United Kingdom which would allow for the prosecution of an individual

who kidnapped a British citizen in the third country, and to bring that person back to the U.K. for prosecution, then it would meet the standard in this treaty with regard to extraterritorial jurisdiction.

As a general matter, the United States exercises, I mean, excuse me, the United Kingdom exercises a somewhat less expansive extraterritorial jurisdiction than the United States and we're not aware of any particular offenses for which there is extraterritorial application under the law of the United Kingdom, but not under the United States law.

And I think your third question was in the are of the larger issue of balance or asymmetrical—the issue that is, in some ways, being addressed right now in the United Kingdom. I defer to the State Department on that issue.

Mr. WITTEN. Thank you, Mr. Chairman.

I think the best way to think about the claims of imbalance are to take the chronology of prior to the 2003 U.K. law there was an imbalance in favor of the United Kingdom. They had to show probable cause for purposes of arrest and extradition, we had to show the higher prima facie standard, and Mr. McNulty has outlined in the case, I think, of a computer crime case. What that meant in practice for him as a prosecutor—much more substantial evidence, much more difficult to make the case.

In 2003 we signed this treaty—the British Government in that year effective, I think, the first part of 2004 gave us a favored status in that, even though the treaty had not yet entered into force on this aspect of the treaty—obviously not the whole treaty, but this aspect of the treaty we had, we were able to benefit from a standard that is substantially similar to the probable cause. And the recent debate in the United Kingdom on imbalance, as I understand it, and I haven't seen all of the transcripts of what has been said by particular parliamentarians, but I believe the concern is that the British Government—after the 2003 law, was enacted and made a choice, they didn't have to—under their law—give us this preferred status to have the lower evidentiary standard from prima facie, but they chose to and the government defended it on the grounds that the new treaty could be enforced and there would be parity under the treaty. So the claims, I think a lot of the complaints in the U.K. aren't so much about the substance of the treaty, but the fact that we haven't brought the treaty into force, and they chose as a matter of discretion, to give us the benefit.

The CHAIRMAN. Thank you very much, Senator Dodd, do you have any further comment?

Senator DODD. I would just thank our witnesses and thank the earlier panel. I'm sorry Professor Boyle could not make it in, I guess there was a flight problem, but I thought the Chairman handled it well by raising the issues raised in his testimony with the witnesses. I might suggest, Mr. Chairman, this has taken a long time here, and I'm very grateful to you for doing this. I know there's some interest on the panel, we might leave the record open for some additional questions for a few days so that we can have a complete, the fullness of the record. I know we're going to give some response to issues that I've raised, which will be helpful as well, so if we could at least avoid, for a few days, moving on the

committee until we've had a chance to respond to that, I think we'd all have a chance to respond to that, I think we would all be appreciative of that.

The CHAIRMAN. Let us keep the record open for the coming week, that is through business on next Friday, for additional questions and answers, to try to perfect and complete our record. Yes, Mr. Witten?

Mr. WITTEN. Senator, Mr. Chairman, I just wanted to make a very brief comment. In the earlier panel there was some discussion of the word "self-executing" and Title 18 and how it all fit together. I think in the end it became a little clearer, it's complicated, the relationship with the treaty and Title 18, but let me just clarify that the Title 18 provisions on extradition are very generally worded. They have a series of provisions and identify the role of the courts. What our treaties do is fill in, by explaining what crimes are covered, and procedures and what documents are to be submitted and so forth. And the word "self-executing" came in—it's a term that has various meanings, but because of the way our extradition act is in Title 18, we do view these treaties as self-executing—in other words, no additional act by the two houses of Congress would have to take place for this as in any other treaty. It in itself is the overlay that would go on the Title 18 section 3181 and subsequent provisions.

The CHAIRMAN. That's a good point. And my point in raising this, and I think Senator Dodd's, is that we wanted to educate ourselves and maybe our colleagues and the public as to how our extradition policy works. Many of us, prior to getting into these treaties, were not aware of Title 18 and all that that provides, and we come to this committee with a treaty, obviously there's a context of American law, and our constitution that is important, and we've been sort of filling in the blanks of our own understanding, and hopefully helping others to do that, too.

But your point is well-taken and we appreciate very much your testimony—both of you, and so saying, the hearing is adjourned.

[Whereupon, at 1:12 p.m. the hearing was adjourned]

APPENDIXES

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

QUESTIONS FOR THE RECORD SUBMITTED TO DEPUTY ATTORNEY GENERAL PAUL J. McNULTY AND DEPUTY LEGAL ADVISER SAMUEL WITTEN BY CHAIRMAN LUGAR

Question. Why is the administration urging Senate approval of the U.S.-U.K. 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 passenger aircraft en route to the U.S. 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 U.K. 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 witnesses 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, the administration urges Senate approval of the treaty because of its sub-

stantive benefits to the United States, and the administration urges the Senate to act now because the situation in the United Kingdom, and the world, counsel against further delay.

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 were 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.

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 "cer-

tifies" 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.

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.

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.-U.K. 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.

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 U.K. extradition law requires, with respect to extraterritorial offenses, that in addition to a finding of dual criminality there also be a finding that U.K. 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 U.K. criminal law to extraterritorial juris-

diction 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 BIDEN

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 U.K. 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 U.K. sentence.

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.* at 1197.

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.

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 U.K. charges and/or the completion of a U.K. sentence.

b. There are approximately 6 pending U.K. extradition requests to the United States. (This does not include cases where the U.K. has made a request but the fugitive could not be located.) Of the 6 cases, 3 are not yet the subject of judicial proceedings in the United States and 3 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

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.

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 [sic] 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. a. All of our modern extradition treaties contain provisions comparable to Article 5(1) of the proposed U.S.-U.K. 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 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 U.K. (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 U.K. only one time, in a case still pending in U.K. 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.

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 “muddled by referencing standards of proof at two stages in a domestic criminal case—arrest and committal for trial [sic]—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 DODD

Article 2(4)—How is it Consistent with Dual Criminality?

Question. 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.

Article 3 of the Supplementary Treaty

Question. 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 U.K. extradition relationship, the U.S. Senate developed what became Article 3(a) of the 1972 U.S.-U.K. 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 the 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 U.K. 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 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.

Article 4—Exceptions to the Political Offense Exception

Question. 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. 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 from 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 was dismissed when the U.K. withdrew its extradition requests and it 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 explosive offense is not to be considered a "political" offense for which extradition is barred.

Question. 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 U.K. that, under Article 3(1)(a) of the Firearms Northern Ireland Order 2004, it is an offense 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, there is a minimum sentence of 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.

State of Justice System in Northern Ireland

Question. 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 U.S. court deliberations in considering the U.K. extradition requests for Kevin Artt, Paul Brennan and Terence Kirby which dragged on for years until the U.K. withdrew its extradition requests in 2000?

Under the proposed treaty would it be appropriate for the U.S. 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 U.K.; 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 courts 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 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, published 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).¹

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 is not a bar to extradition from the United States. See *Neely v. Henkel*, 180 U.S.C. 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.

¹ A copy of the report has been maintained in the committee's permanent files.

Removal of the Statute of Limitations as a Bar to Extradition

Question. The current U.S.-U.K. 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.-U.K. 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.-U.K. treaty.

b. We are advised that statutory limitations exist under U.K. 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 U.K. law that could apply in a case where there was an unjustifiable delay in prosecuting an individual. First, the U.K. Government has advised us that the right to a fair trial under Article 6 of the European Convention on Human Rights (to which the U.K. is a party and the provisions of which are legally binding on the U.K.) entitles a person charged to a fair and public trial within a reasonable time, and 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 U.K. 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 applies 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.

Double Jeopardy

Question. 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.

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 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 U.K. (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.

Waiver of Rule of Specialty

Question. 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.

Extradition Treaty with the European Union

Question. 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 [sic] 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.-U.K. bilateral extradition treaty currently under consideration by the Senate.

b. A copy of the 2004 U.S.-U.K. 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.-U.K. 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 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.)

INSTRUMENT AS CONTEMPLATED BY ARTICLE 3(2) OF THE AGREEMENT ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE EUROPEAN UNION SIGNED 25 JUNE 2003, AS TO THE APPLICATION OF THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND SIGNED 31 MARCH 2003

1. As contemplated by Article 3(2) of the Agreement on Extradition between the United States of America and the European Union signed 25 June 2003 (hereafter "the Extradition Agreement"), the Governments of the United States of America and the United Kingdom of Great Britain and Northern Ireland acknowledge that, in accordance with the provisions of this Instrument, the Extradition Agreement is applied in relation to the bilateral Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland signed 31 March 2003 (hereafter "the 2003 Extradition Treaty") under the following terms:

(a) Article 5(1) of the Extradition Agreement shall be applied as set forth in Article 8(1) and 12(4) of the Annex to this Instrument to provide for the mode of transmission of the extradition request and supporting documents;

(b) Article 5(2) of the Extradition Agreement shall be applied as set forth in Article 9 of the Annex to this Instrument to provide for the requirements concerning certification, authentication or legalization of the extradition request and supporting documents;

(c) Article 7(1) of the Extradition Agreement shall be applied as set forth in Article 12(4) of the Annex to this Instrument to provide for an alternative method for transmission of the request for extradition and supporting documents following provisional arrest;

(d) Article 8(2) of the Extradition Agreement shall be applied as set forth in Article 10(2) of the Annex to this Instrument to provide for the channel to be used for submitting supplementary information;

(e) Article 10 of the Extradition Agreement shall be applied as set forth in Article 15 of the Annex to this Instrument to provide for the decision on requests made by several States for the extradition or surrender of the same person; and

(f) Article 14 of the Extradition Agreement shall be applied as set forth in Article S bis of the Annex to this Instrument to provide for consultations where the Requesting State contemplates the submission of particularly sensitive information in support of a request for extradition.

2. The Annex reflects the integrated text of the operative provisions of the 2003 Extradition Treaty and the Extradition Agreement that shall apply upon entry into force of this Instrument.

3. (a) This Instrument shall apply to the United States of America and to Great Britain and Northern Ireland. Subject to subparagraph (b), the application of the 2003 Extradition Treaty to the Channel Islands, the Isle of Man, and any other territory of the United Kingdom to which the 2003 Extradition Treaty may apply in accordance with its terms, shall remain unaffected by the Extradition Agreement and this Instrument.

(b) This Instrument shall not apply to any territory for whose international relations the United Kingdom is responsible unless the United States of America and the European Union, by exchange of diplomatic notes duly confirmed by the United Kingdom in accordance with Article 20(1) (b) of the Extradition Agreement, agree to extend its application thereto. The exchange of notes shall specify the authority in the territory responsible for the measure set forth in Article 9 of the Annex and the channels between the United States of America and the territory for transmissions pertaining to the extradition process, in lieu of those designated in the Annex. Such application may be terminated by either the United States of America or the European Union by giving six months' written notice to the other through the diplomatic channel, where duly confirmed between the United States of America and the United Kingdom in accordance with Article 20(2) of the Extradition Agreement.

4. In accordance with Article 16 of the Extradition Agreement, this Instrument shall apply to offenses committed before as well as after it enters into force.

5. This Instrument shall not apply to requests for extradition made prior to its entry into force.

6. (a) This Instrument shall be subject to the completion by the United States of America and the United Kingdom of Great Britain and Northern Ireland of their respective applicable internal procedures for entry into force. The Governments of the United States of America and the United Kingdom of Great Britain and Northern Ireland shall thereupon exchange instruments indicating that such measures have been completed. This Instrument shall enter into force on the date of entry into force of the Extradition Agreement.

(b) In the event of termination of the Extradition Agreement, this Instrument shall be terminated and the 2003 Extradition Treaty shall be applied. The Governments of the United States of America and the United Kingdom of Great Britain and Northern Ireland nevertheless may agree to continue to apply some or all of the provisions of this Instruments

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Instrument.

DONE at London, in duplicate, this 16th day of December 2004.

FOR THE GOVERNMENT OF UNITED STATES OF AMERICA:
HON. JOHN ASHCROFT, ATTORNEY GENERAL

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND:
RT. HON. DAVID BLUNKET, MP, SECRETARY OF STATE FOR THE HOME DEPARTMENT

ANNEX

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

ARTICLE 1

OBLIGATION TO EXTRADITE

The Parties agree to extradite to each other, pursuant to the provisions of this treaty, persons sought by the authorities in the Requesting State for trial or punishment for extraditable offenses.

ARTICLE 2

EXTRADITABLE OFFENSES

1. An offense shall be an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty.

2. An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any offense described in paragraph 1 of this Article.

3. For the purposes of this Article, an offense shall be an extraditable offense:

(a) whether or not the laws in the Requesting and Requested States place the offense within the same category of offenses or describe the offense by the same terminology; or

(b) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being jurisdictional only.

4. If the offense has been committed outside the territory of the Requesting State, extradition shall be granted in accordance with the provisions of the treaty if the laws in the Requested State provide for the punishment of such conduct committed outside its territory in similar circumstances. If the laws in the Requested State do not provide for the punishment of such conduct committed outside of its territory in similar circumstances, the executive authority of the Requested State, in its discretion, may grant extradition provided that all other requirements of this treaty are met.

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

ARTICLE 3

NATIONALITY

Extradition shall not be refused based on the nationality of the person sought.

1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

2. For the purposes of this treaty, the following offenses shall not be considered political offenses:

(a) an offense for which both Parties have the obligation pursuant to a multi-lateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution;

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

(c) murder, manslaughter, malicious wounding, or inflicting grievous bodily harm;

(d) an offense involving kidnapping, abduction, or any form of unlawful detention, including the taking of a hostage;

(e) placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage;

(f) possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage;

(g) an attempt or a conspiracy to commit; participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any of the foregoing offenses.

3. Notwithstanding the terms of paragraph 2 of this Article, extradition shall not be granted if the competent authority of the Requested State determines that the request was politically motivated. In the United States, the executive branch is the competent authority for the purposes of this Article.

4. The competent authority of the Requested State may refuse extradition for offenses under military law that are not offenses under ordinary criminal law. In the

United States, the executive branch is the competent authority for the purposes of this Article.

ARTICLE 5

PRIOR PROSECUTION

1. Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.

2. The Requested State may 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.

3. Extradition shall not be precluded by the fact that the competent authorities of the Requested State:

- (a) have decided not to prosecute the person sought for the acts for which extradition is requested;
- (b) have decided to discontinue any criminal proceedings which have been instituted against the person sought for those acts; or
- (c) are still investigating the person sought for the same acts for which extradition is sought.

ARTICLE 6

STATUTE OF LIMITATIONS

The decision by the Requested State whether to grant the request for extradition shall be made without regard to any statute of limitations in either State.

ARTICLE 7

CAPITAL PUNISHMENT

When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and, is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed, or, if imposed, will not be carried out.

ARTICLE 8

EXTRADITION PROCEDURES AND REQUIRED DOCUMENTS

1. All requests for extradition shall be submitted through the diplomatic channel.
2. All requests for extradition shall be supported by:
 - (a) as accurate a description as possible of the person sought, together with any other information that would help to establish identity and probable location;
 - (b) a statement of the facts of the offense(s);
 - (c) the relevant text of the law(s) describing the essential elements of the offense for which extradition is requested;
 - (d) the relevant text of the law(s) prescribing punishment for the offense for which extradition is requested; and
 - (e) documents, statements, or other types of information specified in paragraphs 3 or 4 of this Article, as applicable.
3. In addition to the requirements in paragraph 2 of this Article, a request for extradition of a person who is sought for prosecution shall be supported by:
 - (a) a copy of the warrant or order of arrest issued by a judge or other competent authority;
 - (b) a copy of the charging document, if any; and
 - (c) for requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested.
4. In addition to the requirements in paragraph 2 of this Article, a request for extradition relating to a person who has been convicted of the offense for which extradition is sought shall be supported by:

(a) information that the person sought is the person to whom the finding of guilt refers;

(b) a copy of the judgment or memorandum of conviction or, if a copy is not available, a statement by a judicial authority that the person has been convicted;

(c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and

(d) in the case of a person who has been convicted *in absentia*, information regarding the circumstances under which the person was voluntarily absent from the proceedings.

ARTICLE 8 BIS

SENSITIVE INFORMATION IN A REQUEST

Where the Requesting State contemplates the submission of particularly sensitive information in support of its request for extradition, it may consult the Requested State to determine the extent to which the information can be protected by the Requested State. If the Requested State cannot protect the information in the manner sought by the Requesting State, the Requesting State shall determine whether the information shall nonetheless be submitted.

ARTICLE 9

AUTHENTICATION OF DOCUMENTS

Documents that bear the certificate or seal of the Ministry of Justice, or Ministry or Department responsible for foreign affairs, of the Requesting State shall be admissible in extradition proceedings in the Requested State without further certification, authentication, or other legalization. "Ministry of Justice" shall mean, for the United States, the United States Department of Justice; and, for the United Kingdom, the Home Office.

ARTICLE 10

ADDITIONAL INFORMATION

1. If the Requested State requires additional information to enable a decision to be taken on the request for extradition, the Requesting State shall respond to the request within such time as the Requested State requires.

2. Such additional information may be requested and furnished directly between the United States Department of Justice and the Home Office.

ARTICLE 11

TRANSLATION

All documents submitted under this treaty by the Requesting State shall be in English or accompanied by a translation into English.

ARTICLE 12

PROVISIONAL ARREST

1. In an urgent situation, the Requesting State may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel or directly between the United States Department of Justice and such competent authority as the United Kingdom may designate for the purposes of this Article.

2. The application for provisional arrest shall contain:

(a) a description of the person sought;

(b) the location of the person sought, if known;

(c) a brief statement of the facts of the case including, if possible, the date and location of the offense(s);

(d) a description of the law(s) violated;

(e) a statement of the existence of a warrant or order of arrest or a finding of guilt or judgment of conviction against the person sought; and

(f) a statement that the supporting documents for the person sought will follow within the time specified in this treaty.

3. The Requesting State shall be notified without delay of the disposition of its request for provisional arrest and the reasons for any inability to proceed with the request.

4. A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to this treaty if the executive authority of the Requested State has not received the formal request for extradition and the documents supporting the extradition request as required in Article 8. For this purpose, receipt of the formal request for extradition and supporting documents by the Embassy of the Requested State in the Requesting State shall constitute receipt by the executive authority of the Requested State.

5. The fact that the person sought has been discharged from custody pursuant to paragraph 4 of this Article shall not prejudice the subsequent re-arrest and extradition of that person if the extradition request and supporting documents are delivered at a later date.

ARTICLE 13

DECISION AND SURRENDER

1. The Requested State shall promptly notify, the Requesting State of its decision on the request for extradition. Such notification should be transmitted directly to the competent authority designated by the Requesting State to receive such notification and through the diplomatic channel.

2. If the request is denied in whole or in part, the Requested State shall provide reasons for the denial. The Requested State shall provide copies of pertinent judicial decisions upon request.

3. If the request for extradition is granted, the authorities of the Requesting and Requested States shall agree on the time and place for the surrender of the person sought.

4. If the person sought is not removed from the territory of the Requested State within the time period prescribed by the law of that State, that person may be discharged from custody, and the Requested State, in its discretion, may subsequently refuse extradition for the same offense(s).

ARTICLE 14

TEMPORARY AND DEFERRED SURRENDER

1. If the extradition request is granted for a person who is being proceeded against or is serving a sentence in the Requested State, the Requested State may temporarily surrender the person sought to the Requesting State for the purpose of prosecution. If the Requested State requests, the Requesting State shall keep the person so surrendered in custody and shall return that person to the Requested State after the conclusion of the proceedings against that person, in accordance with conditions to be determined by mutual agreement of the States.

2. The Requested State 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 or until such person has served any sentence imposed.

ARTICLE 15

REQUESTS FOR EXTRADITION OR SURRENDER MADE BY SEVERAL STATES

1. If the Requested State receives requests from the Requesting State and from any other State or States for the extradition of the same person, either for the same offense or for different offenses, the executive authority of the Requested State shall determine to which State, if any, it will surrender the person.

2. If the United Kingdom receives an extradition request from the United States and a request for surrender pursuant to the European arrest warrant for the same person, either for the same offense or for different offenses, its executive authority shall determine to which State, if any, it will surrender the person.

3. In making its decision under paragraphs 1 and 2 of this Article, the Requested State shall consider all of the relevant factors, including, but not limited to, the following:

- (a) whether the requests were made pursuant to a treaty;
- (b) the places where each of the offenses was committed;
- (c) the respective interests of the requesting States;
- (d) the seriousness of the offenses;
- (e) the nationality of the victim;
- (f) the possibility of any subsequent extradition between the requesting States; and
- (g) the chronological order in which the requests were received from the requesting States.

ARTICLE 16

SEIZURE AND SURRENDER OF PROPERTY

1. To the extent permitted under its law, the Requested State may seize and surrender to the Requesting State all items in whatever form, and assets, including proceeds, that are connected with the offense in respect of which extradition is granted. The items and assets mentioned in this Article may be surrendered even when the extradition cannot be effected due to the death, disappearance, or escape of the person sought.

2. The Requested State may condition the surrender of the items upon satisfactory assurances from the Requesting State that the property will be returned to the Requested State as soon as practicable. The Requested State may also defer the surrender of such items if they are needed as evidence in the Requested State.

ARTICLE 17

WAIVER OF EXTRADITION

If the person sought waives extradition and agrees to be surrendered to the Requesting State, the Requested State may surrender the person as expeditiously as possible without further proceedings.

ARTICLE 18

RULE OF SPECIALTY

1. A person extradited under this treaty may not be detained, tried, or punished in the Requesting State except for:

- (a) any offense for which extradition, was granted, or a differently denominated offense based on the same facts as the offense on which extradition was granted, provided such offense is extraditable, or is a lesser included offense;
- (b) any offense committed after the extradition of the person; or
- (c) any offense for which the executive authority of the Requested State waives the rule of specialty and thereby consents to the person's detention, trial, or punishment. For the purpose of this subparagraph:
 - (i) the executive authority of the Requested State may require the submission of the documentation called for in Article 8; and
 - (ii) the person extradited maybe detained by the Requesting State for 90 days, or for such longer period of time as the Requested State may authorize, while the request for consent is being processed.

2. A person extradited under this treaty may not be the subject of onward extradition or surrender for any offense committed prior to extradition to the Requesting State unless the Requested State consents.

3. Paragraphs 1 and 2 of this Article shall not prevent the detention, trial, or punishment of an extradited person, or the extradition of the person to a third State, if the person:

- (a) leaves the territory of the Requesting State after extradition and voluntarily returns to it; or
- (b) does not leave the territory of the Requesting State within 20 days of the day on which that person is free to leave.

4. If the person sought waives extradition pursuant to Article 17, the specialty provisions in this Article shall not apply.

ARTICLE 19

1. Either State may authorize transportation through its territory of a person surrendered to the other State by a third State or from the other State to a third State. A request for transit shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit.

2. Authorization is not required when air transportation is used by one State and no landing is scheduled on the territory of the other State. If an unscheduled landing does occur, the State in which the unscheduled landing occurs may require a request for transit pursuant to paragraph 1 of this Article, and it may detain the person until the request for transit is received and the transit is effected, as long as the request is received within 96 hours of the unscheduled landing.

ARTICLE 20

REPRESENTATION AND EXPENSES

1. The Requested State shall advise, assist, and appear on behalf of, the Requesting State in any proceedings in the courts of the Requested State arising out of a request for extradition or make all necessary arrangements for the same.

2. The Requesting State shall pay all the expenses related to the translation of extradition documents and the transportation of the person surrendered. The Requested State shall pay all other expenses incurred in that State in connection with the extradition proceedings.

3. Neither State shall make any pecuniary claim against the other State arising out of the arrest, detention, examination, or surrender of persons under this treaty.

ARTICLE 21

CONSULTATION

The Parties may consult with each other in connection with the processing of individual cases and in furtherance of efficient implementation of this treaty.

ARTICLE 22

TERMINATION

Either State may terminate this treaty at any time by giving written notice to the other State through the diplomatic channel, and the termination shall be effective six months after the date of receipt of such notice.

EMBASSY OF THE UNITED STATES OF AMERICA

No. 120

The Embassy of the United States of America at London, England, presents its compliments to Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs and has the honor to refer to the Instrument as contemplated by Article 3(2) of the Agreement on Extradition between the United States of America and the European Union signed June 25, 2003, as to the application of the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland signed March 31, 2003 (the "2003 Extradition Treaty").

Having been informed by the Government of the United Kingdom of Great Britain and Northern Ireland that it will be unable to apply Article 5(2) of the Agreement on Extradition between the United States of America and the European Union, as set forth in Article 9 of the Annex to the Instrument, relating to authentication of extradition documents, until a corresponding change is made in its domestic law governing extradition, the Embassy has the honor to propose on behalf of the United States Government as follows:

Article 5(2) of the Agreement on Extradition between the United States of America and the European Union, as set forth in Article 9 of the Annex to the Instrument, shall not be applied until the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland indicate in a subsequent exchange of notes that the required internal procedures have been completed. Until that time, the parties agree to apply the procedure for authentication of extradition documents set forth in Article 9 of the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland signed March 31, 2003, upon its entry into force. The Government of the United Kingdom of Great Britain and Northern Ireland shall undertake to seek the necessary legislation at the earliest possible time.

The Embassy also wishes to confirm that two exchanges of letters related to the 2003 Extradition Treaty and done simultaneous with its signature shall remain the understandings of the Governments with respect to this Instrument, until such time as they may agree otherwise.

If the foregoing is acceptable to your Government, the Embassy has the honor to propose that this Note and your Note in reply shall constitute an agreement between our two Governments, which shall enter into force on the date of entry into force of the Instrument.

The Embassy avails itself of the opportunity to express to Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs the renewed assurance of its highest consideration.

EMBASSY OF THE UNITED STATES OF AMERICA,
London, England. December 16, 2004.

CONSULAR DIRECTORATE OF THE FOREIGN AND COMMONWEALTH OFFICE

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The Consular Directorate of the Foreign and Commonwealth Office presents its compliments to the Embassy of the United States of America and has the honour to refer to the Embassy's Note No. 120 of 16 December 2004 which reads as follows:

"The Embassy of the United States of America at London, England, presents its compliments to Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs and has the honour to refer to the Instrument as contemplated by Article 3(2) of the Agreement on Extradition between the United States of America and the European Union signed June 25, 2003, as to the application of the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland signed March 31, 2003 (the "2003 Extradition Treaty").

"Having been informed by the Government of the United Kingdom of Great Britain and Northern Ireland that it will be unable to apply Article 5(2) of the Agreement on Extradition between the United States of America and the European Union, as set forth in Article 9 of the Annex to the Instrument, relating to authentication of extradition documents, until a corresponding change is made in, its domestic law governing extradition, the

Embassy has the honour to propose on behalf of the United States Government as follows:

“Article 5(2) of the Agreement on Extradition between the United States of America and the European Union, as set forth in Article 9 of the Annex to the Instrument, shall not be applied until the United States of America and the Government of Great Britain and Northern Ireland indicate in a subsequent exchange of notes that the required internal procedures have been completed. Until that time, the parties agree to apply the procedure for authentication of extradition documents set forth in Article 9 of the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland signed March 31, 2003, upon its entry into force. The Government of the United Kingdom of Great Britain and Northern Ireland shall undertake to seek the necessary legislation at the earliest possible time.

“The Embassy also wishes to confirm that two exchanges of letters related to the 2003 Extradition Treaty and done simultaneous with its signature shall remain the understandings of the Governments with respect to this Instrument, until such time as they may agree otherwise.

“If the foregoing is acceptable to your Government, the Embassy has the honour to propose that this Note and your Note in reply shall constitute an agreement between our two Governments, which shall enter into force on the date of entry into force of the Instrument.

“The Embassy avails itself of this opportunity to express to Her Majesty’s Principal Secretary of State for Foreign and Commonwealth Affairs the renewed assurance of its highest consideration.”

In reply, the Foreign and Commonwealth Office has the honour to confirm that the proposal set out in the Embassy’s Note is acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland and that the Embassy’s Note, and this Reply, shall constitute an agreement between the two Governments which shall enter into force on the date of entry into force of the Instrument.

The Consular Directorate of the Foreign and Commonwealth Office avails itself of this opportunity to renew to the Embassy of the United States the assurances of its highest consideration.

LONDON,
16 December 2004.

Appendix II: Statement Submitted by Professor Francis A. Boyle

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

The United States of America was founded by means of a declaration of independence and a revolutionary war fought against the British Monarchy. But under the terms of this proposed extradition treaty, our Founding Fathers and Mothers such as John Hancock, George Washington, Thomas Jefferson, James and Dolly Madison would be extradited to the British Monarchy for prosecution, persecution, and execution for the very revolutionary activities that . founded the United States of America itself.

Because of this American legacy of revolution against British tyranny, the U.S. has always provided a safe haven for those seeking refuge on our shores. We have always been wary of efforts by foreign powers to transport Americans and foreigners for prosecution abroad on political charges. Indeed, in the Declaration of Independence, one of the specific complaints against British tyranny made by Thomas Jefferson himself was directed at the British outrage of "transporting us beyond seas to be tried for pretended offences." Such is the case for this treaty.

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

The political offense exception has since become a standard part of public international law. But the political offense exception is not some abstract notion created by the World Court, or the United Nations, or any other international body. It began right here in the United States of America—" . . . the land of the free, and the home of the brave." And it was created by our Founding Fathers and Mothers who knew, from personal experience, that it was outrageously unfair for a state to hand a person over to another state for political prosecution and persecution. It is a bed-rock principle of American justice.

This basic principle of American justice is now under assault by means of this treaty which surely has George Washington, Thomas Jefferson as well as James and Dolly Madison turning over in their graves. This new treaty marks an unprecedented departure from two centuries of American extradition practice. Although the new treaty pays lip-service to the political offense exception, it effectively eliminates the political offense exception for all practical purposes.

For example, the political offense exception is eliminated for any offense allegedly involving violence or weapons, including any solicitation, conspiracy, or attempt to commit such crimes. As we have repeatedly seen in Chicago, Florida, and New York, *inter aria.*, undercover government agents infiltrate peaceful Irish American groups, suggest criminal activity to them, and then falsely claim that innocent members of these groups agreed with their suggestions. That is all it takes for a conspiracy to be extraditable under this proposed treaty.

Even worse yet, all it would take for any of the people in this room to get extradited under this proposed treaty is a false allegation from the British Monarchy that one of its spies overheard them say something reckless about weapons or the armed struggle in Ireland. This treaty is unconstitutional under the First Amendment to the United States Constitution, which Britain does not have. Indeed, we Americans fought a bitter revolutionary War against the British Monarchy in order to establish our own Constitution and Bill of Rights, neither of which Britain has.

Under the terms of this proposed treaty, it would be the politicians and diplomats at the U.S. Department of State, not a United States Federal judge, who would be adjudicating the First Amendment rights of Irish American citizens, voters, and taxpayers. My 4 March 2004 memorandum to you has already identified several other constitutional protections set forth in our American Bill of Rights that will be violated by this proposed extradition treaty with the British Monarchy that I will not review now but respectfully incorporate by reference.

In addition, this proposed treaty wipes out a number of constitutional and procedural safeguards. It eliminates any statute of limitations, unconstitutionally elimi-

nates the need for any showing of probable cause, permits unconstitutional indefinite preventive detention, applies retroactively to offenses allegedly committed before the treaty's ratification, eliminates the time-honored Rule of Specialty in all but name, allows for the unconstitutional seizure of assets, and permits extradition under Article 2(4) for conduct that is perfectly lawful in the United States. This treaty retroactively criminalizes perfectly lawful conduct in violation of the constitutional prohibition on *Ex Post Facto* laws set forth in Article I, Section 9 of the U.S. Constitution as well as the basic principles of public international law and human rights and jus cogens known as *nullum crimen sine lege, nulla poena sine lege*—no crime without law, no punishment without law. Under this treaty, the heirs of George Washington could have their assets seized as proceeds of a criminal terrorist conspiracy.

Most outrageously, responsibility for determining whether a prosecution is politically motivated is transferred from the U.S. Federal courts to the executive branch of government. This means that instead of having your day in court, before a neutral Federal judge, you will be required to rely on the not-so-tender mercies of the Department of State, which historically has always been soundly anglophile, pro-British, anti-Irish, and against Irish Americans and Irish America. There are now over twenty million Irish American citizens, voters, and taxpayers, and we all especially like to vote. These and the several other court-stripping provisions of this proposed treaty are unconstitutional under Article III of the United States Constitution.

As the current U.S. Irish deportation cases show, Britain can easily return Irish and British citizens to Britain. So why is the British Monarchy now trying now to shift the extradition decision from the U.S. Federal courts to the executive branch? Because you cannot deport a U.S. citizen. A U.S. citizen has to be extradited. Article 3 of the proposed treaty makes it crystal clear that the British Monarchy wants to target Irish American citizens for persecution in Crown courts, which have a long history of perpetrating legal atrocities against innocent Irish people. That is precisely why the U.S. Senate deliberately put the so-called Rule of Inquiry by a U.S. Federal judge into Article 3 of the 1986 Supplementary Extradition Treaty with Britain. This proposed treaty eliminates the Senate's well-grounded Rule of Inquiry to prevent British Crown courts mistreating Irish people.

Furthermore, unlike Article VIII*bis* of the proposed extradition protocol with Israel, for some mysterious and unexplained reason Article 6 of the proposed extradition treaty with the British Monarchy eliminates any statute of limitations requirements. So citizens of Israel get to benefit from a statute of limitations, but Irish American citizens of the United States do not. Why this differential treatment on behalf of foreigners and against Irish American citizens in these two simultaneously proposed extradition treaties?

The answer to this question becomes quite clear in Article 2(2) and Article 4(2)(g) of the proposed extradition treaty with the British Monarchy, which renders extraditable an accessory after the fact to an extraditable offense. Since there are no statute of limitations requirements and the proposed treaty is retroactive, any Irish American citizen who provided assistance to Joe Doherty would today be extraditable under this proposed treaty as an accessory after the fact to Mr. Doherty. In addition, such Irish American Doherty supporters would be provisionally arrested and indefinitely detained under Article 12 of the proposed treaty. Finally, according to Article 16 of the proposed treaty, such Irish American Doherty supporters would have their homes, businesses, cars, and other property seized, sold and surrendered to the British Monarchy.

That is the real agenda behind this proposed extradition treaty with the British Monarchy: British retaliation against Irish American citizens, voters and taxpayers because of our near universal support for Joe Doherty and other I.R.A. soldiers who fled to the United States of America seeking refuge from fighting their own revolution against British tyranny in Ireland since the Proclamation of the Irish Republic on Easter Sunday 1916. This proposed treaty has been designed by the British Government to eviscerate, overturn, and reverse the delicately crafted human rights compromises that were deliberately built into the 1986 Supplementary Extradition Treaty by the Senate Foreign Relations Committee and other concerned members of the United States Senate. Will the United States Senate and this committee permit the British Monarchy to traduce its previous handiwork? I certainly trust not.

Next, for reasons fully explained in my 4 March 2004 memorandum to you, if the Senate were to consent to this proposed extradition treaty, that would effectively abrogate the most basic human rights of Irish American citizens under the International Covenant on Civil and Political Rights to which the United States is a contracting party. Furthermore, such Senate consent to this proposed treaty would also place the United States of America in breach of its solemn treaty obligations under

numerous provisions of that human rights Covenant with respect to all the other contracting states parties. Such violations will render the United States subject to the treaty enforcement mechanisms of that Covenant as well as to the other ordinary enforcement mechanisms, remedies, and sanctions for violating a solemnly concluded international human rights treaty as well as the basic principle of customary international law and *jus cogens that pacta suet servanda*: i.e., treaties must be obeyed.

My 4 March 2004 memorandum to you established that the proposed extradition treaty will grossly violate this solemn International Human Rights Covenant that has received the advice and consent of 2/3rds of the Members of the United States Senate and is thus “the supreme Law of the Land” under Article VI of the United States Constitution. Nevertheless, the two lawyers from the Departments of State and Justice who appeared before this committee on 15 November 2005 did not even bother to address these weighty issues of international law, U.S. constitutional law, U.S. treaty law, and basic human rights protections. With all due respect, this committee must uphold the Senate’s constitutional responsibilities and prerogatives under the Treaties Clause in Article II, Section 2 of the U.S. Constitution by demanding that both the Departments of State and Justice formally respond in writing to my 4 March 2004 Memorandum’s arguments that this proposed extradition treaty will violate the International Covenant on Civil and Political Rights, to which both the United States and the United Kingdom are contracting parties.

Finally, the British Monarchy has continued to maintain a colonial military occupation regime consisting in part of about 15,000 soldiers in the six northeast counties of Ireland in gross violation of the right of the Irish People to self-determination under both customary and conventional international law, including but not limited to Article 1(1) of the International Covenant on Civil and Political Rights to which the Republic of Ireland, the United States, and the British Monarchy are all contracting parties. This longstanding instance of British criminality has been analyzed in great detail by my article *The Decolonization of Northern Ireland*, 4 Asian Yearbook of International Law 25–46 (1995), a copy of which is attached. I respectfully request that this article be submitted into the formal record of these proceedings.

All of the above incontestable historical facts provide proof-positive of precisely why this proposed treaty of extradition with the British Monarchy must be treated completely differently from any other extradition treaty that the United States of America might have or propose to have with any other country in the world. All of these other so-called modern extradition treaties are historically, politically, and legally inapposite to this proposed extradition treaty with the British Monarchy, which obstinately continues illegally to occupy Ireland militarily and to maintain a colony there in blatant violation of the United Nations’ seminal Decolonization Resolution of 1960. Furthermore, this extradition treaty with the British Monarchy must stand alone and apart from all other modern U.S. extradition treaties precisely because we Americans fought a bitter revolutionary war against the British Monarchy to found this Republic. We Americans did not fight a Revolutionary war against any other state in the world. So it is axiomatic that this proposed treaty with the British Monarchy must be quite carefully distinguished from all of our extradition treaties with every other country in the world—and rejected.

Conclusion

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

Thank you.

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