

EXTRADITION TREATIES WITH THE EUROPEAN UNION

SEPTEMBER 11, 2008.—Ordered to be printed

Mr. DODD, from the Committee on Foreign Relations,
submitted the following

REPORT

[To accompany Treaty Docs. 109-14, 109-15, 109-16, 109-17, 110-11, and 110-12]

The Committee on Foreign Relations, to which was referred the Agreement on Extradition between the United States of America and the European Union, signed at Washington on June 25, 2003 (Treaty Doc. 109-14), together with 27 bilateral extradition instruments subsequently signed with the Republic of Austria on July 20, 2005 (Treaty Doc. 109-14), the Kingdom of Belgium on December 16, 2004 (Treaty Doc. 109-14), the Republic of Bulgaria on September 19, 2007 (Treaty Doc. 110-12), the Republic of Cyprus on January 20, 2006 (Treaty Doc. 109-14), the Czech Republic on May 16, 2006 (Treaty Doc. 109-14), the Kingdom of Denmark on June 23, 2005 (Treaty Doc. 109-14), the Republic of Estonia on February 8, 2006 (Treaty Doc. 109-16), the Republic of Finland on December 16, 2004 (Treaty Doc. 109-14), France on September 30, 2004 (Treaty Doc. 109-14), the Federal Republic of Germany on April 18, 2006 (Treaty Doc. 109-14), the Hellenic Republic on January 18, 2006 (Treaty Doc. 109-14), the Republic of Hungary on November 15, 2005 (Treaty Doc. 109-14), Ireland on July 14, 2005 (Treaty Doc. 109-14), the Italian Republic on May 3, 2006 (Treaty Doc. 109-14), the Republic of Latvia on December 7, 2005 (Treaty Doc. 109-15), the Republic of Lithuania on June 15, 2005 (Treaty Doc. 109-14), the Grand Duchy of Luxembourg on February 1, 2005 (Treaty Doc. 109-14), Malta on May 18, 2006, with a related exchange of letters signed the same date (Treaty Doc. 109-17), the Kingdom of the Netherlands on September 29, 2004, with a related exchange of notes signed the same date (Treaty Doc. 109-14), the Republic of Poland on June 9, 2006 (Treaty Doc. 109-14), the Portuguese Republic on July 14, 2005 (Treaty Doc. 109-14), Romania on September 10, 2007 (Treaty Doc. 110-11), the Slovak Republic on February 6, 2006 (Treaty Doc. 109-14), the Republic of Slovenia on October 17, 2005 (Treaty Doc. 109-14), the Kingdom of Spain on December 17, 2004 (Treaty Doc. 109-14), the Kingdom of Sweden on December 16, 2004 (Treaty Doc. 109-14), and the United

Kingdom of Great Britain and Northern Ireland on December 16, 2004, with a related exchange of notes signed the same date (Treaty Doc. 109–14), having considered the same, reports favorably thereon with one condition and a declaration made with respect to each treaty, as indicated in the resolutions of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolutions of advice and consent.

CONTENTS

	Page
I. Purpose	2
II. Background	2
III. Major Provisions	3
IV. Bilateral Instruments With 27 EU Members	5
V. Entry Into Force	7
VI. Implementing Legislation	7
VII. Committee Action	7
VIII. Committee Recommendation and Comments	7
IX. Resolutions of Advice and Consent to Ratification	10
X. Annex.—Treaty Hearing of May 20, 2008	21

I. PURPOSE

The purpose of these treaties is to modernize, strengthen, and expand on the extradition relationship as between the United States, and the European Union and its Member States.

II. BACKGROUND

Extradition is the formal process by which one nation requests and obtains from another nation the surrender of a suspected or convicted criminal. The United States will ordinarily only grant extradition pursuant to a treaty. The United States has in force a bilateral extradition treaty with each of the European Union (EU) Member States. These treaties account for over twenty percent of U.S. extradition treaties and a significantly higher percentage of U.S. extradition requests.¹ Nevertheless, many of these treaties are quite old and some of their provisions are not in accord with modern extradition practice. The oldest of our existing extradition treaties with EU Member States dates back over a century ago² and most were concluded over twenty years ago, such that most if not all are in need of modernizing. In addition, as EU law enforcement institutions have evolved over the last few decades, it has become clear that developing a more formal basis for cooperation on such matters with the EU itself would be useful.

These extradition treaties, of which there are 28, would modernize our existing extradition treaties with the Member States of the EU³ and strengthen an emerging institutional relationship on

¹Michael Abbell, *Extradition to and from the United States*, Chapter 3, § 3–4, p.120 (2007).

²1901 Treaty on Extradition between the United States and the Kingdom of Serbia (12 Bevans 1238).

³Listed by accession date, Member States of the European Union are as follows: Belgium (1952 (ECSC)), France (1952 (ECSC)), Italy (1952 (ECSC)), Luxembourg (1952 (ECSC)), the Netherlands (1952 (ECSC)), West Germany (1952 (ECSC)), Denmark (1973), Ireland (1973), the United Kingdom (1973), Greece (1981), Portugal (1986), Spain (1986), Austria (1995), Finland (1995), Sweden (1995), Cyprus (2004), Czech Republic (2004), Estonia (2004), Hungary (2004), Latvia (2004), Lithuania (2004), Malta (2004), Poland (2004), Slovakia (2004), Slovenia (2004), Bulgaria (2007), and Romania (2007).

law enforcement matters between the United States and the European Union itself. The framework agreement on extradition with the EU (the “EU Framework Agreement”) essentially requires EU Member States to amend and supplement their existing bilateral extradition treaties with the United States to include certain modern provisions on extradition if they have not already done so. Each bilateral instrument implements the EU Framework Agreement by amending or replacing an existing bilateral extradition treaty so that every U.S. bilateral extradition treaty with a Member State of the EU will be uniformly updated to conform to the provisions in the EU Framework Agreement.

III. MAJOR PROVISIONS

A detailed paragraph-by-paragraph analysis of each treaty may be found in the Letters of Submittal from the Secretary of State to the President on these instruments, which are reprinted in full in Treaty Documents 109–14, 109–15, 109–16, 109–17, 110–11, and 110–12. What follows is a brief summary of some of the key provisions that would be incorporated into our bilateral treaty relationships with every EU Member State if not already contained in existing treaties pursuant to the EU Framework Agreement.

Extraditable Offenses: Modern Dual-Criminality Provisions

Early U.S. extradition treaties confined extraditable offenses to those specifically listed in the treaty itself. Such an approach limits extradition for newly emerging forms of criminality that the United States has a strong interest in pursuing, such as antitrust, cybercrime, and environmental offenses. Modern extradition treaties, however, have developed a new approach, which is frequently referred to as the principle of “dual criminality.” Dual criminality provides that a crime is extraditable if it is punishable as a crime under the criminal law of both parties to the treaty. Pursuant to Article 4 of the EU Framework Agreement, outdated lists of extraditable offenses would be replaced with this modern “dual criminality” standard, which would enable our extradition treaties to cover new offenses as they develop in the criminal legal systems of the United States and its partner country without having to amend the treaty each time. Article 4 additionally contemplates extradition for extraterritorial offenses, which are particularly useful when pursuing terrorists and persons involved in drug trafficking.

Streamlined Authentication and Transmission of Documents

Treaty requests for extradition from other countries are generally submitted to the Department of State and forwarded to the Department of Justice, which then initiates a judicial proceeding for the arrest of the fugitive and an extradition hearing before the court to determine if the fugitive is extraditable. Treaty requests for extradition from the United States to other countries generally travel from prosecutors to the Department of State to foreign diplomatic officials, who in turn have their own equivalent of the Department of Justice that handles the foreign extradition proceeding. The EU Framework Agreement would authorize communications directly between prosecutors, as well as other departures from the current norm, that are intended to make the process more efficient. For example, under Article 6, requests for provisional arrest prior to the

receipt of a formal extradition request may be communicated directly between the Justice Department and its foreign equivalents. In addition, under Article 5(2), the Justice Department and its counterparts in EU Member States can certify extradition documents, when ordinarily this has been a task reserved for diplomatic officials. In sum, with the new EU Framework Agreement as implemented through the associated bilateral instruments, the process of authenticating documents and the transmission of provisional arrest and extradition requests would be streamlined. See Articles 5, 6 and 7 of the EU Framework Agreement.

Temporary Transfer of Persons

Fugitives sometimes face criminal charges or have been convicted for other offenses in the countries to which they have fled. Traditionally, U.S. extradition treaties have allowed the requested State to defer action on an extradition request until the fugitive could be surrendered unencumbered. More modern agreements afford the requested State the option of temporarily surrendering the individual under a promise for his return when proceedings in the requesting State have been completed. Without the option of a temporary transfer, the case against a fugitive can become stale while the fugitive is serving a sentence in another country. Article 9 of the new EU Framework Agreement, as incorporated into the various bilateral instruments, would provide authority for the temporary transfer to the requesting State of persons who are being prosecuted or are serving a sentence in the requested State. Any person so surrendered would be held in custody by the requesting State and would be returned to the requested State at the conclusion of proceedings against that person, as mutually agreed upon by the parties.

Modern Approach to Competing Extradition Requests/Parity with the European Arrest Warrant

Older U.S. extradition treaties obligate parties that receive competing extradition requests for the same fugitive to surrender the fugitive on a first come, first served basis. More modern extradition treaties often obligate the requested State to consider a list of relevant factors when weighing competing requests. Pursuant to Article 10 of the EU Framework Agreement, the requested State is to consider all relevant factors, including the following: 1) whether the requests were each made pursuant to a treaty; 2) the locations where each of the offences were committed; 3) the respective interests of the requesting States; 4) the seriousness of the offenses; 5) the nationality of the victim; 6) the possibility of any subsequent extradition between the requesting States; and 7) the chronological order in which the requests were received from the requesting States.

Article 10 of the EU Framework Agreement makes clear that extradition requests from the United States and competing requests for surrender made pursuant to a European Arrest Warrant (which is the internal EU mechanism for effectively extraditing individuals) will be evaluated using the same approach, including the list of factors described above. As a result, U.S. requests for extradition sent to EU Member States would have the same status as competing requests submitted by other EU Member States.

Simplified Extradition Procedures if Extradition is Not Contested

Article 11 of the EU Framework Agreement would authorize a simplified extradition process in cases in which the person sought does not contest extradition. Older U.S. extradition treaties do not include such a provision; this is a modern development. While such a scenario is the exception rather than the rule, under certain circumstances it may be to the fugitive's benefit to seek an expedited extradition. For example, a fugitive may decide not to contest extradition because of a concern that with the passage of time, a witness for the defense may die or exculpatory evidence may be lost.

Transit Authority

Article 12 of the EU Framework Agreement provides a process through which consent can be obtained for the transportation of a person through the United States or any EU Member State who is being "surrendered" to or from the United States or any EU Member State. In addition, Article 12 provides that authorization is not required when air transportation is used and no landing is scheduled on the territory of the transit State. In sum, with the new EU Framework Agreement, transit authority would be provided in order to facilitate the transportation of persons surrendered to a State Party by a third country when that person has to travel through another State Party in order to be surrendered. *See* Article 12 of the EU Framework Agreement.

Death Penalty Assurances

With the new EU Framework Agreement, a uniform mechanism would be provided by which States Parties can condition extradition on an assurance that the death penalty shall not be imposed, or shall not be carried out, if the offense for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws of the requested State. *See* Article 13 of the EU Framework Agreement. Variations of this provision are already provided for in most U.S. extradition treaties with EU Member States because all EU Member States have effectively abolished the death penalty.⁴

IV. BILATERAL INSTRUMENTS WITH 27 EU MEMBER STATES

There are 22 bilateral instruments with EU Member States that amend and supplement existing bilateral extradition treaties to include the modern provisions on extradition described above. These are as follows: Austria (amending the 1998 U.S.-Austria Extradition Treaty);⁵ Belgium (amending the 1987 U.S.-Belgium Extradition Treaty);⁶ Cyprus (amending the 1996 U.S.-Cyprus Extradition Treaty);⁷ Czech Republic (amending the 1925 U.S.-Czecho-

⁴The only country of the European Union that still retains capital punishment in its law is Latvia, but Latvia joined Protocol 6 of the European Convention on Human Rights (the "ECHR") in 1999, which restricts the application of the death penalty to times of war or "imminent threat of war." Moreover, in 2002, Latvia signed Protocol 13 of the ECHR, which abolishes the death penalty under all circumstances. Latvia has yet to ratify Protocol 13, but has nevertheless imposed a moratorium on capital punishment.

⁵Treaty Doc. 105-50.

⁶Treaty Doc. 104-7.

⁷Treaty Doc. 105-16

slovak Extradition Treaty along with the 1935 Supplementary Extradition Treaty);⁸ Denmark (amending the 1972 U.S.-Denmark Extradition Treaty);⁹ Finland (amending the 1976 U.S.-Finland Extradition Treaty);¹⁰ France (amending the 1996 U.S.-France Extradition Treaty);¹¹ Germany (amending the 1978 U.S.-Germany Extradition Treaty along with the 1986 Supplementary Treaty with Germany);¹² Greece (amending the 1931 U.S.-Greece Extradition Treaty and its 1937 Protocol);¹³ Hungary (amending the 1994 U.S.-Hungary Extradition Treaty);¹⁴ Ireland (amending the 1983 U.S.-Ireland Extradition Treaty);¹⁵ Italy (amending the 1983 U.S.-Italy Extradition Treaty);¹⁶ Lithuania (amending the 2001 U.S.-Lithuania Extradition Treaty);¹⁷ Luxembourg (amending the 1996 U.S.-Luxembourg Extradition Treaty);¹⁸ The Netherlands (amending the 1980 U.S.-Netherlands Extradition Treaty);¹⁹ Poland (amending the 1996 U.S.-Poland Extradition Treaty);²⁰ Portugal (amending the 1908 U.S.-Portugal Extradition Treaty);²¹ Slovak Republic (amending the 1925 U.S. Czechoslovakia Extradition Treaty and the 1935 Supplementary Extradition Treaty currently in force and applicable to the Slovak Republic);²² Slovenia (amending the 1901 U.S.-Serbia Extradition Treaty currently in force and applicable to Slovenia);²³ Spain (amending the 1970 U.S.-Spain Extradition Treaty along with three supplementary treaties done in 1975, 1988, and 1996);²⁴ Sweden (amending the 1961 U.S.-Sweden Extradition Treaty along with the 1983 Supplementary Extradition Treaty);²⁵ the United Kingdom (amending the 2003 U.S.-U.K. Extradition Treaty).²⁶

The five remaining bilateral instruments with EU Member States were concluded as stand-alone extradition treaties (as opposed to amendments) that would supersede existing extradition treaties with each country. Each of the five new extradition treaties is a modernized version of the older treaty, which conforms to the provisions of the EU Framework Agreement. These five treaties were submitted to the Senate in separate treaty documents, which are as follows: 1) The U.S.-Latvia Extradition Treaty, which would replace an existing extradition treaty from 1923 with Latvia;²⁷ 2) The U.S.-Estonia Extradition Treaty, which would replace an existing extradition treaty from 1923 with Estonia;²⁸ 3) The U.S.-Malta Extradition Treaty, which would replace an existing extradition treaty from 1931;²⁹ 4) The U.S.-Romania Extradition Treaty, which

⁸ Exec. C, 69-1 and Exec. K, 74-1.

⁹ Treaty Doc. 93-21.

¹⁰ Treaty Doc. 95-9.

¹¹ Treaty Doc. 105-13.

¹² Ex. A, 96-1 and Treaty Doc. 100-6.

¹³ Ex. D, 72-1 and Executive Agreement Series, No. 114.

¹⁴ Treaty Doc. 104-5.

¹⁵ Treaty Doc. 98-19.

¹⁶ Treaty Doc. 98-20.

¹⁷ Treaty Doc. 107-4.

¹⁸ Treaty Doc. 105-10.

¹⁹ Treaty Doc. 97-7.

²⁰ Treaty Doc. 105-14.

²¹ Ex. JJ, 60-1.

²² Ex. C 69-1 and Ex. K, 74-1.

²³ Ex. E, 57-1.

²⁴ Treaty Doc. 91-24; Treaty Doc. 94-13; Treaty Doc. 102-24; and Treaty Doc. 105-15.

²⁵ Ex. E, 87-2 and Treaty Doc. 97-15.

²⁶ Treaty Doc. 108-23.

²⁷ Ex. F, 68-1.

²⁸ Ex. C, 68-1.

²⁹ Ex. E, 72-1.

would replace an existing extradition treaty from 1924, along with a 1936 supplementary treaty;³⁰ and 5) The U.S.-Bulgaria Extradition Treaty, which would replace an existing extradition treaty from 1924.³¹

V. ENTRY INTO FORCE

In accordance with Article 22, the EU Framework Agreement shall enter into force on the first day following the third month after the date on which the United States and the EU have indicated that they have completed their internal procedures for this purpose. Each bilateral instrument with an EU Member State shall enter into force on the date of entry into force of the EU Framework Agreement.

VI. IMPLEMENTING LEGISLATION

The legal procedures for extradition are governed by both federal statute and self-executing treaties. Subject to a contrary treaty provision, existing federal law implements aspects of these treaties. *See* 18 U.S.C. §§ 3181 to 3196. No additional legislation is needed for the United States to fulfill its obligations under these treaties.

VII. COMMITTEE ACTION

The committee held a public hearing on these treaties on May 20, 2008. Testimony was received from Susan Biniaz, Deputy Legal Adviser at the Department of State and Bruce Swartz, Deputy Assistant Attorney General for the Criminal Division at the Department of Justice. A transcript of this hearing can be found in the Annex to this report.

On July 29, 2008, the committee considered these treaties and ordered them favorably reported by voice vote, with a quorum present and without objection.

VIII. COMMITTEE RECOMMENDATION AND COMMENTS

The Committee on Foreign Relations believes that these treaties, if ratified, would facilitate U.S. efforts in fighting terrorism and transnational crime. In particular, these treaties would eliminate obsolete provisions in existing U.S. extradition treaties with EU Member States and replace them with more effective, efficient, and modern provisions. This will enable the United States to, among other things, pursue extradition in cases involving serious crimes, such as money laundering, antitrust, cybercrime, and environmental offenses in situations in which the United States is now unable to seek extradition. Accordingly, the committee urges the Senate to act promptly to give advice and consent to ratification of these treaties, as set forth in this report and the accompanying resolution of advice and consent.

A. PROVISIONAL ARREST

Extradition treaties with Member States of the EU generally provide a mechanism for provisional arrest, which allows for the arrest and detention of a person on the basis of certain information, in-

³⁰Ex. D, 75-1.

³¹Ex. X, 68-1.

cluding an arrest warrant from the requesting State, for a period of time pending a formal extradition request.

An issue that has received increasing attention in U.S. courts is whether or not the magistrate who issues a provisional arrest warrant in the United States must find probable cause to believe that the person for whom the arrest warrant is sought committed the crime underlying the extradition request or whether it is enough to simply find probable cause that the person at issue has been charged with an extraditable crime by the requesting country. In response to questions from the committee, the Department of Justice has indicated that although the Fourth Amendment of the Constitution applies, “[e]xactly what categories and quantum of information are sufficient to meet Fourth Amendment requirements in the context of provisional arrest pending extradition is not well settled.” The EU Framework Agreement provides no guidance on this matter, as it does not specify the standard of proof that an EU Member State must satisfy in order to obtain the provisional arrest of a fugitive in the United States pending transmission of a formal extradition request.

While the committee takes no position as to what standard of proof must be met in order to meet Fourth Amendment requirements in the context of provisional arrest, the committee does have concerns regarding the length of time an individual may be detained pursuant to a provisional arrest warrant without the United States having yet received a formal extradition request that would establish probable cause to believe that the person has committed a crime. Several extradition treaties with EU Member States limit the number of days that a person who has been provisionally arrested can be detained by the requested State without a formal extradition request having been submitted by the requesting State.³² For example, Article 11(4) of the extradition treaty with the Netherlands states as follows: “Provisional arrest shall be terminated if, within a period of 60 days after the apprehension of the person sought, the Requested State has not received the formal request for extradition and the supporting documents mentioned in Article 9.” Many EU Member State extradition treaties, however, require each party to hold a person who has been provisionally arrested for a certain minimum period of time, but leave to each party’s discretion whether to hold that person longer without having yet received the formal extradition request.³³ For example, Article 10(4) of the extradition treaty with Belgium states as follows: “A person who is provisionally arrested may be discharged from custody upon the expiration of 75 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 supporting documents required in Article 7.”

In response to questions asked by the committee, the Department of Justice has explained that “[i]t is rare for extradition treaty partners to miss the treaty deadline for the presentation of docu-

³²See, e.g., U.S. bilateral extradition treaties with the Czech Republic, the Republic of Finland, the Federal Republic of Germany, the Hellenic Republic, the Italian Republic, and the Kingdom of Spain.

³³See, e.g., U.S. bilateral extradition treaties with the Republic of Austria, the Kingdom of Belgium, the Republic of Cyprus, the Kingdom of Denmark, the Republic of Estonia, France, the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, and the United Kingdom of Great Britain and Northern Ireland.

ments in support of extradition.” The Department of Justice also noted that because it is so rare, the Department “does not track statistics to demonstrate how long a person who was provisionally arrested was held beyond the treaty mandated deadline absent presentation of the formal extradition documents.”

While the committee recognizes the value of a mechanism for provisional arrest when trying to detain a fugitive from justice, the committee is also concerned that such a mechanism be subject to appropriate limits in light of the liberty interests at stake. Thus, in the committee’s view, the Department of Justice should monitor the length of time that individuals are detained pursuant to a provisional arrest warrant pending an extradition request and thus has conditioned its approval of the EU Framework Agreement on a report that would provide such information. In addition, the committee encourages the Department of State and the Department of Justice, when negotiating such mechanisms in future treaties, to include language, such as in the extradition treaty with the Netherlands, that the provisional arrest “shall be terminated” if the requested State has not received a formal extradition request within a specified time period that is long enough to satisfy the legitimate requirements of law enforcement officials in making the request. Such language would avoid the potential for provisional arrest procedures to be used to detain an individual indefinitely.

B. RESOLUTIONS

The committee has included in the resolutions of advice and consent one condition, which is a report on provisional arrest discussed above, and one declaration, which is the same for each treaty and is discussed below.

Declaration

In every resolution of advice and consent, the committee has included a proposed declaration that states that each treaty is self-executing. This declaration is consistent with statements made in the Letters of Submittal from the Secretary of State to the President on each of these instruments³⁴ and with the historical practice of the committee in approving extradition treaties.³⁵ Such a statement, while generally included in the documents associated with treaties submitted to the Senate by the executive branch and in committee reports, has not generally been included in Resolutions of advice and consent. The committee, however, proposes making such a declaration in the Resolution of advice and consent in light of the recent Supreme Court decision, *Medellín v. Texas*, 128 S.Ct.

³⁴See Treaty Doc. 109–14 at p. VI (stating that “[t]he U.S.-E.U. Extradition Agreements and bilateral instruments are regarded as self-executing treaties under U.S. law”); Treaty Doc. 109–15 at p. V (stating that the “[t]reaty is self-executing and will not require implementing legislation.”); Treaty Doc. 109–16 at p. V (stating that the “[t]reaty is self-executing and will not require implementing legislation.”); Treaty Doc. 109–17 at p. V (stating that the “[t]reaty is self-executing and will not require implementing legislation.”); Treaty Doc. 110–11 at p. V (stating that the instrument is “self-executing and will not require implementing legislation.”); and Treaty Doc. 110–12 at p. V (stating that the instrument is “self-executing and will not require implementing legislation.”)

³⁵The committee has consistently expressed the view that extradition treaties are self-executing. See, e.g., Exec. Rept. 106–24 at p. II (stating with regard to the U.S.-Belize, the U.S.-Republic of Paraguay, the U.S.-South African, and the U.S.-Sri Lanka Extradition Treaties that “the legal procedures for extradition are governed by both federal statutes and self-executing treaties”).

1346 (2008), which has highlighted the utility of a clear statement regarding the self-executing nature of treaty provisions.

The committee believes it is of great importance that the United States complies with the treaty obligations it undertakes. In accordance with the Constitution, all treaties—whether self-executing or not—are the supreme law of the land, and the President shall take care that they be faithfully executed. In general, the committee does not recommend that the Senate give advice and consent to treaties unless it is satisfied that the United States will be able to implement them, either through implementing legislation, the exercise of relevant constitutional authorities, or through the direct application of the treaty itself in U.S. law. While situations may arise that were not contemplated when the treaty was concluded and ratified that raise questions about the authority of the United States to comply, the committee expects that such cases will be rare. Accordingly, in the committee’s view, a strong presumption should exist against the conclusion in any particular case that the United States lacks the necessary authority in U.S. law to implement obligations it has assumed under treaties that have received the advice and consent of the Senate.

IX. RESOLUTIONS OF ADVICE AND CONSENT TO RATIFICATION

AGREEMENT ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE EUROPEAN UNION

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION AND A CONDITION

The Senate advises and consents to the ratification of the Agreement on Extradition between the United States of America and the European Union, signed at Washington on June 25, 2003, with a related Explanatory Note (Treaty Doc. 109–14), subject to the declaration of section 2 and the condition of section 3.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

SECTION 3. CONDITION

The advice and consent of the Senate under section 1 is subject to the following condition:

REPORT ON PROVISIONAL ARRESTS. No later than February 1, 2010, and every February 1 for an additional four years thereafter, the Attorney General, in coordination with the Secretary of State, shall prepare and submit a report to the Committee on Foreign Relations and the Committee on the Judiciary of the Senate that contains the following information:

1) The number of provisional arrests made by the United States during the previous calendar year under each bilateral extradition treaty with a Member State of the European Union, and a summary description of the alleged conduct for which provisional arrest was sought;

2) The number of individuals who were provisionally arrested by the United States under each such treaty who

were still in custody at the end of the previous calendar year, and a summary description of the alleged conduct for which provisional arrest was sought;

3) The length of time between each provisional arrest listed under paragraph (1) and the receipt by the United States of a formal request for extradition; and

4) The length of time that each individual listed under paragraph (1) was held by the United States or an indication that they are still in custody if that is the case.

PROTOCOL TO THE EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF AUSTRIA

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Protocol to the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Austria signed January 8, 1998, 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, signed at Vienna on July 20, 2005 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF BELGIUM

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of 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 United States of America and the Kingdom of Belgium signed April 27, 1987, signed at Brussels on December 16, 2004 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF BULGARIA

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Bulgaria, signed at Sofia on September 19, 2007 (Treaty Doc. 110–12), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE REPUBLIC OF CYPRUS

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of 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 Republic of Cyprus signed June 17, 1996, signed at Nicosia on January 20, 2006 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

SECOND SUPPLEMENTARY TREATY ON EXTRADITION BETWEEN THE
UNITED STATES OF AMERICA AND THE CZECH REPUBLIC

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Second Supplementary Treaty on Extradition between the United States of America and the Czech Republic, signed at Prague on May 16, 2006 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE KINGDOM OF DENMARK

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of 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 Treaty on Extradition between the United States of America and the Kingdom of Denmark signed June 22, 1972, signed at Copenhagen on June 23, 2005 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND
THE REPUBLIC OF ESTONIA

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Estonia, signed at Tallinn on February 8, 2006 (Treaty Doc. 109–16), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

PROTOCOL TO THE EXTRADITION TREATY BETWEEN THE UNITED
STATES OF AMERICA AND THE REPUBLIC OF FINLAND

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Protocol to the Extradition Treaty between the United States of America and Finland signed June 11, 1976, signed at Brussels on December 16, 2004 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA
AND FRANCE

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Instrument as contemplated by Article 3, paragraph 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 United States of America and France signed April 23, 1996, signed at The Hague on September 30, 2004 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

SECOND SUPPLEMENTARY TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Second Supplementary Treaty to the Treaty between the United States of America and the Federal Republic of Germany Concerning Extradition, signed at Washington on April 18, 2006 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

PROTOCOL TO THE TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE HELLENIC REPUBLIC

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Protocol to the Treaty on Extradition between the United States of America and the Hellenic Republic, signed May 6, 1931, and the Protocol thereto signed September 2, 1937, 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, signed at Washington on January 18, 2006 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

PROTOCOL TO THE TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF HUNGARY

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Protocol to the Treaty between the Government of the United States of America and the Government of the Republic of Hungary on Extradition signed December 1, 1994, 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, signed at Budapest on November 15, 2005 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA AND IRELAND

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of 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 Treaty on Extradition between the United States of America and Ireland signed July 13, 1983, signed at Dublin on July 14, 2005 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA AND THE ITALIAN REPUBLIC

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of 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 Italian Republic signed October 13, 1983, signed at Rome on May 3, 2006 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND
THE REPUBLIC OF LATVIA

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Latvia, signed at Riga on December 7, 2005 (Treaty Doc. 109–15), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

PROTOCOL TO THE EXTRADITION TREATY BETWEEN THE UNITED
STATES OF AMERICA AND THE REPUBLIC OF LITHUANIA

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Protocol on the application of the Agreement on Extradition between the United States of America and the European Union to the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Lithuania, signed at Brussels on June 15, 2005 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE GRAND DUCHY OF LUXEMBOURG

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Instrument as contemplated by Article 3, paragraph 2 (a) 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 Grand Duchy of Luxembourg signed October 1, 1996, signed at Washington on February

1, 2005 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION TREATY BETWEEN THE UNITED STATES
OF AMERICA AND MALTA

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Extradition Treaty between the Government of the United States of America and the Government of Malta, signed at Valletta on May 18, 2006, with a related exchange of letters signed the same date (Treaty Doc. 109–17), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION AGREEMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE KINGDOM OF THE NETHERLANDS

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Agreement comprising the Instrument as contemplated by Article 3 (2) of the Agreement on Extradition between the United States of America and the European Union signed at Washington on June 25, 2003, as to the application of the Extradition Treaty between the United States of America and the Kingdom of the Netherlands signed at The Hague on June 24, 1980, signed at The Hague on September 29, 2004, with a related exchange of notes signed the same date (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION AGREEMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE REPUBLIC OF POLAND

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Agreement between the United States of America and the Republic of Poland on the application of the Extradition Treaty between the United States of America and the Republic of Poland signed July 10, 1996, pursuant to Article 3 (2) of the Agreement on Extradition between the United States of America and the European Union signed at Washington June 25, 2003, signed at Warsaw on June 9, 2006 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE PORTUGUESE REPUBLIC

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Instrument between the United States of America and the Portuguese Republic 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, signed at Washington on July 14, 2005 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND
ROMANIA

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Extradition Treaty between the United States of America and Romania, signed at Bucharest on September 10, 2007 (Treaty Doc. 110–11), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE SLOVAK REPUBLIC

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Instrument on Extradition between the United States of America and the Slovak Republic, 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, signed at Bratislava on February 6, 2006 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION AGREEMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE REPUBLIC OF SLOVENIA

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Agreement between the Government of the United States of America and the Government of the Republic of Slovenia comprising 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 Treaty on Extradition between the United States and the Kingdom of Serbia, signed October 25, 1901, signed at Ljubljana on October 17, 2005 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE KINGDOM OF SPAIN

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of 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 Treaty on Extradition between the United States of America and Spain signed May 29, 1970, and the Supplementary Treaties on Extradition signed January 25, 1975, February 9, 1988 and March 12, 1996, signed at Madrid on December 17, 2004 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

EXTRADITION INSTRUMENT BETWEEN THE UNITED STATES OF AMERICA
AND KINGDOM OF SWEDEN

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of 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 Convention on Extradition between the United States of America and Sweden signed October 24, 1961 and the Supplementary Convention on Extradition between the United States of America and the Kingdom of Sweden signed March 14, 1983, signed at Brussels on December 16, 2004 (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

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

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of 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 and the Government of the United Kingdom of Great Britain and Northern Ireland signed March 31, 2003, signed at London on December 16, 2004, with a related exchange of notes signed the same date (Treaty Doc. 109–14), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Treaty is self-executing.

TREATIES

TUESDAY, MAY 20, 2008

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

The committee met, pursuant to notice, at 10:32 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Benjamin L. Cardin, presiding.

Present: Senator Cardin.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, U.S. SENATOR FROM MARYLAND

Senator CARDIN. The committee will come to order.

First, let me thank Senator Biden for allowing me to chair today's hearing. It is a very important hearing dealing with important business on extradition treaties and mutual assistance agreements that are critically important to law enforcement in the United States and with our friends around the globe.

Today the committee meets to review 28 extradition treaties and 30 mutual legal assistance treaties with the European Union, all 27 European Union Member States, and Malaysia. These treaties are intended to modernize and improve the scope and operation of our existing international law enforcement framework while, nevertheless, maintaining a legal framework for the cooperation that is efficient, fair, and effective. The committee recognizes the necessity and the benefits that are derived from such treaties, which enhance cooperation between nations especially at this critical time in our history.

The United States has entered into over 100 bilateral extradition and mutual legal assistance treaties. Extradition treaties are important agreements that ensure, for example, that those who commit crimes in the United States cannot flee to another nation in order to escape justice and punishment. Mutual legal assistance treaties strengthen our ability to obtain evidence and other forms of assistance from overseas in support of our criminal investigations and prosecutions.

The structure of these treaties reflect the consistent evolution we have been observing in Europe over the last several decades. Instead of negotiating a separate and different agreement with each country in Europe, as we have done in the past, there is now one overarching agreement on extradition and another on mutual legal

assistance concluded with the European Union, which harmonizes the content of the bilateral agreements with every Member State.

First, there is a package of extradition agreements. Key provisions of the new extradition agreements implementing the U.S.–EU extradition agreement are as follows.

Outdated lists of extraditable offenses would be replaced with a modern dual criminality standard, which would enable our extradition treaties to cover new offenses, such as money laundering or cybercrime, as they develop in the criminal legal systems of both countries without having to amend the treaty each time.

The process of authenticating documents and transmission of provisional arrests and extradition requests would be streamlined.

Clear authority for the temporary transfer of persons to the requesting state that are being prosecuted or serving a sentence in the requesting state would be provided.

A uniform approach to handling competing requests for extradition or surrender of the same fugitive from every EU Member State and the United States would be established. Moreover, the United States requests for extradition put forward to a EU Member State would have the same status as competing requests submitted by another EU Member State.

Simplified extradition procedures would be provided in cases in which the person sought does not contest extradition.

Transit authority would be provided in order to facilitate the transportation of persons surrendered to a state by a third country when that person has to travel through another State Party in order to be surrendered.

In addition to these treaties on extradition matters, we are also considering today 30 mutual legal assistance treaties, also known as MLATs.

The United States has bilateral MLATs in force with 17 of the 27 EU Member States and has signed three bilateral MLATs with EU Member States that had not yet entered into force, including the 2001 MLAT with Sweden, which we are considering today. Many of the MLATs in force with EU Member States are out of date and thus need to be modernized. Moreover, the United States does not have MLATs in force with the remaining seven states of Bulgaria, Denmark, Finland, Malta, Portugal, Slovakia, and Slovenia. If the treaties we are considering today are approved by the Senate, the United States would have, for the first time, at least a partial or treaty-based mutual legal assistance relationship with these seven states.

Key provisions and mechanisms in the U.S.–EU framework agreement, which will be included in the EU Member State instruments are as follows.

A mechanism through which it would be possible to identify bank accounts and transactions relating to persons and entities under criminal investigation, as specified in the individual bilateral agreements.

States would be authorized to create and operate joint investigative teams comprised of investigating authorities for treaty partner countries for the purpose of facilitating criminal investigations or prosecutions involving one or more EU Member States and the United States where deemed appropriate by relevant parties.

A mechanism that would facilitate the use of video transmission technology to take witness testimony and for other law enforcement purposes.

States Parties would be authorized to use modern technology, such as fax and e-mail, in making requests for legal assistance so that the transmission of requests can be expedited.

States Parties would be authorized to provide legal assistance to administrative authorities conducting investigations with a view to criminal prosecution.

The final MLAT is the one law enforcement treaty under consideration with a state outside of the EU, and that is Malaysia. As with most MLATs, the agreement generally obligates the Parties to assist each other in criminal investigations, prosecutions, and related law enforcement proceedings, as well as civil and administrative proceedings that may be related to criminal matters.

I, particularly, want to thank our two administration witnesses that are with us today. I know this is technical information and it is a formal process that we go through on the constitutional responsibilities of the United States Senate on treaties. But these are very important issues, and I know they just did not come about quickly. It took a lot of work—a lot of hard work—and we appreciate the work that our two witnesses have done in making it possible for the United States Senate to take up these treaties today.

Susan Biniaz is a Deputy Legal Adviser of the Department of State, and Bruce Swartz, the Deputy Assistant Attorney General for the Criminal Division at the Department of Justice. It is nice to have both of the Department of Justice and the Department of State represented today at our hearing.

We will start with Ms. Biniaz.

**STATEMENT OF SUSAN BINIAZ, DEPUTY LEGAL ADVISER,
DEPARTMENT OF STATE, WASHINGTON, DC**

Ms. BINIAZ. Thank you, Mr. Chairman. I am pleased to testify, along with my colleague from the Justice Department, to express the strong support of the State Department and the administration for the Senate's prompt provision of advice and consent to the ratification of 58 new agreements for international law enforcement cooperation.

The agreements fall into three categories. First, there are two agreements with the European Union (EU), one each on extradition and mutual legal assistance. Second, there are 54 bilateral instruments, one on extradition and one on mutual legal assistance, with each of the 27 EU Member States. Third there are mutual legal assistance treaties, or MLATs, with Malaysia and Sweden.

Mr. Chairman, the extradition and mutual legal assistance agreements with the European Union and the individual Member States are the concrete results of a dialogue that began in the immediate aftermath of the September 11 terrorist attacks. From these discussions came a decision to modernize and expand existing law enforcement treaties between the U.S. and the EU Member States. The modernization was pursued initially through the negotiation of agreements with the EU itself, followed by the negotiation of instruments with the individual Member States. Both features, modernization of existing treaties and widening the net of

bilateral treaty coverage, became particularly important when the EU in 2004 and 2007 expanded to admit new countries, primarily from Central and Eastern Europe. In that region, a number of U.S. extradition treaties were antiquated and mutual legal assistance treaties were in some cases nonexistent.

The extradition and mutual legal assistance agreements with the EU were signed in June 2003. Thereafter, the U.S. pursued bilateral implementing instruments, one each on extradition and mutual legal assistance. These instruments were negotiated first with each of the European Union's then-15 Member States and thereafter with the 12 additional states.

We concluded individual bilateral instruments for a number of reasons. As a matter of international law, the bilateral instruments reflect direct sovereign consent by each EU Member State to the changes set forth in the U.S.-EU Agreements to the preexisting bilateral extradition or mutual legal assistance treaty between the United States and that Member State. As a matter of domestic law, the bilateral instruments should ensure application of the revised extradition treaties and MLATs by practitioners and the judiciary, both in the United States and abroad.

Most of the bilateral extradition instruments simply reflect the modernizing provisions contained in the U.S.-EU Agreement. However, five of the bilateral extradition instruments being considered by the committee today, those with Bulgaria, Estonia, Latvia, Malta, and Romania, take the form of comprehensive new extradition treaties. These five treaties were transmitted to the Senate separately. Since the prior extradition treaties with each of these countries had become outdated, it made sense to incorporate the provisions required by the U.S.-EU Extradition Agreement into fully modernized new extradition treaties instead of amendments to old treaties.

As a matter of substance, what is particularly notable in each of the comprehensive new treaties is the obligation to extradite nationals. These five countries have become the most recent European countries to overcome the historic obstacle that nationality has posed in extradition relations between much of Europe and the United States.

The bilateral mutual legal assistance instruments, like the extradition instruments, reflect the scope of the U.S.-EU Agreement. It should be noted that where no bilateral mutual legal assistance treaty previously existed between the United States and an EU Member State, as was the case with seven Member States (Bulgaria, Denmark, Finland, Malta, Portugal, Slovakia, and Slovenia), the new mutual legal assistance agreements will now serve that role.

Ratification processes for both the U.S.-EU Agreements and the individual bilateral instruments are approaching completion in Europe. I am pleased to report that 22 of the 27 EU Member States have completed their domestic procedures to bring the agreements into force. We expect the remainder to do so in the coming months, and prompt Senate action on this package of agreements would be very helpful in accelerating the process of ratification in European Union Member States. The U.S.-EU Agreements and the completed bilateral instruments may enter into force only following

completion of all ratification procedures by all national governments.

In conclusion, Mr. Chairman, the U.S.–EU Agreements and related bilateral instruments before the committee today would result in a historic and comprehensive modernization of the U.S. law enforcement relationship with the 27 members of the EU, and would create an institutional relationship with the EU itself in the law enforcement area. These agreements represent an opportunity to bring an important area of trans-Atlantic cooperation into the 21st century.

Now, turning to the Mutual Legal Assistance Treaty with Malaysia, while this agreement may not have the historic significance and law enforcement impact of the U.S.–EU agreements, it is, nonetheless, an important and necessary tool to help authorities in the United States and Malaysia investigate and prosecute terrorism and organized crime. I have addressed this treaty more fully in my written testimony and would be happy to address any questions you may have on this or on any of the other agreements before the committee.

Thank you.

[The prepared statement of Ms. Biniiaz follows:]

PREPARED STATEMENT OF SUSAN BINIAZ, DEPUTY LEGAL ADVISER, U.S. DEPARTMENT OF STATE, WASHINGTON, DC

Mr. Chairman, I am pleased to testify, along with my colleague from the Department of Justice, to express the strong support of the Department of State and the administration for the Senate's prompt provision of advice and consent to ratification of 57 new agreements for international law enforcement cooperation. The agreements fall into three categories:

- Two agreements with the European Union (EU), one each on extradition and mutual legal assistance;
- Fifty-four bilateral instruments, done pursuant to the U.S.–EU Agreements, one on extradition and one on mutual legal assistance, with each of the 27 EU Member States; and
- A mutual legal assistance treaty (MLAT) with Malaysia.

The Department of State greatly appreciates this opportunity to move toward ratification of these important treaties. I will address the extradition and mutual legal assistance agreements with the European Union and the bilateral instruments with EU Member States first, followed by the MLAT with Malaysia.

EXTRADITION AND MUTUAL LEGAL ASSISTANCE AGREEMENTS WITH THE EUROPEAN UNION

Mr. Chairman, the extradition and mutual legal assistance agreements between the United States and the European Union are the first law enforcement treaties our government has ever concluded with this important international body. They are concrete results of a dialogue that began between our government and the EU in the immediate aftermath of the September 11, 2001, attacks, as part of a wide-ranging exploration of ways of improving trans-Atlantic cooperation against terrorism.

From these discussions came a decision to modernize and expand existing law enforcement treaties between the United States and the Member States of the European Union. It was agreed to pursue this modernization initially through the negotiation of agreements with the EU itself, to be followed by instruments with the individual Member States. Both features—modernization of existing treaties and widening the net of bilateral treaty coverage—became particularly important when the EU in 2004 and 2007 expanded to admit new countries primarily from Central and Eastern Europe, a region where a number of U.S. extradition treaties were antiquated and mutual legal assistance treaties, in some cases, were nonexistent.

Among the most important features of the U.S.–EU Extradition Agreement is a provision replacing outdated “lists” of extraditable offenses with the “dual criminality” approach. This modern approach will now apply to our extradition relations

with all the countries of the European Union. It allows extradition for a broader range of offenses, and also will encompass newer ones, e.g. cybercrime, as they develop, without the need to amend the underlying treaties. The Extradition Agreement additionally contains a series of significant improvements to expedite the extradition process, which will be described by my Department of Justice colleague.

The U.S.–EU Mutual Legal Assistance Agreement likewise contains several innovations that should prove of value to U.S. prosecutors and investigators. It creates an improved mechanism for obtaining bank information from an EU Member State, delineates a legal framework for the use of new techniques such as joint investigative teams, and establishes a comprehensive and uniform framework for limitations on the use of personal data. The Department of Justice testimony also will describe these features in greater detail.

EXTRADITION AND MUTUAL LEGAL ASSISTANCE INSTRUMENTS WITH EU MEMBER STATES

The Extradition and Mutual Legal Assistance Agreements with the EU were signed in June 2003. Thereafter, the United States pursued bilateral implementing instruments, one each on extradition and mutual legal assistance. These instruments were negotiated first with each of the European Union's then-15 Member States and thereafter with the 12 additional states that joined in two groups, in 2004 and in 2007.

The conclusion of individual bilateral instruments was undertaken for important reasons. As a matter of international law, the bilateral instruments reflect direct sovereign consent by each EU Member State to the changes required by the U.S.–EU Agreements to the preexisting bilateral extradition or mutual legal assistance treaty between the United States and that Member State. As a matter of domestic law, the bilateral instruments should ensure application of the revised extradition treaties and MLATs by practitioners and the judiciary, both in the United States and abroad.

Most of the bilateral extradition instruments simply reflect the modernizing provisions contained in the U.S.–EU Agreement. However, five of the bilateral extradition instruments being considered by the committee today—those with Bulgaria, Estonia, Latvia, Malta, and Romania—take the form of comprehensive new extradition treaties. (These were transmitted to the Senate separately.) Since the prior extradition treaties with each of these countries had become outdated, it made sense to incorporate the provisions required by the U.S.–EU Extradition Agreement into fully modernized new extradition treaties instead of amendments to the existing treaties.

As a matter of substance, what is particularly notable in each of the comprehensive new treaties is the obligation undertaken to extradite nationals. With respect to Estonia and Romania, this obligation is unqualified. In the case of Latvia, its government may request that a Latvian national serve a U.S.-imposed sentence in a Latvian prison, pursuant to a prisoner transfer treaty. With regard to Malta and Bulgaria, their nationals may be extradited for 30 specified offenses corresponding essentially to those offenses for which they also may be surrendered for trial to European Union Member States. These countries thus have become the most recent European countries to overcome the historic obstacle that nationality has posed in extradition relations between much of Europe and the United States.

The bilateral mutual legal assistance instruments, like the extradition instruments, reflect the scope of the U.S.–EU MLA Agreement. Notably, where no bilateral law enforcement treaty previously existed between the United States and the EU Member State—as is the case with seven Member States in the mutual legal assistance area (Bulgaria, Denmark, Finland, Malta, Portugal, Slovakia, and Slovenia)—the mutual legal assistance instruments, while not serving as comprehensive MLATs, will ensure that the obligations arising from the U.S.–EU Agreement are applied between the United States and the EU Member State.

Ratification processes for both the U.S.–EU Agreements and for the bilateral instruments are approaching completion in Europe. While the foreign party to the U.S.–EU Agreements is the European Union itself, most EU Member States nonetheless are required or have chosen under their domestic constitutional laws to ratify both the U.S.–EU Agreements and the applicable bilateral instruments. I am pleased to report that 22 of the 27 EU Member States have completed their domestic procedures to bring the agreements into force. We expect the remainder to do so in coming months, and prompt Senate action on this package of agreements would be very helpful in accelerating the process of ratifications in European Union Member States. The U.S.–EU Agreements and the completed bilateral instruments may enter into force only following completion of all ratification procedures by all national governments.

MUTUAL LEGAL ASSISTANCE TREATY WITH MALAYSIA

The Mutual Legal Assistance Treaty with Malaysia does not have the historic significance and law enforcement impact of the U.S.–EU agreements, but it is nonetheless important. Malaysia is located at the heart of a region of the world where our law enforcement authorities are working every day in partnership with local governments to combat terrorism and organized crime. The MLAT will be a useful tool to help authorities in both the United States and Malaysia investigate and prosecute those offenses. It also will serve—indeed, it has already served—as a model for ongoing negotiations between the United States and other nations in that crucial region.

For the most part, the content of the MLAT with Malaysia is similar to that of the many other MLATs that this committee has reviewed in recent decades. It provides broad authority for each party to assist the other in gathering evidence necessary for criminal investigations and prosecutions.

One of the less common features of this MLAT is the provision allowing either party to refuse assistance in the absence of so-called “dual criminality”—in other words, if the conduct being investigated or prosecuted would not also constitute an offense in the state receiving the request punishable by a maximum sentence of at least 1 year’s imprisonment. Unlike extradition treaties, most MLATs do not have, and do not require, such a provision, but it is not unprecedented and we view it as a workable approach. To provide sufficient certainty that cooperation will be available for the range of requests we are likely to submit, our negotiators undertook two important steps: First, they conducted a review and comparison of the criminal codes of the two countries and concluded that there was sufficient commonality between the two that U.S. authorities would be able to obtain assistance in a broad range of matters. In addition, the negotiators prepared and included an annex to the treaty that outlines a set of offenses for which assistance will not be denied on the ground of absence of dual criminality. This annex includes the types of offenses for which U.S. prosecutors generally seek assistance abroad.

Mr. Chairman, I urge that the committee give prompt and favorable consideration to these agreements.

Senator CARDIN. Thank you, Ms. Biniarz.
Mr. Swartz.

STATEMENT OF BRUCE SWARTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. SWARTZ. Mr. Chairman and members of the committee, thank you for this opportunity to present the views of the Department of Justice on the U.S.–EU extradition and mutual legal assistance treaties, the instruments that implement each of those treaties at a bilateral level with each EU Member State, and the mutual legal assistance treaty with Malaysia.

As you note, Mr. Chairman, these are critically important treaties. Each one of them directly advances the national security and law enforcement interests of the United States.

Turning first to the U.S.–EU extradition framework decision and the framework treaty and the mutual legal assistance treaty that follows. With regard to the extradition treaty and the bilateral instruments under that treaty, as you note, Mr. Chairman, this treaty represents three key advances.

First, it replaces the older-list treaty approach found in many of our older extradition treaties with the European Union and substitutes in its place a dual criminality approach, which means, as you note, that we will be able to go forward with the extraditions on crimes such as cybercrime, intellectual property offenses, and importantly, counterterrorism offenses that might not have been possible under the old-list treaty approach.

Second, the EU–U.S. Extradition Treaty replaces the antiquated competing extradition request provisions and substitutes in its place an analysis that will consider all relevant factors. And this is particularly important, as you note, with regard to the European arrest warrant since it makes clear that United States requests will be on a par with European arrest warrant requests as between European Member States and will not be automatically subordinated to them.

And third, the extradition framework treaty puts in place a number of procedural improvements that will help ensure that extraditions are not denied on purely procedural grounds. And those include, as you note, temporary surrender provisions, waiver of extradition, transitive prisoners, a streamlining of provisional arrest, particularly through Justice Ministry and Interpol channels, and transmission and authentication of documents.

In addition to all of these features, as my colleague from the State Department has noted, we have also negotiated five new bilateral extradition treaties, each of which accomplishes the U.S. priority of ensuring that nationals can be extradited from those countries.

Turning next to the U.S.–EU Mutual Legal Assistance Treaty and the bilateral instruments under that, here, too, there are important advances. As you note, we had mutual legal assistance treaties with all but seven of the EU Member States. Our objective here was to ensure that we supplemented the treaties that we had and established relationships with the countries where we did not have treaties with regard to new forms of cooperation and that we improve the modalities under the existing forms of cooperation. And here, too, there are three important new advances represented by the framework U.S.–EU Mutual Legal Assistance Treaty. Each of these will aid our counterterrorism and law enforcement efforts.

The first of these is the identification, as you note, of previously unknown bank accounts and related financial information, a significant advance we expect that will be extremely useful in terrorism and money laundering investigations.

The second is the possibility of the creation of joint investigative teams which we expect will advance and expedite our criminal investigations and our counterterrorism investigations.

The third is the possibility for videoconferencing in criminal investigations and proceedings, a step that we think will greatly expedite the transmission of evidence and investigative information.

In addition to those three advances, as I noted, the framework treaty also establishes modalities that will improve our existing cooperation, including making clear that the assistance can be provided with regard to regulatory agencies insofar as they have statutory authority to conduct investigations with a view toward criminal referrals and are doing so with regard to the request in issue.

Second, in this regard in terms of improving modalities, it is made clear that information that is provided could be used at a minimum in connection with criminal proceedings and where appropriate to ensure that public safety is secured, if there is an immediate threat, and finally with regard to administrative proceedings under the same conditions regarding possible referral for criminal prosecution.

And finally under modalities, the framework treaty makes clear that expedition of transmission of requests by fax and e-mail is also possible, again speeding the vital transmission of this information.

Finally, turning to the Malaysia Mutual Legal Assistance Treaty, as you note, this is also a critically important treaty precisely because it involves an important partner in a very important part of the world. Under Malaysian law, no mutual legal assistance was possible for a criminal investigation prior to the beginning of court proceedings, that is, prior to this treaty. Therefore, this treaty has now secured the possibility of cooperation with Malaysia on critical counterterrorism and transnational crime investigations.

In sum then, we appreciate, Mr. Chairman, the committee's support for these important treaties. We urge that advice and consent be given to them.

And I look forward to answering any questions you might have.

Thank you.

[The prepared statement of Mr. Swartz follows:]

PREPARED STATEMENT OF BRUCE C. SWARTZ, DEPUTY ASSISTANT ATTORNEY
GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. Chairman and members of the committee, I am pleased to appear before you today to present the views of the Department of Justice on the extradition and mutual legal assistance agreements between the United States and the European Union (EU), the instruments that implement them at the bilateral level with each EU Member State, and a mutual legal assistance treaty with Malaysia. These historic treaties directly advance the interests of the United States in fighting terrorism and transnational crime.

At the outset, I wish to note that the decision to proceed with the negotiation of law enforcement treaties such as these is made jointly by the Departments of State and Justice, after careful consideration of our international law enforcement priorities. The Departments of Justice and State also participated together in the negotiation of each of these treaties, and we worked closely with the Department of the Treasury, the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC) in negotiating the articles of the U.S.-EU Mutual Legal Assistance Agreement that relate to their respective functions. We join the Department of State and these other agencies today in urging the committee to report favorably to the Senate and recommend its advice and consent to ratification.

The Departments of Justice and State have prepared and submitted to the committee detailed analyses of the mutual legal assistance and extradition treaties in the Letter of Submittal. In my testimony today, I will concentrate on why these extradition and mutual legal assistance treaties are important instruments for United States law enforcement agencies engaged in investigating and prosecuting terrorism and other serious criminal offenses.

My colleague from the Department of State, Ms. Biniaz, has already touched upon the principal benefits flowing from the U.S.-EU Agreements. I will go into greater detail in describing the objectives of the United States in negotiating the agreements with the EU, and the provisions that resulted.

THE U.S.-EU EXTRADITION AGREEMENT AND ITS BILATERAL IMPLEMENTING
INSTRUMENTS

With respect to the extradition agreement, at this moment, prior to the entry into force of the U.S.-EU Agreement and bilateral implementing treaties with the 27 EU Member States, the oldest of our existing extradition treaties with EU Member States are 100 years old or older (Slovenia, which dates to 1901 and Portugal, signed in 1908). Ten others signed in the 1920s through 1970s (Bulgaria, the Czech Republic, Denmark, Finland, Greece, Romania, and the Slovak Republic) also contain a significant number of antiquated provisions. As a result, one of the principal negotiating objectives of the United States was to arrive—in a single negotiation—at an extradition treaty governing EU Member States that would eliminate obsolete provisions in favor of more effective, modern provisions.

At the same time, many of our existing bilateral extradition treaties with EU Member States were more modern treaties that did not require major revision, and which already reflected the particular needs of the U.S. and the Member State con-

cerned. What is more, the existing bilateral extradition treaties had been negotiated individually with each Member State and, naturally, were not identical; some contained variations that were more progressive than others. Therefore, another negotiating objective for the United States was to ensure that the process of negotiating with the European Union as a whole did not result in provisions that, while reaching consensus among all EU Member States, who were being consulted regularly during the negotiation, might undermine stronger existing provisions between the United States and some Member States.

The third principal objective was to obtain agreement with the European Union on provisions that would represent advances over the provisions of even our most modern bilateral extradition treaties with Member States. I will discuss the manner in which these objectives were reached in turn.

The updating of our oldest extradition treaties was accomplished in large part by replacing out-of-date provisions with more modern formulations contained in the U.S.–EU Agreement. In particular, the oldest treaties define extraditable offenses by reference to a list of crimes enumerated in the treaty itself. Such an approach limits extradition for newly emerging forms of criminality that the United States has a strong interest in pursuing, such as antitrust offenses, cybercrime, and environmental offenses. Through application of the Agreement and the subsequently concluded implementation instruments that directly amend the bilateral treaties, these old provisions are replaced by modern “dual criminality” provisions. This means that the obligation to extradite applies to all offenses that are punishable in both countries by a maximum term of imprisonment of more than 1 year; which is a significant improvement since extradition will be possible in future with respect to the broadest possible range of serious offenses, without the need to repeatedly update treaties as new forms of criminality are recognized. The dual criminality provision also contemplates extradition for extraterritorial offenses. For the United States, extraterritorial jurisdiction is important in two areas of particular concern: Drug trafficking and terrorism.

The Extradition Agreement also incorporates a variety of procedural improvements that update not only the oldest extradition treaties, but also a number of more recent treaties that do not already contain such provisions. For example, the Agreement contains a “temporary surrender” provision, which allows a person found extraditable, but already in custody abroad on another charge, to be temporarily surrendered for purposes of trial. Absent temporary surrender provisions, we face the problem of delaying the fugitive’s surrender, sometimes for many years, while the fugitive serves out a sentence in another country. During this time, the case against the fugitive becomes stale, and the victims await vindication for the crimes against them.

The Extradition Agreement also allows the fugitive to waive extradition, or otherwise agree to immediate surrender, thereby substantially speeding up the fugitive’s return in uncontested cases. It provides for transit of prisoners through the United States and EU Member States, a provision that can be of great practical importance where a surrendered fugitive must be transported to the United States from a country in Africa or Asia and commercial airlines only offer flights transiting Europe, or where the surrendered fugitive is being transported from Latin America to an European Union Member State through the United States. It also streamlines the channels for seeking “provisional arrest”—the process by which a fugitive can be immediately detained while the documents in support of extradition are prepared, translated, and submitted through the diplomatic channel—and the procedures for supplementing an extradition request that already has been presented.

To reach the second objective I mentioned—ensuring that the provisions of the U.S.–EU Agreement do not inadvertently weaken existing bilateral treaties which go farther than the provisions in the Extradition Agreement—U.S. negotiators carefully reviewed existing bilateral treaties with Member States and drafted the scope provision of article 3(1) to ensure that the substantive articles apply only in order to either replace outmoded provisions, add useful provisions to treaties that did not already have them, or be even more advantageous than the modern provisions currently in place. As to replacing outmoded provisions, for example, article 3(1)(a) provides that article 4’s “dual criminality” requirement replaces the provisions of antiquated “list” treaties; dual criminality provisions in modern U.S. extradition treaties with EU Member States remain unaffected. As to adding useful provisions, for instance, article 3(1)(f) adds the possibility of temporary surrender to those treaties that do not already permit it.

Finally, article 3(1)’s terms provide that certain provisions that are more favorable than those found in our current treaties replace the prior formulation. For example, article 10(2) provides that where an EU Member State receives a request for extradition from the United States as well as a request for surrender of the same

fugitive from another EU Member State pursuant to the European Arrest Warrant, the EU Member State holding the fugitive shall make its determination as to which request should receive priority based on a consideration of all relevant factors, rather than giving automatic precedence to the request from the EU Member State. This was a very important point for the U.S., because many EU Member States do not extradite their nationals. Were the EU to decide that, as an internal matter, European Arrest Warrant requests from other Member States should receive priority over foreign extradition requests, a fugitive who is a national of another EU Member State could be surrendered to his country of nationality—even for less serious charges than those for which the U.S. might seek his extradition—and we would not be able to subsequently extradite him from the country of nationality. This provision, in combination with article 3(1)(g), makes clear that such a result would not be consistent with the international obligations set forth in the Agreement.

Another provision that represents an advance over many modern treaties is article 7, which addresses transmission of documents following provisional arrest of a fugitive, an event that triggers a treaty deadline for receipt of the documents in support of extradition, which, if not met, will result in the fugitive's release. The Agreement provides that once the extradition documents have been received by the Member State's embassy in the U.S., the treaty deadline for receipt of the documents is considered satisfied. This is the same standard that the United States already applies when receiving extradition documents from other countries, and we will now benefit from the same treatment when we make extradition requests. Pursuant to article 3(1)(d), this provision is added to all U.S. extradition treaties with EU Member States.

Last, articles 3(1)(b) and 5(2) of the Agreement greatly simplify the authentication requirements for extradition documents to enable them to be admitted in evidence at extradition hearings. Over the years, the authentication requirements of extradition treaties, requiring extradition documents to be certified at embassies to permit them to be admitted in evidence in extradition hearings, had become increasingly time consuming to satisfy, to the point that doing so entailed some risk that the fugitive might be released or flee during the time it took to complete these requirements. The new U.S.-EU provision specifies that documents bearing the seal or certificate of the justice or foreign ministry of the State seeking extradition are admissible in extradition proceedings, thereby significantly streamlining the process, yet retaining sufficient assurance of the reliability of the documentation received.

Of course, in the case of Bulgaria, Estonia, Latvia, Malta, and Romania with whom we have negotiated completely new bilateral extradition treaties, the provisions of the U.S.-EU Extradition Agreement are incorporated. All five of these complete treaties also provide for the extradition of nationals, a U.S. negotiating priority.

THE U.S.-EU MUTUAL LEGAL ASSISTANCE AGREEMENT AND ITS BILATERAL IMPLEMENTING INSTRUMENTS

With respect to mutual legal assistance, the situation at the outset of negotiations was somewhat different from that of extradition. We have a Mutual Legal Assistance Treaty (MLAT) either signed or already in force with all but seven EU Member States (the seven being Bulgaria, Denmark, Finland, Malta, Portugal, the Slovak Republic, and Slovenia). Where we have not concluded an MLAT, cooperation is being provided pursuant to domestic mutual legal assistance statutes. The 20 MLATs signed or already in force are modern instruments, with the oldest being our 1981 treaty with the Netherlands. Thus, in the mutual legal assistance area, the principal objective was not to update out-of-date treaties, but rather to supplement our MLATs with new forms of cooperation not expressly provided for to date, and, in some cases, to provide more flexible and beneficial modalities in carrying out cooperation.

Accordingly, the U.S.-EU Agreement contains three new types of provisions not previously set forth in U.S. MLATs, meaning that, while these forms of assistance might be possible as long as the domestic law of the U.S. and the EU Member State do not prohibit the assistance, there was previously no specific obligation to make such assistance available.

The first of these provisions is the identification of bank information pursuant to article 4. While our existing MLATs already provide for the production of bank records needed in money laundering, terrorism financing and many other kinds of investigations, as well as for the identification, freezing, and forfeiture of proceeds of crime laundered through banks, MLATs do not currently provide a procedure for locating previously unidentified bank accounts, on the basis of, for example, the

name and date of birth of the account holder. Authority to identify such banking information for terrorism and money laundering investigations was established for the United States in the USA PATRIOT Act of 2001, and for the European Union in its 2000 MLAT among EU Member States. The U.S. and EU both having established this power, we were able to formulate a provision that will facilitate the identification of such information in requests for cooperation made between us. Experience has shown that terrorists and money launderers often use U.S. and European banks for their purposes. Article 4, therefore, provides a powerful law enforcement tool that will greatly aid us in identifying where terrorists and money launderers are secreting their funds, following which we can take appropriate action using existing international cooperation treaties and laws. While the assistance the U.S. provides to EU Member States will—in accordance with the USA PATRIOT Act's limited grant of authority—be restricted to cases involving terrorism and money laundering activities, a number of EU Member States agreed to make this form of cooperation available to the U.S. with respect to an even broader range of criminal activities.

Second, article 5 of the Agreement authorizes the establishment of joint investigative teams for purposes of coordinating closely in the ever increasing number of international terrorism and organized crime investigations that require simultaneous action in more than one country. While U.S. investigative agencies have long worked cooperatively with their foreign counterparts in investigations having international aspects, the extent of joint activity has at times been limited absent this kind of provision. Once the Agreement enters into force, we will have a framework that will enable a fuller integration of investigative activities with our European partners where we deem it important to do so.

Finally, article 6 facilitates the use of modern video-conferencing technology in criminal investigations and proceedings, authorizing its use for taking testimony or other investigative uses. Already in use regularly in domestic U.S. criminal cases for some pre and post-trial hearings, to take witness statements, and for other investigative actions, video-conferencing technology is used less frequently at the international level, where many countries have more limited experience with it. Its increased use will benefit the United States, by permitting investigative statements to be taken abroad, with investigators and prosecutors, or even incarcerated defendants in the U.S., being able to participate more meaningfully via use of video-conferencing technology if participation in person is not feasible. In this area as well, in the past, the United States has facilitated the taking of testimony via video link from witnesses in the United States for use in foreign criminal proceedings. However, absent a specific provision of this type, some EU Member States would not be able to authorize a video feed to the United States during witness questioning. This provision will therefore provide greater flexibility in international criminal cases.

I also mentioned that a number of provisions of the U.S.–EU Agreement provide more favorable modalities to be applied in carrying out cooperation than were previously available under some of our MLATs. I would like to mention the two principal articles in this regard, pertaining to administrative authorities and use limitations.

First, pursuant to article 8 of the Agreement, the U.S. and EU Member States must provide assistance to regulatory agencies with statutory authority to conduct investigations with a view to referral for purposes of prosecution. To an increasing extent, Federal agencies such as the SEC, the Commodity Futures Trading Commission, and the FTC are conducting the initial investigation in serious fraud cases. While some prior MLATs permit agencies such as these to receive assistance, some foreign law enforcement partners have declined to entertain requests which do not originate from criminal courts, prosecutors or criminal investigative agencies. As a result of this provision, U.S. regulatory agencies engaged in investigations that could result in referral to the Department of Justice for criminal prosecution will be entitled to cooperation from all EU Member States and, likewise, will be able to use the information obtained in their regulatory enforcement proceedings even if the case does not ultimately result in criminal referral. Of course, to the extent EU Member States have administrative components engaged in analogous investigations they will receive reciprocal cooperation.

Second, article 9 of the MLAT allows the information and evidence provided in response to a mutual legal assistance request to be used, at a minimum, for any criminal investigation or proceeding, for the purpose of preventing immediate and serious threats to public security, and for use in the regulatory proceedings I just described. This formulation is an advance over some older use limitation formulations, which often set out a cumbersome procedure by which use was initially limited to the purposes set forth in the request, and permission for any other subse-

quent use had to be sought and granted. The new formulation recognizes that in cases involving immediate threats to public security, there is not sufficient time to ask permission for a different use, and there is no sound reason to deny permission where the evidence and information provided is pertinent to other criminal conduct not known at the time the MLAT request was drafted.

MUTUAL LEGAL ASSISTANCE TREATY WITH MALAYSIA

In addition to the treaties with the EU, the Department of Justice urges the committee to give favorable consideration to the Mutual Legal Assistance Treaty with Malaysia. Under Malaysian law, in the absence of this treaty, there is no obligation to provide assistance to the United States in investigations prior to the initiation of court proceedings. With the entry into force of the MLAT, there will be a mutual obligation to provide assistance similar to what is found in other U.S. MLATs.

CONCLUSION

In conclusion, Mr. Chairman, we appreciate the committee's support in our efforts to strengthen the framework of treaties that assist us in combating international crime. For the Department of Justice, modern extradition and mutual assistance treaties are particularly critical law enforcement tools. Moreover, EU Member States are among our closest law enforcement partners, and we are seeing a continual increase in the number and complexity of mutual legal assistance requests flowing between us. To the extent that we can update our existing cooperation agreements and arrangements in a way that enables cooperation to be more efficient and effective, we are doing ourselves, and each other, a great service. Accordingly, we join the State Department in urging the prompt and favorable consideration of these law enforcement treaties.

Senator CARDIN. Well, again, let me thank both of you for your testimony.

Ms. Biniiaz, you indicated that, I think, 22 of the 27 European countries have taken steps to implement these agreements. Is there a problem in the other five states? Are there any anticipated issues that we should be aware of—of controversy surrounding the approvals among the 27 European countries?

Ms. BINIAZ. I do not think we anticipate any problems. I can give a quick rundown of the countries and where things stand.

The first one would be Belgium. Belgium required implementing legislation in order to ratify this package, and as of mid-February, it was being reviewed by the Conseil d'Etat prior to being sent to Parliament. The prediction by the EU Presidency is that the legislation will pass by June, and Belgium would then be in a position to ratify the package.

The next country is Cyprus. The ratification package or instruments are with the Parliament's legal affairs committee. There was a second reading of the bill a couple of weeks ago, and we anticipate further action in the near future. In fact, it may have happened over the weekend. We need to check that.

Greece is the next country. The Justice Ministry has begun drafting the implementing legislation that is necessary to be submitted to Parliament after a lengthy review by parliamentary experts. On that one, we do not have any sort of indication of timing, but do not anticipate any particular problem.

The fourth country is Italy. As you know, a new government was formed in April, so the ratification process is not expected to be imminent but it is on track.

Finally, the Netherlands. The package is scheduled for plenary debate before the lower House of Parliament during the week of May 26. There are some smaller opposition parties which will raise questions at that time, but those questions are not expected to be

about the package itself. They are expected to be raising concerns about aspects of U.S. foreign policy related to the war on terror, and this is just an opportunity to raise those questions. But they do not relate to the package of treaties before the Parliament.

In sum, we do not expect a problem with any of the five remaining countries.

Thank you.

Senator CARDIN. And with the new government in Italy, have you gotten any indication of any concerns about perhaps reopening this agreement?

Ms. BINIAZ. I am told we have no indication of any problems. If we do, we will get back to you.

Senator CARDIN. So you anticipate that these agreements will be approved in all the European countries.

Now, what is the status of Malaysian support for the MLAT?

Ms. BINIAZ. They are already in a position to exchange instruments of ratification. So my understanding is that they are just waiting for us.

Senator CARDIN. Both of you mentioned the extradition of nationals, and I know it applies in Estonia, Romania, and Latvia. Is there a concern that American nationals may be subject to this extradition which may not be in what the United States would otherwise want to see happen to American nationals?

Ms. BINIAZ. I can give an answer and it can be elaborated by Justice.

We do not generally conclude extradition treaties unless we have fully examined the country's legal system and ensured that human rights issues, including due process issues, are up to our standards, and that we would be comfortable sending U.S. nationals to those countries.

In an extreme case, it is always at the discretion of the Secretary of State whether to extradite persons from the United States. So I think we have no reason to be concerned.

Senator CARDIN. So you are saying that even with the countries that we do have these agreements with, there is no 100 percent guarantee that those countries would extradite their nationals to the United States. Is that also true?

Ms. BINIAZ. Well, it depends on the terms of the given extradition treaty.

Senator CARDIN. In regards to Romania or Latvia or Estonia?

Ms. BINIAZ. Yes. There is an obligation in those new treaties to extradite regardless of nationality.

Senator CARDIN. Would that also not be true then with the United States? You indicated the Secretary could prevent the extradition of an American to Latvia.

Ms. BINIAZ. I was giving an example of an extreme case where there happened to be an issue, but my general point was that we would not enter into an extradition treaty unless we were comfortable with sending U.S. nationals there, and the other country, obviously, has to be comfortable sending its nationals to the United States because those are the terms of the treaty.

Senator CARDIN. So the bottom line is that an American national would be subject to extradition.

Ms. BINIAZ. Yes; which is the way it is generally under our extradition treaties.

Senator CARDIN. And you feel comfortable with the systems today in Romania and Latvia and Estonia that Americans would be protected against the concerns we have in extradition.

Ms. BINIAZ. Yes.

Senator CARDIN. Thank you.

Mr. Swartz, you mentioned joint investigations, which I find intriguing. We will be taking up on Thursday in the Judiciary Committee giving the Justice Department additional tools in dealing with exploiting of children, which is legislation that has strong bipartisan support. I looked at offering amendments to give the Justice Department more authority to deal with other countries because a lot of the exploitation issues are international. Under these agreements, would it be easier for you to work joint investigations on exploitation issues with the European countries?

Mr. SWARTZ. Mr. Chairman, we believe that it would be easier. The United States has long favored the creation, on an ad hoc basis, of joint investigative teams. The great advantage of having this provision in the framework treaty is that it authorizes EU Member States, some of whom have felt that they needed such authorization in terms of having it on a treaty basis, to go forward as well. But we believe that our work has always benefited by the possibility of working jointly and engaging in the informal sharing of information that can then be followed up with the formal request through the mutual legal assistance process. So we look forward to any opportunity to engage in joint work with our colleagues on cases that are of joint importance.

Senator CARDIN. And we do have international commitments in regards to trafficking which, I take it, the Justice Department is working in cooperation with other countries. The Internet issues involve more complicated issues because the legal systems are different as to the protection of the Internet. Actually there is probably more protection in the United States than in most of the European countries. I am just trying to get a grip as to whether these agreements will have any impact on trying to deal with those international forces that are preying on our children.

Mr. SWARTZ. Mr. Chairman, we expect that it will. We have worked quite closely on child exploitation cases with European partners already, and as the chairman is aware, we have engaged in joint arrests, coordinated takedowns of organizations involving child exploitation. We expect that this particular agreement, by making it clear that such joint investigative teams are not only permissible on an ad hoc basis but to be encouraged and are now incorporated in the treaty framework, will make countries that might have otherwise found it more difficult to cooperate or to form such teams willing to do so. But we are fully committed as a Department to the pursuit of such cases and to continue our work singly and jointly with other countries to try and deal with the very serious problem of child exploitation.

Senator CARDIN. Thank you.

I want to get a better understanding on the transport through one of these states when the surrender occurred outside. What I am thinking about is circumstances where perhaps we have a per-

son who has surrendered in the Middle East and we are trying to bring the person back to the United States and we have to travel through several European countries' airspace that are subject to these agreements.

Can you just explain to me whether we are protected? Do we preauthorization in order to do that under these agreements, or is there still a process it needs to go through in order to transport someone who has surrendered in the Middle East to the United States to travel through air to our country?

Mr. SWARTZ. Mr. Chairman, Article 12 of the extradition agreement between the United States and the European Union covers the question of transit and establishes both the principle of transit but also a procedure to be followed to ensure that transit is permissible. In particular, Article 12.2 states that a request for transit shall be made through the diplomatic channel or directly through the Justice Ministry of the Member State, and Interpol can also be used to facilitate such a request. And the request itself makes clear that it is identifying not only the person being transited but the description of the facts of the case, and that essentially that he or she is detained in custody during the period of transit. So, yes; there is a procedure, and there is also a procedure in 12.3 when there is an unscheduled landing that takes place.

Senator CARDIN. I understand notification, but would these agreements provide preauthorization so that we have their permission to do it? I understand we may have to follow certain guidelines in order to achieve and notify what we are doing and we may have an issue of landing in their country. But is there an implied authorization if we have to transport over their airspace?

Mr. SWARTZ. Only in the cases in which an individual is being transited and lands in that country. The unauthorized landings—we have a separate procedure for that.

Senator CARDIN. So if they travel over the airspace, you do have preauthorization? No; you do not. Yes, no?

Mr. SWARTZ. For traveling through the airspace, you do not need preauthorization.

Senator CARDIN. You do not. Thank you for that.

Let me talk a little bit about the bank information, which is new. Certainly I think we all understand how important information is in investigations concerning bank accounts. But as you know, there is a concern in Congress on privacy, and I just would like to know a little bit more about how you envision this provision being implemented, particularly respecting the legitimate privacy rights of Americans to know that their bank records are not being just shared inappropriately. Whoever feels like answering that.

Mr. SWARTZ. I guess I feel like answering that.

Mr. Chairman, I am happy to say that the concerns with regard to privacy were certainly taken into account in the negotiation of this provision on both the United States and the European Union side. As you are aware, the EU is concerned about data protection. We are as well. And there are several aspects of the bank identification provision of the mutual legal assistance treaty that help cure privacy.

In the first place, the request will go to our investigative agencies, if they are coming from abroad, either the FBI attaché or DEA

or ICE, as appropriate. And there has to be sufficient information provided to allow basically a reasonable conclusion that there is a crime involved, that the information being sought exists in a bank, and that there is a relationship between the crime and the information being sought. That is a determination that our law enforcement agencies will make before submitting this to FINCEN, the Treasury Department's Financial Crimes Enforcement Network.

And a further protection is provided by the fact that all that goes back through these channels is an indication that there is an account or other information, not the actual information itself. That information then has to be obtained through mutual legal assistance with all of the protections and assurance that the central authority, in this case, the Department of Justice, will review any such request for mutual legal assistance.

Senator CARDIN. This is a sensitive area, as I am sure you are aware. Once again, I think it is extremely important that information that is needed in the investigation, legitimately entitled to if it were in the United States, that that cooperation be provided to the countries in which we have entered into these agreements. But I am also concerned that we have in place the adequate oversight to make sure that the type of determinations that you just quickly went through are being done so that Americans have the protection for privacy that they are entitled to. It is one thing when the initiation comes from American sources. We have jurisdiction over those entities and can take action that there is abuse. The problem is the information made available from foreign sources. We do not have the same degree of oversight—the same degree of accountability and jurisdiction.

So I think it is critically important that the procedures in place in this country are checking and making sure that the information made available is accurate and that there is some degree of ability to hold the other country accountable in the event that information proves to have been provided that was inaccurate.

Mr. SWARTZ. Mr. Chairman, we take that very seriously, and we will certainly, in terms of the review of this procedure, ensure that that is the case. As I have noted, we really have checks built into it at three levels: First, when our law enforcement attachés receive the request; second, when it goes to the Financial Crimes Enforcement Network at Treasury; and then finally, through our central authority at the Department of Justice when the request is followed up with a mutual legal assistance request.

But that said, we recognize the importance of ensuring that this process is used for the purposes for which it is intended, and in the United States case, that will be for terrorism and money laundering offenses. And we will certainly review the process as it goes forward. In fact, Article 4 expects there will be a review, and if there is a burden or other issues, we expect that that would be a subject of further consultation.

Senator CARDIN. And I noticed it was restricted to those two areas of money laundering and terrorism. Was there discussion of using it in a broader context, or is there anticipation that that may follow, that there may be a broader use of this power?

Mr. SWARTZ. The bilateral instruments make clear that it is possible, should the United States expand its legislation in this regard,

that there might be a reciprocal expansion with regard to requests from other countries. And several other countries—EU Member States—have already made clear that it can be used for their purposes for offenses beyond money laundering and terrorism.

Our use of money laundering and terrorism was based on the existing legislation under the PATRIOT Act, under section 314 in particular, which focuses on exactly this kind of procedure for money laundering and terrorism within the United States. So for the present, we believe that that addresses, particularly given the extensive predicate offenses for money laundering in the United States, the range of offenses that gives us a chance to see how this procedure works, helps focus it in the way that you suggest, Mr. Chairman. And then if Congress determines to expand this approach, we can seek similar expansion from our European partners.

Senator CARDIN. I think that is reasonable.

Let me just make a strong suggestion, and that is that the appropriate committees in Congress are kept well informed on the use of this particular authority within these agreements so that there are no surprises as to how it is being utilized, the volume of requests that are being made, how they are being screened, how you are following up to make sure that it was appropriate. I think if you do that, you can avoid a future problem, particularly when you come for perhaps expansion of the power, which again I think is a reasonable request, but there is going to be a desire to see how it has been applied.

So I would urge you, rather than wait for congressional hearings or for something perhaps that comes out in the newspaper that causes a reaction by Congress, that you work with Congress on these powers because I think there is a genuine understanding of the need to get these records, and we just want to make sure it is done in the appropriate way and that we just do not give carte blanche to other countries that may have different tolerance than we do for protecting the right of privacy.

Mr. SWARTZ. Mr. Chairman, we will be glad to work with Congress in that regard.

Senator CARDIN. Thank you.

Now that we have finished banking records, let me talk about capital punishment, another subject, of course, that has a little bit of controversy surrounding it. By way of background, I serve as the Senate chair of the Helsinki Commission and am well aware of the European concerns about capital punishment in the United States. As I understand these agreements, extradition can be conditioned upon certain assurances given on capital punishment not being applied in a particular case. I have a couple questions here.

The first is, Can a country that we have an agreement with use that provision to deny the extradition of someone to the United States even though the United States has indicated it would not seek capital punishment?

Mr. SWARTZ. Mr. Chairman, I think it is fair to say that under any extradition agreement in which such provisions appear, including the current ones under consideration by the committee, the requested state can decide not to grant extradition and could do so notwithstanding the conditions being given by the United States with regard to the death penalty.

Were that to happen, however—that is, were the United States to have indicated that the conditions under Article 13 of the U.S.—EU Extradition Treaty would be met by the United States—we would certainly strongly take issue with the country's refusal to extradite the individual precisely because, as the chairman is well aware, the reason that we have such a provision is to ensure that a fugitive cannot escape punishment entirely by fleeing to a nondeath penalty jurisdiction. We have never in this country failed to meet our obligations with regard to assurances or conditions that have been set with regard to the death penalty, and we would certainly urge that point with regard to any country were it to decide not to go forward, notwithstanding our agreement to meet the conditions.

Senator CARDIN. So what you are saying is that under the exception for capital punishment, there would be a requirement to extradite someone where assurances have been given, but that there is enough discretion remaining that it could be a factor in the denial of a country extraditing to the United States, although we would raise serious concerns about that and use our best efforts to make sure that does not happen. Is that a fair assessment?

Mr. SWARTZ. Yes, Mr. Chairman. We would certainly make certain that our best efforts were extended to make clear to the country that we had agreed to the conditions set forth in Article 13 and therefore there was no basis for refusing extradition. But the request of State is always the final arbiter with regard to decisions to extradite.

Senator CARDIN. So now let me put it on the other side. The country has decided to extradite the individual to the United States. We now have custody of the individual and we are ready to pursue the criminal matters with the restrictions that we placed about no capital punishment. We have codefendants that are in the United States for which the prosecutor would like to see the capital punishment considered.

What type of dilemma do we have on constitutional rights for equal justice and just the fairness of our system where we have codefendants, one of which could be subject to capital punishment, the other not, for committing the same crimes?

Mr. SWARTZ. Mr. Chairman, I would be glad to take that question more fully for the record, but I can state that, of course, it does present a difference with regard to those two individuals. As the chairman is aware, oftentimes a variety of factors can lead to different codefendants facing different penalties even for the same crime. Nonetheless, it is the case, as you say, that an individual who has been successful in fleeing to a nondeath penalty jurisdiction can take advantage of that fact to when he comes back to the United States subject to conditions that the death penalty will not be imposed.

Senator CARDIN. I will take that answer, but if you have additional information you would like to make available to the committee, we would appreciate that.

It is a serious problem for the United States. Capital punishment—the use in the United States is not consistent with our allies in Europe. They have a different standard for the use of capital punishment. And it presents real problems for law enforcement.

And I do think there—I do not know if it is constitutional. It might be a problem that we have when we have different restrictions on different criminals that are unrelated to the crime that they committed and the impact it has certainly on the fairness of our system. I have concerns as to how we deal with it under our current capital punishment laws and would appreciate your adding to that weight of discussion perhaps by expanding on your answer going forward.

Let me bring up another area that I would like to have a little bit of understanding as to how you expect to use this authority, and that is dealing with administrative authorities. Perhaps you could tell us exactly what agencies you think are involved and what type of requests you anticipate might be made. As I read the agreements, there is a provision where you can tailor the response based upon the burden of the agency. I guess that is the best way of saying it. There is a safety valve here that you could argue pragmatic reasons for not fully complying with the request.

My question is, Was that put in at the request of the United States or our European friends? Is there a concern that there will be more requests coming to us or more requests coming to them? Have you heard from the regulatory agencies as to their concerns? Can you just fill us in a little bit more as to that provision and how it will be implemented?

Mr. SWARTZ. Mr. Chairman, with regard to the investigative agencies, the administrative agencies would have the power to refer matters criminally. We would expect this likely to be used on the U.S. side by entities such as the SEC, the Commodities Futures Trading Commission, and perhaps the FTC as three examples.

And we did consult with our administrative agencies in this regard. We think this is an important advance certainly from the United States perspective since our regulatory agencies do have that power to engage in criminal referrals and do work closely with us in that context when criminal referrals are made. So we think this is a significant step forward from the point of view of the United States.

In terms of, as you say, of the safety valve, because this is a new provision, we, and perhaps the European Union as well, felt that it was wise to have the possibility of determining in the future if this becomes a burden on either side of the Atlantic simply because this is basically a new approach we are taking in this regard, but we expect the advantage to the United States to be significant. We trust that the burdens will not be that burdensome, but should they be so, we would have the ability to reconsider how this should go forward in the future.

Senator CARDIN. So the provision that says “shall take measures to avoid the imposition of extraordinary burdens on requests to states through application of this article” was suggested by the United States?

Mr. SWARTZ. I am informed, Mr. Chairman, that it was a U.S. suggestion in this regard.

Senator CARDIN. Well, it could work both ways. If we are more aggressive in these areas, then it could be used by our European friends to deny us some information. Of course, one of the areas that we have been actively involved with the agencies that you

refer to in regards to criminal matters—I might suggest that you keep us closely informed as to how this new authority is working to see whether it has been useful in going after the types of criminal activities that we are concerned about and whether this provision is, in fact, being used to filter the type of information we otherwise would be receiving and, on the reverse side, how many requests we are getting from other countries to give information. So I think particularly in regards to the regulatory agencies, as well as the financial information, they are sensitive matters that I would appreciate you keeping us all informed.

Mr. SWARTZ. Mr. Chairman, we will certainly do that.

Senator CARDIN. Thank you.

If you will bear with me for just one moment.

[Pause.]

Senator CARDIN. There may be some additional questions for the record. We would ask if they are made, that you would try to supplement that within the next few days if possible because I know we are trying to expedite the Senate considerations of these treaties and agreements so that we can get the benefits as quickly as possible.

With that, I thank again both of you for being here, and the committee will stand adjourned.

Thank you very much.

[Whereupon, at 11:20 a.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

RESPONSES OF DEPUTY LEGAL ADVISER SUSAN BINIAZ TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN

Question. Please explain whether a breach by an EU Member State of a provision of the U.S.–EU extradition agreement that has been incorporated into a bilateral instrument would be considered a breach by both the European Union and the Member State, or just the Member State.

Answer. We would ordinarily expect that a breach by an EU Member State of a provision of a bilateral instrument derived from the U.S.–EU Extradition Agreement would be considered a breach only by that Member State. Article 3 of the U.S.–EU Extradition Agreement requires the EU to “ensure that provisions of this Agreement are applied in relation to bilateral extradition treaties” between the individual Member States and the United States. The EU’s responsibility therefore relates to ensuring that specified provisions are reflected in individual bilateral instruments, while the Member States remain responsible for carrying out the content of such provisions under their respective bilateral agreements with the United States. Thus, even where a Member State breach related to a provision that derived from the U.S.–EU Agreement, it would be the Member State that would ordinarily be in breach, rather than the EU. Having said that, we do not rule out a situation in which a breach might be of such a character or magnitude that it might implicate the EU’s own responsibility for ensuring the application of certain provisions with respect to an individual bilateral instrument.

Question. What would be, if any, the surviving treaty-based extradition relationship between the United States and an EU Member State if that EU Member State were to terminate its bilateral extradition treaty with the United States, but the U.S.–EU Extradition Agreement remained in force? What recourse would the United States have under such circumstances?

Answer. Under those circumstances, there would no longer be a treaty-based extradition relationship between that Member State and the United States. The key provisions of the Agreement with the European Union apply, as Article 3 stipulates, “in relation to bilateral extradition treaties” between the United States and the individual Member States and do not constitute a free-standing extradition treaty relationship. In any event, the Agreement does not contain such fundamental extra-

dition treaty provisions as the obligation to extradite. Thus, if an EU Member State were to terminate its bilateral extradition treaty with the United States, the provisions in the U.S.–EU Agreement contained in a bilateral instrument would not suffice to constitute a free-standing legal basis for bilateral extradition relations.

At the same time, the institutional relationship with the EU created by the U.S.–EU Agreement would remain. In addition to whatever bilateral diplomatic discussions the United States were to undertake with the terminating Member State, it could also utilize the treaty relationship with the European Union, as well as take steps outside the Agreement framework, to express its views and seek, as appropriate, EU intervention and assistance in the matter.

RESPONSES OF DEPUTY ASSISTANT ATTORNEY GENERAL BRUCE C. SWARTZ TO
QUESTIONS SUBMITTED BY SENATOR BIDEN

Question 1. How would Article 4 of the U.S.–EU Mutual Legal Assistance Agreement operate in practice? Please work through an example of when you would hope to rely on this provision and explain exactly what information you would give to the relevant EU Member State in your request, what information you would receive in exchange, and how you would use that information in prosecuting an individual for a specific crime in a U.S. court.

Answer. U.S. agents conducting a criminal investigation in the United States may learn that subjects of the investigation are using banks or other financial institutions to further their illegal activities, but may not know which foreign banks or institutions and which accounts are being used. To further the investigation, the agents would prepare a request directed to an appropriate EU Member State, transmitted through one of the designated U.S. law enforcement agencies (FBI, DEA, or ICE), requesting information as to whether the subject of the investigation maintains accounts at, or has conducted financial transactions unrelated to accounts through, banks or financial institutions in the EU Member State.

The request for information would specify the identity of the subject and the nature of the investigation. If the request is directed to an EU Member State that has limited the scope of its assistance under this provision to terrorism and money laundering offenses (to correspond with the limits of U.S. assistance in reciprocal cases), then the U.S. request must relate to an investigation into terrorism or money laundering activities. If the request is directed to an EU Member State that has defined its obligations to assist more broadly, then the U.S. investigation may be related to a broader scope of criminal conduct, as permitted by the agreement with that particular EU Member State. The request would also provide factual information concerning the investigation sufficient to lead the competent authority in the EU Member State to reasonably suspect that the subject of the investigation has engaged in the criminal activity under investigation, that the information sought relates to the matter under investigation and that the banks or financial institutions in the requested state may have the information sought. To assist the EU Member State to narrow the breadth of the inquiry, the U.S. request would provide any specific information available to investigators that identifies the relevant banks or financial institutions or the transactions at issue.

If the EU Member State concludes that it is appropriate and possible to comply with the request, it would undertake an inquiry through its financial sector to retrieve the information sought and respond to the request by either confirming that the suspected transactions took place or that the suspected accounts exist. They may also provide information identifying the specific banks where the accounts are held, the name of account holders and the corresponding account numbers. No records of accounts or transactions would be provided pursuant to this process. Because the response received would only be information concerning the existence of relevant accounts or transactions and not records themselves, if the U.S. agents and prosecutors conducting the investigation conclude that the information is relevant and probative, they would prepare a formal mutual legal assistance request seeking the production of certified copies of the relevant banking or financial records, so that the records may be used at trial. This request for record production would be submitted through the usual mutual legal assistance channels in place between the United States and the particular EU Member State (i.e., through the applicable Mutual Legal Assistance Treaty (MLAT) or by letter rogatory, if no MLAT is in force). The MLAT or letter rogatory request would be reviewed by the competent authority in the requested state to determine whether the request meets the legal standards for the production of the records sought. It is the certified copies of the records received through the MLAT process, rather than the information received through

Article 4 of the U.S.–EU Mutual Legal Assistance Agreement, that will be used to prosecute a defendant.

Question 2. You addressed in part at the hearing how the Department of Justice would treat requests made by our treaty partners under Article 4 of the U.S.–EU Mutual Legal Assistance Agreement so as to ensure that any privacy concerns would be minimized for U.S. citizens. Can you expand on this point and confirm that you will keep the committee informed regarding the implementation of this provision and any problems that develop, should these treaties be approved and ratified?

Answer. Requests directed to the United States by EU Member States pursuant to Article 4 of the U.S.–EU Mutual Legal Assistance Agreement would be handled in a similar fashion as discussed above in the response to question 1. Upon receipt of a request from an EU Member State, the receiving agency (FBI, DEA, or ICE) would review it for conformity with the requirements of Article 4 and, only when satisfied that the request provides sufficient information that there is an ongoing investigation into terrorism or money laundering activity that there is sufficient factual information to reasonably suspect that the subjects of the investigation engaged in the criminal activity and that there may be information in U.S. banks or financial institutions that is relevant to the investigation, would refer the request to the Treasury Department's Financial Crimes Enforcement Network (FINCEN) to conduct the inquiry through the U.S. financial sector.

As previously noted, information confirming the existence and identification of accounts or transactions in the United States would be provided pursuant to the mechanism established by Article 4 of the U.S.–EU Mutual Legal Assistance Agreement. However, the corresponding bank or financial records would not be available through this mechanism. Should the requesting state seek production of the corresponding bank or financial records for use in the foreign investigation or prosecution, the United States may produce the records upon receipt of an MLAT request or letter rogatory and after a U.S. Federal court orders their production, pursuant to the MLAT and Title 28 United States Code, section 1782. This is the same procedure used currently with respect to foreign requests for records from U.S. banking and financial institutions. The U.S.–EU Mutual Legal Assistance Agreement makes no changes to this process. Both the information provided pursuant to Article 4 and any records produced subsequently, through the usual mutual legal assistance channels, may be used only as authorized by Article 9 of the U.S.–EU Mutual Legal Assistance Agreement, addressing limitations on use to protect personal and other data.

The United States and the European Union have the obligation to take measures to avoid extraordinary burdens as the result of application of Article 4, and in cases in which such burdens nonetheless may result, they must consult immediately with a view to facilitating the application of the provision. To comply with these obligations, the Justice Department would monitor the implementation of this provision and would also report any problems to this committee.

Question 3. In the bilateral MLATs between the United States and EU Member States, U.S. assistance with respect to the identification of bank information is limited to terrorism and money laundering activity, consistent with the scope of section 314(a) of the USA Patriot Act. Would it be possible for the United States to notify our treaty partners of additional crimes for which we would provide assistance with respect to the identification of bank information, without additional U.S. domestic legislation?

Answer. As explained in the executive branch's report to the Senate on the Agreement, the United States, consistent with the scope of section 314(a) of the USA Patriot Act, chose to limit application of this measure to terrorist and money laundering activity punishable in both the requesting and requested States. The language permitting the scope of the article to be expanded to further activity at a later time was intended to expand the scope of assistance in the future in a manner corresponding to any future expansion of the scope of the measure under U.S. domestic legislation.

Question 4. Paragraph 3 of Article 8 of the U.S.–EU Mutual Legal Assistance Agreement provides that States Parties "shall take measures to avoid the imposition of extraordinary burdens on requested States through application of this Article." Please describe the sorts of measures the United States intends to take, and what measures other parties are expected to take, when complying with this article.

Answer. An increasing number of MLATs permit requests for assistance to be made on behalf of regulatory agencies investigating activity with a view to referral for criminal prosecution. In our experience, there has not been a precipitous rise in

the volume of requests as a result of the adoption of such provisions. Nonetheless, this article expands this approach to all 27 EU Member States at once, and while the U.S. and EU negotiators did not believe that extraordinary burdens would result through the application of the article, the actual effect could not be known with certainty at that time. Accordingly, we believed it would be prudent to include the same kind of safeguard clause that was included in the bank information article.

Question 5. The Convention with Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and accompanying Protocol (Treaty Doc. 110–3), like the new Belgium MLAT, contains provisions regarding the sharing of information held by financial institutions.

- a. Can you explain to what extent, if any, the scope of these two treaties' information-sharing provisions overlap?
- b. Please compare and contrast these two information-sharing mechanisms. In what ways is the tax treaty mechanism more effective and in what ways is the MLAT mechanism more effective?
- c. Assuming there is some overlap in these provisions' scope of application, in circumstances in which it is possible to use either treaty mechanism, can you explain how government officials will choose between these two mechanisms?

Answer to 5a. The Convention with Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the Double Taxation Treaty) is available for assistance (including the exchange of financial information) only with respect to those matters specified in that instrument (i.e., matters involving the administration of tax, including the prosecution of tax evasion). The MLAT between the United States and Belgium facilitates assistance—including obtaining records from banks and other financial institutions—in investigations and prosecutions of a broad range of criminal matters, including but not limited to tax offenses. Accordingly, to a minor extent, the Double Taxation Treaty and the United States-Belgium MLAT may overlap.

With respect to the identification of previously unknown bank accounts and transactions set forth in Article 4 of the U.S.–EU Mutual Legal Assistance Agreement and Article 12 *bis* of the United States-Belgium bilateral implementing instrument, the potential area of overlap, if any, would be extremely minor, given that both the United States and Belgium limited the banking information provision applied by operation of Article 4 of the U.S.–EU Mutual Legal Assistance Agreement to information exchange with regard to terrorism and money laundering activities.

Answer to 5b. The two information sharing mechanisms are mutually exclusive in all respects except with regard to the investigation and prosecution of tax matters, which could be pursued under either treaty. The Double Taxation Treaty will be more effective in all noncriminal tax administration matters, inasmuch as the MLAT would not be available in those instances. The bilateral MLAT will be the more effective mechanism in criminal tax matters inasmuch as assistance in such cases is usually sought with a view to criminal prosecution and may involve assistance beyond the competence of the tax authorities designated to execute requests under the Double Taxation Treaty. For example, in addition to the tax offenses, the criminal investigation also may involve violations of Law beyond those covered by the Double Taxation Treaty.

Answer to 5c. As noted above, the Double Taxation Treaty is applicable only with respect to matters of tax administration and investigations into tax offenses. The MLAT is an assistance mechanism with a broader scope. Whether it is appropriate to use one mechanism or the other might depend on whether the matter involves possible violations of law beyond the scope of the Double Taxation Treaty. If so, it may prove more efficient to make one request pursuant to the MLAT that covers all possible criminal violations.

Question 6. In the 109th Congress, in connection with the consideration of several extradition treaties, the Department of Justice stated that “[t]he 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.”

- a. Is it the position of the Department of Justice that in issuing a warrant for the provisional arrest of an individual pending an extradition request, the fourth amendment of the Constitution requires an independent judicial determination of probable cause prior to issuing such a warrant?
- b. In making such a probable cause determination, is the proper question whether there is probable cause to believe the accused committed the offense(s) at issue in the request? If not, what is the proper probable cause determination?

c. In making the decision to enter into extradition treaties that authorize provisional arrest, such as the ones now pending before the committee, does the executive branch examine the process by which our potential treaty partners issue arrest warrants? If so, is a determination made in each case as to whether the prospective treaty partner's process requires an evidentiary showing that is equivalent to demonstrating probable cause to believe a crime has been committed, before issuing a warrant for an individual's arrest?

Answer to 6a. The U.S.–EU Extradition Agreement does not contain an article regulating the standard of proof an EU Member State must satisfy in order to obtain the provisional arrest of a fugitive in the United States pending transmission of the full extradition request. As a result, the bilateral instruments implementing the U.S.–EU Extradition Agreement apply the standard set forth in the extradition treaty currently in force with the Member State concerned. The language in these treaties describing the information to be submitted in support of a request for provisional arrest varies. However, irrespective of the particular language of the treaty, it remains the case that the fourth amendment of the Constitution does apply.

Exactly what categories and quantum of information are sufficient to meet fourth amendment requirements in the context of provisional arrest pending extradition is not well settled, and in particular, U.S. jurisprudence has articulated no uniform response to the question of whether probable cause that the person committed the offense must be provided at the provisional arrest stage. The law, however, is well established in holding that a standard of probable cause must be met at the subsequent stage of the extradition hearing, where the formal extradition request and the certified documents in support of the request are submitted. At the formal extradition hearing, in a case where the fugitive is sought for prosecution, the U.S. court must be satisfied, among other things, that there is sufficient evidence to find there is probable cause to believe the fugitive committed the crime at issue before the judge may certify that the fugitive is extraditable. *Hoxha v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006); *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980). However, if the person has been convicted at a trial at which he was present, proof of the conviction itself satisfies the probable cause requirement and an independent review of the evidence of criminality is not required. See, e.g., *Spatula v. United States*, 925 F.2d 615, 618 (2d Cir. 1991).

Thus, the purpose of provisional arrest—detaining a fugitive for a limited period while the Requesting State amasses the documentation required to sustain a finding of probable cause at the extradition hearing—as well as existing case law affirming an abbreviated probable cause determination for extraditability where the fugitive has already been convicted, suggests that probable cause at the provisional arrest stage can be met with less than a full-blown determination of probable cause as to evidence of the criminality of the fugitive. That being said, however, in practice, the Department of Justice seeks as much information as possible to support a provisional arrest request, bearing in mind that foreign law enforcement officials are not expert in U.S. criminal procedure, and that information submitted in the context of an urgent provisional arrest is necessarily more abbreviated than in the context of the full extradition request submitted to support a final judicial determination of extraditability.

Our approach has been to present, at a minimum, information sufficient for a court to find probable cause to believe that the elements for extradition will be satisfied at the extradition hearing, such elements generally being that the person has been charged or convicted in the foreign jurisdiction, that the person before the court is the person so charged or convicted, that the offense is one for which extradition is provided under the applicable treaty (which necessarily also entails a finding that the conduct at issue would be an offense under U.S. law), and in the case of a person sought for trial, that the information provided by the treaty partner establishes probable cause to believe the person committed the offense. Thus this information should include information to identify the fugitive, particulars about the foreign charge or conviction and arrest warrant, a clear description of the offenses for which the fugitive is sought, and a summary of the facts of the case and, to extent possible, an indication of the evidence relied upon. But ultimately it is for the court to decide whether the information submitted is sufficient to justify the issuance of a warrant for provisional arrest, and we will strive to obtain as much information as possible so that the court will be satisfied that a warrant should issue.

Answer to 6b. See above.

Answer to 6c. Prior to and during treaty negotiations, the executive branch examines a number of questions, including the process by which our negotiating partner issues arrest orders. Our experience has shown that the U.S. probable cause standard is a unique outgrowth of the fourth amendment and the body of jurisprudence

interpreting it. While some foreign legal systems come closer to considering the same factors than others, no foreign system adopts the same standard. Therefore, to ensure that there is sufficient indicia of a person's involvement in the crimes alleged prior to being extradited for trial from the United States, our treaties require that the Requesting State's extradition request include a description of the evidence that provides a reasonable basis to believe that he or she committed the offense for which extradition is sought, in addition to a copy of the arrest warrant. The phrase "reasonable basis" is commonly used in our modern treaties and is more easily understood by foreign prosecutors and judges, but it is meant to be the equivalent of the U.S. "probable cause" standard and is understood as such by our courts.

Question 7. Several extradition treaties with EU Member States limit the number of days that a person who has been provisionally arrested can be detained without a formal extradition request having been submitted. For example, Article 11(4) of the extradition treaty with the Netherlands states as follows: "Provisional arrest shall be terminated if, within a period of 60 days after the apprehension of the person sought, the Requested State has not received the formal request for extradition and the supporting documents mentioned in Article 9." The majority of EU Member State extradition treaties, however, appear to require each party to hold a person who has been provisionally arrested for a certain minimum period of time, but leave to each party's discretion whether to hold that person longer without having yet received the formal extradition request. For example, Article 10(4) of the extradition treaty with Belgian states as follows: "A person who is provisionally arrested may be discharged from custody upon the expiration of 75 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 supporting documents required in Article 7."

- a. What is the longest period of time the United States has held someone who was provisionally arrested without having received a formal extradition request from the country that requested the person's provisional arrest?
- b. In the last 5 fiscal years (through FY 2007), how many people have been detained on provisional arrest warrants, and what has been the average length of time that a person has been held under provisional arrest without receipt by the United States of a formal extradition request?
- c. In the Department of Justice's view, what is the maximum length of time that the United States can or should hold a person who has been provisionally arrested, without a formal extradition request from the country that requested the person's provisional arrest?

Answer to 7a. It is rare for extradition treaty partners to miss the treaty deadline for the presentation of documents in support of extradition. Because the fugitive is put on notice of the foreign country's intent to seek extradition when he or she is provisionally arrested, it is in the foreign country's best interest to present the supporting documentation within the treaty prescribed deadline or risk the possibility that the fugitive will flee once again, upon being released from custody. Because missed deadlines are rare, the Department of Justice does not track statistics to demonstrate how long a person who was provisionally arrested was held beyond the treaty mandated deadline absent presentation of the formal extradition documents.

Answer to 7b. The Department of Justice does not have the statistics requested. Persons provisionally arrested are detained prior to receipt of the formal extradition request for no longer than the duration of time prescribed by the treaty. If the treaty specifies that a person shall be released after expiration of that time period without receipt of the documents, then the person would be released. If the treaty specifies that the person may be released after expiration of the treaty prescribed period if the formal extradition request is not received, then the person may petition the district court for release from custody. In such case, the Department of Justice either would oppose the petition for release if all indications were that receipt of the extradition documents was imminent, or not oppose the release if the available information suggested that the formal extradition request would not be forthcoming in the near future. It would be within the judge's discretion whether to release the person or maintain the detention. If the person is released, the extradition treaties usually specify that a subsequent re-arrest may be requested if the formal extradition request arrives at a later time.

Answer to 7c. The Department of Justice takes the position that it is appropriate to hold persons in accordance with the provisions of the particular treaty; and the maximum length of detention depends on the provisions of the particular treaty. Rarely does this time period exceed 60 days, although a few treaties do specify slightly longer periods. In such cases, the longer time period is intended to make

special accommodation for translation of potentially voluminous extradition documents into the language of the arresting country; which must be accomplished, together with certification and transmission, within the time specified by the treaty. Whether it is appropriate to exceed the treaty specified maximum would depend on whether the treaty envisions a discretionary extension of that time and the circumstances in a particular case. For example, if the formal extradition documents have been transmitted but unavoidably delayed and it appears that they will be presented within a short period of time (days), then a court might conclude that extension of the person's detention for a few days is appropriate when balanced against the fact that re-arrest may be sought when the documents arrive and there is a significant risk that the fugitive would flee in the interim. However, it is worth restating that missed treaty deadlines are relatively rare and persons are rarely held beyond the treaty prescribed time periods.

Question 8. The United States has an existing extradition treaty with each EU Member State. In the last 5 years, have there been any diplomatic or legal problems with regard to the implementation of any of these treaties? In other words, are the treaties operating as intended, or have there been significant problems in securing extradition of fugitives to or from the United States?

Answer. In general, the treaties are operating as intended, in an atmosphere of mutual cooperation, and there have not been significant legal or diplomatic problems. We expect that the streamlined and updated provisions of the U.S.–EU Extradition Agreement will further improve the extradition relationship of the United States with the EU Member States.

○