AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

IMPLEMENTATION OF CERTAIN INTERNATIONAL NUCLEAR AND MARITIME TERRORISM AGREEMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

OCTOBER 5, 2011

Serial No. 112–71

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

70–575 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

LAMAR SMITH, Texas, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
DANIEL E. LUNGREN, California
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TIM GRIFFIN, Arkansas
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
DENNIS ROSS, Florida
SANDY ADAMS, Florida
BEN QUAYLE, Arizona
MARK AMODEI, Nevada

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
MIKE QUIGLEY, Illinois
JUDY CHU, California
TED DEUTCH, Florida
LINDA T. SÁNCHEZ, California
[Vacant]

SEAN MCLAUGHLIN, *Majority Chief of Staff and General Counsel*
PERRY APELBAUM, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman*
LOUIE GOHMERT, Texas, *Vice-Chairman*

BOB GOODLATTE, Virginia
DANIEL E. LUNGREN, California
J. RANDY FORBES, Virginia
TED POE, Texas
JASON CHAFFETZ, Utah
TIM GRIFFIN, Arkansas
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
SANDY ADAMS, Florida
MARK AMODEI, Nevada

ROBERT C. "BOBBY" SCOTT, Virginia
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
JUDY CHU, California
TED DEUTCH, Florida
SHEILA JACKSON LEE, Texas
MIKE QUIGLEY, Illinois
[Vacant]

CAROLINE LYNCH, *Chief Counsel*
BOBBY VASSAR, *Minority Counsel*

CONTENTS

OCTOBER 5, 2011

Page

OPENING STATEMENTS

The Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security 1
The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security 2

WITNESSES

Thomas M. Countryman, Assistant Secretary of State for International Security and Nonproliferation, U.S. Department of State
Oral Testimony 4
Prepared Statement 6
Brad Wiegmann, Deputy Assistant Attorney General, U.S. Department of Justice
Oral Testimony 14
Prepared Statement 17

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Letter from Andrew M. Semmel, former Deputy Assistant Secretary of State for Nuclear Nonproliferation Policy and Negotiations 32
Letter of Support 33
Letter of Support from William H. Tobey 35
Letter from Ambassador Linton F. Brooks, Independent Consultant on National Security 36
Response to Hearing Questions from Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice 37

IMPLEMENTATION OF CERTAIN INTERNATIONAL NUCLEAR AND MARITIME TERRORISM AGREEMENTS

WEDNESDAY, OCTOBER 5, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Goodlatte, Gowdy, Adams, Scott, Johnson, and Jackson Lee.

Staff Present: (Majority) Caroline Lynch, Subcommittee Chief Counsel; Arthur Radford Baker, Counsel; Lindsay Hamilton, Subcommittee Clerk; (Minority) Bobby Vassar, Subcommitte Counsel; Aaron Hiller, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. SENSENBRENNER. The Subcommittee will be in order.

Without objection, the Chair will be authorized to declare recesses during votes today, which I do not expect, and the Chair yields himself 5 minutes for the purpose of an opening statement.

Today's hearing examines the important international agreements that improve our efforts to protect the United States from terrorist attacks and specifically against attacks utilizing weapons of mass destruction or the destruction of ships and maritime platforms. Full implementation of the treaties discussed today will not be achieved unless Congress amends existing criminal provisions of the U.S. Code.

This hearing will focus on four agreements, two of which concern nuclear and radiological materials, the sabotage of nuclear facilities and the protection of nuclear fatalities and the materials used for peaceful purposes. The other two treaties relate to the use of targeting of a ship or maritime platform as a part of a terrorist attack, the transporting of certain materials by ship for terrorist purposes, and the transport of terrorists by ship, among the other things.

Now, it may seem odd that we need new legislation regarding terrorist acts against ships or the smuggling of nuclear materials; and a logical question would be, don't we already have laws that prohibit this kind of activity? Existing law may cover certain aspects of these treaties, but, in order to comply fully and ultimately

ratify the treaties, parties to the agreement are required to criminalize certain offenses as well as comply with extradition requirements and other obligations relating to international cooperation.

The treaties themselves were modified to cover gaps in their original drafting. For example, one of the treaties we will hear about today concerns the physical protection of nuclear materials which originally only covered protection during international transport. An amendment to that treaty now also requires protecting domestic nuclear facilities and materials.

There are many reasons why it is important that we ratify these agreements. Doing so keeps the United States at the forefront of global counterterrorism and counterproliferation efforts. Also, these measures are consistent with our domestic efforts to protect our homeland, and ratifying these treaties will encourage other nations to follow suit, which further helps protect the United States.

I look forward to hearing more about these proposals advanced by the Department of Justice for implementing the treaty requirements and how these matters are important to our national security, and I want to thanks the witnesses for participating in today's hearing.

It is now my pleasure to recognize for his opening statement the gentleman from Virginia and Ranking Member of the Subcommittee, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Good morning. I thank the Chairman for scheduling this hearing.

When the Department of Justice proposes legislation to change our criminal laws, this Subcommittee benefits from the opportunity to hear testimony about why the Department believes that it is necessary and what its impact will be. Today we will discuss proposals to enact criminal offenses related to treaties signed by the United States related to international efforts to fight and prevent terrorism, certainly a laudable cause.

At the outset, it is important to distinguish between the four treaties at the heart of our discussion and the legislation that has been proposed by the Administration to implement the treaties.

The treaties themselves are the cornerstone of an important effort to update international law for the post-9/11 era. Two of the treaties, the International Convention for the Suppression of Acts of Nuclear Terrorism and the Convention for the Physical Protection of Nuclear Material, require party nations to better protect nuclear materials and to punish acts of nuclear terrorism. The two other treaties, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for Suppression of Unlawful Acts Against the Safety of Fixed Platforms, address the use of ships and fixed platforms in terrorist attacks, as well as the transport of weapons, weapons delivery systems, and terrorist fugitives by sea.

The United States signed these treaties in 2005. The Senate passed a resolution of advise and consent for all four in 2008. In an era where increasingly we rely on our allies to combat terrorism, these new treaty obligation also are plain commonsense, and I hope we find a swift path to total ratification.

I am still not convinced, however, that the implementing legislation before us today is the best path forward. The fact is that exist-

ing statutes already cover most of our obligations under these new agreements. One proposal suggests creating a new Federal crime prohibiting the possession or use of a nuclear explosive device in an act of terrorism, but this conduct is already illegal, and 18 U.S.C. 832(c) prohibits the possession or use of a radiological weapon. 18 U.S.C. 2332(h) prohibits an unlawful possession and use of a weapon or device designed to release radiation. Section 831 and Section 2283 prohibit the unlawful transport of these materials. Why is it then that we need to invent a new crime?

If our new treaty obligations create a gap in existing statutes, then the Committee should address those gaps. But we need to be convinced that there are in fact gaps; and if there are gaps in existing statutes, we should close them in a manner that simplifies the criminal code, rather than complicates it.

The legislative proposals raise similar questions where the Administration has clearly asked for more than is necessary to implement these treaties. Why should we add to the list of wiretap predicates? Why should we give the Attorney General the authority to board ships when the U.S. Navy and Coast Guard already have broad authority to conduct such boardings? Why should Congress preauthorize the President to conduct additional international agreements? The legislation would expand the scope of conduct subject to the death penalty, but how many times do we need to be able to execute an individual for a crime of terrorism?

When we have answered these questions to our satisfaction, I suspect that we will have arrived at a simpler legislative proposal that fully honors our new commitments. I look forward to hearing from our distinguished witnesses and discussing with them these issues.

I yield back. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. Thank you very much, Mr. Scott.

It is now my pleasure to introduce today's witnesses.

Thomas Countryman is currently serving as the Assistant Secretary for International Security and Nonproliferation in the Department of State. He has been with the State Department for almost 30 years. Mr. Countryman has served with distinction in a variety of assignments, including as the Principal Deputy Assistant Secretary for Political Military Affairs, Deputy Assistant Secretary for European Affairs, Deputy Chief of Mission at the U.S. Embassy in Athens, and Administrator Counselor for Political Affairs at the American in Rome. He has also worked as a Director of the Office of South Central European Affairs, Director for Near East and South Asian Affairs at the National Security Council, and as a counselor and political officer in Belgrade, Yugoslavia, and in the Department's Office of Eastern European and Yugoslav Affairs and Office of Counterterrorism. He graduated from Washington University in St. Louis with a degree in economics and political science and studied at the Kennedy School of Government at Harvard.

Brad Wiegmann has served as Deputy Assistant Attorney General for National Security with the Justice Department since March, 2009. He has been a career government attorney for the past 15 years, having previously served in legal position at the Departments of Defense and State and with the National Security Council.

Before joining the government, Mr. Wiegmann worked at Shay & Gardner in Washington where he focused on civil litigation and served as clerk for Judge Patrick Higginbotham on the United States Court of Appeals for the 5th Circuit. He is a graduate of Duke University and Harvard Law School.

Both witnesses' statements will be entered into the record in their entirety. I ask that each witness summarize his testimony in 5 minutes or less.

I now recognize Mr. Countryman. Please go ahead.

TESTIMONY OF THOMAS M. COUNTRYMAN, ASSISTANT SECRETARY OF STATE FOR INTERNATIONAL SECURITY AND NONPROLIFERATION, U.S. DEPARTMENT OF STATE

Mr. COUNTRYMAN. Good morning and thank you, Mr. Chairman, Ranking Member Scott——

Mr. SENSENBRENNER. Could you pull the mike a little bit closer to you.

Mr. COUNTRYMAN. Good morning and thank you, Mr. Chairman, Ranking Member Scott, for the honor of being able to discuss with you today implementing legislation for these four multilateral counterterrorism treaties.

The International Convention for the Suppression of Acts of Nuclear Terrorism addresses a critical category of terrorist activity, the nexus between terrorism and nuclear weapons and other radioactive materials and devices such as dirty bombs. The amendment to the Convention on Physical Protection of Nuclear Material addresses the physical protection of nuclear material used for peaceful purposes and domestic use, storage, and transport, in addition to that in international nuclear transport, and the physical protection of nuclear facilities used for peaceful purposes. And the Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, the 2005 SUA protocols, address the potential use of maritime vessels and platforms as a means of conducting or enabling terrorist activity and the unlawful transport of WMD and related items via commercial ships.

These four treaties are key tools in the international fight against terrorism and the proliferation of WMD. The criminal offenses covered under these treaties are serious offenses involving nuclear terrorism, WMD proliferation, maritime terrorism, and unlawful maritime transport of WMD and their delivery systems. Each treaty fills a gap in the existing international regime.

In 2008, the Senate provided advice and consent to ratify all four of these treaties. The ratification is critical for several reasons.

First, joining these treaties will enhance U.S. national security. Terrorism and weapons proliferation do not recognize international boundaries. To combat these threats effectively, we need not only a complete domestic legal framework but also a broad international legal framework to facilitate international cooperation. These treaties help achieve that goal.

Second, the treaties bolster other U.S. Government counterterrorism and nonproliferation policy priorities such as the Global Ini-

tiative to Combat Nuclear Terrorism, the Proliferation Security Initiative, and the Nuclear Security Summit. They also further the objectives and support implementation of international obligations like United Nations Security Council Resolution 1540. The SUA protocols in particular help to promote implementation of U.N. sanctions on Iran and North Korea.

Third, U.S. ratification of these treaties will encourage widespread ratification and implementation by other countries. For many years, the United States, both the Congress and the executive branch, have been and will remain the international leader in counterterrorism and nonproliferation efforts; and passage of this legislation will reinforce our leadership.

Mr. Chairman, earlier this year, my colleagues from Justice submitted to Congress the draft implementing legislation that will enable us to ratify these key treaties. I will let my colleague speak about the specific provisions within the draft legislation, but just two more brief points regarding the relationship between the proposed legislation and these treaties.

First, the proposed implementing legislation will ensure that the U.S. complies with our obligations which we have assumed under each treaty to criminalize certain terrorism-related conduct, and it will establish criminal jurisdiction over that conduct. This will fill gaps in current U.S. law and facilitate international cooperation in the framework of these treaties.

Second, and finally, the proposed legislation is modeled after legislation approved by Congress to implement earlier counterterrorism treaties. Most recently, in 2002, Congress passed legislation to implement treaties related to terrorist bombing and terrorist finance. The proposed legislation tracks that which has been successfully used in the past.

Thank you. I look forward to your questions.

[The prepared statement of Mr. Countryman follows:]

Testimony before the House Committee on the Judiciary

Subcommittee on Crime, Terrorism, and Homeland Security

October 5, 2011

Assistant Secretary of State for International Security and Nonproliferation

Thomas M. Countryman

The International Convention for the Suppression of Nuclear Terrorism, the Amendment to the Convention on Physical Protection of Nuclear Material, the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

Introduction

Chairman Sensenbrenner, Ranking Member Scott, distinguished Members of this committee, thank you for the opportunity to appear before you today to discuss implementing legislation that would allow the United States to ratify four important multilateral counterterrorism treaties:

- The International Convention for the Suppression of Acts of Nuclear Terrorism ("ICSANT" or "the Nuclear Terrorism Convention") addresses a critical category of terrorist activity, the nexus between terrorism and nuclear weapons and other radioactive materials and devices, such as "dirty bombs;"

- The Amendment to the Convention on Physical Protection of Nuclear Material ("CPPNM Amendment") addresses the physical protection of nuclear material used for peaceful purposes in domestic use, storage and transport—in addition to that in international nuclear transport—and the physical protection of nuclear facilities used for peaceful purposes;

- And Protocols to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Convention for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf ("2005 SUA Protocols"), address the potential use of maritime vessels and platforms as a means of conducting or enabling terrorist activity and the unlawful transport of WMD and related items via commercial ships.

These four treaties are key tools in the international fight against terrorism and the proliferation of Weapons of Mass Destruction (WMD) and each of these treaties fill gaps in the existing international regime.

In 2008, all four of these treaties received advice and consent from the Senate. The Department of State strongly supports passage of implementing legislation that will now allow the United States to ratify these treaties. While my colleague from the Department of Justice can discuss the provisions of the proposed implementing legislation, I would highlight a few points with respect to the relationship between the proposed legislation and these four treaties:

First, the proposed implementing legislation will ensure that the United States complies with our international obligations under each treaty to criminalize

certain conduct and establish criminal jurisdiction over that conduct. The criminal offenses covered under these treaties are serious offenses involving nuclear terrorism, WMD proliferation, maritime terrorism, and unlawful maritime transport of WMD and their delivery systems. There is international consensus that countries should cooperate in the prevention, investigation, and prosecution of these offenses. The proposed implementing legislation will both fill gaps within U.S. law and facilitate international cooperation with foreign partners under the framework of these treaties.

Second, the proposed implementing legislation is modeled after legislation passed by Congress to implement earlier counterterrorism treaties. Most recently, in 2002 Congress passed legislation to implement two treaties which focused on terrorist bombings and terrorist finance. The form of the proposed legislation tracks that which has been successfully used in the past. Indeed, the proposed legislation for the 2005 SUA Protocols itself amends legislation originally passed by Congress to implement the SUA Convention and Fixed Platforms Protocol. Just as the 2005 SUA Protocols amend those earlier treaties, so would the proposed legislation amend U.S. law implementing those treaties.

The ratification of these treaties is critical for several reasons:

First, joining these treaties will enhance U.S. national security. Terrorism and WMD proliferation do not recognize international boundaries. To combat these threats effectively we need a broad international legal framework, and each of these treaties fill a gap in an existing international regime that is time tested and in which the U.S. already participates. The treaties modernize and strengthen the international legal framework in a manner that is critical to our efforts to prevent terrorists from acquiring or using WMD.

Second, the treaties bolster related U.S. government policy priorities, such as the Global Initiative to Combat Nuclear Terrorism, the Proliferation Security Initiative (PSI), and the Nuclear Security Summit. The treaties also further the objectives and support implementation of the international obligations concerning nonproliferation set out in United Nations Security Council Resolution 1540.

Third, U.S. ratification of these treaties will encourage widespread ratification and implementation by other countries and will reinforce the leading role the United States has played in promoting these treaties, the counter-terrorism treaty regime, and nonproliferation in general. The CPPNM Amendment, a U.S.-led initiative, is not yet in force. The SUA Protocols, both

of which are also U.S.-led initiatives, have recently entered into force, but have not achieved the number of ratifications that we would like to see. While 77 states are party to the ICSANT, it still lags far behind other similar counterterrorism conventions, most of which have over 150 states parties. U.S. ratification will likely generate powerful momentum towards other states' ratification. The U.S. has ratified the 12 counterterrorism conventions that preceded these four treaties, and U.S. leadership in promoting those treaties has been instrumental in getting other countries to also ratify those treaties.

Expeditiously enacting implementing legislation would allow us to ratify these key treaties. Ratification, in turn, will enhance our national security and reinforce U.S. leadership in nonproliferation and counterterrorism.

I now would like to turn to a more detailed discussion of each treaty.

CPPNM Amendment

The 1987 Convention on the Physical Protection of Nuclear Material ("CPPNM") established international obligations for physical protection of nuclear material used for peaceful purposes in international transport. It required criminalization of certain offenses involving nuclear material and included the "extradite or prosecute" regime and mutual legal assistance provisions common to the other counterterrorism conventions.

Beginning in the late 1990s, the United States led the initiative to expand CPPNM to cover physical protection of nuclear material in domestic use, storage, and transport, and the physical protection of nuclear facilities. The terrorist attacks on September 11, 2001, greater terrorist interest in acquiring nuclear material for nuclear weapons and "dirty bombs," and increased concerns about illicit trafficking in nuclear materials added urgency to the efforts to expand the CPPNM. The Amendment to the CPPNM, adopted on July 8, 2005, at a diplomatic conference held under the auspices of the International Atomic Energy Agency (IAEA) in Vienna, Austria, is the result of those efforts.

The CPPNM, as amended, imposes international requirements for the physical protection of nuclear material used for peaceful purposes in domestic use, storage, and transport, as well as in international nuclear transport, and of nuclear facilities used for peaceful purposes. This significantly expands the scope of the original CPPNM. In effect, the Amendment globalizes U.S. nuclear physical protection practices. Specifically, it establishes, *inter alia*:

- new international norms for the physical protection of nuclear material and facilities used for peaceful purposes, including protection from sabotage;

- strengthened international obligations for cooperation among State Parties to the Amendment on matters of physical protection and for protection of the confidentiality of physical protection information; and

- new offenses that the Convention requires Parties to criminalize in their domestic law.

The basic physical protection requirements set out in the Amendment place international obligations on each State Party to establish, implement, and maintain an appropriate physical protection regime applicable to nuclear material and nuclear facilities used for peaceful purposes under its jurisdiction, with the aim of:

- protecting against theft and other unlawful taking of nuclear material in use, storage, and transport;

- ensuring the implementation of rapid and comprehensive measures to locate and, where appropriate, recover missing or stolen nuclear material;

- protecting nuclear material and nuclear facilities against sabotage; and

- mitigating or minimizing the radiological consequences of sabotage.

The Convention also sets a series of "Fundamental Principles" covering a number of aspects of physical protection. For example, the principles address the overall responsibility of the State for establishing, implementing, and maintaining a regime to govern physical protection. The Convention requires Parties, insofar as reasonable and practicable, to apply these principles in their physical protection regimes.

Under the Amendment's expanded cooperation and assistance provisions, Parties are required, in accordance with their national law, to provide cooperation and assistance to the maximum extent feasible on matters within the scope of the amended CPPNM. For example, Parties with knowledge of a credible threat of sabotage of nuclear material or a nuclear facility in another State must decide on appropriate steps to be taken to inform that State as soon as possible and, where

appropriate, the IAEA and other relevant international organizations. Further, in the case of sabotage of nuclear material or a nuclear facility in its territory, the Convention requires Parties to take appropriate steps to inform, as soon as possible, other States likely to be radiologically affected, and to inform, where appropriate, the IAEA and other relevant international organizations.

Finally, the Amendment builds upon the penal regime provided for in the CPPNM by requiring Parties to criminalize domestically two new principal offenses --nuclear smuggling and sabotage of a nuclear facility. The amended Convention also includes a range of accessory offenses found in modern counterterrorism treaties. Like the CPPNM, the Convention as amended requires Parties to extradite or submit for prosecution persons accused of covered offenses.

The Amendment will enter into force only after two-thirds (97) of the current 145 Parties to the CPPNM join the Amendment. Forty-nine countries have ratified to date. We believe that ratification by the United States will create significant momentum towards entry into force.

The ICSANT

The United States signed the ICSANT on September 14, 2005, the first day the treaty was open for signature. The ICSANT closely follows the model of other counterterrorism conventions to which the United States is a party, such as the Terrorist Bombings and Terrorist Financing Conventions. It provides a specific legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit terrorist acts involving radioactive material or a nuclear or radioactive device, or nuclear facilities.

Like previous treaties, the ICSANT establishes offenses, requires domestic criminalization of those offenses, and obligates Parties to establish jurisdiction over the offenses under certain circumstances. More specifically, the treaty requires Parties to criminalize the unlawful and intentional:

- possession of radioactive material (including nuclear materials) or the making or possession of a device, which includes nuclear explosive devices and "dirty bombs," with the intent to cause (1) death or serious bodily injury, or (2) substantial damage to property or to the environment; and

- use of radioactive material or a device, or use of or damage to a nuclear

> facility in a manner which releases or risks the release of radioactive material, with the intent (1) to cause death or serious bodily injury, (2) to cause substantial damage to property or to the environment, or (3) to compel a natural or legal person, an international organization, or a country to do or refrain from doing an act.

In addition to the principal offenses, the ICSANT includes ancillary offense provisions that require Parties to criminalize threats and attempts to commit an act of nuclear terrorism and participation as an accomplice, organizing and directing, and certain contributions to acts of nuclear terrorism.

Similar to other multilateral counterterrorism treaties to which the United States is a party, the ICSANT obligates Parties to extradite or submit for prosecution persons accused of committing the relevant offenses and to provide one another assistance in connection with investigations or criminal or extradition proceedings in relation to such offenses. We have successfully relied on equivalent provisions, especially in the Terrorist Bombings and Terrorist Financing Conventions, to support U.S. extradition and provisional arrest requests and as a basis to request mutual legal assistance from other Parties.

The ICSANT also requires Parties to make every effort to ensure appropriate physical protection for nuclear and radiological material and obligates States to take all practicable measures to prevent and counter preparations in their territories for the commission of the covered offenses.

The Convention entered into force on July 7, 2007, and there are currently 77 State Parties, including Russia, India, Japan, the United Kingdom, Spain, and Saudi Arabia.

The 2005 SUA Protocols

In the wake of the September 11th terrorist attacks, the United States was concerned that the scope of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("1988 SUA Convention") and the accompanying 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms ("1988 Protocol") was not adequate to address maritime-related terrorism. Specifically, while the 1988 Convention and Protocol covered vessels and fixed platforms at sea as potential *objects* of terrorist activity, it did not address the use of vessels and fixed platforms as *means* of conducting or enabling terrorist activity.

As a result, the United States initiated a process at the International Maritime Organization (IMO) to negotiate multilateral instruments that provide a more effective international framework to combat maritime terrorism, conduct maritime interdictions of weapons of mass destruction, and prosecute unlawful transport of WMD and their delivery systems. Our efforts culminated in the adoption by a diplomatic conference of the IMO, on October 14, 2005, of the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol (collectively "the 2005 Protocols").

The new Protocols, among other things, set forth new principal offenses, add ancillary offenses, and establish a ship boarding regime that will expedite consensual boardings at sea. In terms of establishing offenses, the Protocols are the first multilateral treaty framework for the investigation, detention, prosecution, and extradition of persons who (1) commit terrorist attacks using a ship or fixed platforms; (2) transport WMD, their delivery systems, or related materials to be used for WMD, including dual use items by sea; or (3) transport terrorist fugitives by sea. The Protocols also create a robust framework for criminal liability for ancillary offenses, including accomplice liability, organizing or directing a covered offense, and certain contributions to such offenses. The Protocols require Parties to criminalize domestically these offenses, and obligations in the new Protocols are covered by the obligation under the 1988 SUA Convention to extradite or submit for prosecution persons accused of committing such new offenses. The Protocols also require Parties to provide mutual legal assistance for the new offense provisions. It is important to note that the WMD-related offense provisions do not affect the rights and obligations under the Nuclear Non-Proliferation Treaty, the Biological and Toxins Weapons Convention, and the Chemical Weapons Convention of Parties to those treaties.

The framework for consensual ship boarding of vessels on the high seas suspected of involvement in the covered offenses is a major development. This ship boarding regime will serve to strengthen the international legal basis for inspecting vessels at sea and will promote implementation of UN sanctions on Iran and North Korea.

The 2005 SUA Protocols entered into force last year. Twenty states have ratified the 2005 SUA Protocol and 16 states have ratified the 2005 Fixed Platforms Protocol. We believe that ratification by the United States will increase momentum for further ratifications of these Protocols and reinforce our leading role in initiating and promoting these Protocols.

Conclusion

In sum, Mr. Chairman, these treaties are important for our security, for nonproliferation and the fight against WMD terrorism, and for continued U.S. leadership in these areas. We urge you and your colleagues to introduce implementing legislation for these treaties as soon as possible and stand ready to work with you to do so.

Mr. SENSENBRENNER. Thank you very much.
Mr. Wiegmann.

TESTIMONY OF BRAD WIEGMANN, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. WIEGMANN. Chairman Sensenbrenner, Ranking Member Scott, thank you for inviting me to testify today regarding two important legislative proposals: first, a proposal to implement two

international conventions concerning nuclear terrorism and nuclear proliferation; second, a proposal to implement two international protocols on maritime terrorism and the maritime transportation of weapons of mass destruction. The Department of Justice strongly supports enactment of the legislation needed to implement these four treaties, which we believe strengthen national security and enhance multilateral efforts to combat terrorism and proliferation.

In 2008, the Senate gave its advice and consent to ratification of all four treaties, but the United States will not be in a position to ratify them until the implementing legislation is in place. We submitted the necessary implementing legislation in 2008, again in 2010, and most recently in April of this year. Today, I am going to briefly describe what the implementing legislation does, why it is necessary, and then I would be happy to take your questions.

The four treaties, as Assistant Secretary Countryman has explained, are the Nuclear Terrorism Convention, an amendment to the Convention on the Physical Protection of Nuclear Material, and the two SUA protocols adopted in 2005, one on the safety of maritime navigation and the other on the safety of fixed platforms on the Continental Shelf. All four treaties establish specific criminal offenses related to terrorism and proliferation that state parties are obliged to include in their criminal codes.

Our proposal would accomplish this by creating one new section in Title 18 of the U.S. Code and amending three others. The new section is 2332(i) governing acts of nuclear terrorism related to possession or use of a nuclear weapon or device or radioactive material, as well as sabotage of nuclear facilities.

Section 831 of Title 18 would also be amended to cover nuclear smuggling; i.e., intentionally transporting nuclear material into or out of a country without lawful authority.

The maritime terrorism offenses required by the two SUA protocols are reflected in amendments to 18 U.S.C. 2280 and 2281. As amended, those provisions would address terrorism involving ships and offshore platforms, transportation of weapons of mass destruction and related materials, and transportation of terrorist fugitives.

Now, while the United States already has an array of criminal offenses in these areas, there are some gaps between what the treaties require and what U.S. law currently covers. These gaps are both substantive and jurisdictional, and they are the reason why this implementing legislation is needed. Although my time is limited today, I would like to mention briefly a few examples of such gaps, as I did in my written testimony.

First, let's consider the issue of sabotage of a nuclear facility. Existing U.S. law already prohibits a person from destroying or damaging a nuclear facility, but the current statute, 42 U.S.C. 2284, does not cover threats of sabotage as required by the nuclear treaties and as our proposed legislation would do.

Second, 18 U.S.C. 2283 already prohibits the transport by vessel of biological agents, chemical weapons, and radioactive or nuclear material with the requisite intent. However, the SUA protocol and, hence, our legislative proposal also covers the maritime transport of equipment or technology that contributes to the design, manufacture, or delivery of a nuclear, biological, or chemical weapon. So there is the gap.

Third, each of the four treaties require us to be able to prosecute an individual who is found in the United States if we do not extradite him, regardless of the connection of the offense to the United States. The relevant provisions of existing U.S. law addressing illicit nuclear activities, such as 18 U.S.C. 2332(h) and 42 U.S.C. 2284, lack this bound-in jurisdiction, and there would be no basis for us to assert jurisdiction over the required offenses in the absence of implementing legislation.

Fourth, there is no real analog in U.S. law that addresses shipboard transportation of terrorist fugitives, particularly those who may not have committed offenses against U.S. law.

So these are just a few examples of the types of gaps this legislation is designed to fill.

In addition to addressing these gaps, the implementing legislation contains procedural and investigative provisions that, although not required by the treaties, will help ensure the United States is able to implement effectively U.S. law. Examples include designating these offenses as wiretap predicates and designating them as predicate crimes under the material support statute, 18 U.S.C. 2339(a).

Thank you again for inviting me to this hearing. I am happy to answer any questions you may have.

[The prepared statement of Mr. Wiegmann follows:]

Department of Justice

STATEMENT

OF

BRAD WIEGMANN
DEPUTY ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

AT A HEARING ENTITLED
"THE IMPLEMENTATION OF CERTAIN INTERNATIONAL NUCLEAR AND MARITIME TERRORISM AGREEMENTS"

PRESENTED ON
OCTOBER 5, 2011

Statement of
Brad Wiegmann
Deputy Assistant Attorney General
Department of Justice
Before the
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives
At a Hearing Entitled
"The Implementation of Certain International Nuclear and Maritime Terrorism Agreements"
Presented on
October 5, 2011

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today regarding two important legislative proposals: first, a proposal to implement two international conventions concerning nuclear terrorism and nuclear proliferation; and second, a proposal to implement two international protocols on maritime terrorism and the maritime transportation of weapons of mass destruction ("WMD"). Today, I will briefly describe how the implementing legislation for these agreements will strengthen national security and enhance multilateral efforts to combat terrorism and proliferation of WMD.

The Department of Justice has submitted draft legislation to implement all four international agreements: the International Convention for the Suppression of Acts of Nuclear Terrorism ("Nuclear Terrorism Convention" or "NTC"), an amendment to the Convention on the Physical Protection of Nuclear Material ("CPPNM"), the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the "SUA Protocol"), and the 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (the "Fixed Platforms Protocol") (together, the "SUA Protocols"). In 2008, the Senate gave its advice and consent to ratification of all four of these treaties, and the United States will be in a position to ratify them once the implementing legislation is in place. Enactment of this legislation is important because it will strengthen the tools available to U.S. law enforcement authorities to help protect the country from terrorism and WMD proliferation. Equally important, enactment of this legislation and ratification of these treaties by the United States will encourage other nations also to ratify and implement these agreements, thereby helping to establish a stronger international network of legislation and cooperation in this area.

Criminal Offenses Required by the Agreements

All four agreements establish specific criminal offenses that States Parties are obliged to include in their criminal codes. The NTC offenses include certain acts relating to the possession and use of radioactive material and radiological dispersal devices and damage to nuclear facilities, while the CPPNM amendment offenses include, in pertinent part, nuclear smuggling and sabotage of nuclear facilities. Consequently, among other agreement mandates, our legislative proposal would create two new criminal offenses regarding the possession and use of radioactive material, along with criminalizing attempts, threats, and conspiracies to commit these offenses, and it would also implement the CPPNM amendment's provision on nuclear facility sabotage. Specifically, our legislative proposal would make it a criminal offense to knowingly possess radioactive material or make or possess a nuclear explosive, radiation exposure device or radiological dispersal device, with the intent to cause death or serious bodily injury or substantial damage to property or the environment. It would also make it a criminal offense to knowingly use radioactive material or a nuclear explosive or radiological dispersal device or radiation exposure device, or damage or interfere with a nuclear facility in a manner that risks or causes contamination or exposure to radioactive material or radiation, with the intent to cause death or serious bodily injury or substantial damage to property or the environment. Our legislative proposal would also criminalize the additional acts of nuclear smuggling required to be prohibited under the CPPNM amendment.

The offenses established by the 2005 SUA Protocols include the use or targeting of a ship or a fixed marine platform in a terrorist activity; the maritime transportation of explosives, radioactive material, or biological, chemical, or nuclear ("BCN") weapons or certain of their components, delivery means, or materials, under specified circumstances; and the maritime transport of terrorist fugitives. Consequently, our legislative proposal would make it an offense to, unlawfully and with the intent to compel a person, an international organization, or a state to do or refrain from doing an act, (i) use against or on, or discharge from, a ship or fixed platform any explosive or radioactive material, or BCN weapon, in a manner that causes or is likely to cause death, serious injury, or damage; (ii) discharge from a ship oil, liquefied natural gas, or another hazardous or noxious substance, in a manner that causes or is likely to cause death, serious injury, or damage; or (iii) otherwise use a ship in a manner that causes death, serious injury, or damage. Among other offenses mandated by the Protocols, our legislative proposal would also make it an offense to transport explosive or radioactive material intended for a terrorist act, as well as BCN weapons.

In addition to requiring States Parties to criminalize certain conduct, all four agreements also obligate States Parties to establish jurisdiction over the offenses in certain circumstances, as described in more detail below.

Reasons for Establishing the Criminal Offenses

The implementing legislation is necessary because there are substantive and jurisdictional issues in existing U.S. law that must be addressed in order for the United States to be able to implement fully the obligations of States Parties established under the four agreements. Substantively, while some of the criminal offenses enumerated by the agreements overlap with existing U.S. statutes, there are gaps in coverage between what existing U.S. law criminalizes and what the agreements require. Further, certain jurisdictional requirements under the agreements are not reflected in existing U.S. law. In addition to addressing these substantive and jurisdictional issues, the implementing legislation contains procedural and investigative provisions that will help ensure that the United States is able to implement effectively U.S. law, and, in turn, the provisions of the agreements.

Substantive Issues the Implementing Legislation Seeks to Resolve

Because certain offenses covered by the agreements are not criminalized under U.S. law, there are currently substantive gaps in existing U.S. law that would preclude us from meeting the requirements of each agreement. For instance, as noted above, both the NTC and CPPNM amendment require States Parties to establish offenses covering nuclear facility sabotage and threats to commit such sabotage. These sabotage offenses largely overlap with 42 U.S.C. § 2284, which prohibits a person from destroying or damaging a nuclear facility or certain other facilities. However, unlike the agreements, section 2284 does not cover threats of sabotage. Section 2284(a) is also narrower in that it requires actual damage (or an attempt or conspiracy to destroy or damage), while the CPPNM could apply if an activity were merely likely to cause damage, death, or serious injury, and the NTC could apply if an activity were likely to increase the risk of a release of radioactive substances or radiation. Section 2284(b) addresses tampering with machinery, components, or controls at a nuclear facility, while the CPPNM and NTC focus on the possible release of radioactive substances or radiation. Thus, there are activities that the agreements require States Parties to prohibit that are not criminalized under existing U.S. law.

To provide another example, the SUA Protocol offense of using a WMD on a ship with a terrorist purpose might also violate a Federal murder statute, but the mismatch between the offense requirements means that the existing statute may not serve to implement the agreement provision in all cases. Some of the SUA Protocol transport offenses also overlap with 18 U.S.C. § 2283, which prohibits the transportation of an explosive, biological agent, chemical weapon, or

radioactive or nuclear materials, knowing that any such item is to be used to commit a terrorist offense. However, the SUA Protocol covers conduct not criminalized under section 2283, such as the maritime transport of equipment that significantly contributes to the design, manufacture, or delivery of a BCN weapon with the intention that it will be used for such purpose. Section 2283 also has a different *mens rea* requirement than the SUA Protocol transport offense. For example, the SUA Protocol covers the maritime transport of a BCN weapon, regardless of whether such transport is done knowing that the weapon will be used to commit a terrorist offense, whereas section 2283 applies only when such transport is done knowing that the weapon is intended to be used to commit a terrorist offense. Some of the material captured by the SUA Protocol transport offenses also would be reflected in U.S. export control laws, if the material is listed on export control lists and if the transport is an export from the United States, but these laws generally have different *mens rea* requirements, may not include all the materials covered by the SUA Protocols, and have more limited jurisdictional scope.

Similarly, the smuggling offense in the CPPNM amendment overlaps with the possession or transfer offenses described in the original CPPNM and implemented in 18 U.S.C. § 831, but section 831 is narrower in some respects than the new amendment. Whereas the current statute requires the act of smuggling to cause (or to be likely to cause) death, serious bodily injury, or substantial damage—the CPPNM's prescribed smuggling offense does not require these effects.

Each of the agreements includes inchoate crimes in the acts to be covered. Specifically, States Parties must prohibit attempt, participating as an accomplice, organizing or directing others to commit an offense, and contributing to the commission of an offense. *See, e.g.*, NTC Article 2.3-4; SUA Convention 3*quater* as amended; SUA Protocol Article 2*ter* as amended; *see also* CPPNM Article 7.1.f-g (prohibiting attempt and "an act which constitutes participation"). In our proposed legislation, the attempt requirements are implemented as prohibitions on attempt, and the other requirements as conspiracy provisions. This proposal is important because there is no general attempt provision in the U.S. Code. Moreover, the penalties under the general conspiracy statute are more limited than the penalties in the draft legislation.

We have made one substantive proposal that is not required under the agreements: making the offenses established under the new sections predicate crimes under 18 U.S.C. § 2339A, which prohibits providing material support knowing or intending it is to be used in preparation for or in carrying out certain enumerated crimes. The predicate crimes already enumerated include acts of sabotage under 42 U.S.C. § 2284 and the nuclear material crimes under 18 U.S.C. § 831. The implementing legislation for the Terrorist Bombings Convention and the Terrorist Financing Convention similarly made those new offenses predicate crimes under 18 U.S.C. § 2339A. While the addition of these crimes as predicate offenses is not

required by the agreements, it would be anomalous if material support to commit these new WMD and terrorism offenses were lawful when material support to commit other similar offenses is prohibited.

Jurisdictional Issues Addressed by the Implementing Legislation

There are also jurisdictional gaps between existing U.S. law and the jurisdictional requirements of the agreements. Each of the agreements obligates States Parties to establish jurisdiction under certain circumstances, including when the offense is committed in the territory of a State, by a national of the State, or under certain other situations (*i.e.*, vessel and aircraft jurisdiction). In addition, each of the agreements requires a State Party to be able to prosecute an offender found in its territory if it does not extradite the offender. U.S. statutes do not generally include "found-in" jurisdiction unless they are written to implement a treaty obligation that requires the exercise of such jurisdiction.

To give an example, 18 U.S.C. § 2332h, which prohibits possession or other acts related to a radiological dispersal device and overlaps with the NTC's provision covering possession of a nuclear explosive device or radiological dispersal device, does not include "found-in" jurisdiction. It also lacks the vessel and aircraft jurisdiction required by the convention, and the domestic jurisdiction is not as complete as that required by the convention. Similarly, 42 U.S.C. § 2284, which prohibits a person from destroying or damaging a nuclear facility or certain other facilities and overlaps with the sabotage offenses in the CPPNM amendment, is silent on jurisdiction, which could lead to challenges to its use for extraterritorial cases. It also lacks "found-in" jurisdiction. The SUA Protocol offers another example; its ban on the discharge of oil or other hazardous substances with a terrorist purpose overlaps with 33 U.S.C. § 1321(b)(3), which prohibits oil or hazardous substance discharge in the navigable waters of the United States. Nonetheless, the existing Title 33 offense is narrower in jurisdiction than the Protocol requirement because of its limitation to navigable waters of the United States.

This is an illustrative, not exhaustive, list of jurisdictional issues in existing law that must be addressed before the United States can ratify these agreements. We also believe that some of the optional jurisdictional grounds set forth in the agreements are important to include in WMD and terrorism crimes. If a U.S. citizen is a victim of one of these WMD crimes abroad, or if the United States itself is a victim, whether because its property is attacked or because of terrorist attempts to manipulate the U.S. government, we believe we should be able to assert jurisdiction. While these grounds are not required for ratification, legislation without these grounds would be an imperfect protection of our own citizens, property, and government in the event of acts involving WMD abroad.

Investigative and Other Issues

In addition to ensuring that the United States is able to meet its legal obligations under these agreements, the proposed implementing legislation is designed to enable the United States to implement the agreement provisions more effectively. There are a limited number of additional authorities that would be helpful to investigate these crimes effectively and to protect Americans and American interests from terrorism and nuclear proliferation. For example, we have specified in the draft legislation that the offenses covered by the agreements would be predicates for use of Title III wiretap authorities. Allowing Federal investigators to investigate WMD or terrorist activities through the use of Title III wiretaps affords us a basic tool to address this very serious criminal activity that threatens our national security. It is clear that wiretaps should be available to investigate WMD terrorism when they are also available to investigate crimes like money laundering, fraud, theft, misuse of passports, and sporting event bribery. We have also listed the crimes covered by the agreements as Federal crimes of terrorism under 18 U.S.C. § 2332b, which gives the Attorney General primary investigative responsibility over such crimes and provides a predicate for the sentencing of terrorism crimes. It would be counterintuitive if these new WMD terrorism offenses were not considered Federal crimes of terrorism or were not punished at a level commensurate with similar offenses already included in the list of Federal crimes of terrorism, including offenses that implement other international counterterrorism agreement obligations.

Importance of Passing the Implementing Legislation Now

It is important to act now on this implementing legislation for several reasons. First, the treaties will enhance U.S. national security by modernizing and strengthening the international counterterrorism and counterproliferation legal framework. Second, the treaties complement important U.S. government priorities, such as the Global Initiative To Combat Nuclear Terrorism, the Nuclear Security Summit, and the Proliferation Security Initiative. Third, ratification will reinforce the leading role of the United States in promoting these and other counterterrorism treaties and can be expected to prompt other States to join. The treaties are widely supported in the national security community, including by the Departments of Justice, State, and Defense, and they received strong bipartisan support in 2008 when the Senate gave its advice and consent to ratification.

* * * * * * * * * * * *

Thank you again for inviting me to this hearing, and I am happy to answer any questions that you may have.

- 6 -

Mr. SENSENBRENNER. Thank you very much, Mr. Wiegmann.

The Chair yields himself 5 minutes to begin the questioning, and I don't think it will take that much.

Mr. Wiegmann, you heard the litany of complaints that the Ranking Member gave during his opening statement. If we accepted all of these complaints, would we be in violation of the terms of the treaty?

Mr. WIEGMANN. Well, we think that the package we put forward is necessary to implement the treaty, if that answers your question.

Mr. SENSENBRENNER. No, it doesn't.

Maybe you would like to send a letter to be included in the record when you review the complaints that Mr. Scott had in his opening statement on which would put us in violation of the treaty and which would not.

Mr. WIEGMANN. Sure.

Obviously, there are different ways of implementing the statute. We think the manner in which we crafted it is the simplest way.

Just to give you a few reasons for that, the reason why we have implemented other previous terrorism-related treaties is putting all the legislation in one place as opposed to trying to put it in different scattered sections of the U.S. Code where it would be hard to figure out.

Mr. SENSENBRENNER. Well, I support that, even though I got a lot of grief for moving Senator Leahy's National Security Letters into the PATRIOT Act. People blamed me for the NSLs, rather than him.

Mr. WIEGMANN. Right. And while there is some overlap, there is also some benefits in terms of extradition so we don't confront cases where other countries can't tell how we have implemented the treaty and we have dual criminality issues.

So there is a variety of issues why we have crafted it the way we have.

There certainly are gaps. As I mentioned in my opening remarks, we can't rely on existing provisions, which I admit do cover some of this conduct, but they don't cover all of it. So without the implementing legislation, we won't be in a position to implement the treaties.

Mr. SENSENBRENNER. Thank you very much.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you.

In follow-up to the question from the Chairman, are there provisions in the bill that are not necessary for ratification?

Mr. WIEGMANN. Yes, there are. I am going to give you a couple of examples.

One is a forfeiture provision that allows assets that are used in the commission of these offenses to be forfeited to the U.S. Government. That is something that we think is good practice. It is consistent with other parts of U.S. law where we do that. So we think it is appropriate here, but it is really a matter of domestic law and not required by the treaty.

Mr. SCOTT. Can you give us a list for the record of the provisions that are not necessary?

Mr. WIEGMANN. We could do that.

Mr. SCOTT. Mr. Countryman, the vote in the Senate to ratify all four of these treaties, was there any opposition?

Mr. COUNTRYMAN. I am not sure, Congressman. I will get you an answer to that as soon as possible.

[The information referred to follows:]

Representative Scott. Mr. Countryman, the vote in the Senate to ratify all four of these treaties -- was there any opposition?

Mr. Countryman. All four of these treaties received Senate advice and consent on September 25, 2008, and there was no opposition to any of them.

Mr. SCOTT. I don't suspect there was. I think we all want to ratify these, so that is not the question before us. The question is whether these proposals are necessary.

The Attorney General's statutory authority to board ships, the Coast Guard and the Navy have that authority and know how to do it. Does the Department of Justice have that expertise, Mr. Wiegmann?

Mr. WIEGMANN. We have, I believe, conducted such boardings in the past, yes.

Mr. SCOTT. And is this specific authority necessary?

Mr. WIEGMANN. Again, not strictly necessary. We believe we already have the authority without the statute, but we think it is prudent to codify that to make it clear.

Mr. SCOTT. You have in the bill preauthority to the President to enter into international agreements. Mr. Countryman, is there precedent for that?

Mr. COUNTRYMAN. I am sorry, sir?

Mr. SCOTT. The Safety of Maritime Navigation Act would give the President authority to conclude additional agreements with other countries to further the underlying treaties. Is it unusual for the President to have preapproval to enter into agreements? Is there precedent?

Mr. COUNTRYMAN. My belief is that it is not, but if I could get a more complete answer to that question from our legal advisors, I will do that.

Mr. WIEGMANN. I can help on that.

There is a precedent for that in the counternarcotics context, and the provision that we have here is based on that context, whereby we do have similar agreements that the executive branch has with other countries to work on counternarcotics interdiction and so forth. So this is modeled on that provision.

We do already have in the executive branch agreements under the Proliferation Security Initiative that we have been doing under

our own authority in the executive branch. But, again, we think it is prudent for Congress to endorse and kind of codify our authority to enter into those agreements.

Mr. SCOTT. Thank you.

One particular provision, the bill would enhance the application of the death penalty. Is that needed to ratify these treaties?

Mr. WIEGMANN. Again, it is not required, but we think that the death penalty, for example, is already provided for in the existing SUA protocol offenses. So in the amendments to those offenses, where the conduct is similar and related, we think would be anomalous not to have the death penalty for the new offenses when we have it for the existing SUA offenses.

Mr. SCOTT. But you don't need it——

Mr. WIEGMANN. It is not required by the treaty. That is right.

Mr. SCOTT. I think your answers to questions for the record will satisfy the other questions I have. Thank you.

Mr. SENSENBRENNER. The gentlewoman from Florida, Mrs. Adams.

Mrs. ADAMS. Thank you, Mr. Chair.

Mr. Countryman, I was just looking at this. If I understand it correctly, one requirement is to criminalize the possession of radioactive material other than nuclear material. Could you explain and give an example of radioactive material that would fall under this category? Are you talking about a dirty bomb scenario?

Mr. COUNTRYMAN. Yes, that is correct. There are a variety of uses for nuclear material in medicine, in industry. All of those require effective handling and disposal after they are done. These new requirements in the treaties impose additional obligations upon countries to protect that material so that it can't fall into the hands of a terrorist who could use it to build a radiological dispersion device or dirty bomb.

Mrs. ADAMS. Could you elaborate on how the SUA protocols would enhance overall the maritime security?

Mr. COUNTRYMAN. I think, in brief, the amendments to the SUA protocols are intended to expand the protection offered. The first protocols essentially provided or created obligations to prevent criminal attacks against ships and fixed platforms. The recognition of what terrorists are capable of doing caused the international community to say we also need measures to prevent ships and fixed platforms from becoming the base or the platform for terrorist attacks. The specific measures that are included in the new protocols should enhance the security not only of the ships and platforms themselves but of anybody going near those ships and platforms.

Mrs. ADAMS. This is my first year in Congress, so how many different attempts have been made by State and Justice to get support in Congress for implementing legislation, not counting this year, and what is the time span of these efforts?

Mr. COUNTRYMAN. The implementing legislation was first proposed in 2008 following the Senate's advice and consent on the treaties. It was resubmitted last year, in 2010, by the current Administration. And the most recent proposal you have before you closely tracks those previous proposals submitted. We look forward to working with Congress in these coming weeks so that this can

be the year that this legislation is passed and we are able to complete ratification of the treaties.

Mrs. ADAMS. And if you would, I would like to ask you, aside from treaty ratification, what gaps are there in the current U.S. law that will be closed by implementing these treaties?

Mr. WIEGMANN. Yes, I talked about some of those in my opening remarks. There are I would characterize it as modest differences between what existing U.S. law covers and what the treaties require us to cover. These can be jurisdictional in nature.

For example, I mentioned the found-in jurisdiction. Again, each of the treaties sets up essentially an extradite or prosecute regime, wherein you either have to prosecute the individual or extradite him to a foreign country. Sometimes there will be an individual here who has violated maybe foreign law but hasn't violated U.S. law, and his only connection to the U.S. Law would be that he is present in the United States.

We are obliged to either extradite or prosecute under the treaties an individual who is here so he doesn't have refuge in the United States, And other counties would have the same obligation to extradite or prosecute to us. The existing jurisdictional provisions don't provide for found-in jurisdictions.

That is an example. There are a bunch of different examples I could raise for you today. I mentioned some of them in my opening statement. But there are jurisdictional and substantive gaps.

Mrs. ADAMS. Can you explain the significance of your proposal for granting the Attorney General foreign ship boarding authority under the SUA protocols? I mean, are these for consensual boardings or——

Mr. WIEGMANN. Not necessarily. This could include, again, law enforcement boarding a ship to investigate criminal activity with a search warrant, et cetera, to board a vessel in U.S. waters to, let's say, search for a terrorist fugitive, or where we have reason to believe there is contraband, prohibited material on board. That is the type of thing we would be talking about.

Mrs. ADAMS. And you would seek a warrant?

Mr. WIEGMANN. That is right.

Mrs. ADAMS. I yield back.

Mr. SENSENBRENNER. The gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Under current law, the relevant statutes contain a bar to prosecution which prevents Federal prosecutions where the underlying conduct is related to a labor dispute and is a felony under State law. Your proposals would exempt the new criminal offenses from this bar to prosecution. Can both of you explain why?

Mr. WIEGMANN. Yes, I can take that one.

We could not envision any scenario under which one of these very serious terrorism offenses would be involved as part of a labor dispute. My understanding of the existing labor bar is that in the event of a strike or other similar activity the Federal Authorities would not prosecute the activity. It would be left to the States where they could criminalize the activity for violence or whatever occurred as part of a strike.

We think that these terrorism offenses involving vessels and platforms and nuclear materials couldn't be really part of a legiti-

mate labor dispute; and, in any event, that there is a strong Federal interest in having the Federal Government prosecute serious offenses like nuclear terrorism and so forth and not leave it to the States. So that is why we thought it appropriate not to have that bar applicable in this context.

Mr. JOHNSON. Mr. Countryman?

Mr. COUNTRYMAN. Nothing further to add, sir.

Mr. JOHNSON. Why would we bar the bar for labor disputes or anything that could—in other words, you are telling me that you can foresee no dispute that would be a labor dispute, you can see no labor dispute that would generate a prosecution under the statute, and I am wondering what is the harm in letting the bar to prosecution in labor disputes remain?

Mr. WIEGMANN. Again, in our view, in the extraordinarily unlikely event that one of these terrorism offenses would be part of a labor dispute, we think there is a sound interest in the Federal Government being able to investigate and prosecute that activity and not leaving it to the States. Because it is a Federal terrorism offense which is likely to be not something we would want to leave to State authorities.

Mr. JOHNSON. All right, thank you. I yield back.

Mr. SENSENBRENNER. The gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Mr. Chairman, I want to thank you for calling this very important hearing.

I want to thank both of our witnesses for sharing their insights and expertise. They have done a remarkable job of answering the questions that I had, Mr. Chairman; and I would yield back the balance of my time to the distinguished gentleman from Wisconsin for him to use as he sees fit.

Mr. SENSENBRENNER. Well, the way the gentleman from Wisconsin will use it as he sees fit is by saying, without objection, the hearing is adjourned.

Ms. JACKSON LEE. Mr. Chairman?

Mr. SENSENBRENNER. Oh, the gentlewoman—I didn't see or hear you. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

To the witnesses, we have several matters that we are engaged in, so let me start out with a question.

Under the DOJ proposals, the Safety of Marine Navigation Act would give the Attorney General the general authority to board ships while investigating the violations of 18 U.S.C. 2280 and ultimately authorize the President to conclude additional relevant agreements with other nations to further the aims of the treaty. While this has precedence, it is unusual to grant the President carte blanche authority to enter into agreements without consulting the Senate. How would this change preserve the constitutional role of the Senate in giving its advice and consent?

If both of you would answer those questions, I would appreciate it—answer that question. Thank you.

Mr. COUNTRYMAN. Thank you very much, Congresswoman.

There is precedent for authorization for the President, as we have just heard explained in counternarcotics legislation, to enter into these agreements to further the purposes of the treaty. We

have a range of agreements with various countries under the Proliferation Security Initiative in which the United States and partners pledge to work together to interdict weapons of mass destruction and their precursor materials that are bound either for states or for non-state actors, that is, terrorists. These agreements serve us well, and we consult and inform the Congress regularly about these agreements.

I think I may want to ask my colleague from the Department of Justice to talk about the larger issue that you have raised, how it connects to the larger treaties and conventions that the United States enters into.

Mr. WIEGMANN. Yes. There is a complex body of law about what things you have to do by treaty and what things you can do by executive agreement. It was included in the nature of these agreements, which are essentially law-enforcement-related agreements about ship boarding and so forth. That is both based on history and precedent and the relevant constitutional analysis that these are things that could be done by executive agreement.

They are provided to the Senate and I think the House after they are entered into; and, as Assistant Secretary Countryman said, I think we do have more than a dozen at least, maybe several dozen of these agreements already. I am not aware of any objection that the Senate has asserted to the executive branch's authority to enter into these agreements as executive agreements. Nonetheless, we think it is useful for Congress to be on record to kind of codify the executive branch's authority to enter into these agreements.

Again, it is not strictly necessary, but we think it is useful to have this type of provision so that we kind of have a clarity on the relevant authority there.

Ms. JACKSON LEE. Do any of these agreements or present implementation reflect the different climate that we are now in with respect to the, some would say, proliferation of weapons of mass destruction of the different independent or smaller countries that now pose, to some extent, international threat? Does this have any impact on the wave of piracy, for example, which one doesn't necessarily associate with weapons of mass destruction but certainly has troubled the waters in places beyond our immediate boundaries? To both of you.

Mr. COUNTRYMAN. On the first point, it certainly is related to the overall climate, the overall trends that we see in attempts by both states and non-state actors to acquire weapons of mass destruction. What the convention seeks to do and what the implementing legislation seeks to do is to ensure that we are closing every legal gap that we believe that terrorists will exploit.

I expect as both technology and ingenuity advances there will be further need in the future for additional changes in these protocols. These are not intended to address the phenomenon of piracy that is now a problem off the coast of Somalia. There may be a marginal effect, but that is not the intention of either the treaties or the legislation.

Ms. JACKSON LEE. To the DOJ, does this help us move quickly under this structure of treaty, that we can implement or move more quickly than we might ordinarily need to do?

Mr. WIEGMANN. I think it does. I think in cases where we would be extraditing someone for one of these offenses, this will make it easier. It will make it so we make sure that our foreign partners have the same laws on the books that we have on the books, eliminate disputes as to whether, again, as I mentioned earlier, for dual criminality that that offense is extraditable and will enhance and speed that procession.

There are also other provisions of the treaties that I think require other sorts of law enforcement cooperation.

So, yes, we fully support the treaties for those reasons.

Ms. JACKSON LEE. I yield back.

Mr. SENSENBRENNER. The gentlewoman's time has expired.

Now, without objection, the Subcommittee stands adjourned.

[Whereupon, at 10:40 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

October 3, 2011

The Honorable James Sensenbrenner
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to urge the House Judiciary Committee to enact implementing legislation for the 2005 Amendment to the Convention on the Physical Protection of Nuclear Materials (CPPNM). Doing so would expand the original Convention which only covered protection of nuclear materials in international transport to include protections for physical facilities and nuclear materials in storage or in use domestically. The implementing legislation would, among others, criminalize specified offenses such as the possession of radioactive materials other than nuclear material that are not now prohibited by law.

From 2003 to 2007, I was a Presidential appointee serving as the Deputy Assistant Secretary of State for Nuclear Nonproliferation Policy and Negotiations. During that time and since then, the U.S. pushed hard for the ratification of the CPPNM, for the Amendment, and for implementing legislation that is now before the Judiciary Committee. The CPPNM has enjoyed broad bipartisan support. Both the George W. Bush and the Obama administrations have strongly urged other countries to ratify the CPPNM and the Amendment to it. The 2010 Nuclear Security Summit in Washington, D.C. gave new impetus to the importance and urgency of securing nuclear materials and reducing terrorist threats. All this was done because we believed then, as we do now, that enactment of the Amendment is unmistakably in the national security interests of the United States. I can assure you that other countries look to the United States action or inaction on this Amendment, as it does on so many other nonproliferation and arms control measures, as a guide to their own behavior.

Following the collapse of the Soviet Union two decades ago, the terrorist attacks on the United States on 9/11 a decade later, the numerous incidents of illicit trafficking in nuclear materials over time, the repeated reports of unsecured or poorly secured facilities involving nuclear activities, and revelations that terrorist and other rogue groups strain to obtain nuclear materials, components or weapons, the nuclear security issue has been catapulted to the top of the U.S. national security agenda. Despite commendable international initiatives over the years to prevent, deter and respond to lapses in securing nuclear materials and facilities, the problem is likely to grow as nations build new nuclear power reactors for energy and expand on the peaceful use of nuclear science in health care, agriculture, hydrology, water and food safety, and others peaceful applications. There is, therefore, a sense of urgency in bringing the Amendment into force.

I strongly recommend that the Committee act to approve the implementing legislation so that the 2005 Amendment to the CPPNM can be enacted as soon as possible.

Sincerely,

Andrew K. Semmel
Former Deputy Assistant Secretary of State
for Nuclear Nonproliferation Policy and Negotiations

October 5, 2011

The Honorable James Sensenbrenner
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C.
20515

Dear Mr. Chairman-

We write to urge you to promptly enact the implementing legislation for the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material (CPPNM) and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT). Such legislation is necessary to ratify both treaties, which expand and strengthen U.S. efforts to prevent and combat nuclear terrorism.

Signed in 2005, the Amendment to the CPPNM requires parties to protect nuclear facilities and material that is stored and used domestically. The provisions in the original 1980 convention only required physical protection for nuclear material during international transport. The amended convention fills a critical gap in physical protection of nuclear material.

ICSANT establishes an international framework to strengthen cooperation among countries in combating nuclear terrorism and preventing the proliferation of weapons of mass destruction. The Convention also provides a legal basis for international cooperation in the investigation, prosecution, and extradition of alleged offenders.

The George W. Bush administration submitted the Conventions to the Senate in September 2007, demonstrating the strong bipartisan support for the treaties. The Senate overwhelmingly approved them in September 2008. However, both Conventions require the U.S. to criminalize certain offenses in further implementing legislation prior to U.S. ratification.

At the April 2010 Nuclear Security Summit in Washington, D.C., the Obama administration pledged to accelerate efforts to complete ratification procedures for the two treaties. The administration submitted draft implementing legislation for consideration to the Judiciary and Foreign Relations Committees in April 2011.

Republicans and Democrats agree that the greatest threat to U.S. national security is nuclear terrorism. U.S. ratification of the CPPNM amendment and ICSANT will bolster the cooperative international effort to prevent nuclear terrorism.

Many other countries have indicated that they are waiting for the United States to complete ratification before moving ahead with their own ratification processes. The CPPNM

amendment will only enter into force after it has been ratified by two-thirds of the parties to the Convention. As of June 2011, only 48 out of 142 states have approved the amendment. U.S. leadership on nuclear security is essential to its entry into force.

The 2010 Nuclear Security Summit raised international awareness of the need for global cooperation to secure vulnerable nuclear materials and decrease terrorist threats. The 2012 Nuclear Security Summit in Seoul will provide another high-level push to reduce nuclear risks. The United States should demonstrate its continued leadership in nuclear security by swiftly approving the CPPNM amendment and ICSANT implementing legislation, paving the way for ratification of these important conventions in advance of the 2012 summit.

Sincerely,

Jack Boureston, Managing Director, FirstWatch International

Ambassador (ret) Ken Brill, President of The Fund for Peace

*Matthew Bunn, Associate Professor, Harvard Kennedy School**

Charles D. Ferguson, President, Federation of American Scientists

Lt. General (USA, Ret.) Robert G. Gard, Jr.

John Isaacs, Executive Director, Center for Arms Control and Non-Proliferation

Dr. William W. Keller, Director, Center for International Trade & Security, University of Georgia

Daryl G. Kimball, Executive Director, Arms Control Association

Kenneth N. Luongo, President, Partnership for Global Security

*Miles Pomper, Senior Research Associate, Monterey Institute**

*Dr. William C. Potter, Sam Nunn and Richard Lugar Professor of Nonproliferation Studies, Monterey Institute**

Susan Shaer, Executive Director, Women's Action for New Directions

Sharon Squassoni, Director and Senior Fellow, Proliferation Prevention Program, Center for Strategic and International Studies

Paul Walker, Director, Security and Sustainability, Global Green

Peter Wilk, MD, Executive Director, Physicians for Social Responsibility

**Organization listed for identification purposes only*

WILLIAM H. TOBEY
227 SOUTH BALD HILL ROAD
NEW CANAAN, CT 06840

October 6, 2011

The Honorable James Sensenbrenner
Chairman, Committee on Foreign Affairs
United States House of Representatives
Washington, DC

Dear Chairman Sensenbrenner,

I am writing to urge passage of implementing legislation for the Convention on the Physical Protection of Nuclear Material as soon as possible. The Convention is a critical element of international efforts to prevent nuclear terrorism.

Every major presidential candidate since the September 11, 2001 attacks has cited nuclear terrorism as one of the most serious threats to U.S. national security. I recently co-authored a Joint Threat Assessment with colleagues at Harvard's Belfer Center for Science and International Affairs and the Russian Academy of Science's USA-Canada Institute. The study concluded that the threat of nuclear terrorism is real and demands urgent attention, and that physical protection of fissile material is the most important task.

In fully implementing the Convention the United States will again lead other nations to undertake important actions to strengthen international security.

As a member of the National Security Council Staff in the Reagan, Bush (41), and Bush (43) administrations, and a deputy administrator of the National Nuclear Security Administration under President George W. Bush, I was leased to work on policies to prevent nuclear terrorism and proliferation that enjoyed broad bi-partisan support. Implementing the Convention on the Physical Protection of Nuclear Material deserves such support, and I applaud your effort on the matter to date.

Sincerely,

/s/

William H. Tobey

AMBASSADOR LINTON F. BROOKS

INDEPENDENT CONSULTANT ON NATIONAL SECURITY

October 4, 2011

The Honorable James Sensenbrenner
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman

I am writing to urge the House Judiciary Committee to support implementing legislation for the 2005 Amendment to the Convention on the Physical Protection of Nuclear Materials (CPPNM). Doing so would expand the original Convention, which only covered protection of nuclear materials in international transport, to include protections for physical facilities and nuclear materials in storage or in use domestically.

Securing nuclear material and thwarting nuclear terrorism have long enjoyed strong bipartisan support in Congress. I had the opportunity to observe this during the four and one half years I spent as Administrator of the National Nuclear Security Administration during the George W. Bush administration. Although negotiation of the Amendment to the Convention on the Physical Protection of Nuclear Materials was the responsibility of the Department of State, I supported it then and support it now.

Approving the implementing legislation is both important and urgent. It is important because it would strengthen the international regime to counter nuclear terrorism and because it would, among others, criminalize specified offenses such as the possession of radioactive materials other than nuclear material that are not now prohibited by law. It is urgent to help enable the United States to steer the outcome of the March 2012 Seoul summit on nuclear security. I understand that many signatories (including some close American allies) are waiting for the United States to act before moving with their own approval processes. This should not be a surprise. U.S. leadership has historically been required for effective international action on security issues. Approving this legislation will demonstrate that leadership.

I urge the Committee act to approve the implementing legislation so that the 2005 Amendment to the CPPNM can be brought into effect as soon as possible. Thank you for your consideration.

Linton F. Brooks

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 22, 2011

The Honorable F. James Sensenbrenner, Jr.
Chairman
Subcommittee on Crime, Terrorism,
and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to questions posed to Deputy Assistant Attorney General Brad Wiegmann at the Subcommittee's hearing on Wednesday, October 5, 2011, entitled "The Implementation of Certain International Nuclear and Maritime Terrorism Agreements." You and Ranking Minority Member Scott asked which of the provisions in the proposed implementing legislation are not required by these agreements.

Below we highlight those substantive provisions of the implementing legislation that are not strictly required by these agreements. We wish to emphasize, however, that the Administration strongly supports enactment of both the provisions required by the treaties and those which, while not strictly required, are appropriate and important for national security for the reasons discussed herein.

The provisions in the proposed legislation implementing certain provisions of the International Convention for the Suppression of Acts of Nuclear Terrorism ("NTC") and certain provisions of an amendment to the Convention on the Physical Protection of Nuclear Material ("CPPNM") that are not strictly required by the NTC and CPPNM are as follows:

- Part of subsection 2332i(b), insofar as it adopts the optional jurisdictional bases that are permitted by the NTC, but not required. Those permissive bases include jurisdiction over offenses committed (1) against a U.S. national abroad; (2) by a stateless person whose habitual residence is in the United States; (3) against United States State or Government facilities abroad; or (4) in an attempt to compel the United States to do or abstain from doing an act. While these jurisdictional grounds are not required for ratification, legislation without these grounds would be an imperfect protection of our own citizens, property, and government in the event of

acts involving Weapons of Mass Destruction ("WMD") abroad. We have established the same jurisdictional bases in implementing legislation for other international counterterrorism agreements.

- Amendment of section 2516(1)(q), which would add section 2332i as a predicate offense for wiretapping. The Department believes amendment of this provision is appropriate because allowing Federal agents to investigate illicit activities involving WMD or terrorism through the use of Title III wiretaps affords us a key investigative tool to address this very serious criminal activity that threatens our national security. Wiretaps should be available to allow law enforcement agents to investigate the WMD and terrorism-related offenses established pursuant to this implementing legislation just as wiretaps are now available to investigate other terrorism offenses in current law and crimes such as money laundering, fraud, theft, misuse of passports, and sporting event bribery.

- Amendment of subparagraph 2332b(g)(5)(B), which would add section 2332i to the definition of "Federal crime of terrorism," which in turn gives the Attorney General primary investigative responsibility over such crimes and provides a predicate for the sentencing of terrorism crimes. The Department believes amendment of this provision is appropriate to ensure that these new WMD terrorism offenses are, in fact, considered Federal crimes of terrorism and are punished at a level commensurate with similar offenses already included in the list of Federal crimes of terrorism, including offenses that implement other international counterterrorism treaty obligations.

- Amendment of section 2339A, which would make the offenses defined in section 2332i predicate crimes under section 2339A. Section 2339A prohibits providing material support knowing or intending that it is to be used in preparation for or in carrying out certain enumerated crimes. The predicate crimes already enumerated include acts of sabotage under 42 U.S.C. § 2284 and the nuclear material crimes under 18 U.S.C. § 831. The implementing legislation for the Terrorist Bombings Convention and the Terrorist Financing Convention similarly made those new offenses predicate crimes under 18 U.S.C. § 2339A. While the addition of these crimes as predicate offenses is not required by the agreements, the Department believes that it would be anomalous if material support to commit these new WMD and terrorism offenses were lawful when material support to commit other similar offenses is prohibited.

- Subsection 2332i(c), which adopts the penalties in existing subsection 2332a(a). While the treaties require appropriate penalties, they do not specify the penalties. Subsection 2332a(a) provides that if death results from the offense, the offender shall be punished by death or imprisoned for any term of years or for life. The Department believes this provision is appropriate in light of the seriousness of the offenses in question and because the death penalty is available for other comparable Federal

terrorism offenses. The Federal use of the death penalty is limited to very serious conduct and also is circumscribed by provisions on death sentences set out in chapter 228 of title 18 of the United States Code.

- The definition in subsection 2332i(e) is slightly broader for "nuclear material" than the definition in the CPPNM or the NTC because the definition covers all plutonium, rather than "plutonium, except that with isotopic concentration exceeding 80 percent in plutonium-238." The definition is adopted from existing subsection 831(f) in order to provide consistency among the statutes. When amending section 831 in 1996, Congress expanded the definition in that statute beyond the CPPNM definition in order to address other hazardous materials that might be used in radioactive dispersal devices or in other terrorist activity.

The provisions in the proposed legislation implementing the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (together, "SUA Protocols") that are not strictly required by the SUA Protocols are as follows:

- Subsection 2280(b), which provides for civil forfeiture of any real or personal property used or intended to be used to commit or to facilitate the commission of the offenses in this section. While the treaties require appropriate penalties, they do not specify the penalties. The Department believes that this provision is appropriate because civil forfeiture is available for comparable offenses.

- Subsection 2280(e), which makes clear that the existing 18 U.S.C. § 2280 bar to Federal prosecution for labor dispute conduct that is a State law felony does not apply to the maritime terrorism offenses under subparagraphs (a)(1)(G) (offenses that have as a purpose intimidating a population or compelling a government or international organization to act), (H) (offenses concerning the unlawful transport of biological, chemical, nuclear ("BCN"), and related materials), or (I) (terrorist fugitive transportation). The Department's position is that these terrorism and WMD offenses are not part of legitimate labor disputes, both because it is inconceivable that the prohibited acts would arise as a part of a legitimate labor dispute and because the intent requirements of these offenses are so exacting. Moreover, there is a strong Federal interest in the prosecution of all such offenses. Therefore, the bar to Federal prosecution is inappropriate for the new offenses.

- Subsection 2280(g), which codifies the existing authority of the FBI to board ships for investigative purposes related to the new offenses. Although the boarding authority provision is not necessary because it codifies existing practice, the Department deemed it prudent to codify such authority, consistent with the requirement of paragraph 14 of Article 8*bis* of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: "Each State Party shall

take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other States Parties acting on its behalf, are empowered to act pursuant to this article."

- Subsection 2280(h), which authorizes the President to conclude agreements, including reciprocal maritime agreements, with other countries to facilitate the control of the transportation of BCN weapons and related materials and terrorists. The Department believes that this provision is appropriate because it is intended to codify and reinforce the President's authority to enter into the types of ship-boarding agreements contemplated by Article 8*bis*, paragraph 13 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, as amended by the Protocol. That provision allows States Parties to conclude agreements or arrangements between themselves to facilitate law enforcement operations carried out pursuant to Article 8*bis*, which establishes a voluntary ship-boarding regime. Both 8*bis* and our proposal for subsection 2280(h) are modeled after similar provisions in the 1988 Vienna Narcotic Drug Convention and existing United States law granting authority for drug-interdiction-related agreements, found at 22 U.S.C. § 2291(a)(2). The Executive Branch has entered into a number of ship-boarding agreements designed to address the proliferation of WMD and related materials in recent years.

- Amendment of paragraph 2516(1)(q) to make these crimes wiretap predicates. The Department believes that amendment of this provision is appropriate for the reasons outlined above for the NTC and CPPNM offenses.

Please note that there are also certain terms defined in the proposed implementing legislation that are not explicitly defined in these agreements (*e.g.*, the definition of "United States corporation or legal entity" in 18 U.S.C. § 2332i(e)(12)). Other than the provisions listed in this letter, all of the provisions in our proposed legislation are required to implement the treaties.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Robert C. "Bobby" Scott
Ranking Minority Member