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SECOND PROTOCOL AMENDING EXTRADITION TREATY WITH CANADA

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

REPORT

[To accompany Treaty Doc. 107–11]

The Committee on Foreign Relations, to which was referred the Second Protocol Amending the Treaty on Extradition Between the Government of the United States of America and the Government of Canada, signed at Ottawa on January 12, 2001 (Treaty Doc. 107–11), having considered the same, reports favorably thereon, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution of advice and consent to ratification.

CONTENTS

I. PURPOSE

The Protocol amends the existing U.S.-Canada extradition treaty in order to make changes regarding temporary surrender and the authentication requirements.

II. BACKGROUND AND SUMMARY

The Protocol with Canada is the second protocol to the U.S.-Canada Extradition Treaty, which was signed in 1971 and entered into force in 1976. The first Protocol to the Treaty was signed in 1988, and approved by the Senate in 1991. The Protocol before the Sen-

ate was signed in January 2001, and submitted to the Senate on July 11, 2002.

The Protocol achieves two purposes. First, it modernizes the provision on temporary surrender of a person to the requesting state for the purpose of prosecution. Under Article 7 of the current U.S.-Canada treaty, when a person sought for extradition is already being prosecuted or serving a sentence in the requested state, the surrender may be deferred until the conclusion of the proceedings or the sentence has been served. The Protocol would add new paragraphs to Article 7 to allow for temporary surrender to the requesting state for prosecution, even if the individual has not completed his sentence in the requested state. These type of temporary surrender provisions are common to modern extradition treaties. They allow for prosecution of the offense closer in time to its commission, which advances the objective of securing justice. Long delays in commencing trial also raises the danger that witnesses will be unavailable, or that witnesses' memories will fade with the passage of time.

Second, the Protocol provides for simplified authentication requirements with respect to requests from the United States. This takes advantage of changes in Canadian law regarding the admissibility of extradition documents in Canadian courts. Under Article 10(2) of the current Treaty, documentary evidence in support of a request for extradition must be authenticated by an officer of the Department of Justice of Canada and certified by the principal diplomatic or consular officer of the United States in Canada (in the case of a request emanating from Canada) or must be authenticated by an officer of the Department of State of the United States and certified by the principal diplomatic or consular officer of Canada in the United States (in the case of a request emanating from the United States). Article 2 of the Protocol allows requests emanating from the United States to follow a simplified procedure, requiring only that evidence be certified by a judicial, prosecuting or correctional authority. The Protocol also provides a flexible means to take advantage of any future changes in applicable laws in either country. New Article (10)(2)(c) (added by Article 2) would allow admission of evidence which is "certified or authenticated in any other manner accepted by the law of the requested State."

III. Entry into Force and Termination

Under Article 3, the Protocol enters into force upon the exchange of instruments of ratification. It terminates upon termination of the underlying Extradition Treaty.

IV. Committee Action

The Committee held a public hearing on the Protocol on September 19, 2002, receiving testimony from representatives of the Departments of State and Justice. (S. Hrg. 107–721) The Committee considered the Protocol on October 8, 2002, and ordered that it be favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to ratification of the Protocol.

V. EXPLANATION OF THE SECOND PROTOCOL AMENDING THE EXTRADITION TREATY WITH CANADA

What follows is a technical analysis of the Treaty prepared by the Departments of State and Justice.

Technical Analysis of The Second Protocol Amending the Extradition Treaty Between the Government of the United States of America and the Government of Canada of December 3, 1971

On January 12, 2001, the United States signed the Second Protocol Amending the Treaty on Extradition between the Government of the United States of America and the Government of Canada ("the Second Protocol"). The Second Protocol authorizes: (1) the temporary extradition to the requesting State of individuals charged with crimes there who are serving sentences in the requested State, and (2) the modification of the authentication requirements for U.S. extradition documents being submitted to Canadian authorities.

On June 17, 1999, Canada enacted new extradition legislation, which includes a provision on temporary surrender.[1] The United States currently has no similar law. Absent the authorization provided by the Second Protocol, surrender through the extradition process of persons already convicted and sentenced in the country from which extradition is sought must generally be deferred until the completion of their sentences, by which time the evidence in the other country may no longer be compelling or available. Pursuant to the Second Protocol, such individuals, upon the granting of requests for their extradition, can be temporarily surrendered to the requesting State for purposes of immediate prosecution and then returned to the requested State for the completion of their original sentences.

The Second Protocol also makes several technical changes that would streamline the Extradition Treaty's authentication provisions. Under Article 10(2) of the Extradition Treaty, documentary evidence in support of an extradition request from the United States must be authenticated by the Department of State and by the principal diplomatic or consular officer of Canada in the United States. Similar requirements are in place for requests from Canada. Canada's June 17, 1999 extradition legislation provides that no authentication of documents is required unless a relevant extradition agreement provides otherwise.[2] The Second Protocol eliminates the need for State Department and diplomatic/consular authentication for documents in support of U.S. requests. Instead, Article 2 of the Second Protocol allows for a judicial authority or prosecutor in the United States to provide the necessary certification when the person is sought for prosecution. When the person sought has already been convicted, documents supporting the U.S. request can be certified by a judicial, prosecuting or correctional authority. Although the Second Protocol retains the existing authentication provisions for extradition requests from Canada, it also provides

[1] Bill C–40, Chapter 18, Part 2,—66
[2] Bill C–40, Chapter 18, Part 2,—33(4)

the alternative that documents may be certified or authenticated in any other manner accepted by the law of the requested State. This alternative enables both countries to take advantage of any new changes to their laws.

The Second Protocol serves as a supplement to, and is incorporated as a part of, the existing Extradition Treaty between the United States of America and Canada, signed at Washington on December 3, 1971, as amended by an Exchange of Notes of June 28 and July 9, 1974, and a Protocol signed at Ottawa on January 11, 1988.[3] The temporary surrender mechanism established by the Second Protocol is a standard feature in extradition treaties concluded in recent years.[4] In addition, on November 13, 1997, the United States and Mexico signed a Temporary Surrender Protocol to the Extradition Treaty Between the United States of America and the United Mexican States of May 4, 1978. The addition of this mechanism to the U.S.-Canada Extradition Treaty, along with the streamlined authentication procedures, will serve to improve the bilateral extradition process in light of modern treaty practice and patterns of criminal behavior.

The Office of International Affairs, Criminal Division, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, prepared the following technical analysis of the new Treaty based on their participation in its negotiation.

ARTICLE 1

Article 1 amends the Extradition Treaty by adding a new article entitled "Article 7 bis" after Article 7. Paragraph 1 of the new article describes the new mechanism of temporary surrender for individuals serving sentences in the requested State.

Article 1, paragraph 1, of the Second Protocol sets forth the substantive authorization for the requested State to allow the temporary surrender to the requesting State of individuals who have been found extraditable, but have already been convicted and sentenced in the requested State. Article 7 of the Extradition Treaty contemplates only the surrender outright of such individuals, or the deferral of their surrender until the punishment imposed against them has been fully executed. To prevent the injustice potentially created by prolonged delays prior to surrender, the expedited transfer procedure of the new Article 7 bis provides another option to assist both governments in the effective pursuit and prosecution of criminal defendants.

Temporary surrender under the Second Protocol applies only to those who have been convicted and sentenced in the requested State. It does not cover persons who are simply facing charges in

[3] 27 UST 983; TIAS 8237

[4] Temporary surrender provisions are found at Art. 15, United States-Switzerland Extradition Treaty, signed Nov. 14, 1990, entered into force Sept. 10, 1997; Art. 12, United States-Belgium Treaty, signed April 27, 1987, entered into force Sept 1, 1997; Art. 13, United States-Malaysia Treaty, signed August 3, 1995, entered into force June 2, 1997; Art. 14, United States-Hungary Treaty, signed Dec. 1, 1994, entered into force March 18, 1997; Art. 11, United States-Philippines Treaty, signed Nov. 13, 1994, entered into force Nov. 22, 1996; Art. 11, United States-Bolivia Treaty, signed June 27, 1995, entered into force Nov. 21, 1996; Art. 13, United States-Jordan Treaty, signed March 28, 1995, entered into force July 29, 1995; and Art. 12, United States-Bahamas Treaty, signed March 9, 1990, entered into force Sept 22, 1994.

the requested State or against whom proceedings have been initiated, but not yet completed, because of jurisdictional and speedy trial issues that might otherwise be implicated. Similarly, as in analogous provisions of other extradition treaties to which the United States is a party, the Second Protocol does not apply to those being sought by the requesting State for service of a previously-imposed sentence, because the rationale for this mechanism—the prosecution of the extraditee while the case is still viable—is not implicated for those who already have been convicted in the requesting State.

During the negotiations, the delegations discussed the circumstances under which each State anticipates making requests for temporary surrender. Both delegations expressed the view that the mechanism should not be used for every case in which a person sought in the requesting State is serving a sentence in the requested State. Rather, it is envisioned that temporary surrender should be reserved for cases in which witnesses or evidence may not be available in the requesting State for a later trial, the person is serving a lengthy sentence in the requested State, the offense charged in the requesting State is particularly serious or sensitive, or other conditions indicate that the ends of justice will best be served by temporary surrender.

Paragraph 1 goes on to explain that the temporary surrender of the person shall not divest the Courts in the requested State of jurisdiction over any appeal or habeas corpus application relating to the conviction or sentence that may be available under the laws of the requested State. The negotiators included this language to make clear that the temporary surrender will not impair the ability of the Courts in the requested State to consider appropriate challenges to the original conviction or sentence in that State, or otherwise compromise the appellate process due to the defendant's absence. This process contemplates only post-conviction appeals in the United States, and post-conviction or post-acquittal appeals in Canada, as the latter's law provides for appeals of acquittals by the Government. The negotiators concurred that only in rare circumstances will the Parties effect the temporary surrender of an individual before the appeals process has been completed in the requested State.

Article 1(2) states that the surrendered person shall be kept in custody in the requesting State. The negotiators agreed that the mandatory language in the Second Protocol was intended to preclude the release of a person temporarily surrendered.

Canada's temporary surrender legislation requires that a person be returned within 30 days of the conclusion of the trial, unless a relevant extradition agreement provides for another time limit. Recognizing that 30 days from trial might not capture related sentencing proceedings and could restrict the time available to a person to consult with his attorney in the requesting State regarding the filing of an appeal, paragraph 2 provides that a person " . . . shall be returned to the requested State within forty-five (45) days after the conclusion of the proceedings for which the person's presence was required or at another time as specified by the requested State, in accordance with conditions to be determined by the Parties for that purpose."

Article 1(2) contemplates that authorities in the United States and Canada will consult to determine appropriate conditions for the temporary surrender of an individual, including arrangements for the transfer and maintenance of custody of the prisoner and the return to the requested State, as well as any extraordinary matters that may be relevant, such as the proper handling of individuals requiring medical treatment or the disposition of a prisoner who commits new crimes in the requesting State during the period of temporary surrender. Canada's temporary surrender law provides for what is understood to be the rare circumstance in which the Minister of Justice may require an assurance that the person to be surrendered temporarily will be returned no later than a specified date, in which case the Parties will have to decide on the timing of the transfer. As in paragraph 1, the negotiators included language ensuring that the transfer of the prisoner back to the requested State would not divest the Courts of the requesting State of jurisdiction over any appeal or habeas corpus application that may be available under the law of the requesting State, relating to the matter for which the prisoner was temporarily surrendered.

Paragraph 3 establishes that the time spent in custody in the requesting State may be credited to the sentence in the requested State. Canadian law provides for credit without regard to conviction in the requesting State, and the Canadian negotiators felt strongly about including such a provision in the Second Protocol. Credit for time served may differ among U.S. state and federal authorities. Accordingly, the negotiators agreed to use the permissive "may" formulation in this paragraph in order to provide flexibility for different approaches.

In light of the agreement in paragraph 3 that the requested State's sentence may be running during the period of temporary surrender, paragraph 4 establishes that when the sentence that the transferred person was serving in the requested State expires during the temporary surrender period, the requested State may waive the return of the person and the surrender will be considered "final." This provision makes administrative and economic sense, and avoids needless transport of the prisoner back to the requested State only to have the person finally extradited to the requesting State.

Paragraph 5 provides that when an individual has been surrendered temporarily, convicted and sentenced in the requesting State for the offense for which temporary surrender was granted, and returned to the requested State, the individual may be finally surrendered to the requesting State without a further request for extradition. The operation of this paragraph is subject to paragraphs 6 and 7, which are discussed below.

Paragraph 6 was proposed by the Canadian delegation, in accordance with their new law, to establish that the final surrender of a person shall take place when the person has finished serving the custodial portion of the sentence in the requested State, or at an earlier time specified by the requested State. This paragraph allows the requested State to effect the final surrender of a person who has been released on parole, or under other conditions, and permits the possibility of final surrender at any earlier time per-

missible under the requested State's law, even if the sentence technically is not concluded.

Paragraph 7(a) contemplates that there shall be no final surrender of an individual when the requesting State advises that it is no longer required because the sentence imposed has expired, or for other reasons. One example of this might be when the requesting State convicts a person temporarily transferred there and imposes a sentence intended to run concurrently with one in the requested State. In such a case, the requesting State may not want final surrender of the person from the requested State, or the sentence may expire in the interim. Paragraph 7(b) accounts for a situation in which, during the intervening period between return of the person to the requested State and final surrender, the order of surrender is revoked by the Canadian Minister of Justice or the U.S. Secretary of State.

ARTICLE 2

Article 2 of the Second Protocol deletes Article 10(2) of the Extradition Treaty and replaces it with streamlined procedures for the authentication of U.S. extradition documents. Canada's new extradition legislation provides that no authentication of documents is required unless a relevant extradition agreement provides otherwise.

Article 2(2) of the Second Protocol establishes a framework for the admissibility of documentary evidence in support of a request for extradition. Paragraph (2)(a) requires that, in the case of a request from Canada, documents must be authenticated by an officer of the Department of Justice of Canada and certified by the principal diplomatic or consular office of the United States in Canada. These requirements mirror our current practice concerning documents in support of Canadian extradition requests. Although the Canadian delegation expressed its hope that the United States could dispense in the Second Protocol with the more cumbersome requirements for admissibility of their documents in U.S. courts, the U.S. delegation explained that it was limited in what it could do by the requirements of Title 18, United States Code, Section 3190. Nevertheless, the Canadian delegation permitted the United States to take advantage of Canada's new law, agreeing to design paragraph (2)(b) so that the United States would no longer be required to have its documents in support of extradition requests to Canada authenticated by an officer of the Department of State of the United States and certified by Canada's principal diplomatic or consular officer in the United States.

Paragraph (2)(b) goes on to state that, in the case of a request from the United States for a person who is sought for prosecution, documents are admissible in Canada if they are certified by a judicial authority or prosecutor who attests that the evidence is available for trial and is sufficient to justify prosecution under the law of the prosecuting jurisdiction. This attestation tracks the provision of Canadian law that was designed for requests from common law legal systems. The new procedure will eliminate the need for authentication by State Department and diplomatic/consular officials, which can be time consuming and cumbersome for all parties involved. In our current extradition practice, the United States is cer-

tifying and authenticating documents both in accordance with the new Canadian Extradition Act and the requirements of the Extradition Treaty.

Under paragraph (2)(b), when the person sought has already been convicted, documents supporting the U.S. request must be certified by a judicial, prosecuting or correctional authority who attests to the fact that the documents are accurate. As in the case of a person who is sought for prosecution, this procedure will reduce the administrative burden of preparing documents in support of extradition requests to Canada.

Paragraph (2)(c) provides the alternative that documents may be certified or authenticated in any other manner accepted by the law of the requested State. This will enable both countries to take advantage of any new changes to their laws.

ARTICLE 3

Paragraph 1 establishes that this Second Protocol shall form an integral part of the Extradition Treaty.

Paragraph 2 provides for retroactivity, stating that notwithstanding paragraph (2) of Article 18 of the Extradition Treaty, the Second Protocol shall apply in all cases in which the request for extradition is made after its entry into force regardless of whether the offense was committed before or after that date.

Paragraph 3 states that the Second Protocol shall be subject to ratification, and shall enter into force upon the exchange of instruments of ratification. It shall terminate upon termination of the Extradition Treaty.

VI. TEXT OF RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Second Protocol Amending the Treaty on Extradition Between the Government of the United States of America and the Government of Canada, signed at Ottawa on January 12, 2001 (Treaty Doc. 107–11).

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