FBI AUTHORITY TO SEIZE SUSPECTS ABROAD

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

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FBI AUTHORITY TO SEIZE SUSPECTS ABROAD

WEDNESDAY, NOVEMBER 8, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:50 a.m., in room 2141, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, Geo W. Crockett, F. James Sensenbrenner, Jr., William E. Dannemeyer, and Craig T. James.

Also present: James X. Dempsey, assistant counsel, and Colleen Kiko, minority counsel.

Mr. EDWARDS. The subcommittee will come to order.

This morning the subcommittee considers whether or not the FBI can seize a suspect from a foreign country without the cooperation or the consent of that country.

We are going to have witnesses from the Department of Justice and from the State Department and I will reserve any further comments until after the testimony.

Mr. Sensenbrenner.

Mr. SENSENBRENNER. Mr. Chairman, I have an opening statement.

Mr. EDWARDS. The gentleman is recognized.

Mr. SENSENBRENNER. Mr. Chairman, we're here today still suffering from a hangover of Jimmy Carter's last month in office. After he was defeated for the Presidency by Ronald Reagan in 1980, his Justice Department came up with guidelines relative to FBI activities in the seizing of international terrorists abroad.

We're having a hearing on these guidelines now, over 8 years after the fact, and after two more Presidential elections, where the sons of Jimmy Carter did not make it through the polling place.

I am concerned about the timeliness of this hearing and I am also concerned about the fact that there appears to be an attempt to hamstring the efforts of the FBI in the apprehension of international terrorists abroad and returning them to justice in the United States.

If the Carter administration guidelines are continued in force, the only people who will take joy in that are the Muammar Qadhafis, the Manuel Ortegas, and the drug bosses of the Medillin drug cartel, and that is an accomplished fact.

We're no longer fortress America. It seems to me that our law enforcement personnel ought to be able to project themselves

abroad in certain narrowly selected cases where the national interest of the United States and, indeed, the safety and peace of the world is at hand.

I think those are the guidelines that the FBI has conducted itself during the present administration as well as during President Reagan's two terms in office.

To suggest that the President's power in international law is absolutely barred to do this, in my opinion, is unconscionable. It seems to me that we ought to be able to do the right thing, as Ronald Reagan did in the *Achille Lauro* hijacking attempt and the bringing of the Egyptian plane down in Italy in the apprehension of some of the terrorists there.

I thank the chairman.

Mr. EDWARDS. I thank the gentleman for his observation.

I will only make one point. I'm not going to make a speech, but I would like to point out that already the Iranian Parliament has cited this Justice Department opinion and says that they have the same right to come into the United States and arrest Iranian fugitives without our knowledge and kidnap them.

Mr. Dannemeyer, do you have an opening statement?

Mr. DANNEMEYER. No, Mr. Chairman.

Mr. EDWARDS. The gentleman from Florida.

Mr. JAMES. No.

Mr. EDWARDS. No statement.

Our witnesses today are Mr. William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice; the Honorable Abraham D. Sofaer, Legal Adviser, U.S. Department of State, and our friend of many years, Oliver B. Revell, Associate Deputy Director for Investigations, Federal Bureau of Investigation.

Mr. Barr, I believe that you're going to be first.

[Witnesses sworn en masse.]

Mr. EDWARDS. Thank you.

Without objection, the full statements of all three witnesses will be made a part of the record. We welcome you, and Mr. Barr, you may proceed.

STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. BARR. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Barr, you'll have to give the whole statement insofar as it only arrived this morning. I might point out, that all three testimonies violated the rules of the House. We're supposed to get this testimony 48 hours in advance and several of them got here late last night but none of them complied with the rules. So insofar as you're concerned, Mr. Barr, please read the entire statement.

Mr. BARR. I am pleased to be here today to discuss the extent to which the United States has authority under its own domestic laws to carry out extraterritorial arrests which may depart from principles embodied in international law.

The United States is facing increasingly serious threats to its domestic security from both international terrorist groups and narcotics traffickers. Many of these criminal organizations target the United States and U.S. citizens while operating from foreign sanctuaries.

While many nations have cooperated in our efforts to combat terrorism and narcotics trafficking by entering into extradition agreements and providing us with other forms of assistance, some foreign governments have unfortunately failed to take steps to protect the United States from these predations, and others actually act in complicity with these groups.

It was in this context that the Office of Legal Counsel reexamined an opinion that was issued in 1980, the last year of the Carter administration. The 1980 opinion had potentially broad ramifications for the conduct of extraterritorial law enforcement activities by the Federal Bureau of Investigation and other executive branch officials.

The question presented was whether the FBI had the authority under U.S. law to arrest a fugitive in a foreign country without that country's consent under classic principles of customary international law.

Assuming on the facts before them that the apprehension in question would most likely constitute a violation of customary international law, the authors of the 1980 opinion determined that the FBI had no authority under domestic law to perform such an arrest. The 1980 opinion based its conclusion on two separate grounds.

First, the 1980 opinion determined that "U.S. agents have no law enforcement authority in another nation unless it is the product of that nation's consent," reasoning that the authority of the United States, as a sovereign, is necessarily "limited by the sovereignty of foreign nations."

In other words, the 1980 opinion suggested that the President and the Congress are legally powerless under U.S. law to authorize action in a foreign country that departs from customary international law.

Second, regardless of whether the United States, as a sovereign, has the authority to act in contravention of customary international law, the 1980 opinion concluded that the FBI could never make apprehensions in contravention of customary international law under its own general enabling statutes.

Although the statutes themselves do not restrict the extraterritorial reach of the agency's authority, the 1980 opinion reasoned that they must be construed restrictively to preclude the FBI from departing from customary international law norms in all circumstances.

Because such limitations may impair our ability to defend ourselves from overt physical assaults on our citizens by terrorists and the equally pernicious large-scale trafficking of drugs into the United States by foreign criminal organizations, the FBI asked the Office of Legal Counsel and the Department of Justice to reexamine its 1980 opinion.

On June 21, 1989, we issued an opinion partially reversing the 1980 opinion. Although the content of the 1989 opinion, like other

advice rendered by the Office of Legal Counsel, must remain confidential, I am happy to share with the committee our legal reasoning and our conclusions.

Before turning to these legal issues, I think it is important that the committee understand——

Mr. EDWARDS. Mr. Barr, may I interrupt?

Why does it have to remain confidential? Is this a change in policy? We have a copy of other nonclassified opinions. This is not a classified document, Mr. Barr. Why are you withholding it from this committee, and have you sent it to any other committees?

Mr. BARR. No, we have not sent the opinion to any other committee.

Mr. EDWARDS. Yes, I believe you did.

Mr. BARR. No.

Mr. EDWARDS. Well, you sent the assassination one to the Intelligence Committee.

Mr. BARR. We issued an opinion concerning Executive Order 12333 at the request of the Director of Central Intelligence when he asked for our advice. It was in the context of a dialog he was having with the House and Senate Intelligence Committees, and he asked us to prepare a memo, an opinion, which he would share with those committees. So that opinion was written with the expectation that it would be shared with the Intelligence Committees.

Now, this is not a change in policy, Mr. Chairman. Since its inception, the Office of Legal Counsel's opinions have been treated as confidential.

Mr. EDWARDS. Up until 1985 you published them, and I have it in front of me—opinions of the Office of Legal Counsel—the previous opinion.

[The previous opinion, published in 1985, is reproduced in the appendix.]

Mr. BARR. Our office has a limited publication project, where after a number of years have transpired, we review opinions and select certain opinions that we think it's in the public interest to publish. And after careful review in the executive branch, including review at the White House and within the Department of Justice, and all concerned agencies, we publish them.

A 1980 opinion was published in 1985—5 years after its publication. Prior to that time, it was not published.

I'm sure you can appreciate that the Attorney General serves—one of his core functions is to provide legal advice to the President, and the Office of Legal Counsel performs that function on behalf of the Attorney General. We provide legal advice to the White House and to Cabinet agencies.

It has been the long established policy of OLC that except in very exceptional circumstances, the opinions must remain confidential. We do not even share our opinions with other executive branch agencies that are unconcerned, and we do not even share our opinions within the Department of Justice to different components within the Department. We try to keep them confined to the clients who are directly operationally affected by it.

This policy is based on the very same principles that the attorney-client privilege in general is based upon. It's very important

that people in government, in all three branches, be able to seek legal advice.

Mr. EDWARDS. I understand that, Mr. Barr, but this is public business, the subject of much discussion in the United States and you're going to have to tell the public and the Congress sometime why you changed the rules on this arresting of fugitives overseas.

Mr. BARR. That's what I'm here doing. We have no objection to explaining our conclusions and our reasoning to the committee.

Before turning to the legal issues, I think it is important that the committee understand exactly what the 1989 opinion did and what it did not do.

Although the 1989 opinion has been characterized by the press as a document that changed Department of Justice policy, the 1989 opinion did no such thing. It is strictly a legal analysis of the FBI's authority, as a matter of domestic law, to conduct extraterritorial arrests of individuals for violations of U.S. law.

The 1989 opinion expressly takes no position supporting or opposing, as a matter of policy, the use of the FBI or any other executive branch officials to make apprehensions in contravention of customary international law It explicitly cautions that apart from the question of legality under domestic law such operations raise serious policy considerations that obviously must be carefully weighed.

Moreover, the 1989 opinion does not address the legal implications of deploying the FBI in violation of provisions of self-executing treaties or treaties that have been implemented by legislation.

Now let me turn to the reasons we think the 1980 opinion was flawed. The 1980 opinion expressed the view that the United States, as a sovereign, has no authority under its own laws to conduct law enforcement operations in another country without that country's consent.

It based this view on the conclusion that the de jure authority of the United States is necessarily limited by the sovereignty of the nations.

We do not agree with this proposition, and believe that the 1980 opinion's reliance on the *Schooner Exchange* v. *M'Faddon* was misplaced. Under our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law. At least as respects our domestic law, such action constitute "controlling executive or legislative acts" that supplant legal norms otherwise furnished by customary international law.

In the early 19th century, the Supreme Court, speaking through Chief Justice Marshall, recognized that while customary international law may provide rules of decision in the absence of a controlling executive or legislative act to the contrary, it does not absolutely restrict the Nation's sovereign capacity to act in the international arena.

In *Schooner Exchange,* Chief Justice Marshall opined that under principles of customary international law a French warship was impliedly immune from judicial process within the territory of the United States, but expressly acknowledged that "the sovereign, the United States, is capable of destroying this implication, either by employing force, or by subjecting such vessels to the jurisdiction of its ordinary tribunals."

In the *Brown* case, Marshall observed that the rule of customary international law:

"is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."

In acknowledging the United States' sovereign authority in this area, Chief Justice Marshall did not attempt to draw any distinction between actions that infringe on the territorial sovereignty of foreign nations and other types of departures from customary international law.

Since that time, the courts have repeatedly recognized that the executive and legislative branches may, in exercising their respective authority, depart from customary international law norms.

In particular, it has been stated that in the exercise of his constitutional authority, the President may depart from customary international law by a "controlling executive act." The 1980 opinion utterly failed to consider the Supreme Court's recognition of the President's authority in this area.

The 1980 opinion also concluded, as its second ground, that the FBI could not make apprehensions in contravention of customary international law under one of its general enabling statutes, reasoning that general enabling statutes must be construed restrictively to prohibit absolutely any departure from the standards of customary international law. Again, we reject this analysis.

The FBI's general enabling statutes, 28 U.S.C. 533(1) and 18 U.S.C., section 3052, give the FBI authority to "detect and prosecute crimes" and "make arrests" without any express geographical limitation.

The Office of Legal Counsel has previously opined that there does not appear to be any room for serious dispute, that these statutes confer extraterritorial law enforcement authority on the FBI. For example, when a foreign sovereign has consented to the FBI's conduct of an arrest within its territory, we see no basis to conclude that the FBI is powerless to make the arrest.

Thus, the narrow question presented is whether the FBI's enabling statutes absolutely bar the FBI from undertaking extraterritorial apprehensions whenever such actions depart from customary international law.

The gravamen of the 1980 opinion is that customary international law imposes absolute restrictions on the authority of the United States to take extraterritorial action, and that these restrictions, when read into the FBI's general enabling statutes, absolutely bar the FBI from conducting extraterritorial arrests that depart from customary international law norms.

We think that that position is untenable. Both of the enabling statutes are statutes that carry into execution the President's core executive law enforcement power which, where extraterritorial action is concerned, intersects with this constitutional responsibilities in the field of foreign relations.

In our view, because the President has recognized authority to override customary international law, restrictions imposed by customary international law should not be read into such general ena-

bling statutes in a manner that precludes the exercise of his authority.

As Justice Jackson said in his famous concurring opinion in the steel seizure case, "I should indulge the widest latitude of interpretation to sustain the President's exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."

To the extent that principles of customary international law are read into these broad enabling statutes, we reject the notion that the statute must be read as transforming customary international law principles into absolute restrictions on executive action.

Accordingly, the FBI's general enabling statutes should be construed as permitting the agency to take extraterritorial action either when such actions are consistent with customary international law—as with the consent of a foreign sovereign—or when the agency has been directed to do so by a "controlling executive act" that supplants customary international law.

Quite apart from the question whether the FBI has statutory authority to override customary international law in accordance with an appropriate directive from the executive or legislative branches, the 1980 opinion failed to consider the President's inherent constitutional power to authorize law enforcement activities.

Even in the absence of 28 U.S.C., section 533(1) and 18 U.S.C., section 3052, the President, in accordance with his general executive authority under article II and his constitutional responsibility to "take care that the laws be faithfully executed," nevertheless has the power to authorize agents of the executive branch to conduct extraterritorial arrests.

The Supreme Court's decision in the *In re Neagle* case in 1890 supports this conclusion. A recitation of that case is set forth in the testimony and I'd like to skip that, if I may, and continue.

Mr. EDWARDS. Without objection, so ordered.

Mr. BARR. Our conclusion also finds support in the recent decision of the U.S. Court of Appeals for the Eleventh Circuit in *Garcia-Mir* v. *Meese,* a 1986 case, and again, the facts of that case and the court's decision is set forth in the testimony.

Moreover, the conclusion that the President has the authority to depart from customary international law is consistent with the very nature of customary international law. Customary international law is not a rigid canon of rules, but an evolving set of principles founded on a common practice and understanding of many nations.

It is understood internationally that this evolution can occur by a state departing from prevailing customary international law principles, and seeking to promote a new rule of international custom or practice—although a state remains liable under international law for breaches until a new rule develops.

In the absence of authority under the Constitution to take actions departing from customary international law, the United States would be absolutely bound under its own fundamental laws to international customs and practices, and largely powerless to play a role in shaping and changing those customs and practices.

Under our constitutional system, where the President is primarily responsible for the conduct of our foreign affairs, it therefore

makes sense that the President has the discretion to depart from customary international law norms in the exercise of his constitutional authority.

As my colleague Judge Sofaer will also discuss, there are instances where extraterritorial arrests without the host sovereign's consent may be justified under international law. For example, in response to an actual or threatened terrorist attack, we would have good grounds under general principles of international law to justify extraterritorial law enforcement actions over a foreign sovereign's objections.

Moreover, in appropriate circumstances, we may have a sound basis under international law to take action against large-scale drug traffickers being given safe haven by a government acting in complicity with their criminal enterprise. Thus, it may well be that the President will choose to direct extraterritorial arrests only when he believes that he is justified in doing so as a matter of self-defense under international law.

However, it is ultimately the President's judgment as to the need for a particular operation that is controlling for purposes of domestic law.

In closing, I want to emphasize that the United States strongly believes in working cooperatively with other nations and fostering respect for international rules of law, and we continue to work together with foreign governments to stem the threats that international terrorism and drug trafficking pose to the world community. The 1989 opinion does not change that policy.

Furthermore, in light of the serious international consequences that could follow from deploying the FBI to conduct an extraterritorial apprehension in contravention of customary international law, I can assure you that the administration would take such action only in the most compelling circumstances after appropriate deliberation among the Departments of State and Justice and appropriate executive branch officials.

The administration is well aware that adherence to a system of just international norms contributes to world peace and stability.

That concludes my testimony. I would be happy to address any questions that you might have.

Mr. EDWARDS. Thank you, Mr. Barr.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to be with you today to discuss the extent to which the United States has authority under its own domestic laws to carry out extraterritorial arrests which may depart from principles embodied in international law.

The United States is facing increasingly serious threats to its domestic security from both international terrorist groups and narcotics traffickers. Many of these criminal organizations target the United States and United States citizens while operating from foreign sanctuaries. While many nations have cooperated in our efforts to combat terrorism and narcotics trafficking by entering into extradition agreements and providing us with other forms of assistance, some foreign governments have unfortunately failed to take steps to protect the United States from these predations, and others actually act in complicity with these groups. Congress has enacted laws to criminalize certain terrorist conduct wherever it occurs, such as 18 U.S.C. § 1203 (implementing International Convention Against the Taking of Hostages) and 18 U.S.C. § 2331 (terrorist acts abroad against United States nationals). Viewed against this backdrop, the extraterritorial enforcement of United States laws is of growing importance to our ability to protect vital national interests.

It was in this context -- particularly in the face of the growing menace of anti-U.S. terrorism -- that the Office of Legal

Counsel reexamined an opinion that it had issued in the last year of the Carter Administration. 4B Op. O.L.C. 543 (March 31, 1980) (the "1980 Opinion"). The 1980 Opinion had potentially broad ramifications for the conduct of extraterritorial law enforcement activities by the Federal Bureau of Investigation ("FBI") and other Executive Branch officials. The question presented was whether the FBI had the authority under United States law to arrest a fugitive in a foreign country without that country's consent under classic principles of customary international law. Assuming on the facts before them that the apprehension in question would most likely constitute a violation of customary international law, the authors of the 1980 Opinion determined that the FBI had no authority under domestic law to perform such an arrest. The 1980 Opinion based its conclusion on two separate grounds.

First, the 1980 Opinion determined that "U.S. agents have no law enforcement authority in another nation unless it is the product of that nation's consent," reasoning that the authority of the United States, as a sovereign, is necessarily "limited . . . by the sovereignty of foreign nations." 4B Op. O.L.C. at 551. In other words, the 1980 Opinion suggested that the President and the Congress are legally powerless under United States law to authorize action in a foreign country that departs from customary international law. Second, regardless of whether the United States, as a sovereign, has the authority to act in contravention of customary international law, the 1980 Opinion

concluded that the FBI could never make apprehensions in contravention of customary international law under its general enabling statutes. Although the statutes themselves do not restrict the extraterritorial reach of the agency's authority, the 1980 Opinion reasoned that they must be construed restrictively to preclude the FBI from departing from customary international law norms in all circumstances.

Because such limitations may impair our ability to defend ourselves from overt physical assaults on our citizens by terrorists and the equally pernicious large-scale trafficking of drugs into the United States by foreign criminal organizations, the FBI asked the Office of Legal Counsel to reexamine the 1980 Opinion. On June 21, 1989, we issued an opinion partially reversing the 1980 Opinion (the "1989 Opinion").[1] Although the content of the 1989 Opinion, like other advice rendered by Office of Legal Counsel, must remain confidential, I am happy to share with the Committee our legal reasoning and conclusions.

Before turning to these legal issues, I think it is important that the Committee understand exactly what the 1989 Opinion did and did not do. Although the 1989 Opinion has been characterized by the press as a document that changed Department of Justice policy, the 1989 Opinion did no such thing. It is strictly a legal analysis of the FBI's authority, as a matter of

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[1] The 1989 Opinion reaffirmed the conclusion reached in the 1980 Opinion that, absent cruel or outrageous treatment, the mere fact that a fugitive is brought within the jurisdiction of a United States court against his will would not impair the court's power to try him.

domestic law, to conduct extraterritorial arrests of individuals for violations of United States law. The 1989 Opinion expressly takes no position supporting or opposing, as a policy matter, the use of the FBI or any other Executive Branch officials to make apprehensions in contravention of customary international law. It explicitly cautions that -- apart from the question of legality under domestic law -- such operations raise serious policy considerations that obviously must be carefully weighed. Moreover, the 1989 Opinion does not address the legal implications of deploying the FBI in violation of provisions of self-executing treaties or treaties that have been implemented by legislation.

Now let me turn to the reasons we think the 1980 Opinion was flawed. The 1980 Opinion expressed the view that the United States, as a sovereign, has no authority under its own laws to conduct law enforcement operations in another country without that country's consent. It based this view on the conclusion that the de jure authority of the United States is necessarily limited by the sovereignty of other nations, citing The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812).

We do not agree with this proposition, and believe that the 1980 Opinion's reliance on The Schooner Exchange v. M'Faddon was misplaced. Under our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law. At least as respects our domestic law, such

actions constitute "controlling executive or legislative act[s]" that supplant legal norms otherwise furnished by customary international law. The Paquete Habana, 175 U.S. 677, 700 (1900).

In the early nineteenth century, the Supreme Court, speaking through Chief Justice Marshall, recognized that while customary international law may provide rules of decision in the absence of a controlling executive or legislative act to the contrary, it does not absolutely restrict the Nation's sovereign capacity to act in the international arena. Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814); The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 145-46 (1812). In The Schooner Exchange, Chief Justice Marshall opined that, under principles of customary international law, a French warship was impliedly immune from judicial process within the territory of the United States, but expressly acknowledged that "the sovereign [i.e., the United States] . . . is capable of destroying this implication. . . . either by employing force, or by subjecting such vessels to the [jurisdiction of its] ordinary tribunals." 11 U.S. (7 Cranch) at 146. In Brown, Marshall observed that the rule of customary international law

> is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

12 U.S. (8 Cranch) at 128. In acknowledging the United States' sovereign authority in this area, Marshall did not attempt to draw any distinction between actions that infringe on the

territorial sovereignty of foreign nations and other types of departures from customary international law.

Since that time, the courts have repeatedly recognized that the executive and legislative branches may, in exercising their respective authority, depart from customary international law norms. See, e.g., The Paquete Habana, 175 U.S. at 700; Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960); The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925). In particular, in the exercise of his constitutional authority, the President may depart from customary international law by a "controlling executive . . . act." The Paquete Habana, 175 U.S. at 700. The 1980 Opinion utterly failed to consider the Supreme Court's recognition of the President's authority in this area.

The 1980 Opinion also concluded that the FBI could not make apprehensions in contravention of customary international law under one of its general enabling statutes, 28 U.S.C. § 533(1),[2] reasoning that general enabling statutes must be construed restrictively to prohibit absolutely any departure from the standards of customary international law. Again, we reject this analysis.

The FBI's general enabling statutes, 28 U.S.C. § 533(1)[3] and

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[2] The 1980 Opinion did not consider the scope of the FBI's authority under the agency's second general enabling statute, 18 U.S.C. § 3052.

[3] Section 533(1) provides, "The Attorney General may appoint officials . . . to detect and prosecute crimes against the United States. . . ."

18 U.S.C. § 3052,[4] give the FBI authority to "detect and prosecute crimes" and "make arrests" without any express geographic limitation. The Office of Legal Counsel has previously opined, and there does not appear to be any room for serious dispute, that these statutes confer extraterritorial law enforcement authority on the FBI. For example, when a foreign sovereign has consented to the FBI's conduct of an arrest within its territory, we see no basis to conclude that the FBI is powerless to do so. Thus, the narrow question presented is whether the FBI's general enabling statutes absolutely bar the FBI from undertaking extraterritorial apprehensions whenever such actions depart from customary international law. The gravamen of the 1980 Opinion is that customary international law imposes absolute restrictions on the authority of the United States to take extraterritorial action, and that these restrictions, when read into the FBI's general enabling statutes, absolutely bar the FBI from conducting extraterritorial arrests that depart from customary international law norms.

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[4] Section 3052 provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Id.

We think that this position is untenable. Both 28 U.S.C. § 533(1) and 18 U.S.C. § 3052 are broad enabling statutes that carry into execution the President's core executive law enforcement power which, where extraterritorial action is concerned, intersects with his constitutional responsibilities in the field of foreign relations. In our view, because the President has recognized authority to override customary international law, restrictions imposed by customary international law should not be read into such general enabling statutes in a manner that precludes the exercise of this authority. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."). To the extent that principles of customary international law are read into these broad enabling statutes, we reject the notion that the statute must be read as transforming customary international law principles into absolute restrictions on executive action. Accordingly, the FBI's general enabling statutes should be construed as permitting the agency to take extraterritorial action either when such actions are consistent with customary international law (as with the consent of a foreign sovereign), or when the agency has been directed to do so by a "controlling executive act" that supplants customary international law.

Quite apart from the question whether the FBI has statutory authority to override customary international law in accordance with an appropriate directive from the executive or legislative branches, the 1980 Opinion failed to consider the President's inherent constitutional power to authorize law enforcement activities. Even in the absence of 28 U.S.C. § 533(1) and 18 U.S.C. § 3052, the President, in accordance with his general executive authority under Article II and his constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, nevertheless has the power to authorize agents of the Executive Branch to conduct extraterritorial arrests.

In In re Neagle, 135 U.S. 1 (1890), the Supreme Court considered the question whether the Attorney General had the authority, in the absence of an express grant of statutory authority, to assign a Deputy United States Marshal to safeguard the life of a Justice of the Supreme Court. In concluding that he did, the Supreme Court reasoned that the President's constitutional duty to see that the laws be faithfully executed is not limited to the enforcement of acts of Congress or treaties according to their terms, but extends also to the "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." Id. at 64-67. In passing, the Neagle Court highlighted the President's power in the area of foreign affairs as one area in which he enjoys

considerable inherent presidential power to authorize action independent of any statutory provision. Id. at 64.

The Neagle Court's decision reflects the fundamental principle stated by John Jay that "[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature. . . ." The Federalist No. 64, at 394 (C. Rossiter ed. 1961). Where, as here, the President's constitutional authority to enforce the laws intersects with his foreign affairs power, we believe that he retains the constitutional authority to order enforcement actions in addition to those permitted by statute. Commensurate with these inherent constitutional powers, this authority carries with it the power to direct Executive Branch agents to carry out arrests that contravene customary international law and other international law principles which our legislature has not acted upon to make part of our domestic law.

Our conclusions find support in the recent decision of the United States Court of Appeals for the Eleventh Circuit in Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Cir.), cert. denied, 479 U.S. 889 (1986). In Garcia-Mir, the Court of Appeals considered whether the United States was authorized to detain indefinitely Cuban aliens who had arrived as part of the Mariel boatlift, notwithstanding that such a detention was inconsistent with customary international law. The Attorney General had ordered the detention pursuant to 8 U.S.C. § 1227(a) which, like

28 U.S.C. § 533(1) and 18 U.S.C. § 3052, contains a broad grant of authority, but does not specifically authorize the Executive Branch to take action that departs from customary international law.[5]

With respect to one group of the Mariel detainees, the Court of Appeals concluded that there was insufficient evidence of an express congressional intention to override international law. 788 F.2d at 1453-54. The Court of Appeals nevertheless held that the President could override international law, and that the Attorney General's decision to detain the aliens indefinitely constituted a sufficient "controlling executive act." Id. at 1454-55. Garcia-Mir thus supports our general view that in an area such as law enforcement, where the President has constitutional authority and his agents have broad statutory authority, the President and high level Executive Branch officers may act in the national interest contrary to international law.

Moreover, the conclusion that the President has the authority to depart from customary international law is consistent with the very nature of customary international law. Customary international law is not a rigid canon of rules, but an evolving set of principles founded on the common practices and understandings of many nations. It is understood internationally that this evolution can occur by a state departing from

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[5] Section 1227(a) provides in relevant part, "[a]ny alien . . . arriving in the United States who is excluded under this chapter, shall be immediately deported, . . . unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper."

prevailing customary international law principles, and seeking to promote a new rule of international custom or practice (although a state remains liable under international law for breaches until a new rule develops). In the absence of authority under the Constitution to take actions departing from customary international law, the United States would be absolutely bound under its own fundamental law to international customs and practices, and largely powerless to play a role in shaping and changing those customs and practices itself. Under our constitutional system, where the President is primarily responsible for the conduct of our foreign affairs, it therefore makes sense that the President has the discretion to depart from customary international law norms in the exercise of his constitutional authority.

As my colleague Judge Sofaer will also discuss, there are instances where extraterritorial arrests without the host sovereign's consent may be justified under international law. For example, in response to an actual or threatened terrorist attack, we would have good grounds under general principles of international law to justify extraterritorial law enforcement actions over a foreign sovereign's objections. Moreover, in appropriate circumstances we may have a sound basis under international law to take action against large-scale drug traffickers being given safe haven by a government acting in complicity with their criminal enterprise. Thus, it may well be that the President will choose to direct extraterritorial arrests

only when he believes that he is justified in doing so as a matter of self-defense under international law. However, it is ultimately the President's judgment as to the need for a particular operation that is controlling for purposes of domestic law.

There may also be occasions when we are permitted to perform an extraterritorial law enforcement operation with the informal cooperation of representatives or departments of a foreign government while the government publicly withholds its formal consent. We believe that in these circumstances too we should retain the option of bringing international terrorists and drug traffickers to justice.

In closing, I want to emphasize that, as Oliver Revell will indicate, the United States strongly believes in working cooperatively with other nations and fostering respect for international rules of law, and we continue to work together with foreign governments to stem the threats that international terrorism and drug trafficking pose to the world community. The 1989 Opinion does not change that policy. Furthermore, in light of the serious international consequences that could follow from deploying the FBI to conduct an extraterritorial apprehension in contravention of customary international law, I can assure you that the Administration would take such action only in the most compelling circumstances after appropriate deliberation among the Departments of State and Justice and appropriate Executive Branch officials. The Administration is well aware that adherence to a system of just international norms contributes to world peace and stability.

That concludes my testimony. I would be happy to address any questions that you might have.

Mr. EDWARDS. We will now hear from Judge Abraham D. Sofaer, Legal Adviser, U.S. Department of State.

STATEMENT OF ABRAHAM D. SOFAER, THE LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. SOFAER. Mr. Chairman, I apologize for the delay in submission of my statement. I can only say that coordinating the statements of three individuals just added somewhat to the normal processes. But I do ask your indulgence in allowing me to summarize my statement so we don't have to spend the entire time listening to that.

Mr. EDWARDS. Yes.

Mr. SOFAER. Thank you, sir.

It is a privilege to testify before this committee on behalf of the State Department on the important questions of international law and policy that nonconsensual arrests in a foreign country would raise.

The Office of Legal Counsel, as the Office within the Department of Justice responsible for articulating the executive branch view of domestic law, recently issued an opinion concerning the FBI's domestic legal authority to conduct arrests abroad without host country consent.

Mr. Barr has summarized its conclusions for you. As Mr. Barr has indicated, that opinion addressed a narrow question—the domestic legal authority to make such arrests. The opinion did not change administration or Department of Justice policy concerning such arrests.

As the White House recently made clear, an interagency process exists to ensure that the President takes into account the full range of foreign policy and international law considerations before making any such decision.

My role today is to address issues not discussed in the OLC opinion—the international law and foreign policy implications of a nonconsensual arrest in a foreign country.

The Federal courts have treated international law, Mr. Chairman, as part of U.S. law since our early days as a Nation. The *Paquete Habana* is probably best known, and most frequently cited, for language in Justice Gray's opinion concerning the authority of the executive branch to violate international law by controlling act.

In fact, however, the decision in that case found no controlling executive act, affirmed the relevance of international law to the conduct of executive branch officials, and disallowed an action by a lower official because it violated international law.

In reaching this conclusion, Justice Gray stated, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

Numerous subsequent cases have adopted this conclusion.

Presidents, and other executive officials, have also recognized the importance and authority of international law. Our first Attorney General, Edmund Randolph, declared in 1792: "The law of nations,

although not specially adopted by the Constitution or any municipal act, is essentially a part of the law of the land."

And most recently, President Bush, in his statement to the United Nations General Assembly, emphasized the organization's role in promoting the notion that law, not force, should govern relations among States.

Congress, similarly, has demonstrated substantial respect for international law. While the principle that Congress can override international law for purposes of our domestic law is well established, actual examples of such actions are few, and the record is overwhelmingly to the contrary. Even when dealing with issues of national urgency, the Congress has acted with respect for our international obligations.

Recent examples that I've cited in my testimony are in the Omnibus Diplomatic Security and Antiterrorism Act of 1986 where Congress declined to include a provision authorizing self-help measures. And in the Anti-Drug Abuse Act of 1986, where Congress explicitly found that the Coast Guard required foreign flag consent to board a foreign flag vessel on the high seas.

Given this tradition of respect for international law, it is not surprising that our courts assume in all cases of doubt that our political branches have acted consistently with international law.

While Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our Nation's respect for international law is built into our domestic legal system, and the high value accorded that law in theory and practice.

Our tradition of support for international law is not simply naive American idealism. International law rules reflect the practices of nations and are based on human experience. They are, therefore, predictions of the type of conduct to which nations will be driven by the practical necessities of international relations.

I have a quotation from former Secretary Kissinger to this effect.

Now, territorial integrity is a cornerstone of international law; control over territory is one of the most fundamental attributes of sovereignty. This control includes a prohibition on the sending of agents for the purpose of apprehending within a foreign territory persons accused of having committed a crime.

The United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity. I have cited examples, Mr. Chairman, in which other nations have seized Americans and have apologized and returned those Americans because we objected to those seizures as well as examples of situations in which U.S. persons seized foreigners in other countries in which we have apologized for those actions and returned those abducted persons.

States have sought to overcome the limitations on international law enforcement activities arising from the principle of territorial integrity by cooperating in dealing with extraterritorial crime and in apprehending fugitives.

An array of international agreements, institutions, and practices have developed to help nations deal with the difficulties in pursuing criminals caused by our respect for each other's borders. This

has been going on for thousands of years, Mr. Chairman, and most recently, and most heroically, Colombia has extradited individuals under its extradition treaty with the United States despite enormous pressure felt by them from narcotics dealers and criminals within their jurisdiction.

We also have multilateral conventions which impose an obligation on parties to prosecute or extradite for hijacking, hostage-taking, aircraft sabotage, and other forms of terrorist behavior. Other agreements deal with international drug dealers, and create an obligation on parties to prosecute or extradite those criminals as well.

Despite the importance of the principle of territorial integrity there are situations in which that principle is not entitled, under international law, to absolute deference. Every state retains the right of self-defense, recognized in article 51 of the U.N. Charter.

Thus, a state may take appropriate action in order to protect itself and its citizens against terrorist attacks. This includes the right to rescue American citizens and to take action in a foreign state where that state is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks on U.S. citizens. Any use of force in self-defense must meet the standards of necessity and proportionality to be lawful. But if these conditions are met, the fact that the use of force breaches the territorial integrity of a state does not render it unlawful.

During the Reagan administration and in other prior administrations, the United States has defended the use of force by Israel and other states, and by the United States, in defending themselves from attack and defending their citizens from attack, and in rescuing their citizens abroad.

This brings me to the increasingly serious threat to the domestic security of the United States and other nations by narcotics traffickers. In recent months, Mr. Chairman, evidence has accumulated that some of these traffickers have been trained in terrorist tactics. They have enormous resources and small armies at their command. Their modus operandi is to try to intimidate or disrupt the legal process in states. They have threatened violence against U.S. citizens, officials, and property, both here and abroad. They have been provided safe haven, or given approval to transit, by governments in complicity with them.

We are reaching the point, Mr. Chairman, at which the activities and threats of some drug traffickers may be so serious and so damaging as to give rise to the right to resort to self-defense.

The evidence of imminent harm from traffickers' threats would have to be strong to sustain a self-defense argument. Arrests in foreign states without their consent have no legal justification under international law aside from self-defense. But where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures in self-defense.

These actions, actions in self-defense, Mr. Chairman, must be considered carefully by the Secretary of State, who is statutorily responsible for the management of foreign affairs and for the security of U.S. officials overseas, and by the Ambassador to the country in question, who has statutory responsibility for the direction

and supervision of U.S. Government employees in the country to which he or she is assigned.

The actual implications of a nonconsensual arrest in a foreign territory may vary with a variety of factors that I have reviewed in my statement. But I want to say that such operations create substantial risks to the U.S. agents involved. Actions involving arrests by U.S. officials on foreign territory require plans to get those officials into the foreign state, to protect them while in the foreign state, to remove them and the abducted persons from that state, and finally, to bring them safely back to the United States.

While the officials involved might include FBI agents seeking to make an arrest, such operations may also require the use of a wide range of U.S. assets and personnel.

Apart from being killed in such an action, U.S. agents could risk apprehension and punishment for their actions abroad. Our agents would not normally enjoy immunity from prosecution or civil suit in the foreign country involved for any violations of local law which occur.

The United States could also face requests from the foreign country for extradition of the agents. Obviously, the United States would not extradite its agents for carrying out an authorized mission. But our failure to do so could lead the foreign country to cease extradition cooperation with us. Our agents would also be vulnerable to extradition from third countries that they might visit.

Beyond the risks to our agents, the possibility also exists of suits against the United States in the foreign country's courts for the illegal actions taken in that country.

An unconsented, extraterritorial arrest would inevitably have an adverse impact on our bilateral relations with the country in which we act. Less obviously, such arrests could also greatly reduce law enforcement cooperation with that or other countries.

The United States has attached substantial importance over the past decade to improving bilateral and multilateral law enforcement cooperation. For many countries, these agreements reflect the commitment of the United States to confine itself to cooperative measures, rather than unilateral action, in the pursuit of U.S. law enforcement objectives.

We need to consider the fact that our legal position may be seized upon by other nations to engage in irresponsible conduct against our interests. Reciprocity is at the heart of international law; all nations need to take into account the reactions of other nations to conduct which departs from accepted norms.

It is the seriousness of these various policy implications, and our general respect for international law, that has led each witness today to emphasize that no change has been made in U.S. policy concerning extraterritorial arrests.

Our policy remains to cooperate with foreign states in achieving law enforcement objectives. As the White House has emphasized, any deviation from this policy would take place only after full interagency consideration of the range of implicated U.S. interests.

Thank you, Mr. Chairman, for this opportunity to testify.

Mr. EDWARDS. Thank you very much, Judge Sofaer.

[The prepared statement of Mr. Sofaer follows:]

PREPARED STATEMENT OF ABRAHAM D. SOFAER, THE LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. Chairman and Members of the Subcommittee:

It is a privilege to testify before this Committee on behalf of the State Department on the important questions of international law and policy that nonconsensual arrests in a foreign country would raise.

The Office of Legal Counsel, as the office within the Department of Justice responsible for articulating the Executive Branch view of domestic law, recently issued an opinion concerning the FBI's domestic legal authority to conduct arrests abroad without host country consent. Mr. Barr has summarized its conclusions for you. As Mr. Barr has indicated, that opinion addressed a narrow question -- the domestic legal authority to make such arrests. The opinion did not change Administration or Department of Justice policy concerning such arrests. As the White House recently made clear, an interagency process exists to ensure that the President takes into account the full range of foreign policy and international law considerations before making any such decision.

My role today is to address issues not discussed in the OLC opinion -- the international law and foreign policy implications of a nonconsensual arrest in a foreign country.

Bill Barr has explained that the Congress and the President have the power under the Constitution in various circumstances to act inconsistently with international law. That is true. The practical import of this statement of domestic legal authority, of course, must be evaluated in the context of our actual behavior as a nation. In practice, despite their power to act otherwise, each of the branches of our government has shown a healthy respect for international law.

The federal courts have treated international law as part of United States law since our early days as a nation. The Paquete Habana is probably best known, and most frequently cited, for language in Justice Gray's opinion concerning the authority of the Executive Branch to violate international law by controlling act. In fact, however, the decision in that case found no controlling Executive Act, affirmed the relevance of international law to the conduct of Executive Branch officials, and disallowed an action by a lower official because it violated international law. In reaching this conclusion, Justice Gray stated, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination". [175 U.S. 667, 700 (1900)]. Numerous subsequent cases have endorsed this conclusion.

Presidents, and other Executive officers, have recognized the importance and authority of international law. Our first Attorney General, Edmund Randolph, declared in 1792: "The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference." (1 OAG 26 (1792)). In signing the Foreign Sovereign Immunities Act of 1976, President Ford described the law as continuing "the long-standing commitment of the United States to seek a stable international order under the law". President Bush in his statement to the United Nations General Assembly earlier this fall emphasized the organization's role in promoting the notion that law -- not force -- should govern relations among states.

Congress, similarly, has demonstrated substantial respect for international law. While the principle that Congress can override international law for purposes of our domestic law is well-established, actual examples of such actions are few, and the record is overwhelmingly to the contrary. Even when dealing with issues of national urgency, the Congress has acted with respect for our international obligations.

Recent examples from the areas of terrorism and drugs, issues affecting vital U.S. interests, illustrate how Congress has considered and decided against actions which would violate international law. Thus, in passing the Omnibus Diplomatic Security and AntiTerrorism Act of 1986, Congress declined to include a provision authorizing "self-help" measures. Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing on S.1373, S.1429, and S.1508, Before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 63 (1985). In the 1980's Congress responded to the increasing problem of drug smuggling from the high seas, with the Anti-Drug Abuse Act of 1986. In passing the act, Congress explicitly found that the Coast Guard required foreign flag consent to board a foreign flag vessel on the high seas, and urged the Secretary of State to negotiate agreements with the relevant countries to facilitate the interdiction of drug vessels. 100 Stat. 3207-6.

Given this tradition of respect for international law, it is not surprising that our courts assume in all cases of doubt that our political branches have acted consistently with international law.

While Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our nation's respect for international law is built into our domestic legal system, and the high value accorded that law in theory and practice.

Our tradition of support for international law is not simply naive American idealism. International law rules reflect the practices of nations and are based on human experience. They are therefore predictions of the type of conduct to which nations will be driven by the practical necessities of international relations. Former Secretary Kissinger explained in 1975,

> An international order can be neither stable nor just without accepted norms of conduct. International law both provides a means and embodies our ends. It is a repository of our experience and our idealism--a body of principles drawn from the practice of states and an instrument for fashioning new patterns of relations between States.... The United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity.... On a planet marked by interdependence, unilateral action and unrestrained pursuit of the national advantage inevitably provoke counteraction and therefore spell futility and anarchy....

> We have reached that moment in time where moral and practical imperatives, law and pragmatism, point toward the same goals. [Statement to the Annual Convention of the American Bar Association, August 11, 1975.]

"Territorial integrity" is a cornerstone of international law; control over territory is one of the most fundamental attributes of sovereignty. Green Hackworth, one of my predecessors as Legal Adviser, explained in 1937 that "it is a fundamental principle of the law of nations that a sovereign state is supreme within its own territorial domain and that it and its nationals are entitled to use and enjoy their territory and property without interference from an outside source". 5 Whiteman, Digest of International Law 183 (1965). Forcible abductions from a foreign State clearly violate this principle. In his important Survey of International Law in 1949, Sir Hersh Lauterpacht wrote of "the obligation of states to refrain from performing jurisdictional acts within the territory of other states except by virtue of general or special permission. Such acts include, for instance, the sending of agents for the purpose of apprehending within foreign territory persons accused of having committed a crime." Lauterpacht, E. (ed.), International Law, Vol. 1, 487-488 (1970). See also Section 433, Restatement 3rd of the Foreign Relations Law of the United States.

The United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity. In 1876, for example, Canadian authorities subdued a convict in Alaska in the course of transferring him between two points in Canada. Secretary Fish protested the action, contending "a violation of the sovereignty of the United States has been committed". The abducted individual was released following an official British inquiry. In another case, the Canadian government abducted two persons from the United States and brought them back to Canada for trial. After an official complaint by the United States, the Canadian government apologized and offered to return the two. Satisfied with the apology, the United States permitted Canada to try the two men for their felonies.

On the other side of the ledger, in 1872 British authorities protested the seizure by a U.S. citizen of an individual from Canada. Although the United States denied any official involvement in the abduction, the United States acceded to a British request that charges be dropped against the abducted individual, and informed the British, "I trust that I need not assure you that the government of the United States would lend no sanction to any act of its officers or citizens involving a violation of the territorial independence or sovereignty of her Majesty's dominions".

More recently, two American bail bondsmen seized an individual from Canada and brought him to Florida for trial before the State courts. After vigorous Canadian protest, and intervention by the federal government, the State of Florida released the individual; the bail bondsmen were extradited to Canada and convicted.

States have sought to overcome the limitations on international law enforcement activities arising from the principle of territorial integrity by cooperating in dealing with extraterritorial crime and in apprehending fugitives. An array of international agreements, institutions, and practices has developed to help nations deal with the difficulties in pursuing criminals caused by our respect for each other's borders. States have voluntarily returned fugitives from justice through legal devices such as extradition, deportation, and expulsion for literally thousands of years. Where such cooperation is possible, no question of unilateral action even arises. Colombia, for example, while suffering serious threats from criminal narcotics organizations, has demonstrated strong resolve to counter the threat, and has extradited several individuals for prosecution in the United States. We are working with Colombia to counter the narcotics threat in this region of the world, and look forward to increasing our cooperation.

Further, certain forms of criminal activity have been subjected to universal jurisdiction. Multilateral conventions impose an obligation on parties to prosecute or extradite for hijacking, hostage-taking, aircraft sabotage, and other forms of terrorist behavior. Other agreements deal with international drug dealers, and create an obligation on parties to prosecute or extradite those criminals as well.

The adverse effects of the principle of territorial integrity on law enforcement are also mitigated by the willingness of States to consent to foreign law enforcement action on their territory. No particular formality or publicity is required for such consent to be legally effective. Even tacit consent is sufficient if given by appropriate officials. For political reasons a State may decide to deny after the fact that it had consented to an operation. This would not vitiate the legality of an action, if consent had in fact been given. In still other cases, a foreign State may cooperate by quietly placing an individual wanted by the United States on board a plane or vessel over which the United States has jurisdiction.

Despite its importance, however, the principle of territorial integrity is not entitled to absolute deference in international law. Every State retains the right of self-defense, recognized in Article 51 of the UN Charter.

Thus, a State may take appropriate action in order to protect itself and its citizens against terrorist attacks. This includes the right to rescue American citizens and to take action in a foreign State where that State is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks upon U.S. citizens. Any use of force in self-defense must meet the standards of necessity and proportionality to be lawful. But if these conditions are met, the fact that the use of force breaches the territorial integrity of a State does not render it unlawful.

Thus, the United States defended Israel's rescue mission at Entebbe in 1976, notwithstanding the temporary breach of Uganda's territorial integrity. The U.S. representative to the United Nations stated that "given the attitude of the Ugandan authorities, cooperation with or reliance on them in rescuing the passengers and crew was impracticable." The United States was acting consistently with international law in taking forcible action against Libya in ~~1982~~ 1986 for its role in terrorist attacks against the United States. Even in the area of forcible abductions, the international community seems willing to take into account particular circumstances in assessing a violation of territorial integrity.

While the international community criticized the forcible abduction of Adolf Eichman from Argentina, it did not call for his return and even Argentina was satisfied by an Israeli expression of regret for any violation of Argentine law and sovereignty.

In considering the availability of the doctrine of self-defense to justify a breach of territorial integrity, it is essential to recognize that the President is not bound by the interpretations of international law taken by other States. The President should carefully consider those views, since the U.S. must be prepared to defend its interpretation of the law. But self-defense is a right deemed "inherent" in the Charter. Here, more than anywhere else in international law, a State must act in good faith, but must also be free to protect its nationals from all forms of aggression. State-sponsored terrorism has created new dangers for civilized peoples, and the responses of the United States in Libya and elsewhere have gained ever wider recognition as having been necessary and effective methods for defending Americans.

While the law must be given full respect even in matters of self-defense, we must not permit the law to be manipulated to render the free world ineffective in dealing with those who have no regard for law.

We must not allow law to be so exploited, but rather must insist on the continued development of legal rules that enable states to deal effectively with new forms of aggression.

This brings me to the increasingly serious threat to the domestic security of the United States and other nations by narcotics traffickers. In recent months evidence has accumulated that some of these traffickers have been trained in terrorist tactics. They have enormous resources and small armies at their command. Their modus operandi is to try to intimidate or disrupt the legal process in States. They have threatened violence against United States citizens, officials, and property. They have been provided safe-haven, or given approval to transit, by governments in complicity with the drug traffickers.

We are reaching the point, Mr. Chairman, at which the activities and threats of some drug traffickers may be so serious and damaging as to give rise to the right to resort to self-defense. The evidence of imminent harm from traffickers' threats would have to be strong to sustain a self-defense argument. Arrests in foreign States without their consent have no legal justification under international law aside from self-defense. But where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures in self-defense.

While international law therefore permits extraterritorial "arrests" in situations which permit a valid claim of self-defense, decisions about any extraterritorial arrest entail grave potential implications for US personnel, for the United States, and for our relations with other States. These considerations must be carefully weighed by the Secretary of State, who is statutorily responsible for the management of foreign affairs and for the security of U.S. officials overseas (22 U.S.C. 2656 and 22 U.S.C. 3927), and by the Ambassador to the country in question, who has statutory responsibility for the direction and supervision of U.S. government employees in the country to which he or she is assigned (22 U.S.C. 3927).

The actual implications of a nonconsensual arrest in foreign territory may vary with such factors as the seriousness of the offense for which the apprehended person is arrested; the citizenship of the offender; whether the foreign government itself had tried to bring the offenders to justice or would have consented to the apprehension had it been asked; and the general tenor of bilateral relations with the United States. However, any proposal for unilateral action would need to be reviewed from the standpoint of a variety of potential policy implications.

First, such operations create substantial risks to the U.S. agents involved. Actions involving arrests by U.S. officials on foreign territory require plans to get those officials into the foreign State, to protect those officials while in the foreign State, to remove the officials with the person arrested from that State, and finally to bring them safely back to United States territory. While the officials involved might include FBI agents seeking to make an arrest, such operations may also require the use of a wide range of U.S. assets and personnel.

Apart from being killed in action, U.S. agents involved in such operations risk apprehension and punishment for their actions. Our agents would not normally enjoy immunity from prosecution or civil suit in the foreign country involved for any violations of local law which occur. (In 1952, the Soviets abducted Dr. Walter Linse from the U.S. sector of Berlin to the Soviet sector, where he was tried and convicted by a Soviet Tribunal. Two of Linse's abductors were subsequently apprehended in West Berlin and sentenced for kidnapping.) Moreover, many States will not accord POW status to military personnel apprehended in support of an unconsented law enforcement action. The United States could also face requests from the foreign country for extradition of the agents.

Obviously the United States would not extradite its agents for carrying out an authorized mission, but our failure to do so could lead the foreign country to cease extradition cooperation with us. Moreover, our agents would be vulnerable to extradition from third countries they visit.

Beyond the risks to our agents, the possibility also exists of suits against the United States in the foreign country's courts for the illegal actions taken in that country. For example, U.S. courts held that Chile was not immune from suit in the United States for its involvement in the assassination of a Chilean, Letelier, in the United States. The United States could also face challenges for such actions in international fora, including the International Court of Justice.

An unconsented, extraterritorial arrest would inevitably have an adverse impact on our bilateral relations with the country in which we act. Less obviously, such arrests could also greatly reduce law enforcement cooperation with that or other countries. The United States has attached substantial importance over the past decade to improving bilateral and multilateral law enforcement cooperation. For many countries, these agreements reflect the commitment of the United States to confine itself to cooperative measures, rather than unilateral action, in the pursuit of U.S. law enforcement objectives.

If the United States disregards these agreed law enforcement norms and mechanisms, and acts unilaterally, we must be prepared for States to decline to cooperate under these arrangements or to denounce them. Foreign States have reacted adversely to extraterritorial US laws, even when those laws involve enforcement action taken only in the United States. The breadth of our discovery practices and antitrust laws have led some States to pass blocking and secrecy statutes that preclude cooperation with the United States. Their reaction to unconsented extraterritorial arrests could be more extreme.

Finally, we need to consider the fact that our legal position may be seized upon by other nations to engage in irresponsible conduct against our interests. Reciprocity is at the heart of international law; all nations need to take into account the reactions of other nations to conduct which departs from accepted norms.

It is the seriousness of these various policy implications, and our general respect for international law, that has led each witness today to emphasize that no change has been made in United States policy concerning extraterritorial arrests.

Our policy remains to cooperate with foreign States in achieving law enforcement objectives. As the White House has emphasized, any deviation from this policy would take place only after full inter-agency consideration of the range of implicated U.S. interests.

Thank you for this opportunity to testify. I would be happy to address any questions you might have.

Mr. EDWARDS. We will now hear from the third member of the panel, Mr. Oliver B. Revell, Associate Deputy Director-Investigations, Federal Bureau of Investigation. Mr. Revell, welcome.

STATEMENT OF OLIVER B. REVELL, ASSOCIATE DEPUTY DIRECTOR-INVESTIGATIONS, FEDERAL BUREAU OF INVESTIGATION

Mr. REVELL. Thank you, Mr. Chairman.

I am pleased to appear before the committee this morning to discuss the FBI extraterritorial jurisdiction and operations abroad. You have expressed an interest in this area and through my prepared remarks, I will present the FBI's mandate in this area. I will also discuss general procedures, and detail some examples of when extraterritorial investigative measures have been utilized in the area of counterterrorism.

As a starting point, let me briefly touch upon the issue of lead agency status relating to counterterrorism investigations. In April 1982, the Reagan administration refined specific responsibilities for coordination of the Federal response to terrorist incidents.

This mandate assigned to the Department of State responsibility for the coordination of counterterrorism abroad. The FBI, through the Department of Justice, was designated the lead agency for investigating acts of terrorism perpetrated within the United States. In addition, the Attorney General has designated the FBI as the responsible agency for investigations abroad, when authorized.

In October 1982, in response to the growing problem of terrorism, then FBI Director William Webster elevated the counterterrorism program within the FBI to a national priority status, bringing it on par with other critically important investigative programs such as foreign counterintelligence and organized crime.

As the primary Federal agency for combating terrorism in the United States, there exists for the FBI a twofold mission: First, and I think most importantly, to prevent terrorist acts before they occur and; second, should they occur, to mount an effective investigative response.

The prevention phase involves acquiring, through legal means, intelligence information relating to terrorist groups and individuals who threaten Americans or U.S. interests, or foreign nationals within the United States.

The response phase involves prompt and effective investigation of criminal acts committed by members of terrorist groups. It is the FBI's view that swift and effective investigation of terrorist acts, culminated by arrests, convictions, and incarcerations, sends a powerful and effective message to terrorists and serves as a deterrent to future acts of terrorism.

As a result of legislation passed in 1984 and in 1986, a new era began for the FBI with expanded involvement in the investigation of international terrorism.

Since 1985, we have been involved in at least 50 separate investigations outside the United States, as a result of U.S. citizens or interests having been targeted by terrorists.

This FBI extraterritorial jurisdiction is derived from a number of U.S. statutes to include the Comprehensive Crime Control Act of 1984, which created a new section in the U.S. Criminal Code for

hostage-taking, and the Omnibus Diplomatic Security and Antiterrorism Act of 1986, which established a new statute pertaining to terrorist acts conducted abroad against U.S. nationals.

These laws allow the United States to assert Federal jurisdiction outside of our borders when a U.S. national is either murdered, assaulted, or taken hostage by a terrorist. Internal FBI and Department of Justice oversight, host country concurrence, and coordination with the U.S. Department of State are prerequisites in the implementation of this jurisdiction.

The FBI is aware of the public attention generated by the Department of Justice opinion of June 21, 1989, in its opinion regarding extraterritorial matters.

However, this opinion is a statement of legal authority and does not alter existing FBI policy regarding arrests in foreign countries. FBI policy has been, and will continue to be, that a request for an arrest in a foreign country will be coordinated, approved, and conducted with the appropriate authorities of that country. Any departure from our current policy would have to be directed and coordinated by the Justice Department.

The extraterritorial statutes have afforded the United States a legal mechanism to investigate and, when warranted, to seek the prosecution of terrorists who attack U.S. nationals abroad. Our investigations of extraterritorial matters have met with considerable success. Numerous indictments have been obtained against individuals who have committed such acts. Others have been arrested and tried abroad—many times with our evidence—and yet others are currently the subject of extradition requests.

While time will not permit a complete review of all extraterritorial cases, I have cited several of the more significant investigations in my formal statement.

These include the TWA 847 hijacking and the subsequent arrest and conviction of Mohammad Hammadei; the June 1985 hijacking of the Royal Jordanian airliner and the eventual arrest and conviction here in Washington of Fawaz Younis; the seizure of Pan Am flight 73 in Pakistan and the conviction of the perpetrators by the Pakistani authorities, again using our evidence; the June 1987 mortar attack and car bomb attack near the U.S. Embassy in Rome, for which the Japanese Red Army is believed responsible; the April 1988 suspected JRA car bomb in Naples and a coincidental arrest of a Japanese Red Army member, Yu Kikumura, in New Jersey, at the same time; the June 1988 assassination of Navy Capt. William Nordeen in Athens; the Pan Am flight 103 tragedy in Scotland in December of last year; the assassination of Colonel Rose in the Philippines; the murder of two American missionaries in La Paz, Bolivia; and the attempted bombing by the same group of former Secretary of State Shultz's motorcade in August 1988.

These cases represent but a sampling of the extraterritorial efforts that we've conducted over the past few years in carrying out the congressional mandate.

To carry out our international liaison responsibilities and to assist in extraterritorial pursuits, the FBI maintains legal attachés in 16 foreign countries. The primary mission of the Legal Attaché Office is to establish and sustain effective liaison with principal law enforcement, intelligence, and security services throughout the

designated foreign countries, thereby providing channels through which the FBI investigative responsibilities can be met.

The legal attaché function also provides a prompt and continuous exchange of law enforcement information.

Legal attachés and associated liaison activities play a vital role in the successful fulfillment of FBI responsibilities abroad. These activities are maintained in strict accordance with limitations imposed by statute, Executive order, Attorney General guidelines, and our own internal policy.

This is not a one-way street. The FBI assists cooperative foreign agencies with their legitimate and lawful investigative interests in the United States, consistent with U.S. policy and the law of foreign police cooperation matters.

We also work extensively through international organizations such as the U.N., Interpol, NATO, the Trevi organization, the International Association of Chiefs of Police, and others, to properly coordinate and enhance international cooperation in law enforcement matters.

In conclusion, I would like to stress that the FBI International Counterterrorism Program is a strong and effective program. This is due in part to our expanded role in extraterritorial matters which has led to a growing and improved relationship with friendly foreign services.

However, we recognize that there is much to be done in order to continue our success in combating terrorism. Through enhanced cooperation, better sharing of information, and improved investigative techniques, we will strive to keep Americans worldwide free from the threat of terrorism.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Revell.

[The prepared statement of Mr. Revell follows:]

PREPARED STATEMENT OF OLIVER B. REVELL, ASSOCIATE DEPUTY DIRECTOR-INVESTIGATIONS, FEDERAL BUREAU OF INVESTIGATION

GOOD MORNING MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE. I AM PLEASED TO HAVE THIS OPPORTUNITY TO APPEAR BEFORE YOU TO DISCUSS FBI EXTRATERRITORIAL JURISDICTION AND OPERATIONS ABROAD. YOU HAVE EXPRESSED AN INTEREST IN THIS AREA AND THROUGH MY PREPARED REMARKS, I WILL PRESENT THE FBI'S MANDATE IN THIS AREA, DISCUSS GENERAL PROCEDURES, AND DETAIL SOME EXAMPLES OF WHEN EXTRATERRITORIAL INVESTIGATIVE MEASURES HAVE BEEN UTILIZED IN THE AREA OF COUNTERTERRORISM.

AS A STARTING POINT, LET ME BRIEFLY TOUCH UPON THE ISSUE OF "LEAD AGENCY" STATUS RELATING TO COUNTERTERRORISM INVESTIGATIONS. IN APRIL 1982, THE REAGAN ADMINISTRATION REFINED SPECIFIC RESPONSIBILITIES FOR COORDINATION OF THE FEDERAL RESPONSE TO TERRORIST INCIDENTS. THIS MANDATE ASSIGNED TO THE U.S. DEPARTMENT OF STATE RESPONSIBILITY FOR THE COORDINATION OF COUNTERTERRORISM ABROAD. THE FBI, THROUGH THE DEPARTMENT OF JUSTICE, WAS DESIGNATED THE "LEAD AGENCY" FOR INVESTIGATING ACTS OF TERRORISM PERPETRATED IN THE UNITED STATES. IN ADDITION, THE ATTORNEY GENERAL HAS DESIGNATED THE FBI AS THE RESPONSIBLE AGENCY FOR INVESTIGATIONS ABROAD, WHEN AUTHORIZED. IN OCTOBER 1982, IN RESPONSE TO

THE GROWING PROBLEM OF TERRORISM, THEN FBI DIRECTOR WILLIAM WEBSTER ELEVATED THE COUNTERTERRORISM PROGRAM WITHIN THE FBI TO NATIONAL PRIORITY STATUS, BRINGING IT ON PAR WITH OTHER CRITICALLY IMPORTANT INVESTIGATIVE PROGRAMS SUCH AS FOREIGN COUNTERINTELLIGENCE AND ORGANIZED CRIME.

AS THE PRIMARY FEDERAL AGENCY FOR COMBATING TERRORISM IN THE UNITED STATES, THERE EXISTS WITHIN THE FBI A TWO-FOLD MISSION: TO PREVENT TERRORIST ACTS BEFORE THEY OCCUR AND, SHOULD THEY OCCUR, TO MOUNT AN EFFECTIVE INVESTIGATIVE RESPONSE. THE PREVENTION PHASE INVOLVES ACQUIRING, THROUGH LEGAL MEANS, INTELLIGENCE INFORMATION RELATING TO TERRORIST GROUPS AND INDIVIDUALS WHO THREATEN AMERICANS, U.S. INTERESTS, OR FOREIGN NATIONALS WITHIN THE UNITED STATES.

THE RESPONSE PHASE INVOLVES PROMPT AND EFFECTIVE INVESTIGATION OF CRIMINAL ACTS COMMITTED BY MEMBERS OF TERRORIST GROUPS. IT IS THE FBI'S VIEW THAT SWIFT AND EFFECTIVE INVESTIGATION OF TERRORIST ACTS, CULMINATED BY ARRESTS, CONVICTIONS, AND INCARCERATIONS, SENDS A POWERFUL AND EFFECTIVE MESSAGE TO TERRORISTS AND SERVES AS A DETERRENT TO FUTURE ACTS OF TERRORISM.

AS A RESULT OF LEGISLATION PASSED IN 1984 AND 1986, A NEW ERA BEGAN FOR THE FBI WITH EXPANDED INVOLVEMENT IN THE INVESTIGATION OF INTERNATIONAL TERRORISM. SINCE 1985, WE HAVE BEEN INVOLVED IN AT LEAST 50 SEPARATE INVESTIGATIONS OUTSIDE THE UNITED STATES, AS A RESULT OF U.S. CITIZENS OR INTERESTS HAVING BEEN TARGETED BY TERRORISTS. THIS FBI EXTRATERRITORIAL JURISDICTION IS DERIVED FROM A NUMBER OF U.S. STATUTES TO INCLUDE THE "COMPREHENSIVE CRIME CONTROL ACT OF 1984," WHICH CREATED A NEW SECTION IN THE U.S. CRIMINAL CODE FOR HOSTAGE TAKING, AND THE "OMNIBUS DIPLOMATIC SECURITY AND ANTITERRORISM ACT OF 1986," WHICH ESTABLISHED A NEW STATUTE PERTAINING TO TERRORIST ACTS CONDUCTED ABROAD AGAINST U.S. NATIONALS/INTERESTS.

THESE LAWS ALLOW THE UNITED STATES TO ASSERT FEDERAL JURISDICTION OUTSIDE OF OUR BORDERS WHEN A U.S. NATIONAL IS EITHER MURDERED, ASSAULTED, OR TAKEN HOSTAGE BY A TERRORIST. INTERNAL FBI AND DEPARTMENT OF JUSTICE OVERSIGHT, HOST COUNTRY CONCURRENCE, AND COORDINATION WITH THE U.S. DEPARTMENT OF STATE ARE PREREQUISITES IN THE IMPLEMENTATION OF THIS JURISDICTION. THE FBI IS AWARE OF THE PUBLIC ATTENTION GENERATED BY THE DEPARTMENT OF JUSTICE OPINION OF JUNE 21, 1989,

REGARDING EXTRATERRITORIAL MATTERS. HOWEVER, THIS OPINION IS A STATEMENT OF LEGAL AUTHORITY AND DOES NOT ALTER EXISTING FBI POLICY REGARDING ARRESTS IN FOREIGN COUNTRIES. FBI POLICY HAS BEEN, AND WILL CONTINUE TO BE, THAT A REQUEST FOR AN ARREST IN A FOREIGN COUNTRY WILL BE COORDINATED, APPROVED, AND CONDUCTED WITH THE APPROPRIATE AUTHORITIES OF THAT COUNTRY. ANY DEPARTURE FROM OUR CURRENT POLICY WOULD HAVE TO BE DIRECTED AND COORDINATED BY THE DEPARTMENT OF JUSTICE.

THE EXTRATERRITORIAL STATUTES HAVE AFFORDED THE UNITED STATES A LEGAL MECHANISM TO INVESTIGATE AND, WHEN WARRANTED, TO SEEK THE PROSECUTION OF TERRORISTS WHO ATTACK U.S. NATIONALS ABROAD. OUR INVESTIGATIONS OF EXTRATERRITORIAL MATTERS HAVE MET WITH CONSIDERABLE SUCCESS. NUMEROUS INDICTMENTS HAVE BEEN OBTAINED AGAINST INDIVIDUALS WHO HAVE COMMITTED SUCH ACTS, OTHERS HAVE BEEN ARRESTED AND TRIED ABROAD, AND YET OTHERS ARE CURRENTLY THE SUBJECT OF EXTRADITION REQUESTS. WHILE TIME WILL NOT PERMIT A COMPLETE REVIEW OF ALL FBI EXTRATERRITORIAL CASES, ALLOW ME TO CITE A NUMBER OF THE MORE SIGNIFICANT INVESTIGATIONS.

IN JUNE 1985, TWA FLIGHT 847 WAS HIJACKED BY SHIA TERRORISTS WHILE EN ROUTE FROM ATHENS, GREECE TO ROME, ITALY. THE HIJACKERS SUBSEQUENTLY FORCED THE AIRCRAFT TO LAND IN BEIRUT, LEBANON. FORTY-TWO AMERICANS WERE HELD HOSTAGE FOR TWO WEEKS. DURING THIS ORDEAL A U.S. SERVICEMAN WAS MURDERED. INVESTIGATION INTO THIS INCIDENT DETERMINED THAT MOHAMMAD HAMMADEI WAS ONE OF THE INDIVIDUALS RESPONSIBLE FOR THE HIJACKING. HAMMADEI WAS ARRESTED IN FRANKFURT, WEST GERMANY, BY GERMAN AUTHORITIES IN JANUARY 1987, AND THE UNITED STATES IMMEDIATELY INITIATED EXTRADITION PROCEEDINGS. HOWEVER, WEST GERMANY REFUSED THE EXTRADITION REQUEST AND INDICATED IT WOULD PROSECUTE HAMMADEI FOR MURDER AND AIR PIRACY. DURING THIS TRIAL, FBI AGENTS TESTIFIED ON THE INVESTIGATION OF THIS HIJACKING AND MURDER. HAMMADEI WAS CONVICTED IN MAY OF THIS YEAR AND SENTENCED TO LIFE IMPRISONMENT.

ALSO DURING JUNE 1985, A ROYAL JORDANIAN AIRLINER IN BEIRUT, LEBANON WAS THE TARGET OF A TERRORIST HIJACKING. BECAUSE U.S. NATIONALS WERE ABOARD THE FLIGHT, A WARRANT WAS ISSUED FOR THE ALLEGED PERPETRATOR OF THE HIJACKING, FAWAZ YOUNIS, A LEBANESE NATIONAL. IN SEPTEMBER 1987, YOUNIS WAS ARRESTED BY THE FBI IN INTERNATIONAL

WATERS IN THE MEDITERRANEAN SEA. HE WAS RETURNED TO THE UNITED STATES SHORTLY THEREAFTER. YOUNIS WAS CONVICTED IN MARCH OF THIS YEAR IN FEDERAL DISTRICT COURT IN WASHINGTON, D.C. AND SENTENCED TO 30 YEARS' IMPRISONMENT. THE FACT THAT YOUNIS WAS CAPTURED IN INTERNATIONAL WATERS SERVED NOTICE THAT THE U.S. GOVERNMENT IS WILLING TO GO TO SUBSTANTIAL LENGTHS TO APPREHEND THOSE RESPONSIBLE FOR ACTS OF TERRORISM AGAINST U.S. NATIONALS.

FOUR GUNMEN, DISGUISED AS AIRPORT SECURITY GUARDS, BOARDED PAN AM FLIGHT 73 IN SEPTEMBER 1986, AS IT WAS PREPARING FOR TAKEOFF FROM KARACHI, PAKISTAN EN ROUTE TO FRANKFURT, GERMANY; LONDON, ENGLAND; AND NEW YORK. THE FLIGHT ORIGINATED IN BOMBAY, INDIA. THE HIJACKERS WOUNDED 2 AIRPORT WORKERS AT THE START OF THE SEIGE, THEN KILLED A U.S. CITIZEN AND DUMPED HIS BODY ONTO THE TARMAC. IN ALL, 2 U.S. CITIZENS WERE KILLED. THE HIJACKERS DEMANDED THAT THE AIRCRAFT BE FLOWN TO CYPRUS WHERE 3 PALESTINIANS WERE IMPRISONED. THE TAKEOVER LASTED 17 HOURS, DURING WHICH THE 3-MAN FLIGHT CREW ESCAPED THROUGH A HATCH IN THE COCKPIT. THE SITUATION ENDED WITH A GUNFIRE EXCHANGE AND GRENADE-THROWING SPREE. THE 4 HIJACKERS CLAIMED MEMBERSHIP IN A FACTION OF THE

ABU NIDAL ORGANIZATION, A RADICAL PALESTINIAN TERRORIST GROUP. THE GOVERNMENT OF PAKISTAN PROSECUTED AND CONVICTED THE PERPETRATORS AND THEY ARE CURRENTLY SERVING LIFE SENTENCES.

THE JAPANESE RED ARMY (JRA) IS BELIEVED TO HAVE BEEN RESPONSIBLE FOR A MORTAR ROCKET/CAR BOMB ATTACK IN ROME, ITALY, IN JUNE 1987. A CAR BOMB SHATTERED WINDOWS AND SET FIRE TO 2 PARKED CARS NEAR THE U.S. EMBASSY, AND ROCKETS EXPLODED ON THE GROUNDS OF THE U.S. AND BRITISH EMBASSIES IN ROME. THE 3 EXPLOSIONS OCCURRED WITHIN A HALF-HOUR OF EACH OTHER AND HAPPENED WHILE THE VENICE ECONOMIC SUMMIT WAS IN PROGRESS. THERE WERE NO REPORTED INJURIES. A TELEPHONE CALL TO THE UNITED PRESS INTERNATIONAL OFFICE IN LONDON, ENGLAND, CLAIMED THAT THE ATTACKS WERE COMMITTED BY THE ANTI-IMPERIALIST INTERNATIONAL BRIGADE (AIIB), A SUSPECTED COVER NAME USED BY JRA OPERATIVES, IN PROTEST TO WESTERN "STATE TERRORISM" AND CONDEMNED THE STANCE OF THE VENICE ECONOMIC SUMMIT ON THE ISSUE OF TERRORISM. SUBSEQUENT INVESTIGATION BY ITALIAN AUTHORITIES AND THE FBI IDENTIFIED JRA MEMBERS AS THE PERPETRATORS OF THE BOMBINGS.

DURING APRIL 1988, A CAR BOMB EXPLODED OUTSIDE THE USO BUILDING IN NAPLES, ITALY, KILLING 5 PERSONS AND INJURING 18 OTHERS, INCLUDING 4 AMERICANS THAT WERE OUTSIDE AT THE TIME OF THE EXPLOSION. ONE OF THE DEAD WAS IDENTIFIED AS A U.S. NAVY SERVICEWOMAN; THE OTHER 4 WERE ITALIAN NATIONALS. THREE ANONYMOUS TELEPHONE CALLS WERE RECEIVED CLAIMING CREDIT FOR THE BOMBING. INVESTIGATION AT THE CAR RENTAL AGENCY, FROM WHICH THE AUTOMOBILE UTILIZED IN THE ATTACK WAS LEASED, IDENTIFIED A JRA MEMBER AS THE INDIVIDUAL WHO RENTED THE AUTOMOBILE. THIS JRA BOMBING WAS APPARENTLY INTENDED TO COINCIDE WITH ANOTHER BOMBING IN NEW YORK CITY. FORTUNATELY, YU KIKUMURA, A KNOWN JRA MEMBER, WAS ARRESTED OUTSIDE NEW YORK ON APRIL 12, 1988. IN HIS POSSESSION AT THE TIME OF HIS ARREST WERE 3 IMPROVISED EXPLOSIVE DEVICES WHICH HE HAD CONSTRUCTED.

DURING JUNE 1988, U.S. NAVY CAPTAIN WILLIAM E. NORDEEN, A U.S. DEFENSE ATTACHE, WAS KILLED WHEN A PARKED CAR EXPLODED AS HE DROVE PAST IT ON HIS WAY TO WORK IN ATHENS, GREECE. THE TERRORIST GROUP "17 NOVEMBER" CLAIMED RESPONSIBILITY FOR THE ASSASSINATION. THIS IS THE SAME GROUP WHICH HAS CLAIMED RESPONSIBILITY FOR

NUMEROUS TERRORIST ATTACKS IN GREECE. SINCE 1975, "17 NOVEMBER" HAS CLAIMED RESPONSIBILITY FOR 7 ATTACKS AGAINST U.S. TARGETS IN GREECE, INCLUDING THE ASSASSINATIONS OF RICHARD WELCH, SPECIAL ASSISTANT TO THE U.S. AMBASSADOR IN ATHENS IN 1975, AND CAPTAIN GEORGE TSANTES, CHIEF OF THE U.S. NAVY MISSION IN GREECE IN 1983.

PAN AM FLIGHT 103 EXPLODED AND CRASHED AT LOCKERBIE, SCOTLAND, IN DECEMBER 1988, KILLING 270 PEOPLE. THIS INCIDENT HAS THE EARMARK OF A WELL-ORCHESTRATED ACT OF TERRORISM. THIS AIR DISASTER IS PROOF OF THE DEVASTATING POTENTIAL FOR LOSS OF LIFE AND DESTRUCTION OF PROPERTY AT THE HANDS OF TERRORISTS.

THE PAN AM 103 INCIDENT VIVIDLY ILLUSTRATES THE INTERNATIONAL COOPERATION AND COMPLEX COORDINATION NECESSARY TO CONDUCT AN EXTRATERRORITORIAL INVESTIGATION AFTER A TERRORIST ACT HAS OCCURRED. FOR EXAMPLE, FOLLOWING THE INCIDENT AND HOST COUNTRY INVITATION, THE FBI DISPATCHED NUMEROUS PERSONNEL TO SCOTLAND, ENGLAND, AND WEST GERMANY IN PURSUIT OF THIS INVESTIGATION TO INCLUDE INTERVIEWS, RECORDS REVIEWS, AND FORENSIC COLLECTION AND EXAMINATION. BRITISH, SCOTTISH, GERMAN, AND U.S. LAW

ENFORCEMENT REPRESENTATIVES HAVE BEEN WORKING CLOSELY TOGETHER AND ARE ENGAGED IN EXTENSIVE CONSULTATION ON ALL ASPECTS OF THIS COMPLEX INVESTIGATION. IN THE UNITED STATES, ATTORNEY GENERAL DICK THORNBURGH, SECRETARY OF TRANSPORTATION SAM SKINNER, CENTRAL INTELLIGENCE AGENCY DIRECTOR WILLIAM WEBSTER, FBI DIRECTOR WILLIAM SESSIONS AND NUMEROUS OTHER SENIOR OFFICIALS INVOLVED IN THIS CASE, HAVE ACTIVELY CONSULTED AND EXCHANGED INFORMATION WORKING TOWARD A SOLUTION TO THIS MOST HEINOUS ACT. THIS CRIME MUST BE SOLVED AND THOSE RESPONSIBLE IDENTIFIED AND BROUGHT TO JUSTICE.

IN APRIL OF THIS YEAR, U.S. ARMY COLONEL JAMES N. ROWE WAS ASSASSINATED IN MANILA, PHILIPPINES BY AUTOMATIC WEAPON FIRE WHILE TRAVELING IN HIS CAR. HIS DRIVER WAS SLIGHTLY WOUNDED IN THE ATTACK. INVESTIGATION HAS DETERMINED THAT THERE WERE 6 TO 7 ASSASSINS, 4 WERE IN THE AMBUSH VEHICLE AND 2 OR 3 WERE IN A BACK-UP VEHICLE. THE NEW PEOPLE'S ARMY (NPA), THE MILITARY ARM OF THE PHILIPPINE COMMUNIST PARTY, CLAIMED CREDIT FOR THE ATTACK. THE FBI IMMEDIATELY DISPATCHED INVESTIGATORS AND FORENSIC EXPERTS TO WORK WITH PHILIPPINE LAW ENFORCEMENT AUTHORITIES. BASED UPON THIS COOPERATIVE EFFORT,

ON JUNE 16, 1989, DONATO B. CONTINENTE, AN NPA MEMBER, WAS ARRESTED BY THE PHILIPPINE CONSTABULARY CRIMINAL INVESTIGATIVE SERVICE (CIS) AND CHARGED AS AN ACCESSORY TO THE MURDER OF COLONEL ROWE. ON AUGUST 27, 1989, NPA MEMBER JUANITO ITAAS WAS ARRESTED BY THE CIS AND CHARGED WITH THE MURDER. AN EYEWITNESS POSITIVELY IDENTIFIED ITAAS AS ONE OF THE GUNMEN. UPON CONFESSING, HE FURTHER IDENTIFIED SEVEN OTHER INDIVIDUALS INVOLVED IN THE ATTACK. ARREST WARRANTS HAVE BEEN ISSUED BY PHILIPPINE AUTHORITIES.

ON MAY 24, 1989, TWO U.S. CITIZENS WERE SHOT TO DEATH IN FRONT OF THEIR RESIDENCE IN LA PAZ, BOLIVIA, BY TWO INDIVIDUALS IN A VAN. THE VICTIMS WERE MISSIONARIES OF THE MORMON CHURCH. A GROUP NAMED "FUERZAS ARMADAS DE LIBERACION ZARATE WILLCO" CLAIMED RESPONSIBILITY FOR THE ATTACK. AGAIN, THE FBI DISPATCHED A TEAM OF INVESTIGATORS TO WORK CLOSELY WITH BOLIVIAN LAW ENFORCEMENT PERSONNEL. AS A DIRECT RESULT OF THIS JOINT INVESTIGATION, THIS SAME GROUP WAS IMPLICATED IN THE ATTEMPTED BOMBING OF THE MOTORCADE OF FORMER SECRETARY OF STATE GEORGE SCHULTZ IN LA PAZ DURING AUGUST 1988. FOUR INDIVIDUALS HAVE BEEN ARRESTED BY BOLIVIAN AUTHORITIES AND OTHERS

ARE BEING SOUGHT AS FUGITIVES.

TO ASSIST IN FBI EXTRATERRITORIAL PURSUITS, THE FBI MAINTAINS LEGAL ATTACHE OFFICES IN 16 FOREIGN COUNTRIES. THE PRIMARY MISSION OF FBI LEGAL ATTACHE OFFICES IS TO ESTABLISH AND SUSTAIN EFFECTIVE LIAISON WITH PRINCIPAL LAW ENFORCEMENT, INTELLIGENCE, AND SECURITY SERVICES THROUGHOUT DESIGNATED FOREIGN COUNTRIES THEREBY PROVIDING CHANNELS THROUGH WHICH FBI INVESTIGATIVE RESPONSIBILITIES CAN BE MET. THE LEGAL ATTACHE FUNCTION ALSO PROVIDES FOR A PROMPT AND CONTINUOUS EXCHANGE OF LAW ENFORCEMENT INFORMATION.

LEGAL ATTACHES AND ASSOCIATED LIAISON ACTIVITIES PLAY A VITAL ROLE IN THE SUCCESSFUL FULFILLMENT OF THE RESPONSIBILITIES OF THE FBI ABROAD. THESE ACTIVITIES ARE MAINTAINED IN STRICT ACCORDANCE WITH LIMITATIONS IMPOSED BY STATUTE, EXECUTIVE ORDER, ATTORNEY GENERAL GUIDELINES, AND FBI POLICY. BUT THIS IS NOT A "ONE WAY" STREET. THE FBI ASSISTS COOPERATIVE FOREIGN AGENCIES WITH THEIR LEGITIMATE AND LAWFUL INVESTIGATIVE INTERESTS IN THE UNITED STATES, CONSISTENT WITH U.S. POLICY REGARDING "FOREIGN POLICE COOPERATION" MATTERS.

IN CONCLUSION, I WOULD STRESS THAT THE FBI INTERNATIONAL COUNTERTERRORISM PROGRAM IS A STRONG AND EFFECTIVE PROGRAM. THIS IS IN PART DUE TO OUR EXPANDED ROLE IN EXTRATERRITORIAL MATTERS WHICH HAS LED TO GROWING AND IMPROVED LAW ENFORCEMENT RELATIONSHIPS WITH FRIENDLY FOREIGN GOVERNMENTS. HOWEVER, WE RECOGNIZE THAT THERE IS MUCH TO BE DONE IN ORDER TO CONTINUE OUR SUCCESS IN COMBATING TERRORISM. THROUGH ENHANCED COOPERATION, BETTER SHARING OF INFORMATION, AND IMPROVED INVESTIGATIVE TECHNIQUES WE WILL STRIVE TO KEEP AMERICANS WORLDWIDE FREE FROM THE THREAT OF TERRORISM.

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, THIS CONCLUDES MY PREPARED REMARKS. I WILL NOW ADDRESS ANY QUESTIONS.

Mr. EDWARDS. Judge Crockett.

Mr. CROCKETT. Thank you, Mr. Chairman.

Both you, Mr. Barr, and you, Judge Sofaer, have——

Mr. EDWARDS. We have called the electrician. He has been here twice. I hope next time the electrician comes he can find out what's wrong.

[Brief pause]

Mr. CROCKETT. To what extent is there formal cooperation between the State Department and Justice in determining whether or not the situation in a foreign country is such as to justify our going in without the consent of that country to make arrests or apprehensions?

Mr. SOFAER. I think to the fullest extent necessary, Judge Crockett, I think there would be interagency coordination, but beyond that there would be coordination through the National Security Council as has been reaffirmed by General Scowcroft.

Mr. CROCKETT. Is there any policy of also consulting responsible agencies of the Congress before you take such action?

I say that because I notice, Mr. Barr, in your testimony at the bottom of page 4, you seem to suggest that the decision is left entirely to the executive authority and that there is no compelling necessity for him to consult the legislative branch of the government.

Is that true?

Mr. BARR. If the operation entails exercise of war powers then the administration would act consistently with the War Powers Resolution. If it required covert action, then the administration would adhere to the reporting provisions applicable to covert action.

Mr. CROCKETT. My final question. While there's a tendency to analogize the so-called war on drugs with the idea of war generally, I think all of us recognize that there are certain material differences.

It seems to me that it sort of strains a bit to say that the attempt to bring narcotics into this country presents the same character of national threat to our security that would be true in the case of some other military action.

I say that because I'd like to have you comment on the circumstances under which, in carrying on the so-called war against drugs, we would be justified, for example, in making what amounts to a military strike in some country in South America or in the Caribbean.

Can you visualize circumstances that would justify doing that?

Mr. BARR. As a matter of international law I'll defer to Judge Sofaer.

Mr. SOFAER. Judge, a few years ago I would have said probably not. But recently, we have been confronted with groups in some countries that have armed bands of people working for them who have received training in terrorist and other types of activities and they have made public threats, which in some instances they have carried out, not only against local authorities who are enforcing local laws against them, but against Americans just because America is so much a part of this war against drugs. And not only

against Americans in the local country but Americans in the United States.

There has been a recent statement by one drug syndicate which said that they would come over here and kill Americans systematically, including Government officials.

I simply have to deal with that—if someone makes that kind of an assertion that he's going to kill my legislators and my executive officials, I have to say to them, if you start doing that and you have in effect a military type operation under your command, with billions of dollars at your disposal, I'm going to have to tell my officials: You can treat this as an attack. You might be able to exercise force in self-defense against this kind of a force.

It hasn't happened yet to the extent that it would justify it. We have never asserted this power. But years ago, we wouldn't have said this about terrorism and now I think it's pretty much accepted, as Oliver Revell has testified, that terrorism raises self-defense threats, threats amounting to justifying self-defense.

I can envision, if this drug thing continues, Judge, that we will be confronted with that kind of a situation in the area of drugs as well.

Mr. BARR. Following up on that, Judge, I think that the international trafficking in drugs is as pernicious a threat as many wars could be.

As Judge Sofaer said, we are talking about organizations that have at their command billions and billions of dollars, more money than most countries in the world. They have private armies. They are heavily armed. They use ruthless tactics that wouldn't be used by most countries in the world. That's why we call them "narco-terrorists."

The impact on the United States is equally drastic. One-third of all felonies committed in the United States are committed by people under the influence of drugs. Ninety percent of all male arrestees in New York City are people who test positive for drugs.

Mr. CROCKETT. Thank you, Mr. Chairman.

Mr. EDWARDS. I'm curious as to why we have two Departments obviously at odds.

Were both of these statements cleared by the OMB?

Mr. BARR. Mr. Chairman, I don't think the statements are at odds. Both statements were cleared by OMB and cleared by the respective departments.

The Department of Justice issues legal advice on matters of domestic legal authority. The issue very simply is whether or not there is legal authority in the United States, under our own domestic laws, to engage in extraterritorial arrests without the consent of the host government.

We issued an opinion, as a matter of law, saying, yes, that was not a policy decision.

The bottom line is if we find a terrorist, for example, someone who blows an American 747 out of the sky, and if we find him basking him in some safe haven, enjoying the payoff that he received for blowing Americans out of the sky, the issue is whether or not we have the legal authority under our own laws to go in and arrest him and bring him to justice.

The Department of Justice says, yes, we do have the authority under our own laws. I don't think the State Department disagrees with that.

Mr. EDWARDS. So you believe that if you feel that you want to arrest somebody in a friendly country, a country with which we're not at war, that you can send a secret agent in there, violating the law of that country without asking the permission of that country, and kidnap that individual and put him on an airplane and bring him back home?

Mr. BARR. Both my statement and the example I've just given indicate that we're talking about a limited range of circumstances in the areas of——

Mr. EDWARDS. Limited or unlimited, Mr. Barr, my statement is what you have testified to.

Mr. BARR. Let me say what I testified to, and that is that we're talking about a limited range of circumstances in the area of counterterrorism and counternarcotics.

The Department of Justice understands and agrees with the Department of State that when the President is making a decision in the area of extraterritorial law enforcement, we have the intersection of a number of responsibilities. He acts as the foremost law enforcement officer in the country. He acts as the administrator of the foreign relations of the United States and as Commander in Chief. He has a range of responsibilities, including the responsibility to take into account international law and the international obligations of the United States.

He also must consider the practical consequences of what a particular operation may bring about.

He has to consider the precedential value, or danger of the action; and the practical difficulties of carrying out an operation, and the impact it might have on the cooperative relationships we have abroad.

But when push comes to shove, after he has weighed all of those factors, and he determines that it's in the national interest to pursue a particular law enforcement operation overseas, that judgment, as a matter of domestic law, overrides customary international law, and that is an authorized, legal, constitutional action for American agents to engage in.

At the same time, it is a violation, or under many circumstances it could be a violation of international law and we would have to be prepared to take the consequences of that violation.

Mr. EDWARDS. The consequences could be that the FBI agent, whoever you send over to kidnap this person, could be arrested and tried, and the United States could be sued and, of course, the individual would also be liable in a civil action; isn't that correct, and you're going to take that chance?

Mr. BARR. Those, in a given circumstance, could be risks, just like a national security operation could pose risks for the United States, such as the bombing of Libya, that posed risks to the people involved; in fact, pilots lost their lives in that raid.

Mr. EDWARDS. Why did you feel this was necessary at a time when we have for the first time in my 26 years in Congress, a detente with more nations than we have ever had before, with communism crumpling in all parts of the globe, and for us to come out

with this very radical proposal, why did you have to do it at this time?

You're talking about you're so worried about drugs, is that it?

Mr. BARR. The Office of Legal Counsel, we're lawyers; we give legal advice. We give advice as to what the scope of potential legal authority is. We don't make law enforcement policy. Our Office was asked by the FBI to reexamine the 1980 opinion, and we did that, and I think there was broad consensus within the administration that the 1980 opinion was fundamentally flawed and should be reexamined. So the easy answer to the question is, I looked at it because OLC was asked to look at it by one of our clients.

But more than that, it is true that in the postwar confrontation between the United States and communism there have been a number of changes recently. But at the same time, we are facing an increasing menace in the area of terrorists and narco-terrorists. There are still lawless countries in the world that sponsor terrorism that is directed against the United States.

Mr. EDWARDS. Mr. Barr, we keep very careful count in this committee, having oversight jurisdiction over the FBI, of acts of terrorism in the United States. To the great credit of the FBI, where there were more than 100 incidents a decade ago, the incidents this year and last year are infinitesimal; so what's the crisis?

Mr. BARR. Mr. Chairman, I'm sure the families of the people on Pam Am 103 will be glad to know that the incidences in the United States were infinitesimal.

Mr. EDWARDS. Mr. Revell, Mr. Barr said that the FBI asked for this opinion.

Why did the FBI ask for this opinion at this time?

Mr. REVELL. It wasn't at this time, sir; it was about 2 years ago that our Office of Legal Counsel was asked to look at a number of different scenarios.

Mr. EDWARDS. You were asked by whom?

Mr. REVELL. Our Office of Legal Counsel, within the FBI, was asked by our Criminal Investigative Division to look at a number of different scenarios and to determine what the extent of the FBI authority was under those various scenarios.

As a result of that examination internally, our Legal Counsel Division went to the Office of Legal Counsel at the Department and asked that the 1980 opinion be examined in light of the new extraterritorial responsibilities assigned by the Congress under the two acts that I specified.

I must say that we have not asked for any specific authorization to carry out any rendition in any foreign territory of any fugitive without the permission or the consent of that country.

We have had on occasions, however, situations where there have been informal processes utilized. In other words, the law enforcement agencies of a particular country, the judicial authorities of a particular country, or other competent authority have indicated to us a desire to deal with an expulsion rather than an extradition; a turning over at the border rather than a formal process, and so forth.

So what we were attempting to do was to determine the extent of our legal authority so we could stay well within that authority in carrying out our extraterritorial responsibilities.

Mr. EDWARDS. I can certainly think of no law passed by Congress or any provision of the Constitution that licensed the United States to be an international outlaw. What you have described, the administration, any administration, would have these long conferences, say that the situation is so serious that we must do this extraordinary thing, and then somehow or another license the FBI to go kidnap somebody without asking the consent of the nation involved.

I just think it's extraordinary that you would do that, especially at this time when we have these nations emerging into the sunshine of democracy; we want them to copy us as the beacon of democracy. And yet at the same time, we say that we're going to thumb our nose at international law, when really, whenever the President makes that decision that it's so serious—in my lifetime, we've had these situations where in the long run we lose terribly.

In 1941, it was Japanese in America that were so dangerous, and so we locked up 40,000 of them. The next thing we had in this country was communism, and it was so dangerous, with Senator McCarthy running wild. We persecuted people for communism in this country, even though it wasn't a crime. And now, of course, it's the war on drugs.

We're not going to give up our liberties or our reputation as an international friend of other countries because we have a perceived threat overseas.

Mr. REVELL. And we haven't asked to do that, sir.

Mr. EDWARDS. Something triggered all of this publicity. We didn't start this argument. We started to read it in the newspapers that you people have come to this wonderful conclusion that the FBI can go overseas and kidnap somebody. And Mr. Barr has a long opinion that says, yes, he can, under certain circumstances, and so forth.

Mr. SOFAER. Under domestic law. That doesn't mean that the President would in fact order such action when it was inconsistent with international duties or treaties, or other law.

Mr. EDWARDS. I wish I would hear the President say, or somebody say, that we're not going to do it. That we are going to be good international citizens.

Mr. BARR. You're not fairly characterizing the opinion or our statements today, Mr. Chairman.

Mr. EDWARDS. You haven't shown us the opinion, Mr. Barr—it would be helpful. We're all lawyers, too, we're grown up and we're also very security-minded here.

Mr. BARR. We're saying that there is authority under domestic law to depart from customary international law. We're not saying that we should thumb our noses at international law. International law is something that should be taken into account. And we're not saying as a matter of policy that this should be done at all or that any particular type of operation should be performed.

Mr. EDWARDS. Do you think that Mr. Rafsanjani in Iran, if his parliament passes or authorizes him to do the same that it would be appropriate for Iran, or Noriega to do the same thing, when they want to arrest somebody in the United States without our permission?

Mr. BARR. Arresting, at least in the case of Iran, would be a step forward. Up until now they've felt free to assassinate their enemies.

But I reject any notion of moral equivalence between the United States and countries that are outlaw countries that engage in terrorism. The United States does not engage in terrorism. We do not allow terrorists from the United States and to use the United States as a base to launch attacks on citizens of other countries. We are leading the fight in the world against terrorism.

Now the purpose of law ultimately is to protect innocent people from predators. And the people we're fighting are ruthless predators. They're not restrained by law. They mock the law, and they manipulate international rules of law to shield themselves.

We are acting in the service of freedom in the civilized world. And in a just system the laws protect the innocent from predation.

Mr. EDWARDS. I understand, Mr. Barr, that there has been another opinion issued since June and we formally request a copy.

Mr. BARR. I've issued a lot of opinions since June.

Mr. EDWARDS. On this subject. Well, perhaps not.

If there is one, we make a request for it.

Judge Crockett, do you have further questions?

Mr. CROCKETT. Yes, Mr. Chairman.

I would like to know how these principles we have been discussing here relate to or apply to the situation in Panama.

We have in effect said that Noriega is a criminal and he has violated American law, who said the same thing with respect to the issuance of an indictment—the Department of Justice has issued an indictment.

My question is whether or not we make an exception for either de jure or de facto heads of government and that under no circumstances are we prepared to go in and arrest the head of government and bring him back to the United States for trial? Is there such an exception?

Mr. BARR. An exception to what?

Mr. CROCKETT. To the application of this principle that whenever we feel that the national security of the United States is affected, we are justified in going into the country without its consent and arresting whoever needs to be brought to justice and bring them back here.

Mr. BARR. I repeat: As all three witnesses said today, there has been no change in U.S. policy. Our policy is to work cooperatively with governments to suppress terrorism and illegal narcotics trafficking. Any deviation from that policy would be considered at the highest levels of government within the framework of the National Security Council and would involve consultation between the Secretary of State and the Department of Justice.

Mr. CROCKETT. Your answer then is "yes." In any case where the situation is so serious that we have returned any indictment against him, we are justified in going in and arresting him; is that what you're saying?

Mr. BARR. No, that's not what I'm saying.

Mr. CROCKETT. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Dempsey.

Mr. DEMPSEY. Mr. Barr, in preparing the opinion, did you take into account the law that makes it a crime to kidnap or abduct a foreign official?

Mr. BARR. Which law are you talking about?

Mr. DEMPSEY. Section 1201 of the Federal Criminal Code, as I read it, makes it a crime under U.S. law for anybody to kidnap or abduct a foreign official and the United States may exercise jurisdiction over the offense if the alleged offender is present in the United States.

Mr. BARR. The opinion did not address either how specific treaties would apply in a given context or how other statutes, other than the FBI's enabling statute, would apply.

It reserved those questions and reviewed the rationale of the 1980 opinion.

So the answer is, I did not specifically consider that statute in the 1989 opinion.

Mr. EDWARDS. If the gentleman would yield—Executive orders are not necessarily law. The law in this country are acts of Congress, signed by the President under the Constitution, Mr. Barr.

Mr. BARR. Which Executive order are you referring to, Mr. Chairman?

Mr. EDWARDS. You are quoting the 1980 opinion and I believe an Executive order as giving the authority for what we're talking about today.

Mr. BARR. No, I didn't cite an Executive order. I referred to the Executive order in the context of the longstanding ban on assassination by employees and officials of the United States.

Mr. DEMPSEY. So in considering the legal authority of the FBI to override international law, you did not consider statutes that, on their face at least, appear to be make it a crime for the FBI or anybody else to kidnap a foreign official.

Mr. BARR. I think the opinion, as I recall, notes that there may be statutes that affect any particular operation, but that we do not survey various statutes that could be applicable. That's not to acknowledge that the specific statute you cite would prohibit an authorized operation.

Mr. DEMPSEY. Did you consider, when you did the opinion, the adoption in 1986 of the Omnibus Diplomatic Security Antiterrorism Act which extended extraterritorial jurisdiction over terrorist crimes committed against Americans abroad? And did you consider that in adopting that law, Congress declined to include a provision authorizing self-help measures—Congress declined to include a provision authorizing seizure abroad without host country consent?

Mr. BARR. No.

Mr. DEMPSEY. Now, when Judge Sofaer testified on that bill in 1984, he testified, "I want to emphasize that I do not read this bill as granting any authority for self-help in the enforcement of its provisions."

Now, in exercising jurisdiction over crimes committed abroad, under the provisions of that statute would you consider it relevant that Congress declined to authorize self-help?

Mr. BARR. If I was considering that statute as a source of authority, obviously that would be relevant.

Mr. DEMPSEY. In interpreting the general authority of the FBI, is it relevant that in a subsequent statute extending extraterritorially the authority of the FBI—extending extraterritorially the jurisdiction of the United States—isn't it relevant that Congress declined to grant authority for the type of self-help that you're talking about?

Mr. BARR. As I say, if I was relying on that statute as a source of authority in a particular operation, I would have to review the legislative history and determine its relevance.

Mr. DEMPSEY. And your opinion didn't do that?

Mr. BARR. No, it did not.

Mr. DEMPSEY. Just to be clear, have you reviewed this issue since the June opinion?

Mr. BARR. What do you mean by reviewed?

Mr. DEMPSEY. Reviewed it in terms of another opinion from your office?

Mr. BARR. Do you mean have I reexamined the propositions in the June 21 opinion?

Mr. DEMPSEY. No, have you supplemented the opinion?

Mr. BARR. By issuing a supplementary opinion?

Mr. DEMPSEY. That's the question, yes.

Mr. BARR. No.

Mr. DEMPSEY. Judge Sofaer, have you or the State Department received any expressions of interest or concern from other countries about press reports on this opinion?

Mr. SOFAER. Yes, we have.

Mr. DEMPSEY. What has been the tenor of those communications?

Mr. SOFAER. Several foreign countries have either approached our ambassadors overseas or have come in to see officials within the Department, including myself, and expressed their concern about the newspaper stories that they read which indicated that somehow a new law had been passed, or a new authority had been given to the FBI to engage in extraterritorial arrest without consent.

We have explained to those countries that no new law has been passed and no new authority has been created; and that the policy of the United States regarding extraterritorial unconsented arrest has not changed.

Mr. DEMPSEY. Would they have been concerned if it had changed?

Mr. SOFAER. I have no doubt about it; they would be greatly concerned.

Mr. DEMPSEY. Obviously if this authority were exercised in a particular country, it would have an adverse impact on our relationships with that country.

Do you think that it would also have an adverse impact, in terms of the State Department's ability to deal with other countries in seeking cooperation and negotiation of treaties?

Mr. SOFAER. Yes, if we acted inconsistently with international law, fairly interpreted, yes, I think it would. But I want to emphasize that we do occasionally engage in extraterritorial activity such as the *Achille Lauro* diversion. And while those kinds of actions have created trouble, they have been generally accepted, because

we were acting within what I consider to be a fair interpretation of international law.

Mr. DEMPSEY. Mr. Revell, has the FBI been contacted through any of its legal attachés or otherwise about this opinion?

Mr. REVELL. Yes, it has.

Mr. DEMPSEY. And what's been the nature of those communications?

Mr. REVELL. Concern that we were going to mount up like the Lone Ranger and go out and start seizing fugitives all over the world, which, of course, was never contemplated under any circumstance. And we've given advice back that there is no change in our policy or our procedure; that the Department has rendered a legal opinion, but that opinion does not mean that there are operations or activities that will take place under that opinion.

And we have given assurances to those countries with which we deal that there will be no change in our practice and our policy of coordinating with them and getting their approval for all law enforcement activities that would occur within their territory on behalf of the FBI.

Mr. DEMPSEY. All of the testimony has said that this is a legal opinion and not a change of policy.

When will we know when there's a change of policy? When we read about the seizure of someone in the newspaper?

Mr. BARR. I think the President's—or at least the White House statement, states the policy of the United States.

Mr. DEMPSEY. And that is?

Mr. BARR. In any given case, the President must weigh his constitutional responsibilities for formulating and implementing both foreign policy and law enforcement policy. An interagency process exists to ensure that the President takes into account the full range of foreign policy in international law considerations as well as the domestic law enforcement issues raised by any specific case.

There will be no arrests abroad that have not been considered through that interagency process.

Counsel, if I could clarify a statement I made earlier when you asked if I had issued a supplementary opinion.

I have not issued any supplementary written opinion. Obviously, since that opinion was issued, I've been asked a lot of questions about it, and I have expounded upon it and its potential application in given circumstances. But I have not gone back and revised or changed the opinion.

Mr. EDWARDS. Is it your testimony that in each of these cases the President would have to give his permission, personally?

Mr. BARR. That doesn't seem to be what the White House statement says.

Mr. EDWARDS. Is it your opinion that if an FBI agent is sent into some friendly country to grab somebody that the President would, of necessity, have to make that decision?

Mr. BARR. As a matter of law or as a matter of policy?

Mr. EDWARDS. What do you think would happen? You're the legal adviser, tell us, do you think that the President would have to be—would be advised, or would give permission—of policy, as a matter of policy?

Mr. BARR. As a matter of policy, the interagency process is a National Security Council process, and I expect that the President would be involved. But this statement from the White House is a statement of what the process is.

Mr. EDWARDS. Mr. Revell has testified on page 4, paragraph 1, that the FBI would send in agents to a foreign country if they are directed to do so by the Department of Justice. That's your testimony, Mr. Revell.

Mr. BARR. I think what Mr. Revell was saying is that the FBI is not going to internally make these decisions. It's going to take its directions from the Department of Justice, which will in turn take its directions from the National Security Council process.

Mr. EDWARDS. We don't have testimony on that, Mr. Barr. We have the testimony of Mr. Revell, who says that if the Department of Justice to do it, the FBI will do it.

Mr. BARR. Normally an order for a particular operation would not come directly to the FBI; it would come through the Attorney General. But the process is a National Security Council process that would involve review by the deputy's committee at the National Security Council. The deputy's committee may recommend Presidential consideration.

So I believe that the framework contemplated now would provide for presidential consideration.

Mr. EDWARDS. Thank you.

Judge Sofaer, I have one more question.

In your testimony you emphasize that this kind of power could be exercised in the event that there is really great danger, that the United States is under attack, so to speak.

Is it your testimony that if the President decides that there is some drug guy in Colombia, for example, that is so menacing to the United States that that alone would be of sufficient danger to the United States so that Mr. Revell could send in some FBI agents?

Mr. SOFAER. No, Mr. Chairman. My testimony would be to that, that there would have to be specific acts or dangers that amounted to an attack on the United States under the U.N. Charter, and that the President would then have to be able to act in self-defense, which requires action that does not go beyond what is necessary and proportional.

But once these tests have been met, yes, it is conceivable that that would be an action. And I would consider that action to be one which the Nation as a whole would support, including Congress, because it was an action in self-defense.

Mr. EDWARDS. Thank you.

Mr. BARR. Just to follow up on that, with respect to Colombia in particular, there's obviously no consideration whatever being given to this kind of operation in a situation like Colombia where the Government is actively cooperating with us and is engaged in extradition.

I think Judge Sofaer was talking about a hypothetical situation.

Mr. SOFAER. Absolutely. We salute Colombia, Mr. Chairman, and we would not interfere whatsoever in Colombia without its consent. They are facing up to tremendous adversity and fulfilling all their obligations under international law in terms of cooperation with us.

Mr. EDWARDS. Then you could send agents into Panama or Iran, right, because they don't cooperate internationally, or with us in sending some defendants back to the United States?

Mr. SOFAER. We're not contemplating sending agents anywhere right now, Mr. Chairman.

Mr. DEMPSEY. Judge Sofaer, is it correct that there are some people in the United States whom we have not extradited, accused terrorists whom the United States has failed to extradite?

Mr. SOFAER. That is correct. Occasionally that happens.

Mr. DEMPSEY. Do you read this opinion at all as implicitly recognizing the authority of the country seeking extradition to seize those suspects here and take them back?

Mr. SOFAER. Absolutely not.

Mr. DEMPSEY. Why not?

Mr. SOFAER. Because I would assume that most other countries also would reach the same conclusion as this opinion; they would say, we have the domestic law authority to act perhaps in this kind of seizure. But because of our international legal obligations, either of themselves or as read into domestic law through treaties and otherwise, we will not do so.

I would assume that they would reach that conclusion as we would.

Mr. BARR. Let me just add to that, that the Department of Justice works very hard to extradite terrorists to face justice in other countries; and frequently, because we do have a system of laws, we have to work through the court system.

Mr. DEMPSEY. Would an operation involving U.S. agents arresting a suspect abroad be a covert action requiring a Presidential finding?

Mr. BARR. It depends upon the circumstances.

Mr. DEMPSEY. What sort of circumstances would require it, and what sort would not?

Mr. BARR. If the action was going to be acknowledged by the United States and the people involved were going to be acknowledged by the United States as carrying out an operation of the United States, it was not going to be covert, although it might involve tactical surprise, then that would not necessarily be a covert action.

Mr. DEMPSEY. Judge Sofaer, how many armed officials or agents would we have to send into another country without that country's consent to conduct activities there before it rose to the level of an act of war?

Mr. SOFAER. Any act of war?

Mr. DEMPSEY. Yes.

Mr. SOFAER. I don't mean to suggest that I have any difficulty as such with that concept in the abstract, but in terms of present-day international law, that is not a concept that is used.

Mr. DEMPSEY. So sending armed agents into another country to conduct activities there without the consent of that country, in your view would not be an act of war?

Mr. SOFAER. No. Under the U.N. Charter, this kind of an action could possibly create a right of self-defense. It would be regarded as a form of aggression or perhaps even an attack. But the concept of act of war is really defunct under the U.N. Charter.

We believe—and all of us, I think, support this—that if some act of that kind happens, we're not supposed to go to war. We are supposed to act what we think necessary to stop that kind of action, but not beyond that.

Mr. DEMPSEY. But the insertion of agents into a foreign country would then trigger a right of self-defense on the part of that nation?

Mr. SOFAER. It could. In certain circumstances, it could.

Mr. DEMPSEY. And how isn't that moral equivalency?

It seems to me like you are saying that sauce for the goose, sauce for the gander.

Mr. SOFAER. No one here is advocating these kinds of actions when they would amount to attacks or other forms of aggression. If we were acting in self-defense, it would follow that we would not be acting in a manner that could be characterized as aggression.

An act in self-defense is a justifiable act under international law. It might violate the territorial integrity of another state. They may claim that we are acting as aggressors; and in fact, Libya did claim that we were acting as aggressors. But we believe that in good faith on the basis of very, very powerful evidence, that we were acting in self-defense.

If you agree that we were acting in self-defense, then Libya has no justification for treating our action as a form of aggression.

Mr. DEMPSEY. Mr. Revell, how could you possibly send agents into a country without host country permission and carry out an abduction and expect them to get out of the country safely?

Mr. REVELL. I don't think that I can discuss ways that we could carry out an operation like that tactically in an open session; of course, it can be done.

The difference between that and a covert operation would be that as in the the Fawaz Younis case, which was, of course, an arrest on the high seas, we would immediately bring the person before a magistrate and the charges would be read in public and the circumstances of the arrest would be made a matter of public record. And, of course, the individual defendant would have a right to challenge the authority of that arrest in court.

But, again, let me emphasize that we have no such plans and we have no such intentions. But let me give you an example of where we believe that it would be justified: A situation where there is no law; where there is no effective government—and where from that territory there were attacks being made against our civil aviation, hostages being held, and there was an inability of the law enforcement agencies of Government to do anything to protect U.S. citizens, under those circumstances we would be derelict if we did not attempt to execute in a positive fashion the law of the United States.

That would not be our decision. That would be the decision of the President, the Attorney General, and so forth.

But I think we would have to propose, where there was no other alternative, and American lives had been lost and were further at risk, that that be an alternative.

Mr. EDWARDS. That's a different formula than described by the other witnesses, but we'll accept that.

Mr. REVELL. That was our intention.

Mr. EDWARDS. And different in your testimony, too, your testimony is that if the Attorney General says do it, you do it.

Mr. REVELL. That was not the intent of my testimony, sir. My intent was that that you take orders from the Attorney General.

Mr. EDWARDS. But your explanation is quite different than Judge Sofaer's and Mr. Barr's. It is much more restrictive, much more restrictive.

Mr. SOFAER. I certainly didn't mean to suggest that I had a more expansive view of the situation, but I think the record will speak for itself, Mr. Chairman.

Mr. EDWARDS. Thank you very much, gentlemen.

I want to point out that this committee did not initiate this national or international argument that is going on, that we only read about it in the newspapers—it came from you people. There is a great deal of concern, and I share it. Other nations and most people in the United States who have read the accounts and watched whatever takes place on television understand or believe that there has been a new announcement by this administration that hereafter the FBI can go into friendly countries, countries with which we are not at war, and kidnap people that we want back in the United States, without the consent of the host country.

That's the way it has been reading and the voluminous opinion, Mr. Barr, that we haven't seen, apparently—I'm not quite sure what it says, other than to say that, yes, indeed, in some circumstances this can happen.

Mr. BARR. My testimony summarizes the principal conclusions of the opinion.

Mr. EDWARDS. We thank you. We thank you all for being here. It has really been very helpful and we appreciate your testimony.

The hearing is adjourned.

[Whereupon, at 11:30 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]