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SENATE

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EXTRADITION TREATIES INTERPRETATION ACT OF 1997

OCTOBER 7, 1997.—Ordered to be printed

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

REPORT

[To accompany S. 1266]

The Committee on Foreign Relations having had under consideration an original bill to interpret the term “kidnaping” in extradition treaties to which the United States is a party, reports favorably thereon and recommends that the bill do pass.

I. PURPOSE OF THE BILL

The purpose of the bill is to authorize, for the purposes of any extradition treaty to which the United States is a party, the interpretation of the terms “kidnaping” and “kidnapping” to include parental kidnapping. It is designed to remedy a disparity in U.S. extradition law—as it relates to the crime of parental abduction—that has arisen in several dozen extradition treaties to which the United States is a party.

II. BACKGROUND

The criminalization of parental abduction—where one parent takes a child in violation of law, a custody order, or other legally binding agreement (and against the wishes of the other parent)—is a relatively recent development in U.S. criminal law. Prior to the mid-1970s, parental abduction was generally considered a family law matter not covered by criminal law. In the last two decades or so, U.S. criminal law has evolved significantly. Every State in the Union as well as the District of Columbia now makes the act of parental abduction a crime. Congress recognized the need to combat this crime by passing the International Parental Kidnapping Crime Act of 1993 (Pub. L. 103-173; 107 Stat. 1998; 18 U.S.C. 1204).

There, Congress provided for imprisonment of up to 3 years, and fines of up to \$250,000, whenever someone removes a child from the United States, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights.

As a consequence of this development in the law, a disparity has been created in U.S. extradition law. The disparity occurs in a subset of extradition treaties referred to as “list” treaties—so named because they specifically enumerate, or list, the crimes under the treaty that are considered extraditable offenses. (The more recent trend in U.S. treaty practice is the “dual criminality” treaty, which avoids the limiting nature of the “list” treaties by allowing extradition in any case where both countries make a practice a felony. By coincidence, the shift from list treaties to dual criminality treaties roughly coincides with the evolution of U.S. criminal law described in the foregoing paragraph; that is, since the late 1970s, most U.S. extradition treaties have contained a “dual criminality” provision.)

The standard “list” treaty includes, among the offenses that are considered extraditable, the following crimes: “kidnapping; child stealing; abduction, and false imprisonment.” But because the act of “parental abduction” was not considered a crime when the list treaties were negotiated, and consented to by the Senate, it has been the consistent practice of the United States to interpret the list treaties so as to exclude parental abduction. Indeed, this has been the practice of the Department of State for at least the past two decades, from Presidents Ford through Clinton. The following examples illustrate the point.

In 1976, in promulgating a model “list” treaty, the State Department listed the aforementioned crimes (i.e., kidnapping, child stealing) as among those extraditable. In accompanying comments, the State Department Legal Adviser specifically noted that “ * * * . extradition is an instrument of criminal law enforcement, and it is believed that it might be frequently misused if applied to domestic relations problems such as custody disputes.” 41 *Fed. Reg.* 51897 (Nov. 24, 1976).

In 1978, in a letter to the Governor of California, the State Department stated that “[e]ven when the act of the parent is in possible contempt of court and is considered to constitute a felony such as kidnapping or child stealing, it is not considered kidnapping or child stealing within the meaning of these terms in extradition treaties. These terms are intended to reach abduction by persons other than a parent of the person kidnaped.” 1978 *Digest of United States Practice in International Law* 391.

In 1986, the Reagan Administration applied this rule in a specific extradition case requested by Canada. In rejecting the Canadian request, the State Department concluded that:

The terms of the [U.S.–Canada] treaty (negotiated in 1971) do not and were not intended to encompass parental child abductions. It is worth noting * * * that the United States has not to date granted any foreign extradition requests for the offense of parental child abduction.

The Department also rejected an argument, proffered by Canada, that because the law was evolving in the United States—that is, because it had by then become a felony in several states—the treaty terms could now be construed as encompassing parental child abduction. I *Cumulative Digest of United States Practice in International Law, 1981–1988* 700–01 (1993).

The interpretation was recently reaffirmed by the Clinton Administration. In an October, 1996 diplomatic note, the State Department, in rejecting an extradition request, stated that the terms in the bilateral extradition treaty at issue did not “at the time the treaty was concluded encompass parental child abduction.”

This interpretation is limited to the list treaties. No such limitation is imposed upon dual criminality treaties, because, as stated previously, such treaties provide for extradition whenever both parties make the offense a felony.

The changes in U.S. criminal law as to parental kidnapping have thus created a disparity in U.S. extradition law and practice. Parental abduction is considered to be an extraditable offense under dual criminality treaties (as long as the other party treats the act as a felony offense), but it is not considered to be an extraditable offense in the list treaties. The disparity, several state attorneys general have written, “results in a legal atmosphere that encourages parents to remove their children from this country to avoid prosecution.”¹

Seeking to remove this disparity, the Clinton Administration has requested authority to adopt a new interpretation of the term “kidnapping” in the list treaties so that it encompasses parental abduction. The Committee strongly supports this request in order to harmonize U.S. extradition law and practice, and to protect the interests of children and parents who are victims of this crime.

III. COMMITTEE ACTION

The Committee considered the bill on September 24, 1997. With a majority of the members present, the Committee voted unanimously, by voice vote, to report the bill favorably.

IV. COMMITTEE COMMENTS

Scope of Executive Power

Any proposal regarding the adoption of a new treaty interpretation implicates the scope of the Executive’s power to interpret treaties. The Committee, and the full Senate, exhaustively reviewed this important question nearly a decade ago during consideration of the Treaty on Intermediate Nuclear Forces, known as the INF Treaty. See Exec. Rept. 100–15 (hereafter “*INF Treaty Rept.*”).

Under the U.S. Constitutional system, the treaty-making power is shared between the President and the Senate. (Article II, section 2, clause 2). Once a treaty is consented to by the Senate, and ratified by the President, the President is charged with “faithfully executing” it. In this role, the President has the responsibility—absent adjudication—to interpret treaties. But as the Committee stated in

¹Letter from Attorneys General of California, Florida, and Texas, on behalf of National Assoc. of Attorneys General, to the U.S. Attorney General, Mar. 4, 1997.

its report on the INF Treaty, “the Constitution permits the President, acting alone, only to interpret existing treaties—not to make new ones. To remain within the scope of his constitutional power, the President must genuinely be engaged in the act of treaty interpretation.” *INF Treaty Rept.*, at 438.

The principles of treaty interpretation, necessarily derived from the Constitution, were embraced by the Senate in 1988, and reaffirmed by the Senate on several occasions since,² are set forth in Condition (1) in the Resolution of Ratification of the INF Treaty. In brief, it states that the United States shall interpret treaties “in accordance with the understanding of the Treaty shared by the Executive and the Senate at the time of Senate consent to ratification.” Such “common understanding” is based, first, on the text of the treaty and, second, the “authoritative representations” provided by the Executive to the Senate during consideration of the treaty. Any new interpretation that departs from this common understanding shall only be adopted “pursuant to a subsequent treaty or protocol, or the enactment of a statute.”³ The Executive has previously affirmed its acceptance of these principles.⁴ These principles apply regardless of whether the Senate chooses to say so in its consideration of any particular treaty.

It cannot be disputed that the adoption of an interpretation of the term “kidnapping” in the list treaties—so as to include parental abduction—represents a departure from settled U.S. practice. As described above, it has been the consistent practice of the Executive Branch to interpret the list treaties to exclude parental abduction.

The Executive was almost certainly correct in reaching this interpretation. In presenting the various list treaties to the Senate in the period before the 1970s, it is undoubtedly the case that both the Executive and the Senate understood the term “kidnapping” to exclude parental abduction. No exhaustive research of the ratification debate of every treaty at issue is necessary. Instead, resort to the text, and standard interpretive methods, will suffice.

Congress is presumed to know the existing body of law when it enacts a statute. (The same presumption applies when the Senate consents to a treaty). Statutory terms are “generally presumed to have [their] common law meaning.” *Taylor v. United States*, 495 U.S. 575, 592 (1990). In other words, when:

Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as

²The Senate has reaffirmed these principles during consideration of the CFE, START I and START II, and Open Skies Treaties, the Chemical Weapons Convention, and the CFE Flank Agreement. See Exec. Rept. 102-22, at 81 (CFE Treaty); Exec. Rept. 102-53, at 96, 101-02 (START I Treaty); Exec. Rept. 103-5, at 18 (Open Skies Treaty), Exec. Rept. 104-10, at 45, 49 (START II Treaty); 143 *Cong. Rec.* S3651-57 (daily ed. Apr. 24, 1997) (Chemical Weapons Convention); 143 *Cong. Rec.* S4476-78 (daily ed. May 14, 1997) (CFE Flank Agreement).

³The full text of the Condition is set forth at 134 *Cong. Rec.* S12849 (daily ed. May 26, 1988).

⁴See *The START Treaty, Hearings before the Senate Comm. on Foreign Relations*, 102d Cong., 2d Sess., Part 1, at 506-07 (1992); Open Skies Treaty, Exec. Rept. 103-5, at 16.

satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952).

Therefore, because parental child abduction was not generally considered to be an either common law or statutory crime when the list treaties were approved, then it must be concluded that the term “kidnapping,” as used in the list treaties, at the time of consent by the Senate, did not cover parental child abduction. And it is the moment of the Senate’s consent, not a subsequent moment, that must be examined in discerning the meaning of treaty terms and whether a shared understanding exists. As the Committee said in its report on the INF Treaty, “the meaning of the treaty that the President ratifies is the meaning on which there existed a meeting of the minds between the President and the Senate at the time of Senate consent.” *INF Treaty Rept.*, at 438.

The absence of any discussion regarding the meaning of the term “kidnapping” in a ratification record is of no consequence. Indeed, the lack of discussion would hardly be surprising; when a term is well understood, there is no reason for the Senate and the Executive to engage in a dialogue about its meaning. Otherwise, the Senate would be required to conduct an exhaustive exchange with the Executive about the meaning of every term in a treaty.⁵

The foregoing may be summarized as follows. In proposing to adopt a new interpretation of the term “kidnapping” in the list treaties, the Executive seeks to make a 180 degree turn. In so doing, it effectively seeks to revise the common understanding of a treaty term—an understanding which the Executive clearly embraced, given the two decades of Executive practice described previously. Such a new construction of a treaty term would not be within the bounds of “interpretation.” The Committee believes that, absent authorization by the Senate (or in this case, Congress as a whole), the Executive is without the power to so construe the treaty term.

The Committee commends the Executive for promptly consulting with the Committee when this issue arose, and for its cooperation and assistance in drafting this legislation. The Constitution provides that the Executive and the Senate are partners in the treaty-making process; the cooperation followed in this instance is a model of how this partnership should work in practice.

Enactment of a Statute

Of course, the Treaty Power is vested by the Constitution in the President and the Senate. Thus, the ideal course here would be for the Executive to renegotiate the numerous treaties at issue, and submit the amended treaties (or a protocol to the existing treaties) to the Senate for its advice and consent. But Condition (1) to the INF Treaty recognized the practical reality that the later enactment of a statute, as a matter of U.S. law, can provide the authority for the President to adopt a new interpretation of a treaty. Under the “last in time” doctrine, a later Act of Congress can pre-

⁵ See *The START Treaty, Hearings before the Senate Comm. on Foreign Relations*, 102d Cong., 2d Sess., Part 1, at 506–07 (1992). (Executive Branch agrees that it is unnecessary for the Senate to question Executive Branch witnesses with respect to each clause in a treaty in order to establish shared understanding of treaty’s meaning.)

vail over an earlier treaty when the two conflict, *e.g.*, *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), *Whitney v. Robertson*, 124 U.S. 190 (1888), although the general rule of construction is that Congress must make a clear statement that it intends to modify or revoke treaty terms. *E.g.*, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984), *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

Resort to enactment of a statute is necessary here, for two related reasons. First, it would be impractical to expect the Executive to renegotiate dozens of extradition treaties in order to address this one issue. Second, renegotiation of numerous treaties would necessarily delay prompt action by the Executive to address a problem of considerable importance.

The Committee wishes to make it expressly clear that it intends for this Act to provide the authority for the Executive to reverse its longstanding practice of interpreting the term “kidnapping,” as used in extradition treaties, to exclude parental abduction. The Committee believes that the term “kidnapping” in such treaties should be in harmony with the law of each of the 50 states, and the federal government, all of which criminalize parental abduction. In sum, as the U.S. criminal law has evolved to make the act of parental abduction a crime, so, too, must U.S. extradition law and practice.

V. SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

The short title of the bill is the “Extradition Treaties Interpretation Act of 1997.”

Section 2. Findings

This section recites several findings regarding the evolution of U.S. criminal law as it relates to parental abduction and the disparity in U.S. extradition law described in the comments above.

Section 3. Interpretation of Extradition Treaties

This is the operative section of the Act. It authorizes, for the purpose of any extradition treaty to which the United States is a party, the interpretation of the terms “kidnaping” and “kidnapping” to include international parental kidnapping. Out of an abundance of caution, both possible spellings of the word are used.

Section 4. International Parental Kidnapping Defined

The Act defines the term “international parental kidnapping,” using the definition from the International Parental Kidnapping Crime Act of 1993, which is codified at 18 U.S.C. §1204.

VI. COST ESTIMATE

In accordance with rule XXVI, paragraph 11(a) of the Standing Rules of the Senate, the Committee provides the following estimate of the cost of this legislation prepared by the Congressional Budget Office:

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
 Washington, DC, October 7, 1997.

Hon. JESSE HELMS,
 Chairman, Committee on Foreign Relations,
 U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for the Extradition Treaties Interpretation Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Joseph C. Whitehill.

Sincerely,

JUNE E. O'NEILL,
 Director.

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The bill would authorize the interpretation of the term "kidnaping" in extradition treaties to include parental abduction of a child and its removal across international borders with intent to obstruct the lawful exercise of parental rights.

Enactment of the bill could increase slightly the number of requests for extradition processed by the Federal government. Nevertheless, CBO estimates that the bill would have no significant impact on the Federal budget, because the additional expenses for processing the new workload would be small. Because it would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would not affect the budgets of State, local, or tribal governments.

The estimate was prepared by Joseph C. Whitehill. The estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

EVALUATION OF REGULATORY IMPACT

In accordance with rule XXVI, paragraph 11(b) of the Standing Rules of the Senate, the Committee has concluded that there is no regulatory impact from this legislation.

CHANGES IN EXISTING LAW

In compliance with rule XXVI, paragraph 12 of the Standing Rules of the Senate, the Committee notes that there are no changes to existing statutes made by this legislation.