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THE TURNING POINT APPROACHES: THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION

Relying on the political offense exception to extradition, courts in recent years have found fugitive Provisional Irish Republican Army members discovered in the United States not extraditable to the United Kingdom. The recent Senate ratification of a supplementary extradition treaty with the United Kingdom, however, virtually eliminates the political offense exception between the two countries. This Comment argues that the Treaty runs counter to the long-standing history and purpose of extradition and the political offense exception and synthesizes the recent extradition decisions into a proposal for necessary legislative reform.

INTRODUCTION

With world terrorism increasingly the subject of public concern, the United States government has been considering new measures to promote its reduction. Because of the fear that the United States may become a haven for terrorists, traditional extradition policy and procedure have come under increased scrutiny. Decisions of United States courts not to extradite certain Provisional Irish Republican Army (PIRA) members to the United Kingdom to face charges for alleged “terrorist” acts, have led to demands for changes in the extradition process. In recent extradition cases, the courts have differed as to what factors are appropriate in making a political offense determination. The executive branch, meanwhile, has taken

3. Extradition is the “process by which one nation surrenders for purpose of trial and punishment, individuals accused of crimes committed outside its borders, to the nation in which the alleged crimes were committed.” Terlinden v. Ames, 184 U.S. 270, 289 (1902).
steps to rid altogether the extradition determination of the political offense exception. The 1985 Supplementary Extradition Treaty between the United States and the United Kingdom,⁵ is an example of attempts by the executive branch to change the political offense determination process.

This Comment argues that the Supplementary Treaty is inappropriate in light of the fundamental concerns underlying United States extradition procedure. The Comment will also synthesize the various factors the courts have considered in making a political offense determination, and propose a viable test for the political offense exception. Through legislative enactment of such a test, Congress can reaffirm the principles that have governed United States extradition procedure for the past 150 years, and yet provide the means for extradition of terrorists.

General Background

Extradition has a history dating back as far as 1280 B.C., when Ramses II, Pharaoh of Egypt, included such a provision in a peace treaty with the Hittites.⁶ From these beginnings until the late eighteenth century, extradition agreements were entered to ensure the return of fugitives sought for political reasons, with little concern expressed for the return of common criminals.⁷

In the 1800’s, the nature of extradition agreements underwent a reversal of sorts. Extradition agreements suddenly were concerned with returning persons sought for committing various common crimes, while providing for either an understood or explicit exception to extradition requests for persons sought for committing offenses of a political nature.⁸ The revolutions in France and the United States and the political theories underlying them were the impetus for this significant change.⁹

Various ideals took hold in Western Europe and the United States that demanded this reversal in extradition policy. These governments began to acknowledge the right of individuals "to resort to political activism to foster political change."¹⁰ As a result of these ideological concerns, these countries adopted the policy of not returning such individuals to countries where they would be subjected to unfair tri-

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⁶ I M.C. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE ch. I, § 1.3 (1983) [hereinafter UNITED STATES EXTRADITION].
⁷ Id. ch. I, § 1.4.
⁸ Id.
⁹ M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 370-74 [hereinafter WORLD PUBLIC ORDER].
als and punishment because of their political beliefs. The return of individuals under such circumstances would essentially amount to aiding foreign governments in suppressing political dissent.

**History in the United States**

The United States entered into its first extradition agreement early in its history. An extradition provision was included within the Jay Treaty negotiated with Great Britain soon after the United States gained independence. This extradition agreement, however, was short-lived.

In 1799 Great Britain made a request under the Jay Treaty for the return of Jonathan Robbins, an alleged murderer and mutineer from a British warship. Robbins claimed that he was an American and had been impressed into service by the British. When this request came before a local magistrate, President John Adams wrote a letter to the judge imploring him to grant the request for extradition. When the American public later discovered that the judge had been pressured into granting the request, such public outcry ensued that another extradition request was not processed until 1842.

United States extradition law, as it has developed from 1840 until recently, encompasses two very important concerns: 1) the desire to avoid unwarranted executive influence on the extradition determination, and 2) the ideological motivation not to help another country suppress internal political dissent. The former concern was manifested in the passage of the 1848 Extradition Act. This statute required that extradition requests be made under provisions of a treaty and subject to judicial proceedings in federal district court. The underlying theory behind this enactment was that the “judiciary should have the authority to review action such that fundamental individual liberty would not be improperly infringed.” Though the Extradition Act has had some minor amendments since 1848, this underlying theory has remained the controlling concern in the extradition procedure.
The concern over individual liberty was the impetus behind the political offense exception to extradition in United States treaties. In its early history, the United States was inherently suspicious of the government and judicial systems within other countries. Thomas Jefferson, in response to a request by France in 1793 for the return of four fugitives alleged to have conspired against the Republic, stated: "[t]he evil of protecting malefactors of every dye is sensibly felt here as in other nations, but until a reformation of the criminal code of most nations, to deliver fugitives from them would be to become their accomplice . . . ."\(^{17}\)

When the United States eventually entered into another extradition agreement in 1842,\(^{18}\) an exception from extradition for political offenses was believed to be an unwritten provision of the agreement.\(^{19}\) In the numerous extradition treaties that the United States has entered into since, a provision providing for the exception from extradition of political offenses as determined by the requested country generally has been included.\(^{20}\) Thus, the political offense doctrine has a history dating back as far as modern United States extradition law itself.

**Present United States Extradition Procedure**

Before an individual may be extradited from the United States, United States law requires that an extradition treaty presently be in force with the requesting country.\(^{21}\) To initiate an extradition request, the requesting country must present a request to the Depart-

\(^{17}\) T. JEFFERSON. Writings, VI, 462 (Ford ed. 1894), quoted in Senate Hearings, supra note 12, at 113.
\(^{18}\) Webster-Ashburton Treaty, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119.
\(^{19}\) See Senate Hearings, supra note 12, at 113.
\(^{20}\) See World Public Order, supra note 9, at 371.
\(^{21}\) 18 U.S.C. § 3184 (1982). This statute provides:
Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.
ment of State.\textsuperscript{22} In the past, requesting states also were required to file a claim with the appropriate federal district court.\textsuperscript{23} Recently, however, the State Department generally has made an initial determination as to the sufficiency of the request before presenting the claim to the appropriate United States Attorney for prosecution.\textsuperscript{24}

In order to gain extradition, the request must be approved at both the judicial and executive level. At the judicial level, a hearing is held to determine whether: 1) the person before the court is the person sought; 2) the offense charged is an extraditable offense as provided for in the treaty; 3) the offense charged is a crime within the state where the hearing is being held; and 4) there is probable cause to believe that the person before the court committed the offense charged.\textsuperscript{25} The purpose of the hearing is to determine only whether there is probable cause to believe the person committed the offense charged, not to determine the actual guilt or innocence of the individual. Because of the narrow function of the extradition hearing, an extradition determination is not subject to appeal by either the individual sought or the requesting government.\textsuperscript{26} The individual sought, however, may apply for a writ of habeas corpus in order to challenge the extradition order.\textsuperscript{27} Furthermore, the requesting government is free to make another identical extradition request if it is denied in the previous attempt; a decision not to extradite has no res judicata effect.\textsuperscript{28}

The input of the executive branch is limited to those occasions when there has been a judicial determination in favor of extradition. A judicial determination that an individual is not extraditable under the present request is final, at least with respect to that request. But a determination by the courts that the individual sought is extraditable can be ignored if the Secretary of State, in his discretion, determines the request should be denied.\textsuperscript{29} The individual sought will fi-

\textsuperscript{22} See World Public Order, supra note 9, at 511.
\textsuperscript{23} Id.
\textsuperscript{24} This has been the method in all the recent extradition cases. For a discussion of extradition procedure, see generally II United States Extradition, supra note 6, at ch. IX, § 2.
\textsuperscript{25} See World Public Order, supra note 9, at 515.
\textsuperscript{26} Collins v. Miller, 252 U.S. 364, 369-70 (1920); Eain, 641 F.2d at 508; Mackin, 668 F.2d at 125-27; Hooker v. Klein, 573 F.2d 1360 (9th Cir.), cert. denied, 439 U.S. 932 (1978).
\textsuperscript{27} Eain, 641 F.2d at 1368; Mackin, 668 F.2d at 128; Hooker, 573 F.2d at 1364.
\textsuperscript{28} Mackin, 668 F.2d at 128; Hooker, 573 F.2d at 1368.
\textsuperscript{29} 18 U.S.C. § 3168. See Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986); Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981); In re Lincoln, 228 F.2d (E.D.N.Y.), aff'd, 241 U.S. 651 (1915).
nally be returned to the requesting government when both the judicial and executive branch recognize the request as proper under the treaty.

THE POLITICAL OFFENSE EXCEPTION — INTERPRETATION BY THE COURTS

The determination of whether the political offense exception applies to a particular extradition request has been taken up by the judiciary. The political offense determination is viewed as part of the magistrate's determination of whether the offense charged is an extraditable offense under the applicable treaty.

Traditionally, under the political offense doctrine, two types of political crimes have been distinguished: "pure" and "relative" offenses. "Pure" political offenses are "acts aimed directly at the government and have none of the elements of ordinary crime." Crimes included under this category — such as treason, sedition, and espionage — are specifically excluded from the list of extraditable crimes in any treaty.

"Relative" political offenses, however, have proven more difficult to deal with. These offenses involve the "commission of a common crime in connection with a political act or event." Such offenses are normally crimes for which extradition would be granted but for the political nature of the crime. Numerous approaches have been developed for determining whether any particular offense is deserving of exception from extradition under the political offense doctrine. In the United States, the courts have adopted the "incidence" test.

The Incidence Test — Traditional View

The test applied by the United States courts for the political offense exception originally was taken from the British view as outlined in In re Castioni. In that case, Switzerland requested Great Britain to return a Swiss participant in the storming of the government palace in which an official was killed. The British court refused extradition, finding that Castioni's actions were "incidental to and formed a part of the political disturbances." The court stated fur-

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30. See supra note 21; see also Eain, 641 F.2d at 513; Mackin, 668 F.2d at 134.
31. Eain, 641 F.2d at 513.
33. Quinn, 783 F.2d at 793 (citations omitted).
35. Three basic approaches to the political offense issue have developed: 1) the French "objective" test; 2) the Swiss "proportionality" or "means-end" test; and 3) the Anglo-American "incidence" test. Quinn, 783 F.2d at 794-96.
37. Id. at 166 (Hawkins, J.).
ther that common crimes committed "in the course" and "in the furtherance" of political uprisings would be considered political offenses.\(^{38}\)

The Castioni decision has been interpreted by United States courts as establishing a two-fold political offense test: 1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense, and 2) a charged offense that is incidental to in the course of, or in the furtherance of the uprising.\(^{39}\) Should the magistrate find these two requirements met, the fugitive's offense will be considered political and the extradition request will be denied.

Exactly what information is to be considered under this test, however, is relatively unclear. The United States Supreme Court had its only occasion to deal with the political offense exception in 1896, in Ornelas v. Ruiz.\(^{40}\) That case involved several Mexican nationals residing in the United States who had crossed the border from Texas to loot a nearby Mexican village. In looting the village, they attacked a small group of Mexican soldiers. Mexico requested that these individuals be returned for prosecution. The Supreme Court upheld the magistrate's finding that the individuals were extraditable. In dicta, the Court remarked that the crimes committed did not constitute political offenses because there was not sufficient evidence to support the claim of a political uprising.\(^{41}\) The decision indicated several factors that might be relevant to the political offense determination, such as "the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed."\(^{42}\) The guiding factors listed in Ornelas, however, have been all but ignored in later extradition requests,\(^{43}\) at least until recently.

One rule guiding the extradition process generally has been adopted by United States courts. The courts have imposed a rule of noninquiry on their extradition decisions. The rule of noninquiry presumes that any country with which the United States has an ex-

\(^{38}\) Id. at 156 (Denman, J).
\(^{39}\) Quinn, 783 F.2d at 796 (citations omitted); see also Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir.), cert. denied, 405 U.S. 989 (1971); In re Ezeta, 62 F. 972 (N.D. Cal. 1894).
\(^{40}\) 161 U.S. 502 (1896).
\(^{41}\) Id.
\(^{42}\) Id. at 511.
\(^{43}\) See Banoff & Pyle, supra note 32, at 184-85.
Tradition treaty will treat those extradited fairly.\textsuperscript{44} With this rule, the court precludes the introduction of any evidence intended to prove that the individual sought for extradition may receive an unfair trial in the requesting country or be subject to persecution because of his political beliefs.\textsuperscript{45} The rule reflects a policy decision by the judiciary that such an examination into foreign political systems is inappropriate for the judicial branch. Rather, such an examination is best left to the executive branch in its discretionary confirmation of judicial decisions in favor of extradition.\textsuperscript{46}

Cases involving extradition requests are relatively rare occurrences for any individual court, and those involving the political offense issue are rarer still.\textsuperscript{47} Ignoring the factors outlined in Ornelas, the courts have mechanically applied the incidence test. The test has changed little from that outlined in Castioni and first applied here in In re Ezeta.\textsuperscript{48} As such, the United States judiciary's application of the incidence test has been criticized because the courts often find the test met whenever an offense with political overtones had even the slightest connection to a domestic uprising.\textsuperscript{49}

But recent history has seen a dramatic change in the forms and nature of activities undertaken for various "political" causes. Commentators feared that the political offense exception, as applied by the courts, would be a substantial barrier to attempts at bringing terrorists found within the United States to justice.\textsuperscript{50} The "political offense" test appeared to blur the distinction between political rebellion, to be protected, and terrorism, to be punished.

Recent court decisions in extradition determinations highlight this concern.\textsuperscript{51} Most of these cases involve offenses of a very violent and reprehensible nature, seemingly committed to further some political objective. With that in mind, the judiciary has attempted to form an acceptable distinction between violent revolutionary conduct that will be protected under the political offense exception and terrorism. It appears that the judiciary has been successful in creating valid guidelines for making such a distinction; these guidelines attempt to

\textsuperscript{44} Glucksman v. Henkel, 221 U.S. 508, 512 (1910).
\textsuperscript{45} See Banoff & Pyle, supra note 32, at 188-92.
\textsuperscript{46} Eain, 641 F.2d at 518; see also Laubenheimer v. Factor, 61 F.2d 626 (7th Cir. 1932); Sindona v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978).
\textsuperscript{47} See Senate Hearings, supra note 12, at 301 (statement of M. Cherif Bassioumi, Professor of Law, DePaul University). In the last 30 years, the political offense issue has been raised no more than two dozen times.
\textsuperscript{48} 62 F. 972 (N.D. Cal. 1894).
\textsuperscript{49} See I.A. Shearer, Extradition in International Law 181 (1971); Eain, 641 F.2d at 520.
\textsuperscript{50} See Senate Hearings, supra note 12, at 260-64 (statement of Department of State representative Judge Sofaer); Eain, 641 F.2d at 520.
\textsuperscript{51} See cases cited supra note 2; Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981).
preserve the political freedom of all individuals, while at the same
time attempting to send true "terrorists" to justice.

RECENT COURT DECISIONS

The controversy arising from recent court extradition decisions stems from four United Kingdom requests and one Israeli request for the extradition of certain fugitives. The United Kingdom sought four PIRA members for offenses committed in Northern Ireland and England;52 Israel sought a Palestine Liberation Organization (PLO) member for offenses committed in Israel.53 All the fugitives sought in these requests attempted to avoid extradition by claiming that their offenses fell under the political offense exception. Most of the courts involved in these decisions first were confronted by arguments from the government that the political offense determination is for the executive branch to make. Various arguments were put forth by the government in an effort to persuade the courts to refrain from deciding this question, but in every instance the court responded by reaffirming the judicial role in deciding the political offense issue.54

52. McMullen, a Northern Ireland native, is a former soldier in the British Army who deserted his attachment prior to its involvement in the Bloody Sunday shootings in Londonderry, Northern Ireland, in 1972. In 1974 as a member of the PIRA, he was involved in the bombing of a British Army barracks in England.

Mackin, also a citizen of Northern Ireland, shot a British soldier in Andersontown, Northern Ireland, in 1978. He and another PIRA member were searching for a lost taxi cab when they found themselves surrounded by undercover agents of the British Army. The soldier, Mackin, and his PIRA accomplice were all shot when the latter two attempted to avoid capture. Doherty and other PIRA members took over a house in Belfast in May 1980, in an attempt to ambush a British Army convoy. Before this ambush could occur, however, they were discovered by a British patrol. In the ensuing exchange of gunfire, a British Army officer was killed. Doherty was arrested at the scene, but he and several others escaped prison before final sentencing was handed down by the Northern Ireland courts.

Quinn is a United States citizen who lived in Ireland for several years. Quinn claimed to have become a member of the Active Service Unit, an offshoot of the PIRA, during this time. In 1974 and 1975, Quinn was a member of the "Balcombe Street Four." This group was linked to letter bombs that were sent to an army chaplin, a British judge, and a newspaper chairman in the London area, along with three bombs that were placed in various public areas. Quinn murdered a London policeman in February 1975, when the officer stopped him for questioning. Quinn, along with the other three, eventually made it to the United States in their attempts to escape prosecution. See cases cited supra note 2.

53. Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981). Eain involved the Israeli request for PLO member Ziad Abu Eain. Eain was being sought in connection with a bombing of a crowded market area in Tiberius which killed two young Israeli boys. Eain escaped capture by crossing into Jordan and eventually making his way to the United States.

54. Eain, 641 F.2d at 513-18; Mackin, 668 F.2d at 125-30; Quinn, 783 F.2d at 786-90. The government's arguments opposing any judicial interference included ones
The analysis of the political offense question in each case began with the recognition that United States precedent required that some form of the incidence test be met for an offense to be excepted from extradition. Either directly or indirectly, the courts rejected the view that the incidence test is satisfied by a mere finding of a political "uprising" and that the offenses committed were contemporaneous with that uprising. But the courts differed in their understanding of what further requirements were to be met under the political offense exception. In each case, the courts were trying to determine whether the actions purportedly committed by the individuals sought constituted political dissidence or terrorist action.

Under the "uprising" prong of the test, the courts have agreed that some minimum level of political opposition must be shown to exist when the particular offenses took place for the exception to be applicable. In all the PIRA cases, there was a determination that a political uprising was occurring in Northern Ireland at the time of the offenses.

In *Eain v. Wilkes*, involving an Israeli extradition request, the Seventh Circuit tried to make a distinction between internal conflicts involving "on-going, organized battles between contending armies" and those involving forces of "the dispersed nature of the PLO." The Seventh Circuit noted that, as the uprising moved from the former type to the latter, it becomes much more difficult to determine and prove which acts deserve inclusion within the political offense exception and which are merely individual acts of violence.

Two other courts, however, explicitly have rejected this reasoning. The Southern District of New York has acknowledged that the political offense doctrine is not limited to offenses occurring in more traditional, military-like struggles. Rather, past history has shown that successful rebellions can be carried out by "guerilla" forces. Furthermore, the Ninth Circuit held that it was not for the courts to decide which forms of conduct are "acceptable" methods for
The Ninth Circuit’s decision in Quinn v. Robinson highlighted two particular factors under the “uprising” component which help to ensure that international terrorism will not be protected under the political offense exception. First, no offenses occurring beyond the borders of the country or territory whose government the dissidents desire to change can ever be included under the exception. Second, although the court refused to rely solely on this factor in Quinn, the court held that the offender and his dissident group usually must be nationals of the territory in revolt for their conduct to be considered as part of an uprising by persons attempting to change their own government.

In respect to the “incident to” component of the incidence test, Quinn stands alone among these decisions in attempting to adhere to the traditional understanding of this component as laid down in Castioni. Quinn held that only a “liberal nexus” between the acts involved in the particular extradition request and the internal uprising needs to be shown in order for the political offense exception to be met. Acts meeting this requirement are limited to those which take place within the geographic boundaries of the uprising, are contemporaneous with the uprising, and are “casually or ideologically related to the uprising.”

The other three PIRA cases and the PLO case establish further guidelines in determining the extent of the political offense exception. These courts held that an investigation into the dissident organization involved in the uprising was necessary in making their extradition decisions. The individual must establish membership in a dissident group, and in some instances, substantiate his claim by showing that his actions were conducted under the direction or approval of the organization. This reflects a demand for proof that the individual’s conduct was governed by the organization rather than

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64. Quinn, 783 F.2d at 804-05.
65. 783 F.2d 776 (9th Cir. 1986).
66. Id. at 807.
67. Id. at 807-08.
68. Id. at 809.
69. Id.
70. Eain, 641 F.2d at 519-21; Mackin, 668 F.2d at 125; Doherty, 599 F. Supp. at 276; McMullen, 132 CONG. REC. at S9146.
71. Eain, 641 F.2d at 520; Mackin, 668 F.2d at 125; Doherty, 599 F. Supp. 275; McMullen, 132 CONG. REC. at S9146.
72. Eain, 641 F.2d at 520-22; Doherty, 599 F. Supp. 275-76; McMullen, 132 CONG. REC. at S9147. 
559
than a merely personal motivation to do harm.

Additionally, two courts have held that the political offense determination requires an inquiry into the nature of the offense and its consequences. In *Eain*, the court held that acts such as the "indiscriminate bombing of a civilian population" so closely resemble anarchist activity that those accused of such acts must establish a direct link between themselves, the political organization's goals, and the offense in question to obtain political offense protection.73 The district court in *In Re Doherty* went further in stating that indiscriminate acts of killing or wounding people and destroying property cannot be political offenses.74 These approaches apparently place significance on whether the victims of the offense are linked to the military or government, or are merely innocent civilians.75 At least one commentator has read these decisions as creating a "wanton crimes" exception to the political offense decision.76 At any rate, this approach seems designed to ensure that terrorism is never found worthy of exception from extradition.

Other courts, however, have refused to look into the method and result of the acts before making the political offense decision. As the district court in *In re McMullen* held, when the requirements of the political offense test are met, the individual will be excluded from extradition "even though the offense be deplorable and heinous."77 The Ninth Circuit viewed such inquiry as inappropriate for the courts, involving nothing more than an attempt "to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty."78

Finally, international law may require that certain offenses always be subject to prosecution. The district court in *Doherty* specifically points to instances where acts have been considered worthy of punishment even though committed during time of war.79 The court goes on to hold that no act which violates international law and "international standards of civilized conduct"80 is ever to be understood as meeting the political offense requirements. The Ninth Circuit added that "crimes against humanity"81 are never to be protected under

73. *Eain*, 641 F.2d at 521.
75. *Quinn*, 783 F.2d at 802.
76. See *Senate Hearings*, supra note 12, at 128-29 (statement of Professor Christopher H. Pyle).
78. *Quinn*, 783 F.2d at 804.
80. *Id.*
81. *Quinn*, 783 F.2d at 800-01.

560
the exception.

Although all the cases agree that a distinction within the political offense exception needs to be made so that “terrorist” acts are not protected, disagreement exists on what additional considerations need to be made, if any, under the traditional incidence test. While the Eain court went so far as to hold that many offenses, when they involve violence and civilian victims, are not deserving of inclusion under the exception, the court in Quinn refused to peremptorily exclude such acts. And while all the cases continue to uphold the role of the judiciary in making the political offense determination, they differ on how far the idea of ideological neutrality is to be taken within this determination.

ATTEMPTS TO CIRCUMVENT THE COURTS

The above cases were not decided in a judicial vacuum. A heightened awareness of the terrorism problem prevails in both the executive and legislative branches. After nearly a century of acquiescence to the judicial power to make the political offense determination, the executive branch now contends that it maintains the power to make such determinations.

The 97th Congress considered many possible changes in the extradition process under the proposed Extradition Act of 1981. Under initial consideration was a provision placing the political offense issue solely in the hands of the executive branch. The Senate Foreign Relations Committee rejected such a change, favoring the continuance of the judicial role in the political offense decision. Both the House and Senate versions of the bill attempted to introduce various changes in the political offense test to adapt it to modern concerns against terrorism. No version was ever passed by Congress.

The Reagan Administration became increasingly concerned as British requests for the extradition of PIRA members repeatedly were denied. Such decisions were seen as inconsistent with the government’s call for greater international cooperation in dealing with terrorism. Moreover, the decisions directly threatened to undermine Great Britain’s support of United States efforts to combat terrorism.

The Department of State found another short-run tactic available

82. See Mackin, 668 F.2d at 136-37.
84. S. REP. No. 475, 97th Cong., 2d Sess. 7 (1982).
85. See generally Bassiouni, supra note 83.
for dealing with the political offense exception. At least with regards to the United States extradition treaty with Great Britain, a quick solution to the problem could be brought about simply by amending the treaty so as to minimize the reach of the political offense exception, thereby negating the controversial decisions handed down by the judiciary. This approach quickly and successfully culminated with the signing of the Supplementary Extradition Treaty (Supplementary Treaty) between the United States and the United Kingdom on June 25, 1985.86

The Supplementary Treaty alters and adds to the extradition treaty between the United States and the United Kingdom.87 Secretary of State George Schultz described the Supplementary Treaty as "a significant step to improve law enforcement cooperation and counter the threat of international terrorism and other crimes of violence."88

The United States-United Kingdom Supplementary Extradition Treaty

The provisions of primary concern within the Supplementary Treaty, as submitted for Senate approval, were articles 1 and 4. Article 1 essentially eliminates the political offense exception from consideration in any British extradition request.89 It attempts to attack

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89. Id. at 1105-07. Article 1 provides:
For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character:
(a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;
(b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;
(c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;
(d) an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on December 1979;
(e) murder;
f) manslaughter;
g) maliciously wounding or inflicting grievous bodily harm;
h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;
i) the following offenses related to explosives:
(1) the causing of an explosion likely to endanger life or cause serious damage to property; or
terrorism by reasoning that certain types of acts are always terrorist in nature when committed in the United Kingdom or the United States. Article 4 makes the treaty provisions retroactive with respect to offenses committed before the Treaty takes effect. 90

During the Senate Foreign Relations Committee hearings on the Supplementary Treaty, a representative for the Department of State acknowledged that the United States government was already in the process of negotiating similar agreements with other nations. 91 The State Department's rationale for entering into such agreements is that, "with respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment." 92 Apparently, whenever a state is determined by the executive branch to be a "stable democracy" with a "fair" judicial process, the government plans to eliminate violent offenses from the political offense exce-

(2) conspiracy to cause such an explosion; or
(3) the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;
(j) the following offenses relating to firearms or ammunition:
(1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or
(2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;
(k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;
(l) an attempt to commit any of the foregoing offenses.
90. Id. at 1107-08. Article 4 provides:
This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.
This retroactive clause has been criticized because of its practical effect. It changes the rule of a judicial procedure with respect to the political offense exception to extradition, concerning and after the acts committed, in order to almost assure the likelihood of the British requests being approved. The purpose of this clause seems clear — to make those PIRA members previously found not extraditable because of the political offense exceptions subject to almost certain extradition if the request is renewed. Such a provision seems to violate both the constitutional prohibition against ex post facto laws and bills of attainder. See 132 CONG. REC. S9153-60 (daily ed. July 16, 1986) (debate on Senate floor over the retroactive clause and the failure of an attempt to amend it so individuals unsuccessfully sought before could not be sought again); Senate Hearings, supra note 12, at 528-30 (statement of Francis Boyle, Professor of Law, University of Illinois).
91. See Senate Hearings, supra note 12, at 265 (statement of Department of State representative Judge Sofaer).
92. Id.
tion to extradition.

The Supplementary Treaty was ratified by more than two-thirds of the Senate on July 17, 1986, but not without some changes. The Foreign Relations Committee proposed certain amendments to the Treaty which were accepted by both governments. One change alters article 1, diminishing the list of crimes the original Supplementary Treaty eliminated from the political offense exception. The Senate also made changes in article 3(a), which adopts article 5 of the European Convention on the Suppression of Terrorism as was modified within the proposed Extradition Act of 1984. That provision provides the magistrate before whom the extradition request is brought with the power to deny extradition if it is established: 1) "by a preponderance of the evidence that the request for extradition has in fact been made with a view to try to punish him on account of his race, religion, nationality, or political opinion," or 2) that if he were handed over, he would "be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions."

Even with these changes, the Senate has ratified a treaty that virtually eliminates the political offense exception from the United States extradition agreement with the United Kingdom. The Treaty, through article 3, also forces the judicial branch to ignore its longstanding rule of noninquiry into the motives and processes of the requesting government, at least when that government is Great Britain. Thus, although it seems that the Foreign Relations Committee has gone to great efforts to ensure that some safeguards for individual rights remain, article 3 forces the courts to make foreign policy determinations that they traditionally have felt they should avoid.

The Problems with a Treaty-by-Treaty Modification of the Political Offense Exception

There are several reasons why the decision to change the political offense exception on a treaty-by-treaty basis is both unwise and inconsistent with the purposes served by the exception. On an historical level, the executive branch seems to view the whole of extradition doctrine, if not at least the political offense exception, as a matter of

94. S. ExEc. REP. No. 17, 99th Cong. 2d Sess. 4 (1986). References in the original Supplementary Treaty to property damage, possession, intent, and conspiracy were eliminated; manslaughter was qualified by "voluntary", and unlawful detention was qualified by "serious." Compare this with original version, supra note 89.
98. Id.
foreign policy.  Consequently, there is the belief that an extradition decision must conform to current foreign policy “concerns” of the state. Clearly, the initial decision whether to enter an extradition treaty with any given nation is a foreign affairs decision, best left to the executive branch; however, the determination of how the extradition process is to be effectuated and what principles are to govern it, has roots much deeper than the foreign policy goals of any single administration.

As stated earlier, a concern with protecting “fundamental individual liberty” as opposed to executive determinations based on foreign policy concerns, underlies existing extradition treaties. This was the major reason for granting the initial extradition decision to an impartial representative of the judicial branch — the branch traditionally empowered with decisions concerning fundamental fairness.

The political offense exception serves a similar significant purpose. The United States is a nation born of a revolutionary uprising. The founding fathers recognized a continual right of the people to manifest their dissent in any government they find unsatisfactory, allowing drastic acts if necessary — a right specifically set forth in the Declaration of Independence. When the United States, after more than fifty years of reluctance, finally began to enter extradition agreements as a matter of policy, the desire of the government not to be a party to another’s attempt to punish dissent was clear. This desired neutrality is the guiding force behind the long history of the United States as an asylum from political persecution and is the foundation underlying the political offense exception.

As a practical matter, changing the political offense decision on a treaty-by-treaty basis involves unwise “favored nation” determina-

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99. For a discussion of government arguments in favor of executive authority over political offense exception in Eain, Mackin, and Quinn, see supra note 54.
100. U.S. Const. art. II, § 2, cl. 2 (the Constitution gives this power to the executive branch).
101. See supra text accompanying notes 14-16.
102. Id.
103. Declaration of Independence para. 1 (U.S. 1776). The Declaration provides that
[w]henever any Form of Government becomes destructive of [the people’s inalienable rights], it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.
104. See Senate Hearings, supra note 12, at 112-15 (statement of Professor Christopher H. Pyle).
tions.\textsuperscript{105} When the executive branch decides to enter an agreement with one nation under the rationale expressed in the United States-United Kingdom Treaty,\textsuperscript{106} it is impliedly telling nations not chosen for such a treaty that their government is not sufficiently "democratic," or their judicial process is not sufficiently "fair." This may lead to the alienation of that government, or worse, to pressures upon our government to enter such agreements with states who truly do not meet the criteria. A perfect example is the Supplementary Extradition Treaty with the "democratic" regime of President Ferdinand Marcos in the Philippines proposed in 1981.\textsuperscript{107} That treaty would have removed the political offense determination from the judiciary and placed it instead with the Secretary of State. The State Department eventually decided not to submit the treaty to the Senate for formal consideration when it became apparent that the treaty was overwhelmingly opposed.\textsuperscript{108}

The Supplementary Extradition Treaty with Great Britain suffers additional problems. The courts are trying to create an acceptable distinction between offenses not worthy of inclusion under the political offense exception and those offenses for which the exception was designed to protect. This distinction is made difficult because there are no universally accepted definitions of what constitutes "terrorism" and what is a "political offense." Although the court's line-drawing may seem unclear to many, it is more consistent with the political offense exception's purpose than the Treaty's method of completely eliminating many offenses from political offense consideration.

The Treaty is overbroad in its attempt to avoid protecting terrorists.\textsuperscript{109} To exempt almost all possible forms of violent activity from consideration is too simplistic a method to ensure that terrorist activities never come within the political offense exception. In fact, most of the activities of the revolutionaries who led the United States to its own independence would have been extraditable offenses under the Treaty.\textsuperscript{110} The desire to eliminate difficult distinctions

\textsuperscript{105} Id. at 105, and 413-16 (statement of Morton Halperin, representative of the American Civil Liberties Union). \textit{But see id.} at 395-400 (statement of Steven Lubet, Professor of Law, Northwestern University) (Professor Lubet argues that although uniformity of extradition procedure is desirable, it is not necessary to have uniformity in the types of offenses considered to be political, in light of the vast array of governments with which the United States has extradition treaties).

\textsuperscript{106} \textit{See supra} notes 91-92 and accompanying text.

\textsuperscript{107} \textit{See Senate Hearings, supra} note 12, at 119-20 (statement of Professor Christopher H. Pyle) (presents the proposed Philippines treaty as a case-study for the problem with the treaty-by-treaty approach).

\textsuperscript{108} Id. at 120.

\textsuperscript{109} \textit{See supra} notes 89 & 94 (crimes no longer "political" under the Supplementary Treaty).

\textsuperscript{110} \textit{See Senate Hearings, supra} note 12, at 779-80 (Appendix A(1) to statement
from the political offense issue initially may seem worthwhile, but the method used by the Treaty eliminates the difficulties at the expense of the broader ideals that underlie the exception.111

In support of the Treaty, some commentators have argued that the political offense exception has become an absolute defense to extradition for PIRA members.112 The exception is viewed as violating one of its original purposes, that of allowing the United States government to remain neutral towards other countries’ internal conflicts. Refusing extradition in every case involving PIRA members is characterized as de facto support for their cause.113 But this argument ignores the underlying policy of the political offense determination. The recognition of the political offense exception in any particular extradition decision is not a decision that the individual’s cause is worthy of support. A decision not to extradite under the exception is a neutral factual determination. Such a decision recognizes that an uprising political in nature is occurring in the requesting country and any fugitive sought for actions in furtherance of that uprising will not be returned unless exceptional circumstances are shown. The decision not to extradite is not so much a show of support for an individual’s cause as it is a reflection of United States policy not to aid another country to suppress its internal political dissent.

ADAPTING THE POLITICAL OFFENSE EXCEPTION TO MODERN CONCERNS

Within the last decade, many proposals have been offered to adapt the political offense exception to modern realities.114 Proposals such as transferring the political offense determination to the executive branch,115 or specifically eliminating most crimes from being considered political116 are appealingly simple solutions; however, these pro-

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111. See supra text accompanying notes 8-20.
113. Id. at 775.
114. See, e.g., Banoff & Pyle, supra note 32 (proposing legislative reform of the political offense doctrine as applied by the courts); Note, Terrorist Extradition and the Political Offense Exception: An Administrative Solution, 21 VA. J. INT’L L. 163 (1980) (proposing a procedure giving the initial determination of the exception to the Secretary of State).
115. See, e.g., Note, supra note 114.
116. As the Supplementary Treaty essentially succeeds at doing. See supra notes 89 & 94.
posals fail to adequately deal with the issue. The issue in an extradition case is not so much a particular foreign policy concern as it is the continued liberty of an individual. American tradition demands that such liberty not be deprived without a fundamentally fair and neutral hearing.

Congress long ago left the extradition determination primarily to the judicial branch.\textsuperscript{117} For much of United States history, the political offense exception has been viewed as an integral part of the court's extradition determination. The political offense exception has evolved into a crucial aspect of the judiciary's role in interpreting extradition treaty provisions. The courts have attempted to develop a political offense test that respects the concerns for individual liberty and ideological neutrality, while avoiding the sanctioning of terrorism.\textsuperscript{118}

The apparent inconsistencies seen among the courts in their application of the test stem not from a lack of recognition of this historical backdrop, but from uncertainty as to how to best effectuate these concerns in light of the world-wide escalation of terrorist activity. Recently, the courts have found it extremely difficult to distinguish between domestic revolutionary conduct and unacceptable terrorist activity.\textsuperscript{119} Although the methods of analysis in these cases appears incompatible, various points of emphasis should be used to guide political offense decisions in the future.

First, \textit{Quinn} is important in its recognition of certain inherent protections within the "uprising" component of the incidence test that ensure that the international terrorist is not wrongfully harbored. Offenses can be viewed as political only when they occur within the borders of the territory whose government the dissidents oppose and desire to change.\textsuperscript{120} Offenses that occur outside those borders are deemed to be too remote from the conflict and thus lack any political meaning. This second territory, therefore, clearly has an interest in punishing these acts which amount to little more than common criminal activity.

\textit{Quinn} further recognizes that the political offense exception protects only those individuals that share a common nationality to the area in which change is desired.\textsuperscript{121} The exception is intended "to protect those seeking to change their own government or to oust an oc-

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 14-16 and accompanying text.
\item The courts have received little or no help from either the legislative or executive branches in developing a political offense test. None of the statutes presently in force in the United States relating to extradition mention the political offense exception, and none of the bilateral extradition treaties that include the exception attempt to define what is a "political offense" for purposes of the exception.
\item \textit{See supra} text accompanying notes 52-81.
\item \textit{Quinn}, 783 F.2d at 807.
\item \textit{Id.} at 807-08.
\end{enumerate}
\end{footnotesize}
cupying power that is asserting sovereignty over them." 122 The ex-
ception is not designed to protect mere "mercenaries or volunteers in
a foreign conflict." 123 A nonnational must show a "substantial con-
nection" with the territory in which the uprising is occurring to
claim the protection of the exception. 124 Combined with other re-
quirements under the uprising component of the incidence test, these
two conditions successfully eliminate many modern terrorist acts
from the political offense exception.

Second, guidelines developed under the "incident to" component
place even greater scrutiny on the offenses of the individual which
are the subject of the extradition request. Quinn takes the idea of
neutrality to its extreme. The Quinn court simply required that the
offense be contemporaneous with the uprising. 125 Nonetheless, it was
recognized by Justice Oliver Wendell Holmes in the Supreme
Court's only discussion of the political offense exception, Ornelas v.
Ruiz, 126 that more than a mere "liberal nexus" is required between
the offense and the political uprising for the incidence test to be sat-
fisfied. The Quinn court thus utilized the same faulty interpretation
of the "incident to" requirement that the courts had blindly applied
in extradition cases previous to McMullen. Such an interpretation
would most certainly allow many true terrorists to avoid extradition
under the political offense exception.

Holmes certainly did not intend that such a simplistic test be ap-
plied to the "incident to" component. As mentioned earlier, Holmes
believed that "the character of the foray, the mode of attack, the
persons killed or captured, and the kind of property taken or de-
stroyed" 127 also are factors to be considered when making a determi-
nation on the political offense exception. These factors are not so
unlike the ones that were considered in the decisions Quinn criticizes.

A correct application of the political offense exception must in-
clude considerations beyond the timing of the offense to ensure that
acts driven by mere personal motivation are not protected under the
political offense exception. In Congress' latest attempt to reform ex-
tradition law, the House Subcommittee on Crime recognized such a

122. Id. at 807.
123. Id. at 820 (Fletcher, J., concurring and dissenting).
124. Id. at 820-22.
125. Id. at 809.
127. Id. at 511. See supra note 42 and accompanying text.
need. The proposed Extradition Act of 1984 attempted to codify the current case law on the political offense exception. Although the Act ultimately failed, the proposed legislation did help to clarify the guidelines Congress felt important in making the political offense determination. These factors are: 1) whether there was an uprising in the requesting country at the time of the offense; 2) the status of any victims of the offense; 3) the connection of the person requested with a particular political organization within the country; 4) the person’s motive in committing the offense; and 5) the connection between the offender’s conduct and the goals of the political organization. It thus seems that many members of Congress agree with the guidelines established by the courts concerning the political offense exception.

Certain categories of acts exist that should never be protected by the political offense exception. Acts “violative of international law, and inconsistent with international standards of civilized conduct” are never deserving of political offense protection. The Doherty court cites Nazi death camps and various war crimes as examples of acts that are not included in a political offense consideration.

Limitations on the political offense exception based on international standards are arguably difficult to ascertain, given the wide range of world opinion on what may constitute a “war crime” or a “crime against humanity.” There exist, however, widely accepted treaties that go far to delineate these concepts. Furthermore, the United States has entered into various other multilateral treaties which require that certain offenses always be subject to extradition or punishment by the country in which the fugitive is found.

129. Id. § 3194(e)(3).
130. Doherty, 599 F. Supp. at 274.
131. Id.
It has been almost 100 years since Congress enacted legislation in the area of extradition.\textsuperscript{134} Given the recent increase in extradition requests, a need exists to more clearly outline the extradition process, especially the political offense exception. The courts have done a respectable job in drawing the terrorist-political dissident distinction in very difficult cases; some structure is needed, however, for making that distinction in future cases.

The courts have gone to great lengths to distinguish domestic revolutionary conduct to be included under the political offense exception from terrorism. Drawing from these cases, Congress should outline a political offense test requiring that:

1) There must be an uprising or civil disturbance occurring in the country aimed at altering or abolishing the government in control:
   a) the acts charged must occur within the borders of the place whose government the uprising desires to change;
   b) the person sought must be a national of the area desired to be changed, or have substantial connections with that territory.
2) The offense committed must be in furtherance of the uprising, considering such factors as:
   a) the status of any victims of the offense;
   b) the connection of the person requested with a particular dissident organization within the country;
   c) the person’s motive in committing the offense;
   d) the connection between the offender’s conduct and the goals of the offense;
   e) the seriousness of the offense; and
3) The offense must not violate international law.

There still appears to be a widely held belief that the initial extradition decision, along with the political offense determination, is best left in judicial hands.\textsuperscript{135} This belief reflects a continuing view that concerns for protecting the fundamental liberties of the individual outweigh any presently expedient foreign policy determination. Congress can best serve this ideal by enacting legislation codifying the various points the courts have emphasized in making the political offense determination.

In light of the history and purpose of the extradition process and the political offense exception in the United States, Congress should include provisions providing for the initial judicial determination of all extradition requests, including the applicability of the political

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\textsuperscript{134} With only minor changes, the Extradition Act of 1848 continues to govern United States extradition procedure.

\textsuperscript{135} See, e.g., S. REP. No. 475, 97th Cong., 2d Sess. 7 (1982) (The Senate Foreign Relations Committee rejected a proposal in the Extradition Act of 1981 to give the executive branch power of political offense determination in favor of continuing the court’s role in this area).
offense exception. Through such provisions, Congress can maintain judicial authority over future extradition proceedings.\footnote{136}{There also has been some discussion over whether the courts should continue to adhere to their traditional rule of noninquiry. See supra text accompanying notes 44-46. The Supplementary Treaty forces the judiciary to abandon this rule. See supra text accompanying notes 95-98. Some commentators also have argued that the rule of noninquiry should be discontinued. See Banoff & Pyle, supra note 32, at 201-09. But such a change in the extradition procedure would be unwise. Having the court consider whether the individual sought will likely be subject to persecution if returned to the requesting country forces the courts to cross the line into the area of foreign policy best left to the executive branch. The political offense determination involves the judiciary into the determination only of past facts. Dismissing the rule of noninquiry forces the courts to try to guess what future events will take place if the individual is returned to the requesting country. The executive branch is better suited to make such determinations. (The executive branch has the ability to make a determination as to the fairness of a requesting country — 1) when initially entering into an extradition agreement with that country; 2) when deciding whether to pass on the initial extradition request to the courts for hearings; and 3) when deciding whether to confirm the court's approval of extradition).}

**CONCLUSION**

The recently ratified Supplementary Extradition Treaty with the United Kingdom is an unwise attempt to deal with the present problem of terrorism. The Treaty represents little more than a foreign policy decision to help the British government more effectively suppress the conflict in Northern Ireland, while avoiding the urgent need to bring about a peaceful solution to the problem.

The judiciary has exercised the unenviable task of applying the political offense exception for over 100 years with virtually no definitive statement or guidance as to the meaning of the term “political offense.” The judicial branch, especially in recent cases, has attempted to define and apply the exception in light of the ideals that gave rise to the political offense exception and the practice of extradition. To a significant degree, the courts have succeeded in making the difficult distinction between offenses to be protected as political, and “terrorist acts” not to be protected from extradition requests. Nevertheless, uniformity is lacking — the political offense exception should be recognized in all extradition requests and a single set of guidelines should be applied through the courts. Congressional action would eliminate many of the differences between jurisdictions as to the application of the exception. Further, such legislation would ensure the implementation of a test more attuned to modern realities while preserving the liberty of all individuals residing in America.

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