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NOTES AND COMMENTS

Expediting Extraditing: The United States- United Kingdom Supplemental Extradition Treaty of 1986

The defenders of this Realm have worked well in secret and in the open. They think that they have pacified Ireland. They think that they have purchased half of us and intimidated the other half. They think that they have foreseen everything, think that they have provided against everything; but the fools, the fools, the fools - they have left us our Fenian dead, and while Ireland holds these graves, Ireland unfree shall never be at peace.¹

I. INTRODUCTION

On July 17, 1986, the United States Senate approved a new extradition treaty with the United Kingdom.² While it is not uncommon for an extradition treaty to spark political debate, this particular treaty has initiated heated discussion over issues of international and constitutional law. The legal debate concerns the treaty's diminution of the judiciary's traditional role in extradition law.³ This new treaty eliminates the "political offense" exception, a doctrine which denies extradition for crimes committed abroad which are distinctly political in nature.⁴ The treaty will make it almost obligatory for the United States to extradite Irish Republican Army⁵ members accused of criminal acts against British rule in Northern Ireland.⁶ Furthermore, be-

1. Padraic Pearse's funeral oration for Irish Republican hero Jeremiah O'Donovan Rossa, reprinted in G. DANGERFIELD, *THE DAMNABLE QUESTION* 147 (1976).

2. S. DOC. NO. 8, 99th Cong., 1st Sess., 132 CONG. REC. S9273 (daily ed. July 17, 1986).

3. Riley, *Is U.S. Playing Politics with Extradition?*, NAT'L L. J., June 16, 1986, at 8, col. 1-2.

4. S. EXEC. REP. 17, 99th Cong., 2d Sess. 1 (1986) [hereinafter S. EXEC. REP. 99-17].

5. The Irish Republican Army (IRA) is a political organization devoted to the overthrow of British rule in Northern Ireland. In the past, it has been known for its terrorist activities. However, the Provisional Irish Republican Army (PIRA), a splinter group of the IRA, became dissatisfied with the growing passivism of the IRA, and has since become the more active, as well as the more violent, group. Currently, membership in both organizations is outlawed in the United Kingdom. See generally T. COOGAN, *THE IRA* (1980).

6. *Extradition Treaty Passes Senate*, *The Irishman*, Aug.-Sept. 1986, at 1, col. 1. In 1980, an Act of Parliament divided Ireland, establishing six counties in the North, which re-

cause the treaty contains a retroactivity clause, it will allow the extradition of suspects accused of crimes that occurred before the treaty was ratified.⁷

To some, it may not seem repugnant that persons who have been accused of crimes in Northern Ireland should be made to stand trial there. Yet, these suspects will face an extra-judicial system, known as the Diplock Court, which has been specifically created to handle terrorist activities. Critics of the Diplock Court have called it a "mid-night" court system, claiming that it lacks the traditional safeguards of due process for the accused.⁸ Irish Americans have been quite vocal in their opposition to the new treaty.⁹ One critic has stated:

The recent passage of the Anglo-American Extradition Treaty is one of the most blatant rejections of the founding principles of our country [It is] a shameful example of foreign influence peddling in the highest halls of American government. The United States State Department was used by the Thatcher government to spearhead an attack on the American tradition of political asylum.¹⁰

This Comment will analyze the Supplementary Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland of 1986 by reviewing the development of the political offense exception, and the legal controversy over limiting the doctrine. Then, this Comment will discuss the treaty's retroactivity clause and its potential effect on persons whose extradition a United States court has already denied. Finally, this

main within British domain. The Anglo-Irish Treaty of 1921 established the remaining southern counties as what is now known as the Republic of Ireland, a completely independent nation. Foley, *Public Security and Individual Freedom: The Dilemma of Northern Ireland*, 8 YALE J. WORLD PUB. ORD. 284, 285 (1982). One writer summed up the conflict in this way:

In the long struggle between two cultures, Protestant English and Irish Catholic, Gall and Gael, invader and invaded, Alien and indigene, the blame is easily assigned. Yet, the same struggle can be seen as a profoundly human confrontation, one which finally gave to Irish history, in the Easter Rising, one of its most heroic symbols and to British Imperial history, in the Anglo-Irish war and Treaty, one of its saddest, yet most illuminating chapters. It is in this kind of peace, the peace of the past, that the Irish Revolution may one day come to rest.

G. DANGERFIELD, *supra* note 1, at 350. The history and controversy surrounding the Anglo-Irish conflict are well beyond the scope of this Comment. For a thorough discussion, see G. DANGERFIELD, *supra* note 1, and C. O'BRIAN, STATES OF IRELAND (1972).

7. *Extradition Treaty Passes Senate*, *supra* note 6, at 1.

8. 99th Cong. 1st Sess., 132 CONG. REC. S9260 (daily ed. July 17, 1986) (statement of Sen. Bidden).

9. *Extradition Treaty Passes Senate*, *supra* note 6, at 1.

10. *Id.*, Letter from Dr. Seamus Metress to Editor, at 4, col. 4.

Comment will review the controversy over the Northern Irish Diplock Court system, with the hope of determining, if indeed, the "Senate ha[s] pulled down the Statue of Liberty . . . [and] a great American tradition has been destroyed."¹¹

II. CURRENT EXTRADITION LAW AND THE POLITICAL OFFENSE EXCEPTION

The political offense doctrine was established nearly 200 years ago to provide a haven under international law for unsuccessful rebels who fought for their freedom against established authorities in their country and lost.

This doctrine has been carried forward in all the Western democracies until the present day.¹²

Extradition is the process by which one who is charged with a crime against the law of one State and found in a foreign State is returned by the latter to the former for punishment.¹³ The procedure begins when a foreign nation demands the surrender of a fugitive for the purpose of trying and punishing him for a criminal act.¹⁴ Traditionally, the United States has recognized no obligation to extradite in the absence of a treaty with the nation requesting extradition.¹⁵ Where a treaty exists with the requesting nation, the accused is brought before a federal judicial officer who must determine if there is sufficient evidence to sustain the criminal charge under the provisions of the treaty.¹⁶

Most extradition treaties authorize an exception for otherwise ex-

11. *Id.*, Statement of Paul O'Dwyer, at 1.

12. S. EXEC. REP. 99-17, *supra* note 4, at 14 (statement of Sen. Helms).

13. 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW Ch. XVI § 1 (1959) [hereinafter WHITEMAN]. See generally Comment, *Unraveling the Gordian Knot: The United States Law of Extradition and the Political Offender Exception*, 3 FORDHAM INT'L L. F. 141 (1980) [hereinafter *Unraveling the Gordian Knot*].

14. Bassiouni, *International Extradition*, 15 WAYNE L. REV. 733 (1968).

15. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933). The Court stated:

While a government may . . . voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by a treaty.

Id.; see also 18 U.S.C. § 3184 (1948). It is generally thought that U.S. courts simply do not recognize asylum and extradition "as a part of customary international law." Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777, 815 (1977) [hereinafter Cantrell]. See generally WHITEMAN, *supra* note 13, at 732.

16. 18 U.S.C. § 3184 (1976).

traditible offenses when the alleged crime is politically motivated.¹⁷ However, difficulty arises when one tries to determine just what constitutes a "political offense." No treaty to which the United States is a party defines the term "political offense."¹⁸ Thus, the determination of which crimes may fall into the exempt category has been left to the judiciary.

There are two major categories of political offenses: "pure" and "relative." The pure political offense is a crime directed against a sovereign state or political subdivision thereof,¹⁹ such as treason, sedition, or espionage.²⁰ Such offenses lack the elements of common crimes and do not involve private wrongs, but rather, are crimes against a public interest. Purely political offenses are easy to identify, in contrast to relative political offenses. Relative political offenses are those that include a common crime in the furtherance of a political purpose.²¹ For example, a murder committed in the course of a political protest would be a relative political offense, as it contains both a private harm and a political purpose. Both types of political offenses have been excepted from extradition,²² but it has been the latter that has caused the courts the most difficulty in their quest to determine when the political offense exception should apply.

A. *A Variety of Tests for Determining What Constitutes a Political Offense*

An examination of the various interpretations of the term "political offense" reveals only one distinct common denominator with respect to the "relative" political offense: the political motivation for the offense must influence the perpetrator more than the general intent to

17. WHITEMAN, *supra* note 15, at § 15.

18. *Id.* See also Cantrell, *supra* note 15, at 815. However, many recent U.S. treaties identify certain violent crimes which will not qualify as political offenses, such as the hijacking of a commercial flight. See e.g., Treaty on Extradition, May 24, 1974, United States - Australia, 27 U.S.T. 957, T.I.A.S. 8234; Treaty on Extradition, Dec. 1971, United States - Canada, 27 U.S.T. 983, T.I.A.S. 8237. This is because such offenses affect the world community as a whole, and are offensive to all mankind regardless of their motivation. Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition - A Proposed Judicial Standard for an Unruly Problem*, 19 DE PAUL L. REV. 217, 241 (1969) [hereinafter Bassiouni, *Ideologically Motivated Offenses*].

19. Bassiouni, *Ideologically Motivated Offenses*, *supra* note 18, at 245.

20. *Id.* at 245-46. See also, Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses under the Law of Extradition*, 26 U. PITT. L. REV. 65 (1964).

21. Bassiouni, *Ideologically Motivated Offenses*, *supra* note 18, at 248. See also *Extradition Treaty Passes Senate*, *supra* note 6, at 1.

22. WHITEMAN, *supra* note 13, at 800.

commit the common crime.²³ Beyond this, the test developed by various nations for determining which activities fall within the political offense exception vary in scope and analysis. A review of the tests used by the French, Swiss, English and United States courts provides a sampling of the three fundamental approaches for determining when a crime is a non-extraditable political offense.²⁴

1. The French "Injured Rights" Test

One theory for determining when the political offense exception should apply focuses on the injury that results from the crime. This approach is illustrated by the French "injured rights" test.²⁵ The adoption of the French test can be traced to the French Extradition Law of March 10, 1927, which provides that extradition shall be denied when "the crime or offense has a political character or when it is clear (*resulte*) from the circumstances that the extradition is requested for a political end."²⁶

The French courts elaborated on the civil law in the case of *Giovanni Gatti*.²⁷ In that case, the Court of Appeals of Grenoble established the French approach: the offense does not derive its political character from the intent of the offender, but rather, from the nature of the rights injured.²⁸ This "injured rights" approach is a narrow interpretation of the political offense doctrine, in that it does not allow exemption of "relative" political crimes simply because the perpetrator of the common crime alleges political intent.²⁹ The *Giovanni* court stated that:

[t]he fact that the reasons of sentiment which prompted the offender to commit the offence [sic] belong to the realm of politics does not itself create a political offence. The offence does not derive its political character from the motive of the offender but from the nature of the rights it injures.³⁰

23. Bassiouni, *Ideologically Motivated Offenses*, *supra* note 18, at 248-49.

24. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1239 (1962) [hereinafter Garcia-Mora].

25. *Id.* at 1249.

26. Law of March 10, 1927, tit. 1, art. 5, para. 2, in HARVARD RESEARCH 380-81 (Fr.) (unofficial translation), reprinted in Garcia-Mora, *supra* note 24, at 1249.

27. In re *Giovanni Gatti*, 14 Ann. Dig. 145 (Court of Appeal of Grenoble, Fr., 1947).

28. *Id.* at 145-46.

29. Garcia-Mora, *supra* note 24, at 1249.

30. *Id.*

2. The Swiss "Political Motivation" Approach

A second approach to defining a political offense focuses on the motive of the offender, rather than on the nature of the act. In contrast to the "injured rights" approach, the "political motivation" test is somewhat broader, as illustrated by Swiss law.³¹ While the motive of the offender is the court's primary concern, two additional criteria must be met.³² First, the common crime must have been committed in pursuance of an attempt by the perpetrator to modify the political organization of the state.³³ This test was summarized by the Swiss Federal Tribunal, which stated that "acts which are not related to a general movement directed to the realisation [sic] of a particular political object in such a way that they themselves appear as an essential part or incident . . . thereof" can raise no claim to the political offense doctrine.³⁴ The second limit on the political motivation test is that the political motive must predominate the intent to commit the common crime.³⁵ Thus, acts which are so heinous as to be completely out of proportion to the end sought will not trigger the political offense exception.³⁶ The courts of Germany, Brazil, Chile, and Italy have adopted variations of the political motivation test.³⁷

3. The British/United States "Political Incidence" Test

The broadest interpretation of the political offense doctrine seems to be the "political incidence" test adopted by Great Britain and the United States.³⁸ The seminal case of *In re Castioni*,³⁹ decided by the House of Lords in 1891, held that "fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances."⁴⁰ *Castioni* establishes a two-pronged test for determining which acts qualify for the political offense exception. First, the act must be committed during a political disturbance, involving a group of which the accused is a member; and second, the act must be one of political violence committed by the

31. *Id.* at 1251.

32. *Id.* at 1253.

33. *Id.*

34. *In re Ockert*, 1 Ann. Dig. 369, 370 (Fed. Trib. Suisse, 1930).

35. *Garcia-Mora*, *supra* note 24, at 1254.

36. *Id.*

37. *Id.* at 1255-56.

38. *Id.* at 1244.

39. [1891] 1 Q.B. 149.

40. *Id.* at 150.

accused for a political end.⁴¹ The term “political end” was later determined to require “two or more parties in the State, each seeking to impose the Government of their own choice on the other [I]f the offense is committed by one side or the other in pursuance of that object, it is a political offense, otherwise, not.”⁴² The *Castioni* test is the basis for the test that has been developed by United States courts.⁴³

The British courts seem to apply the *Castioni* test more flexibly than the United States judiciary.⁴⁴ In the case of *In re Kolczynski*,⁴⁵ seven Polish crew members of a fishing vessel decided to seek asylum in England. They forcefully overtook the ship, injuring one man who attempted to resist, and docked the ship in a British port. The Polish government requested their extradition, and charged them with the common crimes of using force, wounding a member of the crew, and revolting on board ship.⁴⁶ All of these crimes were extraditable according to the terms of the United Kingdom—Polish Extradition Treaty of 1932.⁴⁷ Denying extradition on the basis that the escape was a political offense,⁴⁸ the court stated:

[n]ow a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave. In this case the members of the crew . . . were under political supervision and they revolted by the only means open to them [I]f they were surrendered there could be no doubt that, while they would be tried for the particular offense mentioned, they would be punished as for a political crime.⁴⁹

The court also noted that the offense in question “must always be considered according to the circumstances existing at the time.”⁵⁰ The *Kolczynski* opinion seems to indicate that the political offense exception is, in the words of Hugo Grotius, “for the benefit of those who

41. Comment, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U.J. INT'L L. & POL. 617, 625 (1981) [hereinafter *Politics of Extradition*].

42. *In re Meunier*, [1984] 2 Q.B. 415, 419.

43. *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), stated “American cases have more or less adopted language used in *Castioni*.” *Id.* at 203 (footnote omitted), *vacated and remanded for further proceedings under 18 U.S.C. § 3184*, 355 U.S. 393 (1958).

44. *Garcia-Mora*, *supra* note 24, at 1244.

45. [1955] 1 Q.B. 540.

46. *Id.* at 543.

47. Treaty of Extradition, Jan. 11, 1932, United Kingdom-Poland, Art. 3 [1934] 11 Bevans 206, T.S. 789, 46 Stat. 2282.

48. *In re Kolczynski*, [1955] 1 Q.B. 540 at 549 (Cassels, J.).

49. *Id.*

50. *Id.*

suffer from undeserved enmity, not those who have done something that is injurious to human society."⁵¹

Ireland follows the rule of *Kolczynski*, but places a greater emphasis on the probability that the accused will face political persecution if extradited.⁵² In the case of *State (Magee) v. O'Rourke*,⁵³ the court followed the principles of *Castioni*,⁵⁴ but allowed greater deference to the individual facts of the case.⁵⁵ Because Magee presented evidence that he would face political persecution for common crimes he had committed in Northern Ireland if extradited to that State, and since Northern Ireland refused to present contrary evidence, Magee was exempted from extradition to Northern Ireland.⁵⁶

The United States adopted the *Castioni* test in *In re Ezeta*.⁵⁷ In *Ezeta*, the acting President of Salvador had taken refuge on a United States ship while fleeing from revolutionary forces who had taken up arms against the government of Salvador. The new regime sought the extradition of Ezeta to face charges for murder and robbery. The court found that Ezeta could properly invoke the political offense exception, stating:

The testimony shows that [the crimes] were all committed during the progress of actual hostilities between the contending forces, wherein Gen[eral] Ezeta and his companions were seeking to maintain the authority of the then existing government against the active operations of a revolutionary uprising. With the merits of this strife I have nothing to do.⁵⁸

However, subsequent United States interpretations of the political offense exception have failed to follow the more liberal view taken by Great Britain in *Kolczynski*. In *Karadzole v. Artukovic*,⁵⁹ the court denied an extradition request made by Yugoslavia for a former government official accused of committing "mass slaughters of the peaceful civilian populations of Croatia, Bosnia and Herzegovina."⁶⁰ Relying on the two-part test established in *Castioni*, and recognizing

51. GROTIUS, DE JURE AC PACIS LIBRIS TRES 530 (Kelsey trans. 1925).

52. Cantrell, *supra* note 15, at 800.

53. *State (Magee) v. O'Rourke*, [1971] Ir. R. 205.

54. *In re Castioni*, [1891] 1 Q.B. 149; see *supra* notes 40-41 and accompanying text.

55. Cantrell, *supra* note 15, at 801.

56. *Id.* at 800-01.

57. 62 F. 972 (N.D. Cal. 1894).

58. *Id.* at 997.

59. 247 F.2d 198 (9th Cir. 1957), *vacated and remanded for further proceedings under 18 U.S.C. § 3184*, 355 U.S. 393 (1958).

60. *Id.* at 204.

that the event took place during a political disturbance, the court found that the alleged crimes constituted political offenses.⁶¹ The *Arturovik* opinion has been sharply criticized,⁶² and illustrates that an inflexible interpretation of the *Castioni* test may result in a broad application of the political offense exception, "result[ing] in asylum for offenders whose motives do not merit humanitarian protection because they may not be genuinely political."⁶³

B. Recent Developments in United States Interpretation of the Political Offense Exception Regarding Crimes Against British Rule in Northern Ireland

In three cases where the political incidence test has been applied, the United States judiciary has denied United Kingdom requests for extradition of members of the Provisional Irish Republican Army accused of common crimes.⁶⁴ In a fourth case, *Quinn v. Robinson*,⁶⁵ the defendant was found extraditable, but a petition for Writ of Certiorari was filed with the United States Supreme Court on July 2, 1986.⁶⁶ When Congress debated the Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, Senator Richard G. Lugar stated that "it was because of these cases that on June 25, 1985, the United States and the United Kingdom signed the Supplementary Extradition [Treaty]. Its purpose is to reverse the three cases where extradition was denied and put an end to this development in the law."⁶⁷

A review of these cases reveals that the broad interpretation given to the political offense exception by the courts could signal to the rest of the world that the United States is a haven for persons who commit acts of terrorism in Northern Ireland.

1. *In re Mackin*

In the case of *In re Mackin*,⁶⁸ Judge Friendly of the Second Cir-

61. *Id.*

62. See, e.g., Garcia-Mora, *supra* note 24, at 1248, and Green, *Political Offenses, War Crimes and Extradition*, 11 INT'L & COMP. L.Q. 329, 333 (1962).

63. *Politics of Extradition*, *supra* note 41, at 628.

64. *In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986); *In re McMullen*, Magistrate No. 3-70-1099 MG (Memorandum decision) (N.D. Cal. 1979), reprinted in 132 CONG. REC. S9146 (daily ed. July 16, 1986).

65. 783 F.2d 776 (9th Cir. 1986).

66. 132 CONG. REC. S9120 (daily ed. July 16, 1986).

67. *Id.* at S9147.

68. 668 F.2d 122 (2d Cir. 1981).

cuit Court of Appeals affirmed a New York magistrate's decision that Mackin's crimes fell within the political offense exception. The governing extradition treaty provided that: "(1) Extradition shall not be granted if: . . . (c)(i) the offense for which extradition is requested is regarded by the requested party as one of a political character"⁶⁹

Mackin was arrested in Northern Ireland and charged with attempted murder of a British soldier, wounding him with the intent to do serious bodily harm, and illegal possession of firearms. Mackin was released on bail, but failed to appear for his trial. Mackin fled to the United States, where he was apprehended by the Immigration and Naturalization Service.⁷⁰ Citing *Castioni*⁷¹ and *Ezeta*⁷², among other cases, the magistrate stated that the political offense exception extends to relative political offenses, "to wit, crimes against persons or property which are incidental to war, revolution or political uprising at the time and site of the commission of the offense."⁷³ By applying the traditional British/United States political incidence test, the magistrate found that at the time of the offenses allegedly committed by Mackin, the Provisional Irish Republican Army⁷⁴ was involved in an uprising in Northern Ireland, and that the offenses committed against the British soldier were incidental to Mackin's role as a member of the Provisional Irish Republican Army.⁷⁵

The *Mackin* case presents another interesting issue. On appeal, the government argued that whether an offense falls within the political offense exemption is a matter that should be committed exclusively to the executive branch.⁷⁶ Judge Friendly responded to this argument by first noting that federal law has consistently upheld the principle that whether or not an alleged crime is a political offense is a question solely within the province of the judicial officer before whom the fugitive is brought.⁷⁷ Then, Judge Friendly pointed out that as he

69. Extradition Treaty, June 8, 1972, United States-United Kingdom, U.S.T. 227, T.I.A.S. 8468.

70. 668 F.2d at 124.

71. *In re Castioni* [1890] 1 Q.B. 149.

72. *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894).

73. *In re Mackin*, 668 F.2d 122, 129 (2d Cir. 1981).

74. *See supra* note 5.

75. 668 F.2d at 125.

76. *Id.*

77. *Id.* at 136. *See, e.g., Jimenez v. Aristegueita*, 311 F.2d 547 (5th Cir.), *cert. denied*, 373 U.S. 914 (1962); *Abu Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); *In re Lincoln*, 228 F. 70, 74 (S.D.N.Y. 1915) (*dicta*); *Karadzole v. Artukovic*, 170 F. Supp. 717 (S.D. N.Y. 1963).

wrote the opinion, a bill was before the United States Senate which would remove from the court's jurisdiction the power to determine when an offender's act fell within the protection afforded by the political offense doctrine.⁷⁸ Accompanying the bill was a legal memorandum which proposed that the bill was necessary since under present case law, the courts have the only authority to determine whether an extradition request may be denied because the charged crime is political in nature.⁷⁹ Judge Friendly then concluded:

[a]s the law now stands, both the judicial and the executive branches have recognized that . . . [the] decision whether a case falls within the political offense exception is for the judicial officer. The Government cites to us no overriding principle which dictates a contrary result While the policy arguments made by the Government are not without force, particularly in an age of terrorism, they are not so overwhelming as to justify us in concluding that [the judiciary should not] decide whether the offense for which extradition is sought is political.⁸⁰

The opinion in *Mackin* seems to indicate that even the judiciary has become aware that the broad interpretation given to the political offense doctrine by United States courts has the potential for terrorist abuse. However, the *Mackin* opinion does not anticipate the remedy that the United States Senate has elected in ratifying the Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland. By designating specifically extraditable crimes not subject to the protection of the political offense doctrine the treaty strips the court of the authority to determine when the political offense exception applies.⁸¹

2. *United States v. Doherty*

Judge Friendly ruled in an almost identical manner in the case of *United States v. Doherty*.⁸² The facts of the *Doherty* case were similar to those in *Mackin*, but resulted in more serious injuries to the victims. In 1980, Doherty, at the direction of the Irish Republican Army, took over a private home in Belfast. He held the owner and

78. *Matter of Mackin*, 668 F.2d 122, 136 (2d Cir. 1981).

79. *Id.* at 136-37.

80. *Id.* at 136.

81. Supplemental Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 1, S. EXEC. REP. 99-17, *supra* note 4.

82. 786 F.2d 491 (2d Cir. 1986).

his family hostage as a part of an operation to ambush a group of British soldiers. A few hours later, a car pulled up in front of the house, and five members of the British Army emerged, armed with machine guns. In an exchange of gunfire, one British soldier was killed. Doherty was arrested and charged with murder, attempted murder, illegal possession of firearms, and with belonging to the Irish Republican Army, an outlawed organization.⁸³ After his trial, but prior to the final decision in his case, Doherty escaped from prison and fled to the United States. The magistrate reviewing Doherty's case determined that the offenses committed during the ambush and the prison escape were political in character, and therefore, constituted political offenses.⁸⁴ Again, Judge Friendly upheld the magistrate's decision.⁸⁵

3. *Matter of Peter Gabriel John McMullen*

In the *Matter of Peter Gabriel John McMullen*,⁸⁶ the court found that the defendant's activities came within the political offense exclusion provided in the extradition treaty then in force between the United States and the United Kingdom.⁸⁷ The magistrate applied the traditional test of *In re Castioni*,⁸⁸ stating that:

[t]he political offense crime must be incidental to or formed as a part of a political disturbance and committed as furthering a political uprising. Even though the offense be deplorable and heinous, the criminal actor will be excluded from deportation if the crime is committed under these pre-requisites.⁸⁹

The United Kingdom sought McMullen's extradition to try him for the bombing of Claro Barracks, a British military installation. On behalf of Great Britain, the United States government argued that McMullen's bombing of the barracks was personally motivated, and isolated from the then-current Provisional Irish Republican Army terrorist campaign. Finding that McMullen had been a member of the Provisional Irish Republican Army in 1974, and further reasoning

83. *Id.* at 493.

84. *Id.* at 494.

85. *Id.* at 503.

86. *In re McMullen*, Magistrate No. 3-70-1099 MG (memorandum decision) (N.D. Cal. 1979).

87. *Id.* (citing Article VI(c)(1) of the Extradition Treaty June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. 8468).

88. *In re Castioni*, [1891] 1 Q.B. 149.

89. *In re McMullen*, Magistrate No. 3-70-1099 MG (memorandum decision) (N.D. Cal. 1979).

that bombing a military barracks is not likely to be a product of personal motivation, the magistrate concluded that:

[t]he defendant has established by evidence, which we must conclude as preponderating that the act of bombing the Claro Barracks was political in character. Thus, all the two requisites of establishing the political offense exception of the treaty having been met, we find that Peter Gabriel John McMullen is not extraditable⁹⁰

4. *Quinn v. Robinson*

The trend towards a broad interpretation of the political offense exception with regard to crimes committed by the Irish was halted in the case of *Quinn v. Robinson*.⁹¹ The facts of the *Quinn* case were shocking enough to provide the court with an appropriate situation in which to limit the application of the doctrine. In 1981, the United Kingdom requested Quinn's extradition to face charges for the murder of a police constable, Stephen Tibble and conspiracy to cause explosions of the kind likely to endanger human life. The magistrate's decision focused on six incidents. In 1974, Quinn's fingerprints were found on the wrapping of a hollowed-out bible containing a bomb, which was mailed to and received by Bishop Gerard William Tickle. At the time, Tickle was the Roman Catholic Bishop to the British Armed Forces. Fortunately, the bomb was defused without causing any harm.⁹²

Quinn's fingerprints appeared that same year on three other letter-type bombs. One was sent to the home of a British Treasury attorney, and another, to the chairman of the Daily Express Newspaper in

90. *Id.* However, in 1980, McMullen's petition for asylum in the United States was denied by the United States Board of Immigration Appeals. The Ninth Circuit Court of Appeals affirmed, 788 F.2d 591 (9th Cir. 1986), holding that McMullen was ineligible for withholding of deportation under 8 U.S.C. § 1253(h). The court found that the PIRA's random acts of violence against ordinary citizens of Ireland were not sufficiently related to the organization's political objectives and therefore, constituted serious non-political crimes for the purpose of a deportation decision. *Id.* at 596. The court went on to state:

[i]n addition, we reject McMullen's argument that we should find him eligible for withholding of deportation because the magistrate in his extradition proceeding found his acts to be political offenses' under the treaty. That a magistrate earlier found McMullen's acts to be political offenses for purposes of denying extradition does not affect the [Board of Immigration Appeals'] contrary finding . . . because extradition determinations have no res judicata effect in subsequent judicial proceedings.

Id. at 597.

91. 783 F.2d 776 (9th Cir. 1986).

92. *Id.*

London. Both packages partially exploded as they were opened, severely injuring the attorney and the chairman's security officer. The third bomb was found on the steps of a London diner, and was defused before it exploded.⁹³

The fingerprints of Quinn's alleged co-conspirators were found on the wrappings of two other bomb packages. One package was found in a public foyer at the Aldershot Railway Station in Hampshire County, England. The other was discovered in an attache case in the entrance hall of the Kings Arms Public House in Warminster, England. Both explosives were defused.⁹⁴

The magistrate presiding over Quinn's extradition hearing held that in order to establish non-extraditability under the political offense exception, Quinn must first show a violent political uprising, and second, that he was a member of the group revolting, and finally, that his activities were in furtherance of the uprising. The magistrate concluded that Quinn had established the first element, but failed with regard to the latter two.⁹⁵ The United States Court of Appeals, Ninth Judicial Circuit, agreed, but vacated and remanded to the district court to determine whether the conspiracy charge was time-barred.⁹⁶

In a lengthy opinion, the court traced the history of the political offense exception, and noted the discord among international and national courts in applying the doctrine.⁹⁷ However, Judge Reinhardt concluded that:

[t]here is no need to create a new mechanism for defining "political offenses" in order to ensure that the two important objectives we have been considering have been met: (a) that international terrorists will be subject to extradition, and (b) that the exception will continue to cover the type of domestic revolutionary conduct that inspired its creation in the first place. . . .

The incidence test has served us well and requires no significant modification. The growing problem of international terrorism, serious as it is, does not compel us to reconsider or redefine

93. *Id.* at 783-88.

94. *Id.*

95. *Id.*

96. *Id.* at 818.

97. *Id.* at 792-818. Specifically, the court stated that "[t]he recent lack of consensus among United States courts confronted with requests for the extradition of those accused of violent political acts committed outside the context of an organized military conflict reflects some confusion about the purposes underlying the political offense exception." *Id.* at 803.

the test.⁹⁸

III. PROVISIONS OF THE SUPPLEMENTAL EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[S]ome things in life we do because they are expedient. Some things we do because they serve our own interests. Some things we do because they obstruct the path of others. The ratification of this treaty is something we should do simply because it is right.⁹⁹

The Supplemental Extradition Treaty eliminates the political offense exception for matters between the United States and Great Britain, and "with it, the traditional role of U.S. courts to deny extradition in connection with alleged political offenses."¹⁰⁰ The new treaty provides that Northern Irish persons accused of committing certain crimes against British rule will no longer be able to flee to the United States and claim the political offense doctrine as their defense.¹⁰¹

98. *Id.* at 806.

99. 132 CONG. REC. S9258 (daily ed. July 17, 1986) (comment of Sen. Mathias).

100. 132 CONG. REC. S9149 (daily ed. July 16, 1986) (statement of Sen. Pell).

101. Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, *reprinted* at S. EXEC. REP. 99-17, *supra* note 4. The relevant provisions of the treaty are:

Article 1

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

(a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or submit his case to their competent authorities for decision as to prosecution;

(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;

(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;

(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if its use endangers any person; and

(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

Article 2

Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested party.

In determining whether an individual is extraditable from the United States, the judicial authority of the United States shall permit the individual sought to present evidence on the questions of whether:

(1) there is probable cause;

A. Article 1: What is Not a Political Offense

Subpart (a) of Article 1 of the Supplemental Extradition Treaty excludes from the political offense exception certain acts enumerated in four multilateral conventions.¹⁰² Under these multilateral conventions, the United States and United Kingdom have agreed to either extradite or try a suspect sought for a listed offense.¹⁰³ The offenses covered by these conventions include certain takings of hostages, hijacking of aircraft and crimes against diplomats.¹⁰⁴ Subpart (b) eliminates the political offense exception for voluntary manslaughter and murder.¹⁰⁵ Offenses involving kidnapping, abduction or taking of a hostage not covered by a multilateral convention are excluded by sub-

(2) a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the courts, exists; and

(3) the act upon which the request for extradition is based would constitute an offense punishable under the laws of the United States.

.....

Article 3

(a) Notwithstanding any other provision of this Supplemental Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial, or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.

(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for offenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate

.....

Article 5

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 the Contracting Parties at the time of its commission.

102. *Id.* art. 1(a).

103. *Supplementary Extradition Treaty with the United Kingdom, Senate Committee on Foreign Relations*, S. EXEC. REP. 99-17, *supra* note 4. The conventions that apply are as follows: The Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970; The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971; 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; The International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979. *Id.* at 6-7.

104. *Id.* at 7.

105. *Id.* "Subpart (b) covers serious violent crimes against the person. The term 'voluntary manslaughter' is intended to cover crimes which have been held by the U.K. courts to be manslaughter and which in many U.S. courts would amount to second degree murder." *Id.*

part (c).¹⁰⁶ Any crime involving the use of explosives, which endangers human life, will not be subject to the political offense doctrine.¹⁰⁷ Finally, subpart (e) incorporates the exclusion to cover attempts and accomplices.¹⁰⁸

B. Article 2: Announcement of Existing Law

Article 2 of the Supplemental Extradition Treaty is simply "a distillation of settled U.S. law."¹⁰⁹ It reaffirms that one who is brought before a federal judge or magistrate is permitted to present evidence relevant to the extradition request.¹¹⁰ Since an extradition hearing is much like a criminal arraignment, the issue before the court is whether there is sufficient evidence to sustain a charge under the applicable extradition treaty, and is not an ultimate determination of innocence or guilt.¹¹¹

C. Article 3: An Announced Standard for Showing Political Persecution if the Accused is Extradited to the United Kingdom

Article 3(a) requires that if a person accused of a crime enumerated in Article 1 wishes to establish that he will face substantially unfair treatment upon extradition to the United Kingdom, he must meet a "preponderance of the evidence" standard.¹¹² The Senate Committee on Foreign Relations characterized Article 3(a) as containing two related, yet distinct, concepts:

first, it authorizes a court to deny extradition based upon a pervasive factual showing that the requesting party has trumped-up

106. Art. 1(c), *reprinted* at S. EXEC. REP. 99-17, *supra* note 4.

107. *Id.* art. 1(d).

108. *Id.* art. 1(e).

109. S. EXEC. REP. 99-17, *supra* note 4, at 7.

110. Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 2, *reprinted* at S. EXEC. REP. 99-17, *supra* note 4, at 16.

111. *Id.*; *see also*, *Analysis*, S. EXEC. REP. 99-17, *supra* note 4, at 7, stating:

It is fundamental that in an extradition hearing the issue before the court is probable cause, not the ultimate guilt or innocence of the person. The purpose of the extradition hearing is to determine whether there are sufficient grounds to bind the individual over for trial, or to return him or her to complete an outstanding sentence in the requesting country. In the former situation, it is the function of the requesting state to resolve at trial the ultimate question of guilt or innocence.

Id.

112. Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 3(a), *reprinted* at S. EXEC. REP. 99-17, *supra* note 4, at 16.

charges against a dissident in order to obtain his extradition for trial or punishment. Second, it authorizes a court to deny extradition if the person sought for extradition can establish by a preponderance of the evidence that he would be prejudiced at his trial, or punished, detained or restricted in his personal liberty because of his race, religion, nationality, or political opinions.¹¹³

It should be noted that Article 3(b) limits the scope of Article 3(a) in the United States extradition proceedings to those offenses listed in Article 1.¹¹⁴ The significance of this limitation is that if the United Kingdom requests the extradition of a person accused of a crime not listed in Article 1, the accused will not be permitted to invoke Article 3(a) before the United State courts.¹¹⁵ Furthermore, Article 3(b) provides that both the accused and the requesting nation may appeal any finding pursuant to Article 3(a).¹¹⁶

D. *The Retroactivity Clause*

Article 5 of the Supplemental Extradition Treaty makes offenses committed before, as well as after the Treaty commences, subject to its provisions.¹¹⁷ The retroactivity provision does not apply to acts which were, at the time they were committed, not considered crimes under both the laws of the United States and the United Kingdom.¹¹⁸

113. S. EXEC. REP. 99-17, *supra* note 4, at 4. Senator Bidden offered this explanation: Let me make sure as part of this colloquy that I understand the nature of the rule of inquiry into the justice system in Northern Ireland that we are establishing here.

My understanding is this: That notwithstanding that probable cause has been established in an American Court; notwithstanding that the accused is the person sought; notwithstanding that it is an extraditable offense under the terms of this [Supplemental Extradition Treaty]; and notwithstanding that otherwise it is an offense for which extradition would lie; and notwithstanding that it is an offense for which the political offense doctrine would not otherwise apply; notwithstanding all of that, The defendant will have an opportunity in Federal court to introduce evidence that he or she personally, because of their race, religion, nationality, or political opinion, not be able to get a fair trial because of the court system or any other aspect of the judicial system in the requesting country, or that person's extradition has been requested with a view to try to punish them on account of their race, their religion, nationality, or political opinion.

Discussion between Senators Kerry and Tribble, *reprinted in Id.* at 5. The Chairman, Senator Tribble, replied, "[m]y answer is yes." *Id.*

114. Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 3(a), *reprinted in* S. EXEC. REP. 99-17, *supra* note 4, at 7-8.

115. S. EXEC. REP. 99-17, *supra* note 4, at 5.

116. Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 3(b), *reprinted in* S. EXEC. REP. 99-17, *supra* note 4, at 8.

117. *Id.* art. 5.

118. *Id.*

IV. CRITICISMS OF THE SUPPLEMENTAL EXTRADITION TREATY

A. *Separation of Powers Concerns*

The Supplemental Extradition Treaty has caused considerable controversy among legal scholars as to who should determine when the political offense exception may be invoked. One opponent of the treaty argues that the "political offense treaty exceptions reflect a constitutionally mandated function of the judiciary Attaching legal labels to facts is not an executive or legislative determination - - it's a judicial function."¹¹⁹

Proponents of the treaty disagree, and argue that because the executive and legislative branches are ultimately responsible for United States foreign policy, these branches are in a better position to determine when a political controversy abroad should be recognized by the United States.¹²⁰ Another authority denies that the separation of powers are threatened: "[t]he new treaty simply defines the law, then the courts apply it. There is no court-stripping at all."¹²¹

Because the treaty categorically excludes certain crimes of violence from the political offense doctrine, it abolishes the tradition of allowing the courts to distinguish between political rebels and violent terrorists on a case-by-case analysis.

The debate over who should consider requests for extradition was the topic of much controversy in Congress at the beginning of the nineteenth century.¹²² In 1795 the United States Supreme Court made its determination that the judiciary was best suited to handle initial extradition requests.¹²³ The Jeffersonian Republicans also fa-

119. Riley, *Is the U.S. Playing Politics with Extradition?*, NAT'L L.J., June 16, 1986, at 8, col. 1 (interviewing Alfred P. Rubin, Professor of International Law at the Fletcher School of Law and Diplomacy).

120. *Id.* at 8, col. 2 (interviewing Richard E. Messick, chief majority counsel to the Senate Foreign Relations Committee).

121. *Id.* at 8, col. 2 (quoting Professor Steven Lubet of the Northwestern University School of Law).

122. *See generally*, 10 ANNALS OF CONGRESS, passim (1800).

123. *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795). In that case, a motion was made by the United States Attorney General for a rule to show cause why a writ of Mandamus should not be issued to Judge Lawrence of the District Court of New York to compel him to issue a warrant for apprehending Captain Barre, a Frenchman accused of deserting the French Ship "Le Pedrix." The Vice Consulate of the French Republic had requested extradition pursuant to the Consular Convention between the United States and France. Under that Convention, certain standards of proof had to be met to trigger extradition, including evidence sufficient to convince the judge of a ship's registry. Judge Lawrence did not consider the evidence offered by the French "to be the kind of proof designated by the 9th article of the

vored the judicial branch.¹²⁴ However, while the Federalists thought the executive branch was the proper branch for deciding initial extradition requests, even John Marshall approved of judicial review over an executive decision by writ of habeas corpus.¹²⁵

The Webster-Ashburton Treaty of 1842¹²⁶ carved out a special role for the judiciary in extradition proceedings,¹²⁷ by authorizing judges to conduct a hearing on the sufficiency of evidence offered in support of extradition.¹²⁸ If the judge or magistrate found that sufficient evidence existed to justify arrest under the laws of the jurisdiction from which the accused was requested, he was to issue a warrant for the arrest of the accused.¹²⁹ Congress elaborated upon this approach in 1948,¹³⁰ when the first United States extradition statute vested federal courts with the authority to conduct hearings on the evidence of criminality pursuant to an extradition request.¹³¹ The same procedural framework has been maintained in the modern

Convention." *Id.* at 44. The United States Supreme Court upheld Judge Lawrence's decision, stating that:

[b]y the Act of Congress . . . the District Judge is appointed by the competent judge, for the purpose expressed in the 9th article of the Convention; the consul applied to him as such; the judge refused to issue his warrant, because, in his opinion, the evidence required by the article was not produced. The act of issuing the warrant is judicial, and not ministerial; and the refusal to issue it for want of legal proof, was the exercise of judicial authority.

Id.

124. See generally 10 ANNALS OF CONGRESS, passim (1800).

125. 10 ANNALS OF CONGRESS 615 (1800), wherein Marshall approved of judicial review in the case of *United States v. Robbins*, 27 F. Cas. 825 (D.S.C. 1700) (No. 16,175). Pursuant to the extradition article of the Jay Treaty of 1794, Robbins was sought by Great Britain for murder and mutiny aboard a British vessel. Robbins was surrendered for extradition through diplomatic channels, then he applied for a writ of habeas corpus. *Id.* at 829. The writ was surrendered to the British. *Id.* at 832. See *Unraveling the Gordian Knot*, supra note 13, at 146.

126. Treaty to Settle Boundaries, Suppress Slave Trade, and Surrender Fugitives (Webster-Ashburton Treaty), Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119.

127. *Id.* art. X.

128. Specifically, the treaty provides that:

the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or other person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered, and if on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.

Id.

129. *Id.*

130. Act of Aug. 12, 1848, Chapter 167, 9 Stat. 302.

131. *Id.*

statute.¹³²

Since most of the extradition treaties to which the United States is a party contain some type of political offense exception,¹³³ the court has used its authority to hold an evidentiary hearing to determine whether or not that defense applies. For example, in *Ex Parte Kaine*,¹³⁴ United States Supreme Court Justice Samuel Nelson, riding circuit in New York, judicially exempted political offenses from extradition, despite the absence of such an exclusionary clause in the treaty or specific statutory authority.¹³⁵ Supporters of this view contend that "decisions involving foreign demands for the extradition of political activists belong to the courts because they involve human liberty. Central to the American concept of liberty is freedom from political persecution for all persons under the protection of our laws and Constitution."¹³⁶

The prohibition against arbitrary banishment or surrender can be found in the constitutional provisions for the writ of habeas corpus.¹³⁷ The writ of habeas corpus has its origins in the English Habeas Corpus Act of 1679,¹³⁸ which denied the King the right to arbitrarily imprison or banish a suspected criminal. This Act established the accused's right to petition a court, not to determine his guilt or innocence, but rather, to determine the legality of his detention or expulsion.¹³⁹ Thus, the argument may be made that the constitutional privilege of the writ of habeas corpus entrusts to the courts the obligation to determine when the political offense exception should apply.¹⁴⁰ Thus, since the new treaty may not violate distinct constitu-

132. 18 U.S.C. § 3184 (1979).

133. See *supra* note 15 and accompanying text.

134. *Ex Parte Kaine*, 14 F. Cas. 79, at 81-82 (C.C.S.D.N.Y. 1853) (No. 7,597).

135. *Id.*

136. *Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, Hearings on Senate Treaty Document 99-8 before the Committee on Foreign Relations, United States Senate, 99th Cong. 1st Sess., (1985) [hereinafter Senate Hearing]* (Statement of Professor Christopher H. Pyle, Mount Holyoke College, Department of Politics) at 115.

137. U.S. CONST. art. I, §§ 7-8.

138. 31 Car. II, C.2. This is the original habeas corpus act, and is "regarded as the great constitutional guaranty of personal liberty." BLACK'S LAW DICTIONARY 363 (5th ed. 1983).

139. 31 Car. II, C.2.

140. *Senate Hearing, supra* note 136 (citing *United States v. Lawrence*, 3 U.S. 42 (1795) and *In re Kaine*, 14 F. Cas. 79). Professor Pyle argues that had the treaty provisions not provided for the political offense exception, the courts would have ruled that the Constitution required them to determine that a crime was not extraditable if it was politically motivated. *Id.*

tional guarantees,¹⁴¹ it can be argued that the treaty must be stricken as violative of the United States Constitution.

Yet, such an argument is not convincing. The United States Constitution vests Congress with the power to confer jurisdiction on the lower federal courts.¹⁴² Furthermore, a validly-enacted treaty has the same effect as a validly enacted statute,¹⁴³ and when conflict arises between an act of Congress and a valid treaty, the "last expression of the sovereign" will control.¹⁴⁴ Therefore, if Congress may grant jurisdiction pursuant to a treaty, Congress most surely may withdraw jurisdiction under a treaty.¹⁴⁵

The courts themselves have recognized that they have a quite limited role in the determination of extraditability.¹⁴⁶ In *Peroff v. Hylton*,¹⁴⁷ the court stated that:

[a]lthough limited judicial review is available by way of a petition for habeas corpus relief, matters involving extradition have traditionally been entrusted to the broad discretion of the executive The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States. Thus, while Congress has provided that extraditability shall be determined in the first instance by a judge or magistrate, 18 U.S.C. 3184, the ultimate decision to extradite is 'ordinarily a matter within the exclusive purview of the Executive.'¹⁴⁸

Furthermore, the courts have recognized that "[t]he fact that the United States participates in the arguable denial of a constitutional protection by surrendering the defendant to the demanding nation does not implicate the United States in an unconstitutional action."¹⁴⁹

Despite the questionable legality of excluding certain crimes

141. *Reid v. Covert*, 354 U.S. 1 (1957). In that case, the court stated that "no agreement with a foreign nation can confer power on the Congress or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 16.

142. U.S. CONST. art. III, § 1.

143. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 168 (1978).

144. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

145. *But cf. Senate Hearing, supra* note 136, Appendix A at 288-92 (Statement of Cherif Bassiouni). Bassiouni argues that the exclusion of "intentional crimes" from the political-offense doctrine does not violate the Constitution, while asserting that the treaty's systematic exclusion of "ordinary crimes of violence" violates the equal protection argument of the 5th Amendment.

146. *Shapiro v. Secretary of State*, 499 F.2d 527 (D.C. Cir. 1974).

147. 563 F.2d 1099 (4th Cir. 1977).

148. *Id.* at 1102 (quoting *Shapiro v. Secretary of State*, 499 F.2d 527 (D.C. Cir. 1974)).

149. *United States v. Galanis*, 429 F. Supp. 1215, 1218 (D.C. Conn. 1977).

from the political offense exception, one must question the wisdom of doing so. First, it may be argued that the Supplemental Extradition Treaty's categorical exclusion of "international" crimes¹⁵⁰ is unnecessary because such crimes are already extraditable under other multilateral treaties that bind the United States.¹⁵¹ Second, by categorically excluding certain crimes from the political offense exception, the Senate manifests a lack of confidence in the ability of the judicial branch to determine, on a case-by-case basis, when a person should not be extradited because the crime of which he is accused was motivated by political ideals.¹⁵² Finally, altering the political offense exception on a treaty-by-treaty basis implies special relationships with certain countries, and provides the potential for inconsistent policies and processes for extradition requests.¹⁵³

Yet, the recent increase in violent international terrorist activity indicates a need for this new treaty. The Supplemental Extradition Treaty signals to the rest of the world that the United States is willing to work with its democratic allies to combat the problem of international terrorism. Specifically, the Treaty increases the likelihood that if a person commits a violent crime in one country and then escapes to another, he or she will be returned to the former to stand trial there. Article 1 of the treaty specifically excludes certain violent crimes from the political offense doctrine.¹⁵⁴ A comparison of the various tests for what constitutes a political offense reveals inconsistency and ambiguity.¹⁵⁵ Furthermore, United States courts seem to have trouble distinguishing between the terrorist and the person who deserves the protection of the political offense exception.¹⁵⁶ Finally, the courts do not have a good record for extradition of Irish Republican Army members who commit violent crimes against British rule in Northern Ireland,¹⁵⁷ because such persons have been able to escape extradition

150. Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 1, *reprinted in* S. EXEC. REP. 99-17, *supra* note 4.

151. *Senate Hearing, supra* note 136, Appendix A at 300 (statement of Professor Bassiouni).

152. *Id.*

153. *Id.* Bassiouni suggests that a better method for proscribing the limits of the political offense exception is by legislation. *Id.* However, such an attempt to eliminate the defense by statute failed in 1981. *See Senate Hearing, supra* note 136 (statement of Professor Pyle), and 127 CONG. REC. S9955-9961, (daily ed. Sept. 8, 1981).

154. *See supra* notes 96-101 and accompanying text.

155. *See supra* notes 23-59 and accompanying text.

156. *See supra* notes 59-82 and accompanying text.

157. *See supra* notes 60-83 and accompanying text.

by asserting that their acts fell within the political offense exception. This indicates to the rest of the world, albeit erroneously, that the United States supports the Irish Republican Army's terrorist campaigns. The Supplemental Extradition Treaty clears up ambiguity and closes loopholes in the extradition process by stating that certain violent crimes will no longer be treated as political.¹⁵⁸

This is not to say that the United States should abandon the tradition of providing a haven for those persons who face persecution in their homeland because of dearly held political or religious beliefs. Such traditions run deep in our democratic ideals. However, it must be recognized that the United Kingdom is also a democracy, and in a democracy, violence should not be excused or considered part of the normal political process. As one proponent of executive discretion in application of the political offense exception stated, "to even permit courts in the United States to consider political motives as justifying murder or other violent crimes show[s] a lack of respect for the democratic process. Where an individual can bring about change through the ballot box, the bomb and the bullet have no place."¹⁵⁹

B. Retroactivity

Other critics of the Supplemental Extradition Treaty are concerned about the retroactivity provision. When the treaty was debated on the floor of the United States Senate, one opponent of Article 5 stated that:

[a]pproving this treaty in its present form may well result in the extradition of certain individuals who American courts have refused to extradite after the most careful consideration. Such a result would be similar to the enactment of a bill of attainder or an ex post facto law in violation of the principle contained in Article I, section 9, clause 3 of our Constitution¹⁶⁰

In response, a proponent of the retroactivity clause pointed out that since an extradition hearing is not a trial on the merits, no double jeopardy problem arises.¹⁶¹

The argument that the retroactivity provision in Article 5 of the treaty is somehow unfair¹⁶² is not persuasive. United States law is

158. See *supra* notes 96-101 and accompanying text.

159. 132 CONG. REC. S9147 (daily ed. July 16, 1986) (comment of Sen. Lugar).

160. *Id.* at S9153 (remarks of Sen. D'Amato).

161. *Id.* at S9154 (remarks of Sen. Lugar).

162. *Id.* at S9254 (remarks of Sen. Kerry).

well established that retroactivity provisions in extradition treaties do not pose a constitutional threat.¹⁶³ In *Cleugh v. Strakosch*,¹⁶⁴ the court held that where crimes committed before the effective date of an extradition treaty were not excluded by the terms of the treaty, the treaty applied to such crimes as well as those subsequently committed.¹⁶⁵

Furthermore, it seems clear that the new treaty does not amount to an *ex post facto* law. An *ex post facto* law imposes punishment for a crime which, at the time of its commission, was not criminal.¹⁶⁶ However, the Supplemental Extradition Treaty specifically provides that no person shall be extradited for an act which, at the time of its commission, was not criminal under the laws of both the United Kingdom and the United States.¹⁶⁷ Thus, there will be no extradition under the new treaty unless the offense for which extradition is sought was criminal when it occurred.¹⁶⁸

The Senate Foreign Relations Committee sought advice from the State Department's legal counsel regarding the retroactivity clause. In a letter dated June 23, 1986, the State Department advised the Committee that Article 5 of the Supplemental Extradition Treaty is "fully consistent with the U.S. Constitution, and serves important U.S. law enforcement interests."¹⁶⁹ The letter listed over twenty treaties containing retroactivity provisions to which the United States is currently a party. The letter then stated:

[y]ou asked if the double jeopardy clause of the U.S. Constitution would be implicated by the extradition under the Supplementary Treaty of an individual whose extradition was refused under the earlier treaty. Double jeopardy would simply not be an issue in such a case The Fifth Amendment right to be free of double jeopardy does not attach until the individual's trial has begun. An extradition proceeding is not a trial, but more akin to such pre-trial proceedings as an indictment or a grand jury. These pre-trial pro-

163. See *In re Giacomo*, 7 F. Cas. 367 (1874) (No. 3,747), and *Sabatier v. Dambrowski*, 453 F. Supp. 1250, *aff'd*, 586 F.2d 866 (D.C.R.I. 1978).

164. *Cleugh v. Strakosch*, 109 F.2d 330 (9th Cir. 1940).

165. *Id.*

166. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 438 (1978).

167. Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 5, *reprinted in* S. EXEC. REP. 99-17, *supra* note 4.

168. *Id.*

169. Letter to Mr. Stockman from Mary V. Mochary, Deputy Legal Advisor, United States Department of State, dated June 23, 1986, *reprinted at* 132 CONG. REC. S9158 (daily ed. July 16, 1986).

ceedings do not implicate the right to be free from double jeopardy, and neither does the extradition proceeding. An extradition request may be refiled at any time¹⁷⁰

Thus, the criticisms of the treaty's retroactivity provisions are legally unsound. Furthermore, the holding of *Cleugh v. Strakosch*¹⁷¹ indicates that even in the absence of a specific retroactivity provision, the treaty would have retroactive application.

C. *The Northern Irish Diplock Courts*

A final criticism of the Supplemental Extradition Treaty has been that by extraditing accused Provisional Irish Republican Army members to Northern Ireland, the United States government forces them to face an inherently unfair judicial system.¹⁷² One senator questioned the practices of the Northern Irish Diplock courts, stating:

I am bothered by their sweeping powers of arrest, by their lack and prohibition of jury trials, by the denial of any right to bail to diplock court defendants, by placing the burden of proof upon the accused offender, by the creation of new offenses unknown to the common law, and the use of coerced confessions in the investigatory process I decry the Diplock courts. I decry the way they are run. I decry the abuses that are occurring. . . . As much as I want to stamp out terrorism, I want to make sure that we do not stamp out some basic legal rights as well.¹⁷³

However, treaty supporters have argued that the United States maintains numerous treaties with nations which fail to incorporate all the traditional rights and procedures of our own judicial system.¹⁷⁴ Furthermore, proponents have argued that the United States does not confer constitutional rights on fugitives who commit acts of terrorism.¹⁷⁵

The treaty limits the political offense doctrine, but does not abandon the principles upon which the doctrine was built. Article 3 of the treaty specifically preserves protection for persons who would face un-

170. *Id.*

171. *Cleugh v. Strakosch*, 109 F.2d 330.

172. 132 CONG. REC. S9160 (daily ed. July 16, 1986) (comments of Sen. Hatch).

173. *Id.*

174. 132 CONG. REC. S9167 (daily ed. July 17, 1986) (comments of Sen. Eagleton).

175. 132 CONG. REC. S9166 (daily ed. July 17, 1986) (comments of Sen. Eagleton). The Senator stated that "[a] person has no constitutional right to commit a crime in another country and escape extradition because the crime was 'political'. The only 'right' involved is the discretionary act of the state, if it so wishes, of its own free choice, to give political asylum for humanitarian reasons." *Id.*

fair judicial procedures if extradited to the United Kingdom.¹⁷⁶ Article 3(a) of the treaty states that a United States court may deny extradition based on a persuasive showing that the person sought for extradition would not receive a fair trial because of his or her race, religion, nationality or political beliefs.¹⁷⁷ This provision established an affirmative right of inquiry by the United States judiciary into the alleged abuses of the Northern Irish Diplock Court system.

The opinion of the district court in *Doherty*¹⁷⁸ contains language that some critics of the treaty say will be used to support judicial conclusions that the Diplock courts are not inherently unfair. Judge Sprizzo's opinion is the only known opinion that discusses the Irish Diplock court system, concluding that the Northern Irish courts discharge their responsibilities in a fair and just manner.¹⁷⁹ However, there are two reasons why such dicta cannot be held to mandate a summary dismissal of the issue of impartial justice in an extradition proceeding. First, in *Doherty*, Judge Sprizzo relied on the evidence presented to him on behalf of the United Kingdom to conclude that the Diplock system was fair. The defendant, on the other hand, presented no contrary evidence.¹⁸⁰ Second, the court "did not have the right to launch an independent inquiry into the administration of justice system in Northern Ireland."¹⁸¹ The new treaty confers a right of judicial inquiry when extradition to Northern Ireland is sought in the United States courts.¹⁸² Thus, in admitting that the Diplock courts may indeed be subject to criticism,

[w]ith article 3(a) [the United States is] conferring upon a potential fugitive the right to introduce evidence on the fairness of the administration of justice system in Northern Ireland - - a right fugitives [did not] enjoy under our traditional extradition law.¹⁸³

Yet, the new treaty does not clarify just what such an inquiry would include. Would affidavits from the accused suffice, or would the court require testimony of persons with firsthand knowledge of the system, such as officials of the Diplock courts, or members of out-

176. *Quinn*, 783 F.2d 785; see *supra* notes 106-110 and accompanying text.

177. See *supra* note 112 and accompanying text.

178. *Matter of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

179. *Id.*

180. *Id.*

181. 132 CONG. REC. S9254 (daily ed. July 17, 1986) (comments of Sen. Kerry).

182. Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 3(b), reprinted in S. EXEC. REP. 99-17, *supra* note 4; see *supra* note 107 and accompanying text.

183. 132 CONG. REC. S9254 (daily ed. July 17, 1986) (comments of Sen. Kerry).

lawed groups subject to Diplock jurisdiction? Such a searching inquiry might be essential to the evaluation of an entire justice system.¹⁸⁴

V. CONCLUSION

The Supplemental Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland takes an important step towards a consistent and reliable definition of the term "political offense" by providing specific examples of what activities will not qualify for the protection of that doctrine. Furthermore, it allows the judiciary to inquire into the nature of the judicial system that the accused will face if extradited, although the extent to which the courts will exercise this duty remains to be seen. In this respect, it preserves the very basis upon which the political offense doctrine was founded—that no person should face an unfair trial because of his or her political ideals.

The treaty is not without potential problems. By categorically excluding certain crimes from the political offense exception, it attacks the almost 200-year-old legal tradition of leaving that determination to the judiciary. Furthermore, the categorization may turn out to be under-inclusive, over-inclusive, or both. Finally, the treaty requires the judicial branch to inquire into the fairness of another judicial system. The scope and nature of this inquiry remains to be seen.

The Reagan administration plans to enter into similar treaties with other democratic nations.¹⁸⁵ Thus, this treaty sets important precedent. At the very least, this treaty makes a significant statement—the United States is willing to cooperate with its allies in order to combat violence in an age of international terrorist activity.

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184. A complete analysis of the Northern Irish Diplock Court System is beyond the scope of this Comment. See generally the Northern Irish Emergency Provisions Act, 1978, chapter 5; the Northern Ireland (Emergency Provisions) Act of 1978 (Continuation Order) 1980 Stat. 1st No. 1049; Foley, *Public Security and Individual Freedom*, *supra* note 6; *Senate Hearing*, *supra* note 136 (comments of Judge Soafer and Professor Pyle).

185. *Extradition Treaty Passes Senate*, *supra* note 6.