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International Extradition Law and the Political Offense Exception: The Traditional Incidence Test as a Workable Reality

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NOTES AND COMMENTS

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I. INTRODUCTION

In the sensationalization of recent episodes in international extradition law,[1] some courts claim that the present application of the political offense exception in extradition proceedings has allowed the United States to become a haven for international terrorists.[2] Defendants have asserted the political offense exception as a defense to extradition from the United States for terrorists acts.[3]

One episode includes the roundly criticized case of *Karadzole v. Artukovic*.[4] In *Artukovic*, the Yugoslavian government sought the extradition from the United States of a former Minister of the Interior of the puppet Croatian government which took over a portion of Yugoslavia following the German invasion in April, 1941. After the war, Artukovic fled to the United States. Artukovic was charged with the war crime of directing the murder of hundreds of thousands of civilians in concentration camps between April, 1941 and October, 1942. The District Court for the Southern District of California held that Artukovic's offenses were non-extraditable political offenses.[5] The Ninth Circuit Court of Appeals affirmed the district court's hold-

1. Such episodes include the Achille Lauro hijacking and Nazi war criminal Artukovic; *see infra* text accompanying notes 4-6, 8-12.

2. *See In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984) (The United Kingdom sought Doherty's extradition from the United States for his murder conviction in Northern Ireland. The district court held that Doherty was exempt from extradition under the political offense exception); Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981) (Israel sought Eain's extradition from the United States as he was charged with exploding a bomb in an Israeli marketplace. The United States granted Eain's extradition).

3. Thompson, *The Evolution of the Political Offense Exception in an Age of Modern Political Violence*, 9 YALE J. WORLD PUB. ORD. 315, 317 (1983).

4. 247 F.2d 198 (9th Cir. 1957).

5. Artukovic v. Boyle, 140 F. Supp. 245, 247 (S.D. Cal. 1956), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated per curiam*, 355 U.S. 393 (1958), *remanded sub nom.* United States ex rel Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

ing, rejecting the argument that war crimes are so barbaric and atrocious they cannot be considered political crimes.[6] The United States Supreme Court vacated the Ninth Circuit's decision and remanded the case for an extradition hearing. The Supreme Court did not comment on any of the substantive issues.[7] Because the *Artukovic* Court failed to establish a clear line of demarcation between political violence that furthers a political uprising and violence that is merely contemporaneous with such an uprising, critics assert that the exception promotes a haven for terrorists.[8]

A second episode involved the hijacking of an Italian cruise ship, the Achille Lauro.[9] On October 7, 1985, four members of the Palestine Liberation Organization (PLO) hijacked the ship as it was nearing Port Said, Egypt.[10] Among the four hundred people aboard the ship, fourteen were United States citizens.[11] The hijackers indicated that the United States citizens aboard would be the first to die if their demands were not met.[12] Consequently, one United States citizen on the Achille Lauro, Leon Klinghoffer, was murdered.[13] The United States unsuccessfully sought to use its bilateral extradition treaties with Italy[14] and Yugoslavia[15] to obtain the provisional arrest of the hijacker's commander, Mohammed Abbas.[16] Similar to the United States, both Italy and Yugoslavia maintain a political offense exception as a defense to extradition that international terrorists seek to be exempt from extradition proceedings.

This Comment will first examine the historical development of the political offense exception in the United States courts. Second, this Comment argues that there is no need to create a new mechanism for defining political offenses in order to ensure that international ter-

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6. Karadzole v. Artukovic, 247 F.2d 198, 202-04 (9th Cir. 1957).

7. *See* Karadzole v. Artukovic, 355 U.S. 393 (1958).

8. Thompson, *supra* note 3, at 324.

9. Comment, *The Achille Lauro Incident And The Permissible Use Of Force*, 9 LOY. INT'L & COMP. L.J. 481 (1987).

10. N.Y. Times, Oct. 9, 1985, at A1, col. 6.

11. N.Y. Times, Oct. 8, 1985, at A1, col. 6.

12. As their principal demand, the hijackers sought the release of fifty Palestinians from Israeli prisons. N.Y. Times, *supra* note 9, at A1, col. 6.

13. *Id.*

14. Convention for the Surrender of Criminals, Mar. 23, 1868, United States-Italy, 15 Stat. 629.

15. Treaty on Extradition, Oct. 25, 1901, United States-Yugoslavia, 32 Stat. 1890.

16. Sofaer, *The Political Offense Exception And Terrorism*, 15 DEN. J. INT'L L. & P. 125 (1986).

rorists will be subject to extradition.[17] Finally, this Comment proposes that a proper application of the traditional incidence test,[18] aside from any improper misapplications or deviations, rightly serves the objectives of the political offense exception. The traditional incidence test does not cover acts of international terrorism.[19] *Quinn v. Robinson*, a recent case exemplifying a correct application of the incidence test will be explored.[20] It will become apparent that any problems within the political offense exception arise upon deviation from or misapplication of the traditional test. Therefore, this Comment concludes that the problem with the political offense exception does not lie in the application of the present incidence test but with deviation from the current United States law.

II. HISTORICAL DEVELOPMENT OF INTERNATIONAL EXTRADITION LAW AND THE POLITICAL OFFENSE EXCEPTION

A. Historical Origins of Extradition Law

Extradition is the process by which persons charged with or convicted of crimes against the law of a state who are located in a foreign state are returned by the latter to the former for trial or punishment.[21] The historical origin of the first recorded extradition treaty dates back to 1280 B.C.[22] This peace treaty between Ramses II of Egypt and the Hittite Prince Hattusili III provided for the return of one party's criminals who were found in the territory of the other party.[23]

Originally, international extradition developed with the need to preserve the internal order of the respective states.[24] Extradition was a gesture of friendship and cooperation between sovereigns.[25] Between the sixteenth and eighteenth century, however, sovereigns used

17. Quinn v. Robinson, 783 F.2d 776, 806 (9th Cir. 1986). (The *Quinn* case supports the assertion of the author).

18. For a glaring deviation from the traditional incidence test, and an example of its improper application, see Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

19. *Quinn*, 783 F.2d at 805. (Again, the *Quinn* case argues that the traditional incidence test is a proper application of the political offense exception as does the author).

20. *Id.* at 776.

21. 6 M. WHITEMAN, DIG. OF INTERNATIONAL LAW 727 (1968).

22. M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 3 (1974).

23. Langdon and Gardiner, *The Treaty of Alliance Between Hittusili King of the Hittite and the Pharaoh Ramses II of Egypt*, 6 J. EGYPTIAN ARCHAEOLOGY 179 (1920).

24. M. BASSIOUNI, *supra* note 22, at 5.

25. *Id.* at 1.

extradition for economic reasons in order to maintain channels of European commerce rather than for altruistic motives.[26] Since the eighteenth century, the main purpose of extradition has been to serve an international means of cooperation to suppress common criminality. Extradition is no longer motivated by economic aspirations.[27]

In international law, the duty to extradite another country's criminals has generally not been looked upon as an absolute duty.[28] Therefore, most countries enter into bilateral treaties in order to ensure the return of their own alleged criminals. Both the United States and England do not permit extradition in the absence of a treaty obligation.[29] Pursuant to a bilateral treaty, one participating government, such as the United Kingdom, will formally request that its own criminal be extradited from the other participating country, such as the United States.[30] Today, the United States is party to ninety-six bilateral extradition treaties with other nations.[31]

Traditionally, the substantive requirements of extradition have been threefold:[32] (1) the offense that the requesting state is claiming must be an extraditable act;[33] (2) the offense must adhere to the rule of double criminality;[34] and (3) the requesting state must comply with

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26. *Id.* at 5.

27. *Id.*

28. For example, in 1953, the Supreme Court of Venezuela surrendered an American national to Panama in the absence of an extradition treaty with that country. The Venezuelan Court held the surrender was "in conformity with the [p]ublic [l]aw of [n]ations [whereby] friendly [s]tates recognize a reciprocal obligation to surrender offenders who have taken refuge in their respective countries." *In re* Tribble, 20 I.L.R. 366, 367 (1953); M. BASSIOUNI, *supra* note 22, at 9; *see* H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 193 (5th ed. 1916).

29. M. BASSIOUNI, *supra* note 22, at 25.

30. Extradition Treaty, June 8, 1972, United States - United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468. The extradition procedure generally involves the following steps. The foreign government communicates its request for the accused's return to the United States through diplomatic channels. *Id.* art. VII. The United States government then applies to a federal magistrate for a provisional arrest warrant on behalf of the foreign government. The magistrate may grant this request if an extradition treaty is in effect, if the offenses charged are within its provisions, and if the accused is within the magistrate's jurisdiction. *Id.*; 18 U.S.C. § 3184 (1982). The foreign government then must request extradition formally within forty-five days of the accused's arrest, which request must include the accused's name and nationality, the facts of the offense(s), the text of the law involved, and a warrant of arrest issued by the proper authority of the foreign government. Extradition Treaty, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468, art. VII.

31. For a list of the ninety-six nations which are parties to the bilateral extradition treaties with the United States, see 18 U.S.C. § 3181 (1986).

32. M. BASSIOUNI, *supra* note 22, at 312-13.

33. *Id.* at 315.

34. I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 137 (1971).

the principle of speciality.[35]

Regarding the first requirement of international extradition law, there are two different methods to determine whether the offense is an extraditable act. The generally adopted method is the "enumerated method"[36] where the treaty "specif[ies] by name the offenses for which extradition will be granted."[37] The alternative development in treaty practice has been the "eliminative method."[38] Here, "extraditable offenses are defined by reference to their punishability according to the laws of the requesting and requested states by a minimum standard of severity."[39]

Assuming that the magistrate[40] determines that the offense is extraditable, the second substantive requirement for extradition is double criminality. This rule requires that an act shall not be extraditable unless it constitutes a crime according to the laws of both the requesting and the requested states.[41] The rule of double criminality is illustrated by *Re Gerber*,[42] a decision of the German Federal Supreme Court in 1957. Switzerland requested the extradition from Germany of a defendant charged with an offense which according to German law was burglary. However, under Swiss law, the same alleged crime constituted three separate offenses: larceny, damage to property and breaking the peace of a private home. Both burglary and larceny were treaty offenses, but the other two offenses were not.

The *Gerber* court held that the set of facts underlying the offense charged were decisive. Thus, Germany had a duty to extradite despite the fact that the legal qualifications of the offense differed in German and Swiss law.[43]

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35. *Id.* at 146.

36. The enumerative method has a limitative effect as it confines the application of the treaty only to those offenses named. The main flaw of this method is that the list might omit certain offenses and later it might prove to be too bothersome to include them by supplemental treaty. M. BASSIOUNI, *supra* note 22, at 315, 317.

37. I. SHEARER, *supra* note 34, at 133.

38. The eliminative method is indicative rather than limitative, as it defines extraditable offenses by their punishment. It is a more convenient method because it avoids unnecessary detail in the treaty and avoids mistake of omitting crimes. The main flaw in this method is that it is impractical to implement with systems that have a notable disparity in penalties. M. BASSIOUNI, *supra* note 22, at 316, 317.

39. *Id.* at 134.

40. A magistrate is a public official exercising administrative and often judicial functions. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1358 (1968).

41. I. SHEARER, *supra* note 34, at 137.

42. Judgement of April 11, 1957, Bundesgerichtschof, GrSSt, W. Ger., 10 Bundesgerichtshof in Strafsachen [BGHSt] 221, 24 Int'l L. R. 493 (1957).

43. *Id.* at 495.

Finally, the principle of speciality further restrains potential extradition. Under the doctrine of speciality, a requesting state cannot try the accused for any offense other than the one for which surrender was made.[44] If a magistrate in the requested state suspects the requesting state's intentions are corrupt,[45] extradition will be denied. The rationale for the doctrine of speciality is to shelter the relator from unexpected prosecution even though the doctrine is mostly employed to shelter the requested state from misusing its processes.[46]

However, the rule of speciality is restrictive; it only applies to instances that prevent the requesting state from breaking its international duties with regard to the requested state.[47] Therefore, it is essential to determine whether the surrendering state would regard the prosecution at issue as a breach of its relations with the receiving state. As expounded in *United States v. Rauscher*,[48] "the rule of speciality does not apply when extradition has been granted by an act of comity by the surrendering state."[49] However, such a restrictive view of the rule of speciality must be applied in the context for which it was designed. The doctrine of speciality restricts the requesting states to only prosecute the extraditee for those offenses for which the accused

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44. I. SHEARER, *supra* note 34, at 146.

45. The European Convention On Extradition at Paris aptly explains the rules governing speciality regarding illegitimate motives:

> ARTICLE 14. RULES OF SPECIALITY
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> 1. A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:
>
> (a) When the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention;
>
> (b) When that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.
>
> 2. The requested Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.
>
> 3. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.

European Convention on Extradition, Dec. 13, 1957, art. 14, 359 U.N.T.S. 273.

46. M. BASSIOUNI, *supra* note 22, at 354.

47. *Id.* at 356-57.

48. 119 U.S. 407 (1886).

49. M. BASSIOUNI, *supra* note 22, at 356.

was surrendered.[50]

B. Denial of Extradition: The Political Offense Exception

Even if a requesting state meets all of the substantive requirements for extradition, the requested state may still deny the request if the bilateral treaty provides any applicable exceptions.[51] The political offense exception provided by most international extradition treaties[52] prohibits extradition for political crimes.[53] The standard political offense exception, exemplified in the extradition treaty between the United States and the United Kingdom, states:

> Extradition shall not be granted if: (i) the offense for which extradition is requested is regarded by the requested party as one of a political character or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try to punish him for an offense of a political character.[54]

The political offense exception originated during the Enlightenment Era with the French idea of justified political resistance.[55] In England, political philosophers, such as John Locke and John Stuart Mill, expanded upon this right of political resistance.[56] In the late nineteenth century, this idea spread to the United States and was reflected in the political offense exception of the standard treaty clause.[57]

The rationale of the political offense exception is premised on three interests: those of the requested person, the states concerned (requesting and requested state), and international public order.[58] The main justifications for the political offense exception which reflect the convergence of these interests are: 1) that a belief that individuals

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50. *Id.*

51. Exceptions to extradition include, but are not limited to, offenses of a political nature, offenses of a military character or offenses of a fiscal character. *See id.* at 368.

52. Each of the United States' ninety-six treaties provides for the political offense exception. *See generally* Thompson, *supra* note 3.

53. C. VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 1 (1980).

54. Treaty of Extradition, June 8, 1972, United States - United Kingdom, art. V (1)(c), 28 U.S.T. 227, 230, T.I.A.S. No. 8468.

55. *See generally*, J. LIVELY, THE ENLIGHTENMENT (1966).

56. *See generally*, J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT ch. XIX (1690); *see also* J. MILL, ON LIBERTY (1859).

57. Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61, 63 (1979).

58. C. VAN DEN WIJNGAERT, *supra* note 53, at 2.

have a right to resort to political activism to foster political change;[59] 2) that individuals—particularly unsuccessful rebels—should not be returned to countries where they may be punished because of their political opinions;[60] 3) and that governments—in particular, their non-political branches—should not intervene in the internal struggles of other nations.[61]

These three justifications offered for the political offense exception reflect a widespread acceptance that political crimes have greater legitimacy than common crimes.[62] Since most extradition treaties do not define "political offense," the task has been left primarily to judicial interpretation.[63] Courts have developed two categories, pure and relative political offenses,[64] for deciding when the political offender is barred from extradition.[65]

"Pure political offenses" are political crimes such as treason, sedition, and espionage.[66] Since these acts are directed at a particular sovereign and not against civilians, courts usually protect an offender under the political offense exception.[67] Treason, sedition, espionage, peaceful dissent, freedom of expression and religion are considered purely political offenses, if they do not incite violence, because they lack the essential elements of common crimes. The perpetrator of the alleged offense merely acts as an instrument or agent of a political movement and is motivated by ideology that does not cause a private harm.[68]

A proposed definition of a pure political offense is as follows:

> A purely political offense is one whereby the conduct of the actor manifests an exercise in freedom of thought, expression and belief (by words, symbolic acts or writing not inciting to violence), freedom of association and religious practice which are in violation of

59. Note, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U. J. INT'L L. & POL. 617, 622 (1981). *See also In re* Doherty, 599 F. Supp. 270, 275 n.4 (S.D.N.Y. 1984).

60. Quinn v. Robinson, 783 F.2d 776, 793 (9th Cir. 1986).

61. C. VAN DEN WIJNGAERT, *supra* note 53, at 3.

62. Note, *In re Doherty: Distinguishing Terrorist Activities From Politically Motivated Acts Under the Political Offense Exception to Extradition*, 1 TEMP. INT'L & COMP. L.J. 99, 105-06 (1985).

63. Note, *American Courts and Modern Terrorism*, *supra* note 59.

64. Sofaer, *supra* note 16, at 126.

65. Thompson, *supra* note 3, at 317.

66. Note, *American Courts and Modern Terrorism*, *supra* note 59, at 623.

67. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VAL. L. REV. 1226, 1234 (1962).

68. M. BASSIOUNI, *supra* note 22, at 382.

law designed to prohibit such conduct.[69]

"Relative political offenses,"[70] however, are more problematic since they encompass both political and criminal elements.[71] A relative political offense occurs when an offender commits a common crime prompted by ideological motives. Unlike the rule of the pure political offense, the parameters of the relative political offense are difficult to formulate because this classification intermixes political elements with criminal elements. Consequently, the relative political offense category is where controversy arises as nations must rely on some type of political offense test.[72] Examples of relative political offenses include murder, bombing and skyjacking. These illustrations by themselves suggest the difficulty in applying the political offense exception.[73]

III. INTERPRETATION OF A POLITICAL OFFENSE: THE INCIDENCE TEST

A. Origins of the Incidence Test in British Common Law

Today, the United States' courts generally use a test of British common law origin to decide if the political offense exception bars extradition.[74] The English courts first defined the implications of treaty provisions prohibiting the surrender of political offenders in *In re Castioni*.[75] "*In re Castioni* marks the first major attempt by Anglo-American courts to reconcile the interests of the state, the laws of the state, and the interests of the fugitive."[76]

Castioni was a Swiss citizen who fled to England after shooting a government official during a large citizen demonstration.[77] The citizen demonstration resulted from continued dissatisfaction with the government. The evidence suggested that Castioni never met with the government official and there were no personal grievances.[78] The case was an obvious example of a relative political offense[79] because it

69. *Id.* at 383.
70. Sofaer, *supra* note 16, at 126
71. Note, *American Courts and Modern Terrorism*, *supra* note 59, at 624.
72. Sofaer, *supra* note 16, at 126.
73. Note, *Distinguishing Terrorist Activities*, *supra* note 62, at 109.
74. Epps, *supra* note 57, at 68.
75. *In re* Castioni, [1891] 1 Q.B. 149.
76. Epps, *supra* note 57, at 64.
77. *Castioni*, 1 Q.B. 149.
78. *Id.* at 151.
79. I. SHEARER, *supra* note 35, at 170.

arose during a demonstration against the government and it provided an opportunity for the court to define the nature of an "offense of a political character."[80]

The British court stated the test for a political offense exception as: "Whether, upon the facts, it is clear that a man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and an [up]rising exists in which he was taking part."[81]

Thus, from *Castioni*, courts developed the traditional two-prong "incidence test" to define the nature of a political offense barring extradition. First, offenses must be "common crimes committed in the course"[82] of an uprising, and second, they must be "in the furtherance of political disturbance"[83] to be considered political. While the incidence test is used today in the United States,[84] the British courts no longer follow the test set out in *Castioni*.[85] Rather, the British courts today have relaxed the requirement that a political offense be committed in furtherance of a political uprising, as exemplified in *Ex parte Kolczynski*.[86]

In *Kolczynski*, seven Polish sailors, under restraint, brought their ship into an English port for the purpose of seeking political asylum.[87] Poland sought their extradition from England based on nonpolitical crimes such as assault on the high seas and revolt on board a ship against the authority of the master.[88]

The accused seamen, however, exhibited evidence that suggested they would be tried for treason if they returned to Poland.[89] Britain denied extradition because Poland intended to try the accused for treason rather than for the common crimes upon which it had based its request.[90]

Kolczynski illustrates that today British courts may look into the

80. *Id.*
81. *Castioni*, 1 Q.B. at 159.
82. *Id.* at 171.
83. *Id.*
84. Thompson, *supra* note 3, at 322.
85. *Id.*
86. *Ex parte* Kolczynski, [1955] 1 Q.B. 540. In this case, Great Britain broadened its inquiry to evaluate the connection between the political objective and the alleged crime. *See* Garcia-Mora, *supra* note 67, at 1243.
87. *Kolczynski*, 1 Q.B. 540.
88. *Id.* at 541-42.
89. *Id.* at 541.
90. *Id.* at 552-53.

motives of the governments requesting extradition in order to determine if a political offense has realistically been committed in furtherance of a political uprising.[91]

B. The Incidence Test in United States Law

The United States' concept of a political offense is reflected in *Castioni*. The United States case establishing the traditional incidence test set forth in *Castioni* was *In re Ezeta*.[92] *In re Ezeta* involved the Republic of Salvador requesting extradition from the United States of its former President, Ezeta, on murder and robbery charges. The charges stemmed from Ezeta's actions taken with his officers in an attempt to suppress a revolutionary coup. The murder charges against Ezeta involved his execution order for four people who refused to defend the Republic against the revolutionary coup.[93] The robbery charges involved money Ezeta had taken to pay his troops.[94] President Ezeta took refuge on a United States ship while fleeing from revolutionary forces against the government of Salvador.

Applying the incidence test established three years previously by the British courts, the court found the offenses to be political:

> The testimony shows that the charges were all committed during the progress of actual hostilities between the contending forces, wherein General Ezeta and his companions were seeking to maintain the authority of the then existing government against the active operation of a revolutionary uprising. With the merits of this strife I have nothing to do.[95]

Therefore, both prongs of the *Castioni* incidence test were met in *Ezeta*. The uprising component was established by the revolutionary coup against the Republic of Salvador.[96] The "incidental to" component was established by Ezeta's acts of murder and robbery which were "incidental" to the revolutionary uprising.[97]

Two years after *Ezeta*, the Supreme Court decided its only political offense case. In *Ornelas v. Ruiz*,[98] Mexico sought the return of three nationals on murder charges. While crossing from Texas to

91. *Id.*
92. 62 F. 972 (N.D. Cal. 1894).
93. *Id.* at 975-76.
94. *Id.* at 976.
95. *Id.* at 997.
96. *Id.* at 1002.
97. 62 F. 972, 1002 (N.D. Cal. 1894).
98. 161 U.S. 502 (1896).

Mexico, Ruiz and his comrades attacked Mexican soldiers, assaulted the villagers and stole from the local village. The group claimed that their alleged crimes were within the treaty of extradition between the United States and Mexico.[99] The Supreme Court found that Ruiz and his colleagues had not committed political offenses because the band's rampage did not rise to the level of a political uprising, and therefore were extraditable.[100]

However, the Court's conclusion in favor of extradition was based less on a stringent application of the political offense exception than on procedural mechanisms.[101] For instance, apparently the Supreme Court opted for the extradition of Ruiz due to political considerations. Secretary of State Greshaw had already expressed his view to the Mexican Foreign Minister that the offenses were not political:

> The idea that these acts were perpetrated with bona fide political or revolutionary designs is negatived by the fact that immediately after this occurrence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas.[102]

Therefore, although Ruiz qualified under the political offense exception, he was still extradited because the Court did not want to embarrass the executive branch. Friendly relations with Mexico were more important at that juncture than giving refuge to a few quasi-revolutionaries. Restricting the scope of habeas corpus provided a procedural mechanism for a political end.[103]

Recent political offense cases in international extradition law have also applied the traditional *Castioni* incidence test with few deviations.[104] In *In re McMullen*,[105] the United Kingdom sought the extradition from the United States of a former Provisional Irish Republican Army (PIRA) member accused of murder in connection with the bombing of a military barracks in England. The PIRA is a

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99. *Id.* at 503.

100. *Id.* at 511-12.

101. Epps, *supra* note 57, at 70.

102. 161 U.S. at 511.

103. Epps, *supra* note 57, at 70.

104. Deviations from the incidence test to detect the political offense exception will be discussed later; *see infra* text and accompanying notes 104-19. *See, e.g.*, Karadzole v. Artukovic, 355 U.S. 393 (1958); Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

105. No. 3-78-1099 MG (N.D. Cal. May 11, 1979).

militant offshoot of the Irish Republican Army dedicated to using terrorism to remove the British from Northern Ireland.[106] In that case, the United States magistrate concluded that McMullen's acts had taken place during an uprising throughout the United Kingdom and were incidental to the political disturbance. Therefore, the political offense exception applied and extradition was denied.[107]

Similarly, the magistrate in *In re Mackin*,[108] also applied the traditional incidence test. In that case, the United Kingdom sought the extradition of an Irish Republican Army member accused of murdering a British soldier in Northern Ireland. As in *In re McMullen*, extradition was denied because both the uprising and incidental to requirements in the political offense exception were satisfied. The conflict in Northern Ireland was characterized as a political contest concerning the control of the state and the offense of murder was held to be incidental to the contest.[109]

In contrast to the generally consistent application of the traditional incidence test,[110] the Seventh Circuit in *Eain v. Wilkes*,[111] applied a different test with limitations on the political offense exception that had not previously been a part of United States law. First, the *Eain* court distinguished between conflicts that involved "on-going, organized battles between contending armies," and conflicts that involved groups with "the dispersed nature of the PLO [Palestine Liberation Organization]."[112] The court noted that only in the former situation could a clear distinction be drawn between the activities of the military forces and individual acts of violence. Second, the court required that there be a "direct link between the perpetrator, a political organization's political goals, and the specific act."[113] In order to apply such a direct link test, a court must examine the motivation for the political legitimacy of the act. Third, the Court simply stated that, regardless of the political objective, "the indiscriminate bombing

106. McMullen v. INS, 658 F.2d 1312, 1314 (9th Cir. 1981).

107. Later, the United States government tried to deport McMullen because of his illegal entry into the United States and his undocumented status. The Ninth Circuit denied deportation since McMullen established that because he had deserted the PIRA, his life or freedom would be threatened if he returned to the United Kingdom. *Id.*

108. No. 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981).

109. *McMullen*, 658 F.2d at 1314.

110. Quinn v. Robinson, 783 F.2d 776, 802 (9th Cir. 1986).

111. 641 F.2d 504 (7th Cir. 1981).

112. *Id.* at 519.

113. *Id.* at 521.

of a civilian population is not recognized as a protective political act."[114]

In *Eain v. Wilkes*, Israel requested the extradition of an alleged member of the Palestine Liberation Organization (P.L.O.) charged with exploding a bomb in the marketplace of an Israeli city.[115] Applying its deviated test, the court stated that a random bombing, intended to indiscriminately bomb a civilian population, is not recognized as a protected political act.[116] Therefore, based on a deviation from the traditional incidence test, the Seventh Circuit in *Eain* affirmed the granting of Israel's extradition request.[117]

In the most recent Ninth Circuit political offense case, the court in *Quinn v. Robinson*[118] affirmed using the traditional incidence test to detect a political offense. Based on the traditional incidence test with the uprising and "incidental to" requirements, the Ninth Circuit denied Quinn's political offense plea to bar his extradition to the United Kingdom.[119]

IV. CRITICISM OF THE POLITICAL OFFENSE EXCEPTION AND/OR THE INCIDENCE TEST AS ENCOURAGING INTERNATIONAL TERRORISM

A. Criticism of the Political Offense Exception

Critics of the political offense exception and/or the incidence test, when used to detect a political offense, claim one or both encourages international terrorism.[120] The extremists believe that the political offense exception should be abolished[121] because it encourages international terrorism by allowing those committing violence in other countries to seek asylum in the United States.[122] Other critics state that, while the political offense exception should be kept, it should be reformed with some new standard because the traditional incidence test does not adequately separate political offenders from

114. *Id.*

115. *Id.* at 507.

116. *Id.* at 521.

117. *Id.* at 523. The *Eain* case will be more fully discussed later in this Comment. *See infra* text accompanying notes 209-25.

118. Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986).

119. The *Quinn* case will be fully discussed later in this Comment. See *infra* pages 25-28.

120. *In re* Doherty, 599 F. Supp. 270, 274-76 (S.D.N.Y. 1984); *see also In re* McMullen, No. 3-78-1099 M.G. (N.D. Cal. May 11, 1979), *reprinted in* Extradition Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 294-96 (1981).

121. Eain v. Wilkes, 641 F.2d 504, 520 (7th Cir. 1981).

122. C. VAN DEN WIJNGAERT, *supra* note 53, at 150.

international terrorists.[123] These critics argue that the present operation of the exception poses difficult definitional problems due to the test's vagueness; international terrorists are treated the same as those who act on the basis of conscience.

1. Abolition of the Political Offense

In the United States, various scholars advocate abolishing the political offense exception in extradition law to reduce incidents of terrorism.[124] Such commentators suggest proposals to replace the political offense exception. One scholar, Epps,[125] advocates the abolition of the political offense exception as it "needlessly hamper[s] harmonious and pragmatic international relations."[126] Epps suggests a solution where two states would rely on existing executive discretion in granting asylum to protect acts of conscience.[127] Such a solution, she claims, preserves the right not to extradite those who are being sought merely for their acts of conscience while reducing acts of terrorism which hamper fruitful international relations.[128]

A second proposal by Bassiouni[129] would remove the political offense from the domestic decision making process of the states involved by giving an international court exclusive jurisdiction over the exception.[130] The proponent claims this proposal would reduce political tension.[131] Political tension would be reduced because the exception would no longer be domestically administered which, she claims, is the problem with the political offense exception.[132]

2. Reform of the Traditional Incidence Test

While some propose to abolish the political offense exception, many scholars advocate reforming the traditional incidence test now used to detect a political offense to reduce the incidents of terrorists

123. *See infra* notes 124-39 and accompanying text for suggestions for a new standard other than the incidence test.

124. Epps, *supra* note 57, at 87.

125. Epps, *supra* note 57.

126. *Id.* at 88.

127. *Id.*

128. *Id.*

129. M. BASSIOUNI, *supra* note 22.

130. *Id.* at 257-58.

131. *Id.*

132. *Id.*

employing the exception to escape extradition.[133] A popular new approach suggested by many commentators calls for the advocation of judicial treatment.[134] One example of judicial treatment is following a balancing approach to be used by the judiciary.[135] Such an approach would weigh the political motives of an act against the gravity of the crimes and the manner of the execution.

A second alternative to the traditional incidence test is to have the Department of State conduct an extradition hearing modeled after the Administrative Procedure Act.[136] By conducting an extradition hearing administratively rather than judicially, more uniform results would follow since one board would conduct all the hearings.

A third proposal in lieu of the incidence test is to codify in either a statute or treaty the matter of political discretion. This codification would define acts of terrorism which would constitute grounds for extradition and which terrorist tactics are to be tolerated.[137] If codified, the judiciary would not have to inquire into the inherently political nature of the offense, thereby eliminating the need to decide the political legitimacy of an act as was done in *Eain*.[138] Furthermore, by codifying a definition of terrorist tactics, the mechanically applied *Castioni* test would not thwart judicial attempts to recognize the crucial role of terrorist tactics in some political movements.[139]

B. Why Critics Associate the Political Offense Exception with International Terrorism

Critics who advocate abolishing or narrowing the political of-

133. *See infra* notes 140-54 and accompanying text for a discussion of the difficulty of defining international terrorism.

134. *See* Banoff & Pyle, *"To Surrender Political Offenders": The Political Offense Exception in the United States Law*, 16 N.Y.U. J. INT'L L. & POL. 168, 219 (1984); Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381 (1979); Lubet & Czakes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, 267-69 (1980); Sternberg & Skelding, *State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law*, 15 CASE W. RES. J. INT'L L. 137, 170 (1983).

135. *See* Banoff & Pyle, *supra* note 134; Hannay, *supra* note 134; Lubet & Czakes, *supra* note 134; Sternberg & Skelding, *supra* note 134; Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 VA. J. INT'L L. 163 (1980); Note, *American Courts and Modern Terrorism*, *supra* note 57; Note, *Political Legitimacy in the Law of Political Asylum*, 88 HARV. L. REV. 450 (1985); Epps, *supra* note 52; M. BASSIOUNI, *supra* note 22.

136. Note, *Terrorist Extradition and the Political Offense Exception*, *supra* note 125, at 179.

137. Note, *American Courts and Modern Terrorism*, *supra* note 59, at 643.

138. Hannay, *supra* note 134, at 405.

139. Note, *American Courts and Modern Terrorism*, *supra* note 59, at 643.

fense exception[140] do so because they associate the exception with international terrorism.[141] The critics assume that a relationship exists between the political offense exception and terrorism because they believe "that modern revolutionary tactics, which include violence directed at civilians, are not politically legitimate."[142] This inherent conceptual shortcoming skews any political offense analysis because, in deciding what tactics are acceptable, the commentators impose on other nations and cultures their own traditional notions of how internal political struggles should be conducted.[143]

Many tactics used by individuals or groups seeking to change their domestic governments are not acceptable to United States citizens. For example, many or most United States citizens find distasteful indiscriminate bombings in public places[144] to achieve political change. However, these tactics are employed by persons who do not share the cultural and social values or mores of many United States citizens.[145] Moreover, in contrast to more organized and identifiable past revolutions such as the American Revolution, today's revolutions are often carried out by many different ideological groups whose only common tie is to oppose those in power (such as the Contras). However, United States citizens should not attempt to impose their sense of political reality on others. Critics should separate their cultural and emotional biases when distinguishing between "terrorism"[146] and internal political struggles because "it is not our place to impose our notions of civilized strife on people who are seeking to overthrow regimes in control of their countries in contexts and circumstances that we have not experienced and which we can identify only with the greatest difficulty."[147]

Instead, critics should focus on the fact that revolutionaries are attempting to change their governments. This goal makes the political offense exception applicable because of the insurgent's motives for

140. Eain v. Wilkes, 641 F.2d 504, 520 (7th Cir. 1981); *In re* Doherty, 599 F. Supp. 270, 275 (S.D.N.Y. 1984).

141. *Id.*

142. Quinn v. Robinson, 783 F.2d 776, 804 (9th Cir. 1986).

143. *Id.*

144. Eain v. Wilkes, 641 F.2d 504, 521 (7th Cir. 1981).

145. *Quinn*, 783 F.2d at 804.

146. The definition of international terrorism is problematic. The United States Code does not contain any criminal statute defining international terrorism per se. *See* Kornblum & Jachnycky, *Politics, The Courts and Terrorism: Are the Laws Adequate?*, 26 JUDGES J. 16-21 (1987).

147. *Quinn*, 783 F.2d at 804.

desiring the change. Indeed, the whole basis for the evolution of the political offense exception was the very separation between common crimes and political offenses.[148] As opposed to common offenses, political crimes are not inherently criminal because the perpetrator acts not for personal motives but for the benefit of society as a whole.[149] Criminal acts, in contrast, are anti-social and not committed to improving the general well-being of society.[150] Because the political offender is committed to enhancing the general well-being of his society, his acts are less reprehensible and in some cases, even excusable.[151] Therefore, the judiciary's role is not to determine tacitly that particular political objectives are not legitimate.[152]

Because of the inherent distinction between common crimes and political offenses,[153] both the policy and legal considerations differ dramatically between acts of international terrorism and violent acts committed as part of other nations' internal political struggles. However, while the application of the political offense exception comports with both the original justifications for the exception and the requirements of the traditional incidence test, its application to acts of internal terrorism comport with neither.[154]

V. THE POLITICAL OFFENSE EXCEPTION IS A WORKABLE REALITY AS IT PROMOTES THE GOALS THAT ORIGINALLY INSPIRED ITS INCEPTION AND AS IT ENSURES THAT INTERNATIONAL TERRORISTS ARE SUBJECT TO EXTRADITION

A. The Incidence Test Protects Acts of Domestic Violence in Connection with a Struggle for Political Self-Determination

As stated in *Quinn v. Robinson*:

> [t]here is no need to create a new mechanism for defining 'political offenses' in order to ensure that . . . international terrorists will be subject to extradition, and that the exception will continue to cover the type of domestic revolutionary conduct that inspired its operation in the first place. The traditional incidence test requires no

148. Note, *Distinguishing Terrorist Activities*, *supra* note 62, at 105.

149. *Id.* at 105-06.

150. For example, in *Eain v. Wilkes*, 641 F.2d 504, 507 (7th Cir. 1981), a bomb was placed in an open marketplace in the name of political opposition.

151. C. VAN DEN WIJNGAERT, *supra* note 53, at 3.

152. Quinn v. Robinson, 783 F.2d 776, 804 (9th Cir. 1986).

153. Note, *Distinguishing Terrorist Activities*, *supra* note 62, at 105-06.

154. *Quinn*, 783 F.2d at 805.

modification as while it protects acts of domestic violence in connection with a struggle for political self-determination, it was not intended to and does not protect acts of international terrorists.[155]

1. The Incidence Test Serves to Limit the Political Offense Exception to its Historic Purposes

Both the "uprising" and "incidental to" requirements of the traditional incidence test serve to limit the political offense exception to its historical purposes.[156] In general, the historical purpose of the political offense exception is to protect an individual's right to agitate for political change, even if through violent means.[157] In order to explain this policy, both components of the incidence test will be examined in light of the connection between domestic violence and political self-determination.

i. The "Uprising" Component

The first element of the political offense exception is that the act must have occurred during an uprising, rebellion, or revolution. Further, the accused must be a member of the group participating in the uprising.[158] Therefore, the uprising requirement limits the exception in two respects. First, the exception is limited to situations where a certain level of violence exists.[159] In addition, such acts must be used by revolutionaries to bring about a change in the composition or structure of the government in their country.[160] Second, " 'an uprising' cannot extend beyond the [physical] borders of the country or territory in which a group of citizens or residents is seeking to change their particular government or governmental structure."[161] For example, if a Turk bombed the Turkish Embassy in Britain and then fled to the United States, the uprising requirement would not be met because the defendant was outside the physical borders of Turkey. Thus, both limitations on the "uprising" requirement seek "to protect those engaged in internal or domestic struggles over the form or com-

155. *Id.* at 806.

156. Note, *Distinguishing Terrorist Activities*, *supra* note 62, at 105-06.

157. Comment, *The Political Offense Exception to Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 NOTRE DAME L. REV. 1005, 1025 (1984); *see also supra* text accompanying notes 55-61 for a full discussion of the historical purposes behind the political offense exception.

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

159. Quinn v. Robinson, 783 F.2d 776, 807 (9th Cir. 1986).

160. *Id.*

161. *Id.*

position of their own government, including, of course, struggles to displace an occupying power."[162] In contrast, when the Irish Republican Army committed certain acts within Ireland to protest English presence, the uprising requirement was met as there was a current uprising in Ireland and such acts occurred within the physical borders of Ireland.[163]

ii. The "Incident to" Component

The second element of the political offense exception is that the accused must be a person engaged in acts of political violence with a political end.[164] In describing this requirement, the United States courts have used the phrases "incidental to," "in the course of," "connected to," and "in furtherance of" interchangeably.[165] Such terms are not distinguishable but the term "incidental to" should be used in order to avoid confusion. If courts are precise in their terminology, confusion will be lessened, and consistent results will follow. There are several limitations placed on the "incidental to" requirement. First, "incidental to" acts are limited by the geographic confines of the uprising.[166] Secondly, there must be a certain level of connection between the political violence and the political end.[167] However, the level of connection that is required by the courts is not concrete. The "act must be causally or ideologically related to the uprising."[168] For example, in *Ornelas v. Ruiz*,[169] the court suggested that by allowing extradition, the rapid withdrawal of the bandits after a foray, in the absence of threatening armed forces, were not acts incidental to an uprising.[170]

Basically, the courts use a "liberal nexus test"[171] to discern if the "incidental to" requirement has been met.[172] Under the liberal nexus test, the court simply determines whether the conduct of the accused is related to or connected with the insurgent activity.[173] For example,

162. *Id.*
163. *Id.* at 813.
164. *In re* Castioni, [1891] 1 Q.B. 149.
165. *Quinn*, 783 F.2d at 809.
166. *Id.* at 806.
167. *Id.* at 809.
168. *Id.*
169. Ornelas v. Ruiz, 161 U.S. 502, 511 (1896).
170. *Id.*
171. *Id.* at 511.
172. Quinn v. Robinson, 783 F.2d 776, 809 (9th Cir. 1986).
173. *Id.* at 810.

in *Eain*, the defendant would not be required to provide evidence that his act of dropping the bomb in the open marketplace was committed for political motivations as such evidence is usually not available. Instead, the focus would be on whether evidence existed to establish that the act was committed for purely personal reasons such as vengeance or vindictiveness.[174] Therefore, like the "uprising" requirement, the "incidental to" requirement is designed to protect those engaged in domestic struggles for control of their government and not to protect mercenaries or those acting for non-political motives.[175]

2. The Incidence Test Does Not Promote Terrorist Activities

Understandably, because of the limitations placed on both requirements in the incidence test, the historical purposes of the exception are promoted while international terrorism is not. To illustrate this point, the current and common terrorist activity of skyjacking is presented.[176]

First, skyjacking would fail the "uprising" requirement of the incidence test for two reasons. Spatially, the act of skyjacking does not qualify as a political act performed to bring about a change in government.[177] Skyjacking also fails temporally under the uprising requirement because an uprising is geographically limited to the physical borders of the country or territory in which the uprising is taking place and skyjackings usually occur elsewhere.[178]

Therefore, under the incidence test, the act of skyjacking would not even reach the "incidental to" requirement as it fails under the "uprising" requirement. However, even assuming an act of skyjacking could pass muster under the uprising component, the accused would have a difficult time trying to relate or connect his conduct with the insurgent activity under the liberal nexus test. Thus, courts would rarely find that an act of skyjacking was not committed for purely personal reasons as opposed to political reasons.

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174. *Id.* at 809.

175. *Id.* at 809-10.

176. Aircraft hijacking is made an extraditable offense in treaties by the United States with Brazil, New Zealand, and Sweden. The United States agreed in 1969 with Great Britain and France to add aircraft hijacking to the list of extraditable offenses. DEP'T ST. BULL., (Dec. 22, 1969), at 592; *see also* Evans, *Aircraft Hijacking: its Cause and Cure*, 63 AM. J. INT'L L. 695, 707-10 (1969).

177. Quinn v. Robinson, 783 F.2d 776, 807 (9th Cir. 1986).

178. *Id.*

B. Quinn v. Robinson: A Proper Application Of The Incidence Test, Does Not Encourage International Terrorism

Quinn v. Robinson[179] is important in considering the political offense exception as it is the most recent case which applies the proper test to find a political offense. In *Quinn v. Robinson*, the Ninth Circuit embraced and defended the application of the traditional incidence test. The court illustrated the proper considerations of the incidence test which, when applied correctly, do not allow the United States to become a haven for international terrorists.[180]

In *Quinn v. Robinson*, United Kingdom officials sought the extradition of William Joseph Quinn, an alleged PIRA member,[181] on charges of murder and conspiracy to cause bomb explosions. Allegedly, Quinn had been involved in a conspiracy with PIRA members who planned a number of bombing incidents.[182] Quinn's murder charges centered around the incident of shooting and killing an off-duty, out-of-uniform police constable.[183]

While being held by the Northern Ireland government in May, 1975, a witness identified Quinn as the murderer of the constable.[184]

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179. 783 F.2d 776 (9th Cir. 1986).

180. Eain v. Wilkes, 641 F.2d 504, 520 (7th Cir. 1981).

181. The Provisional Irish Republican Army is a militant branch of the Irish Republican Army dedicated to using terrorist methods to achieve the removal of the British from Northern Ireland. McMullen v. INS, 658 F.2d 1312, 1314 (9th Cir. 1981).

182. Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986). The evidence before the United States centered around six specific bombing incidents:

1. On January 18, 1974, a hollowed-out copy of the Bible containing a bomb was mailed to Roman Catholic Bishop Tickel. Quinn's fingerprints were on the wrapping paper around the bomb.

2. On January 30, 1974, a letter bomb was sent to and exploded on Crown Court Judge John Huxley Buzzard. Quinn's fingerprints were again found on the wrapping around the bomb.

3. On February 4, 1974, a letter bomb was sent to the chairman of the Daily Express newspaper, Max Aitken, and subsequently exploded in the face of a security guard. Quinn's fingerprints were found on the paper wrappings of the book concealing the bomb.

4. On December 20, 1974, a bomb was found at a railway station in Hampshire County, England. Quinn's co-conspirator's fingerprints were found on the wrapping paper of the bomb.

5. On December 21, 1974, a bomb was found in the archway entrance to the Kings Arms Public House in Warminister, England.

6. On January 27, 1975, a bomb was found on the front step of the Charco-Burger Grill on Heath Street in London. Quinn's fingerprints were again found on the wrappings of the bomb. *See id.* at 783-84.

183. Police Constable Stephen Tibble noticed the chase of a man by two other police officers and so, blocked the suspect's path. The suspect shot Tibble three times and ran, evading the other officers. Tibble died that afternoon. *Id.* at 784.

184. *Id.* at 785.

Quinn, a United States citizen, had returned to the United States where officials arrested him pursuant to a provisional arrest warrant on behalf of the United Kingdom.[185]

At the magistrate's hearing, Quinn asserted the political offense exception to block his extradition to the United Kingdom. The magistrate stated the incidence test of the political offense exception entails three prongs: 1) whether there was a war, rebellion, revolution or political uprising at the time and place of the offenses; 2) whether Quinn was a member of the uprising group; and 3) whether the offenses for which extradition is sought were incidental to and in furtherance of the political uprising.[186] The magistrate concluded that the political offense exception did not bar Quinn's extradition to the United Kingdom because Quinn had not proven he was a member of the PIRA[187] or that his were incidental to a political uprising.[188]

The district court reversed the magistrate's decision, stating that the political offense exception barred Quinn's extradition to the United Kingdom.[189] The district court rejected the magistrate's version of the incidence test by eliminating the membership requirement, which required that the defendant be a member of the uprising group.[190] The court held that there was an uprising in Northern Ireland at the time of the offenses with which Quinn was charged.[191] This uprising consisted of PIRA members seeking to change the structure of the government in the country in which they lived. Moreover, criminal activity in Northern Ireland in conjunction with this uprising clearly satisfied the "incidental to" requirement in the incidence test.[192]

The Ninth Circuit, correctly applying the traditional incidence test, reversed the district court's ruling and thus allowed Quinn's extradition.[193] First, to clear any confusion about the misapplication of the incidence test, the court stated the requirements for the political

185. *Id.* at 783.

186. *Id.* at 810-11.

187. Quinn v. Robinson, 783 F.2d 776, 811 (9th Cir. 1981). The district court in *Quinn* rejected the membership requirement as adopted by the Seventh Circuit in Eain v. Wilkes, 641 F.2d 504, 520-21 (7th Cir. 1981).

188. *Quinn*, 783 F.2d at 811.

189. *Id.*

190. *Id.*

191. *Id.*

192. Quinn v. Robinson, 783 F.2d 776, 811 (9th Cir. 1981).

193. *Id.* at 818.

offense exception.[194] The court clearly stated that the incidence test has two components: the 'uprising' requirement and the 'incidental to' requirement.[195] The 'uprising' component requires that there be an uprising, rebellion, or revolution.[196] The 'incidental to' component requires that an offense must occur in the context of an uprising.[197] The court further extrapolated on the proper considerations in both the "uprising" and "incidental to" prongs, rejecting the membership requirement.[198]

The Ninth Circuit disagreed primarily with the district court's holding that a political uprising in Northern Ireland extended to England.[199] Although an uprising existed in Northern Ireland at the time the charged offenses were committed, there was no uprising in England.[200] In other words "the level of violence outside Northern Ireland was insufficient in itself to constitute an uprising."[201] As the magistrate found, what violence there was was not being generated by citizens or residents of England.[202]

The court further noted that the "uprising" requirement was not met because Quinn's offenses took place in England, a different geographical location than where the PIRA was seeking to change the form of their government—Northern Ireland.[203] Instead, an "uprising" refers to a people rising up in their own land against the government of that land.[204] The "uprising" requirement does not tolerate terrorism exported to other locations as in the instant case.[205] If the acts had occurred in Northern Ireland, the Ninth Circuit probably would have taken another view of the case, respecting the 'uprising' requirement. Moreover, violent acts cannot be committed by persons not residing in the area in which the violent act occured, such as Quinn, a United States citizen.[206]

Therefore, since the Ninth Circuit concluded that the uprising

194. *Id.* at 806-09.
195. *Id.* at 806.
196. *Id.*
197. Quinn v. Robinson, 783 F.2d 776, 806 (9th Cir. 1981).
198. *Id.* at 806-09.
199. *Id.* at 813.
200. *Id.*
201. *Id.*
202. Quinn v. Robinson, 783 F.2d 776, 813 (9th Cir. 1981).
203. *Id.*
204. *Id.*
205. *Id.* at 813-14.
206. *Id.* at 814.

requirement was not met in the incidence test, neither the bombing nor murder charges were non-extraditable offenses under the political offense exception to the extradition treaty between the United States and the United Kingdom. *Quinn v. Robinson* does not condone international terrorism but instead illustrates that a proper application of the incidence test in detecting the political offense exception is a viable approach.

C. Political Offense Problems Only Arise Upon Deviation from the Traditional Incidence Test or its Misapplication

Problems and criticisms of the political offense exception tend to arise when courts deviate from the United States law embodied in the incidence test. In the recent political offense cases that have applied the traditional United States incidence test,[207] the abuses noted by commentators have been avoided.[208]

A flagrant example of a deviation from the traditional incidence test is found in *Eain v. Wilkes*.[209] The *Eain* court "superimposed a number of limitations on the political offense exception that had not previously been a part of the United States law."[210]

In *Eain*, Israel requested the extradition of an alleged member of the Palestine Liberation Organization accused of exploding a bomb in the marketplace of an Israeli city.[211] The defendant challenged his extradition under the political offense exception to the United States-Israel Treaty,[212] based on the P.L.O. claim of responsibility for the bombing. A magistrate granted Israel's extradition request; the dis-

207. *In re* McMullen, No. 3-78-1099 MG (N.D. Cal. May 11, 1979) (The United Kingdom sought the extradition of a former Provisional Irish Republican Army member from the United States on murder charges. The United States denied extradition on the basis of the political offense exception); *in re* Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981) *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981) (The United Kingdom sought the extradition from the United States of an Irish Republican Army member accused of murdering a British soldier. The United States denied extradition on the basis of the political offense exception); Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986); *see supra* notes 179-206 and accompanying text.

208. *See generally supra* text accompanying notes 120-54.

209. 641 F.2d 504 (7th Cir. 1981); *see also supra* text accompanying notes 111-17.

210. Quinn v. Robinson, 783 F.2d 776, 802 (9th Cir. 1986).

211. *Id.* at 507.

212. Convention on Extradition, Dec. 10, 1962, United States-Israel, art. VI(4), 14 U.S.T. 1707, 1709, T.I.A.S. No. 5476. The Convention provides in relevant part:

> Extradition shall not be granted in any of the following circumstances: When the offense is regarded by the requested party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character.

Id.

trict court denied habeas corpus relief, and the Seventh Circuit affirmed.[213] The Seventh Circuit reasoned that regardless of the political objective, "the indiscriminate bombing of a civilian populace is not recognized as a protected political act."[214]

While the result in *Eain* is not necessarily disturbing, the application of the incidence test is problematic. In reaching its decision, the *Eain* court deviated from both the "uprising" and "incidental to" requirements in the incidence test. First, the "court redefined an 'uprising' as a struggle between organized, non-dispersed military forces."[215] The *Eain* court's definition of the uprising component is incorrect as it invites ideological and foreign policy determination by extradition courts.

Unlike their British counterpart, the United States courts demonstrated a "judicial aloofness"[216] in applying the incidence test to decide if an offense is political.[217] United States courts, as exemplified in *In re Ezeta*, should be unconcerned with the nature of the political motives or the "complexion of the old or new regime."[218]

Second, the *Eain* court also introduced a new version of the "incidental to" requirement in stating that a direct tie must exist between the perpetrator, a political organization's political goals, and the specific act.[219] Therefore, in order to evaluate the "direct link"[220] between the offense and the conflict, the court must examine the motivation for and political legitimacy of the act.[221]

This specific rendition of the incidence test in *Eain* is especially problematic because a court is again invited to impose its own ideological and foreign policy determinations in examining the motivation for and political legitimacy of the act.[222] Again, such a focus allows United States citizens to impose their own sense of political reality onto others, instead of separating their cultural and emotional biases. Apparently, the *Eain* court concluded that the P.L.O.'s objectives were not politically legitimate in determining if the political offense

213. Eain v. Wilkes, 641 F.2d 504, 523 (7th Cir. 1981).
214. *Id.* at 521.
215. *Id.* at 519-20.
216. Epps, *supra* note 57, at 69.
217. *Id.* at 68-9.
218. *Id.*
219. Eain v. Wilkes, 641 F.2d at 504, 520 (7th Cir. 1981).
220. *Id.* at 515-16.
221. *Id.* at 520.
222. Note, *Terrorist Extradition and the Political Offense Exception*, *supra* note 135, at 177-78.

exception applied to bar extradition.[223]

The *Eain* court attempted to rationalize its significant departure from the traditional incidence test. The court claimed that in the absence of their newly imposed restrictions:

> [N]othing would prevent an influx of terrorists seeking a safe haven in America . . . . Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States, and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society . . . the political offense exception . . . should be applied with great care lest our country become a social jungle . . . .[224]

Such a rationale is inaccurate since, as illustrated in *Quinn v. Robinson*, a proper application of the traditional test prevents potential terrorists from escaping extradition through the political offense exception.[225]

Irregardless of the result in *Eain*, any deviation from a proper application of the incidence test should be avoided. Deviation and misapplication create confusion, and inconsistent tests and results. Thus, the problem is the application of the political offense exception. The problem does not lie in the political offense exception itself.

VI. CONCLUSION

The incidence test has been applied since 1894 and has been a longstanding tradition in United States extradition law. The incidence test, in light of its historical origins and goals, has served the United States well, and continues to do so. Critics' concern that this country not become a haven for international terrorists can readily be met through a proper application of the incidence test. Acts of international terrorism do not meet the incidence test and are not thus covered by the political offense exception.

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223. Quinn v. Robinson, 783 F.2d 776, 802 (9th Cir. 1986).
224. Eain v. Wilkes, 641 F.2d at 504, 520 (7th Cir. 1981).
225. *Quinn*, 783 F.2d at 806.