

1987

The Political Offense Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?

James J. Kinneally III

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Kinneally, III, James J. "The Political Offense Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?" American University International Law Review 2, no. 1 (1987): 203-227.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

THE POLITICAL OFFENSE EXCEPTION: IS THE UNITED STATES-UNITED KINGDOM SUPPLEMENTARY EXTRADITION TREATY THE BEGINNING OF THE END?

James J. Kinneally III*

INTRODUCTION

The increasing number of terrorist attacks over the past several years have caused heightened concern throughout the world about the international community's ability to maintain world order. One solution proposed to limit and discourage such attacks is greater recourse to the ancient process of extradition.¹ Extradition is the process of returning accused criminals found in a foreign state to the state seeking prosecution.² In the absence of extradition, terrorists avoid prosecution for crimes by seeking refuge in foreign countries that do not sanction extraterritorial crimes.³ Many countries will only extradite individuals pursuant to specific treaty obligations.⁴ Consequently, terrorists who es-

* J.D., 1987, Washington College of Law, The American University.

1. See I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 5 (1971) [hereinafter I. SHEARER] (discussing the oldest known extradition provision in a peace treaty that called for the return of criminals of one party found in the territory of another). This treaty was concluded in 1280 B.C. between Egyptian Pharaoh Ramses II and the Hittite Prince Hattusili. *Id.*

2. 6 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 727 (1968) [hereinafter M. WHITEMAN]; see 1 M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* § 1-1 (1983) [hereinafter M. BASSIOUNI, *UNITED STATES LAW AND PRACTICE*] (defining extradition as several processes in which one sovereign surrenders an accused criminal or fugitive offender to another sovereign).

3. *Proposed Ratification of the Supplementary Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 1 (1985) (statement of Abraham D. Sofaer, Legal Advisor to the State Department) [hereinafter Sofaer]; see Sofaer, *Terrorism and the Law*, 64 *FOREIGN AFF.* 901-02 (1986) (addressing problems associated with sanctioning terrorism).

4. See 1 M. BASSIOUNI, *UNITED STATES LAW AND PRACTICE*, *supra* note 2, at 2, § 2 (discussing the two predominant views on duty to extradite). Bassiouni notes that Puffendorf and Billot consider extradition a moral obligation that requires an explicit agreement or "contract" in order to be binding. *Id.* Bassiouni also discusses the Grotius-deVattel school of extradition that finds that the refugee state has a legal duty under international law to either return the accused persons to the requesting state, or punish them itself. *Id.* Bassiouni maintains that current practice favors the Puffendorf and Billot view, but that some states regard comity as a legally sufficient basis for extradition. *Id.*; see also I. SHEARER, *supra* note 1, at 28 (noting that most common law countries will not extradite an offender without a prior treaty obligation); S. BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 33-48 (1968) [hereinafter S.

cape to countries without extradition treaties easily avoid prosecution. Because extradition treaties are cumbersome, time consuming instruments to negotiate, terrorist attacks that prompt negotiations of such treaties remain undeterred during the years required for negotiation and implementation.

An additional problem with using extradition to prosecute terrorists is that extradition treaties explicitly excuse individuals accused of political offenses.⁵ The majority of terrorist attacks are committed in order to attain a political goal. Consequently, terrorists often invoke the political offense exceptions to extradition treaties, avoiding extradition to jurisdictions where the alleged acts occur.

On June 8, 1972, the United States and the United Kingdom of Great Britain and Northern Ireland signed an Extradition Treaty.⁶ The Treaty included a standard political offense exception.⁷ To address concerns over the ability of Provisional Irish Republican Army (PIRA) members to invoke the political offense exception, the two nations signed a Supplementary Treaty⁸ on June 25, 1985. The Supplementary Treaty narrows the definition of a political offense under the 1972 Extradition Agreement, significantly reducing terrorists' recourse to the political offense exception.⁹

This Comment examines the historical and philosophical underpin-

BEDI] (discussing the various foundations of extradition including treaties and laws); 6 M. WHITEMAN, *supra* note 2, at 727 (outlining the duty to extradite in absence of a treaty obligation and the legal basis that various governments use to support the practice).

5. See Extradition Treaty, June 8, 1972, United Kingdom-United States, art. V, § 1(c), 28 U.S.T. 227, 230, T.I.A.S. No. 8468 [hereinafter Extradition Treaty] (setting forth the political offense exception).

6. Extradition Treaty, *supra* note 5.

7. *Id.* Article V of the Treaty states, in pertinent part, that 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 or punish him for an offense of a political character.

Id.

8. Supplementary Treaty Concerning The Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, S. Doc. No. 8, 99th Cong., 1st Sess. (1985) [hereinafter Supplementary Treaty]. The United States Senate overwhelmingly approved the Supplementary Treaty by a vote of 87-10 on July 17, 1986. N.Y. Times, July 18, 1986, at A1, col. 6.

9. Supplementary Treaty, *supra* note 8, at arts. 2-5. Articles 2 through 5 apply, respectively, to the following: the statute of limitations; submission of evidence; treaty retroactivity; and territorial applicability. *Id.*; see also *infra* note 112 (listing crimes no longer includable under the political offense exception of the 1972 Extradition Treaty).

nings of the political offense exception. In addition, this Comment analyzes the Supplementary Treaty's restriction on the applicability of the political offense exception by examining the underlying rationale of the exception. Finally, this Comment discusses two recommendations for revision of the political offense exception.

I. HISTORICAL BACKGROUND OF THE POLITICAL OFFENSE EXCEPTION

A. ORIGINS OF THE EXCEPTION

The political offense exception has not always been a facet of extradition. From the thirteenth century, B.C., to the eighteenth century, A.D., extradition specifically targeted individuals suspected of religious or political offenses against sovereigns.¹⁰ Prior to the eighteenth century, the escape of common criminals was not considered a public danger necessitating extradition.¹¹ Sovereigns, however, did seek prosecution for crimes against the state and actively pursued offenders who escaped.¹² Many fleeing offenders were captured by medieval despots, eager to surrender mutual political adversaries to solidify political power.¹³ Consequently, extradition treaties developed as a means of facilitating the return of suspected political offenders.

During the eighteenth century, political offenders' status underwent a metamorphosis. Increasing acceptance of the right to dissent and respect for personal liberty were hallmarks of the American Revolution¹⁴

10. See C. VAN DEN WIJNGAERT, *THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION* 5 (1980) [hereinafter C. VAN DEN WIJNGAERT] (discussing the rationale supporting early instances of extradition for political offenses); see also I. SHEARER, *supra* note 1, at 165-66 (explaining the insufficiency of ancient extradition practices and the formulation of more recent extradition doctrines). But see S. BEDI, *supra* note 4, at 16 (noting studies that show early extraditions were not limited to political crimes).

11. See C. VAN DEN WIJNGAERT, *supra* note 10, at 5-6 (noting that prior to the eighteenth century sovereigns were not concerned with extradition of common criminals, but did pursue those committing crimes against the state). But see S. BEDI, *supra* note 4, at 16 (noting that the practice of extraditing common criminals may have developed simultaneously with the extradition of political criminals).

12. See Note, *State Department Determination of Political Offenders: Death Knell for the Political Offense Exception in Extradition Law*, 15 CASE W. RES. J. INT'L L. 137, 138 (1983) [hereinafter Note, *State Department Determination*] (discussing the historical development of extradition as a function of the exigencies of maintaining eighteenth century sovereignty). But cf. C. VAN DEN WIJNGAERT, *supra* note 10, at 5 (noting that few common criminals chose to flee their native countries because of the lack of social and political privileges abroad).

13. See C. VAN DEN WIJNGAERT, *supra* note 10, at 16 (discussing asylum, extradition, and diplomatic relations among medieval sovereigns); *id.* at 5-6 (discussing treaties that require the return of all traitors).

14. See The Declaration of Independence para. 1 (U.S. 1776) (declaring that whenever government becomes destructive of the ends, the people possess the right to

and were advocated by such writers as John Locke¹⁵ and J. S. Mill.¹⁶ Other factors that influenced the political offense exception's development include: (1) a growing reluctance to engage in "victor's justice";¹⁷ (2) an increasing respect for due process rights of individuals;¹⁸ and (3) an unwillingness to interfere in the internal affairs of other countries.¹⁹ The political changes of the eighteenth century, therefore, marked the transformation of the political offense into a "nonextraditable offense par excellence."²⁰

The political offense exception was first codified in the Belgium Extradition Act of October 1, 1833²¹ and was included in a treaty between France and Belgium the following year.²² Over the next several

alter or abolish it).

15. See J. LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT 18-19 (E. Barker ed. 1960) (maintaining that the people have the right to overthrow governments that abuse power).

16. See J.S. MILL, ON LIBERTY (C. Shields ed. 1956). In this work, Mill stated:

The aim, therefore, of patriots was to set limits on the power which the ruler should be suffered to exercise over the community; and the limitation was what they meant by liberty. It was attempted in two ways. First, by obtaining a recognition of certain immunities, called political liberties or rights which it was regarded as a breach of duty of the ruler to infringe, and which, if he did infringe, specific resistance or general rebellion was held to be justifiable.

Id. at 4. Mill discusses the growing acceptance of the removal of people's delegates and magistrates at the pleasure of the citizens. *Id.* Mill concludes that the ability to remove government officials is necessary for citizens to have complete security that governmental power is not "abused to their disadvantage." *Id.* at 5.

17. *Extradition, Political Crimes, and the U.K. Treaty: Hearings Before the Senate Committee on Foreign Relations*, 99th Cong., 1st Sess. 12 (1985) (testimony of Prof. Christopher H. Pyle) [hereinafter Pyle]. Under the concept of "victor's justice," a nation may refuse to extradite a revolutionary "merely because he had the misfortune to fail." Note, *State Department Determination*, *supra* note 12, at 139.

18. See C. VAN DEN WIJNGAERT, *supra* note 10, at 3 (listing the three components of the rationale behind the political offense exception). The first component is the humanitarian interest in preventing a state from commencing unfair trial proceedings against a given revolutionary. *Id.*; see also M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 425 (1975) [hereinafter M. BASSIOUNI, WORLD PUBLIC ORDER] (noting the inherent unfairness in judicial proceedings of a state against its rebels).

19. *Quinn v. Robinson*, 783 F.2d 776, 793 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986). The court in *Quinn* stated three rationales behind the political offense exception: (1) the belief that citizens may actively attempt to change their political systems; (2) the desire to prevent a government from retaliating against an individual for his political beliefs; and (3) the general principle that governments should not interfere in the domestic political struggles of other countries. *Id.*

20. M. BASSIOUNI, WORLD PUBLIC ORDER, *supra* note 18, at 371.

21. 8 BULLETIN OFFICIEL DES LOIS ET ARRETES ROYAUX DE LA BELGIQUE 1195 (1833).

22. Treaty of 22 November 1834, Belgium-France, art. 5, 10 BULLETIN OFFICIEL DES LOIS ET ARRETES ROYAUX DE LA BELGIQUE 963 (1834), *cited in* I. SHEARER, *supra* note 1, at 167 n.2; see C. VAN DEN WIJNGAERT, *supra* note 10, at 13 (reproducing a portion of the Belgian Extradition Act of 1833 and noting that the Act prohibits

decades, France included the political offense exception in numerous treaties with other states.²³ Despite the codification of the political offense exception in treaties and statutes, many nations considered the exception self-evident and maintained that its codification was unnecessary.²⁴

B. THE PROBLEM OF DEFINING A POLITICAL OFFENSE

Historically, the most fundamental problem in applying the political offense exception is the lack of a clear definition of a political offense.²⁵ Although many nineteenth century treaties incorporated the exception, few clearly defined the parameters of a political offense.²⁶ One attempt to clarify the political offense exception was the attentat clause of the 1856 Belgian extradition law.²⁷ The attentat clause specifically excluded assassination attempts on heads of states from political offense

the prosecution of foreigners for political offenses before extradition).

23. I. SHEARER, *supra* note 1, at 167 (listing French extradition agreements concluded in the 19th century that included the political offense exception).

24. Letter of Mr. Fish to Mr. Hoffman, May 22, 1876 FOREIGN REL. 233, 237 (1876); 4 J. MOORE, INTERNATIONAL LAW DIGEST § 604, at 334 (1906) (reprinting the text of a letter from Hamilton Fish, Secretary of State, to Great Britain's Secretary of State Wickham Hoffman regarding codification of the political offense exception). The letter states:

Neither the extradition clause in the treaty of 1794, nor in that of 1842 contains any reference to immunity for political offenses, or to the protection of asylum for political or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible, anymore than, by the laws of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation.

Id.

25. C. VAN DEN WIJNGAERT, *supra* note 10, at 95-102. The concept of a political offense is fluid and changes with each factual situation. *Id.* at 95. What is considered an offense of political nature under some circumstances may not fall into that category in subsequent situations. *Id.* If a treaty includes a formal and rigid definition of the political offense that fails to allow for its elasticity, the parties can not compensate for future refinements in the definition without negotiating an amendment to the treaty. *Id.* at 97. Future developments may include new crimes such as terrorist attacks that are not explicitly covered under many treaties. The absence of a limiting definition allows parties to respond to developments as they present themselves, rather than going through the cumbersome and time consuming negotiation and implementation process for treaty amendment. *Id.* at 103. Consequently, the lack of a precise definition of political offense presents both advantages and disadvantages to the extradition process.

26. I. SHEARER, *supra* note 1, at 168-69 (noting the difficulties involved in defining the term "political" in treaties and legislation). The working definition is an elastic concept that has developed through judicial decisions, the work of commentators and the exercise of executive authority in response to the particular facts of each case, rather than through treaty negotiation. *Id.* See *supra* note 25 (discussing the definition of a political offense).

27. C. VAN DEN WIJNGAERT, *supra* note 10, at 13.

protection.²⁸

The absence of a uniform and precise definition of a political offense continued through the twentieth century.²⁹ Judicial and executive branches have unsuccessfully attempted to draft a more precise and uniform definition.³⁰ The Supplementary Treaty is representative of the most recent attempt to rectify the definitional problem.

Political offenses are divisible into two categories, the pure political offense and the relative political offense.³¹ The pure political offense involves "conduct directed against the sovereign . . . that constitutes a subjective threat to a political, religious or racial ideology, or its supporting structures . . . without . . . any of the elements of a common crime."³² Examples of pure political offenses include treason, sedition, and espionage,³³ but also include more passive forms of dissidence such as disagreement with state or party ideology, or draft evasion.³⁴ The

28. See *id.* at 136 (discussing the continuing controversy over the attentat clause). Van den Wijngaert notes that scholars have criticized the clause for excluding all other categories of political offense, except for assassinations of heads of state, from the definition of an extraditable offense. *Id.* Critics also contend that the attentat clause broadly assumes that heads of state are innocent of wrongdoing. *Id.* Thus, critics conclude that the clause is both too narrow and too broad. *Id.*

29. *Id.* at 95-102.

30. See Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L. REV. 495 (1984) (surveying recent congressional proposals on extradition and noting different positions taken by the Senate and the House on the political offense exception); Note, *Extradition Reform and the Statutory Definition of Political Offenses*, 24 VA. J. INT'L L. 419 (1984) (comparing legislative proposals of the Senate and House with respect to extradition and political offenses); see also *infra* notes 123-31 and accompanying text (discussing the judicial and executive branch roles in the extradition process); Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 VA. J. INT'L L. 163 (1980) (advocating legislative changes to clarify both the definition and application of the political offense exception by the two branches). The Supplementary Treaty signifies the most recent attempt to rectify the definitional problem. See *infra* notes 110-13 and accompanying text (discussing the provisions of the Supplementary Treaty regarding political offenses).

31. C. VAN DEN WIJNGAERT, *supra* note 10, at 105 (recognizing that political offenses are either pure or relative).

32. M. BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 18, at 379 (emphasizing that a pure political offense is a public, as opposed to a private wrong).

33. See *id.* at 380 (characterizing such crimes as a threat to the state and therefore purely political).

34. C. VAN DEN WIJNGAERT, *supra* note 10, at 107. These passive offenses are often nonextraditable for an unrelated reason known as the principle of double criminality which is included in most extradition treaties. See *Extradition Treaty*, *supra* note 5, at art. III (1)(a) (providing that extradition is granted . . . if the offense is punishable under the laws of both parties). If the act does not constitute an offense in both countries, then extradition is denied. See I. SHEARER, *supra* note 1, at 137 (discussing the principle of double criminality). Acts that constitute the passive offenses are often not prohibited in many countries, and they may be nonextraditable for that reason. See C. VAN DEN WIJNGAERT, *supra* note 10, at 107 (noting that passive offenses are often

pure political offense is generally nonextraditable because of the recognized right of individuals to alter or abolish their government.³⁵

The second category of political offenses, inspiring a plethora of interpretations concerning the scope of the political offense, is the relative political offense. The pure political offense only involves acts that are political in nature, whereas the relative political offense includes elements of a common crime coupled with political purposes or motives.³⁶ The addition of common crime elements dilutes the political character of the offense, making attempts to classify the act as political for extradition purposes more difficult.

C. RELATIVE POLITICAL OFFENSES UNDER THE POLITICAL OFFENSE EXCEPTION

1. *The Objective Test*

The ambiguous nature of the relative political offense prompted courts to employ different interpretations of the proper scope of the political offense exception. The most restrictive interpretation focuses solely on the objective act with complete disregard for the actor's motives.³⁷ In *In re Giovanni Gatti*, a 1947 French case, the court applied this restrictive interpretation to an extradition request for an individual convicted *in absentia* of murdering a communist.³⁸ Despite the seemingly persuasive argument that the act was politically motivated, the court approved extradition because the political character of the offense emanated not from the offender's motive, but from the nature of the rights injured.³⁹ Therefore, under the objective test, a country will not comply with an extradition request unless the nature of the injured rights is political.⁴⁰

not prohibited in many countries).

35. See *supra* notes 14-20 and accompanying text (discussing the philosophical and historical underpinnings of the political offense exception).

36. See C. VAN DEN WIJNGAERT, *supra* note 10, at 108 (using the term "relative" to include all political offenses that are not "pure"); M. BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 18, at 383 (noting that in a relative political offense, ideological motives prompt an act that constitutes a common crime).

37. See C. VAN DEN WIJNGAERT, *supra* note 10, at 120 (noting that the objective approach to defining a political offense is rarely applied). The reason for the minimal use of the objective theory is the requirement that in any given fact pattern, it is usually difficult to separate acts from the motives behind them. *Id.* at 121-22.

38. *In re Giovanni Gatti*, 14 I.L.R. 145 (1947), quoted in C. VAN DEN WIJNGAERT, *supra* note 10, at 121.

39. *Id.* (noting that the court applied a purely objective approach in deciding to extradite the offender).

40. *Id.* at 122. This approach is problematic because it blurs the distinction between pure and relative offenses. If killing a member of a communist group is not

2. *The Motives Test*

In direct contrast to the objective approach, some courts have focused solely on the offender's motives.⁴¹ Thus, if the offender is politically motivated, the actions are not considered sufficient grounds for extradition, regardless of the relationship to political motives or purposes.⁴² For example, in 1975, a French court denied a United States extradition request for two Americans charged with air piracy, kidnapping, and extortion because during the hijacking one of the defendants demanded that the pilot fly the plane to Hanoi.⁴³ Due to French government opposition to the American role in the Vietnam War, the reference to Hanoi convinced the French court that the hijackers were politically motivated and within the parameters of the political offense exception.⁴⁴

3. *The Swiss Test*

The predominance or proportionality test, also known as the Swiss test,⁴⁵ balances the political motive or purpose of the offender against the elements of common crime. The political offense exception is raised

considered political, then nothing short of a direct attack against a political institution can qualify as a political offense under this test. *Id.* In addition, the objective test is considered too formal because it fails to distinguish political crimes, as defined by the objective test, committed for strictly personal motives. *Id.* For example, the assassination of a head of state is considered a political offense under the objective test because of the nature of the rights injured. The objective test is applied in the same manner if the motives behind a murder stem from a completely nonpolitical argument concerning, for example, a gambling debt.

41. *See id.* (observing that in the majority of cases, French courts have focused on the alleged offender's motives).

42. *See id.* at 122-23 (commenting that the focus on intent provides too much protection when a purely personal, yet political motive prompts a serious crime).

43. *See* E. McDOWELL, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 168-75 (1975) (discussing United States contentions that allegations of political motives were insufficient to give rise to a political offense).

44. *See* Sofaer, *supra* note 3, at 15-16 (using this case as an example of the undesirable effects of the political offense exception). Sofaer cites a second example supporting his contention that an overbroad application of the political offense exception may have harmful results. *Id.* In 1973, five Americans—two of whom had escaped from jail while serving sentences for murder and armed robbery—hijacked a domestic flight and held the passengers for \$1 million ransom. *Id.* A French court declined a United States extradition request, stating that the hijackers' act was committed to escape racial segregation and criminal charges brought as a product of political persecution. *Id.* at 17; *see also* E. McDOWELL, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 124-25 (1976) (discussing the racial persecution the five would suffer if returned for trial on the charges stemming from the hijacking).

45. *See* C. VAN DEN WIJNGAERT, *supra* note 10, at 126-32 (providing the origins of the proportionality test); *see also* I. SHEARER, *supra* note 1, at 182 (discussing the Swiss courts' adoption of the preponderance theory).

only if the former outweighs the latter.⁴⁶ Under the Swiss test, the taking of life—because it is so extreme—is considered predominantly political and nonextraditable if the killing is of last resort.⁴⁷

4. *The Political Incidence Test*

The final test of interpreting relative political offenses is the political incidence test, currently used in the United States⁴⁸ and Great Britain.⁴⁹ The test was first formulated in *In re Castioni*,⁵⁰ a case involving an individual accused of killing an elected official during a popular uprising.⁵¹ The court found that the alleged acts were political crimes incidental to and part of political disturbances.⁵² Three years later the political incidence test was applied again in *In re Meunier*.⁵³ This case involved an anarchist responsible for bombings resulting in two deaths.⁵⁴ Using the political incidence test, the court approved extradition.⁵⁵ The court noted that for an anarchist, the requirement of two or more parties attempting to impose a government of choice upon the other was absent, because the anarchist is the enemy of all government.⁵⁶ The political incidence test, like most theories enumerated above, is also subject to divergent interpretations.⁵⁷

46. See C. VAN DEN WIJNGAERT, *supra* note 10, at 126, 129 (stating that the exception only applies if the offense is predominantly political); see also I. SHEARER, *supra* note 1, at 182 (describing the standard as whether, in a mixed common and political offense, the political or the common elements preponderate); M. BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 18, at 403 (noting that the political element must predominate over the ordinary criminal element).

47. C. VAN DEN WIJNGAERT, *supra* note 10, at 130. Critics argue that the arbitrariness of the predominance test makes it susceptible to manipulability. *Id.* at 131. The predominance test relies on subjective evaluations rather than its presumed objective standards. *Id.* at 132.

48. See *infra* notes 60-70 and accompanying text (discussing the evolution of the political incidence test in American courts).

49. See C. VAN DEN WIJNGAERT, *supra* note 10, at 111-20 (discussing the history of the political incidence theory and its applications in Great Britain, the United States, and the Irish Republic); I. SHEARER, *supra* note 1, at 169-81 (discussing United States and British interpretations of a political offense); S. BEDI, *supra* note 4, at 182 (observing that an offense, combined with a political disturbance, results in a relative political offense).

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

51. *Id.* at 150; see also M. BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 18, at 388 (providing *Castioni* as an example of a court applying the political incidence test).

52. *In re Castioni*, [1891] 1 Q.B. 149, 152.

53. *In re Meunier*, [1894] 2 Q.B. 415 (involving a French extradition request).

54. *Id.*; see also C. VAN DEN WIJNGAERT, *supra* note 10, at 112 (citing *Meunier* as an example of the British application of the political incidence test).

55. *In re Meunier*, [1894] 2 Q.B. 415, 419.

56. *Id.*

57. See *Regina v. Governor of Brixton Prison, ex parte Kolczynski*, [1954] 1 Q.B. 540 (applying the political incidence test when the act was not incidental to an upris-

II. UNITED STATES LAW AND THE POLITICAL OFFENSE EXCEPTION

Although the United States recognized an exception to extradition early in its history,⁵⁸ United States case law on the political offense exception did not develop until the late nineteenth century.⁵⁹ Since that time, several decisions made in courts across the country have fashioned the political incidence test.

A. ADOPTION OF THE POLITICAL INCIDENCE TEST

The seminal United States case embracing the political incidence test, *In re Ezeta*,⁶⁰ involved the Salvadoran government's extradition request for five individuals accused of murder and robbery. The California court denied extradition because the offense was directly related to an ongoing conflict.⁶¹ The court noted that acts taken by military personnel were "closely identified" with the rebellion "in an unsuccessful attempt to suppress it."⁶²

Two years later, in 1896, the United States Supreme Court ruled on the political offense exception for the first and only time in *Ornelas v. Ruiz*.⁶³ In *Ornelas*, Mexican authorities sought the extradition of several individuals charged with murder, arson, robbery, and kidnapping.⁶⁴

ing). In *Regina*, the British Government refused to surrender seven Polish seamen who mutinied and brought the ship into an English port requesting asylum. *Id.* Although the sailors' act was not incidental to any uprising, the British court refused to extradite the men. *Id.* The court stated that the revolt of the crew was an effort to avoid prosecution for political offenses and therefore the offense was political. *Id.* at 551. The court added, "if only for reasons of humanity [it is necessary] to give a wider and more general meaning to the words we are now construing." *Id.*; see also C. VAN DEN WIJNGAERT, *supra* note 10, at 112 (inferring that the court manipulated the political incidence test when applying it to the facts of *Regina*).

58. See *supra* note 24 (quoting Letter to Secretary of State Hoffman on the protection of political offenders).

59. See *infra* notes 60-70 and accompanying text (discussing the development of case law on the political offense).

60. *In re Ezeta*, 62 F. 932, 974 (N.D. Cal. 1894).

61. See *id.* at 1002 (describing the conflict between Ezeta, then in power, and revolutionary forces).

62. *Id.* The court also considered the relationship of the political character of the offense to military law. *Id.* at 1005. See *id.* at 1000 (noting the limited relevance of cases involving acts committed against a government because the instant situation involved officials of the existing government committing the acts); *Quinn v. Robinson*, 783 F.2d 776, 800 n.24 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986) (noting the paradox when a government acts in furtherance of government policy while individuals act in furtherance of an uprising).

63. *Ornelas v. Ruiz*, 161 U.S. 502 (1896).

64. *Id.* at 503. The offenses were covered by the extradition treaty then in force between Mexico and the United States). *Id.*

The alleged crimes were committed in a Mexican border town at approximately the same time as a rebellion.⁶⁵ The Supreme Court recognized the two-part requirement of existing revolutionary activity⁶⁶ and an alleged criminal act as a part of the activity.⁶⁷ Applying this test, the Court found that the raid was committed, not as an act of revolution, but as an act of banditry, separate from the ongoing revolution.⁶⁸ Thus, while the alleged banditry occurred contemporaneously with revolutionary activity, the Court held that the criminal acts were extraditable because they were not incidental to or part of the political uprising.⁶⁹

Since *Ornelas*, United States courts have consistently used the political incidence test to determine the applicability of the political offense exception.⁷⁰ *Ornelas* requires the satisfaction of both parts of the political incidence test before a court can refuse to extradite. Courts have further refined the criteria for meeting the two-part subtests in holding: (1) that there must be an uprising or other violent political disturbance; and (2) that the offense must be incidental to, in the course of, or in furtherance of the uprising.

B. JUSTIFICATIONS

Proponents of the political incidence test justify use of the test, reasoning that the requirement of an uprising or other violent disturbance comports with the underlying rationale of the political offense excep-

65. *Id.*

66. *Id.* at 511 (stating that the evidence indicated the existence of a revolutionary movement).

67. *Id.* (reporting the District Court's record that the raid was part of a political movement to overthrow the Mexican Government).

68. *Id.* The Supreme Court found that the District Court judge could not disturb the findings of the Secretary of State. *Id.* The Secretary had concluded that any political designs were negated when the individuals crossed the border with their booty instead of advancing into Mexico. *Id.*

69. *Id.* at 511.

70. See, e.g., *Quinn v. Robinson*, 783 F.2d 776, 796 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986) (examining, applying, and approving the political incidence test); *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980) (pointing out that the Fifth Circuit defines a political offense as an offense committed in the course of, and incidental to, a violent political disturbance and emphasizing that an offense does not assume political character simply because a political motive is involved); *Jimenez v. Aristequieta*, 311 F.2d 547 (5th Cir. 1962) (holding that financial crimes are not political when using the political incidence test); *United States v. Artukovic*, 170 F. Supp. 383, 393 (S.D. Cal. 1959) (applying the political incidence test to find that a political crime was committed). But see *Matter of Doherty by Government of the United Kingdom*, 599 F. Supp. 270, 274 (S.D.N.Y. 1984) (advocating that a two-part requirement is the beginning of analysis and concluding that no act is political when it violates international law).

tion.⁷¹ It is the people's right to revolt against their government and this right developed concomitantly with the political offense exception.⁷² The right is implicitly collective and not for the use of isolated individuals.⁷³ Consequently, the requirement of an uprising ensures that a popular element⁷⁴ is present and that individual actors are ineligible for protection under the political offense exception.⁷⁵

It is necessary, however, to clearly delineate the boundaries of the requisite uprising. In *Eain v. Wilkes*, the court required "ongoing, organized parties" with "organized armies."⁷⁶ For the purpose of applying the political incidence test, the requisite uprising may not need to meet the Seventh Circuit's prescribed level.⁷⁷

An uprising is defined as "a usually localized act of popular violence in defiance of an established government."⁷⁸ Accordingly, other courts consider an uprising a revolt against one's own or an occupying government.⁷⁹ In *Quinn v. Robinson*, Judge Reinhardt determined that one characteristic of an uprising was temporal and spatial limitation.⁸⁰ Therefore, an uprising can only exist when it is initiated by nationals in the state of nationality.⁸¹ The second criterion, that a minimal connection exist between the acts and the uprising, applies solely to acts committed as part of the political uprising.⁸² This part of the incidence test

71. See *Quinn v. Robinson*, 783 F.2d 776, 806-07 (9th Cir.), cert. denied, 107 S. Ct. 271 (1986) (discussing the uprising component and concluding that it requires no significant modification).

72. See *supra* notes 14-20 and accompanying text (discussing the philosophical underpinnings of the political offense exception).

73. The Declaration of Independence para. 1 (U.S. 1776) (stating that the people have the right to alter or abolish a government).

74. Pyle, *supra* note 17, at 90.

75. *Id.*

76. *Eain v. Wilkes*, 641 F.2d 504, 519 (7th Cir.), cert. denied, 454 U.S. 894 (1981); see *infra* notes 97-109 and accompanying text (discussing *Eain v. Wilkes*); *Quinn v. Robinson*, 783 F.2d 776, 797 (9th Cir.), cert. denied, 107 S. Ct. 271 (1986) (stating that the United States view of what constitutes an uprising is stricter than the British view); see also *Regina v. Governor of Brixton Prison ex parte Kolczynski*, [1954] 1 Q.B. 540 (showing that the uprising requirement is manipulable, allowing exception to extradition).

77. *Eain v. Wilkes*, 641 F.2d 504, 519 (7th Cir.), cert. denied, 454 U.S. 894 (1981).

78. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1297 (9th ed. 1983).

79. See *Quinn v. Robinson*, 783 F.2d 776, 807 (9th Cir.), cert. denied, 107 S. Ct. 271 (1986) (referring to a revolt against one's own or an occupying government as an uprising); see also Pyle, *supra* note 17, at 90 (stating that courts have rejected invocation of the political offense exception when individuals or groups act without popular support).

80. *Quinn v. Robinson*, 783 F.2d 776, 807 (9th Cir.), cert. denied, 107 S. Ct. 271 (1986).

81. *Id.*

82. Pyle, *supra* note 17, at 90.

prevents individuals from availing themselves of political offense protection when crimes are committed for personal reasons during a political uprising.⁸³

Recently, a California district court penned the final chapter in the extradition of Andrija Artukovic when it denied his request for a writ of *habeas corpus*.⁸⁴ Artukovic was charged in Yugoslavia with ordering the machine gun murders of several hundred men, women, and children, while serving as the Croatian Minister of the Interior during World War II.⁸⁵ Yugoslavia, pursuant to a treaty between the United States and Serbia, requested the extradition of Artukovic.⁸⁶ The court noted the presence of political uprisings during the time in question, but stated that Yugoslavia was required to demonstrate "a rational nexus between the alleged crimes and the prevailing turmoil."⁸⁷ Ultimately, the court concluded that the murders were not of political character, but were ordered out of a desire for personal gain.⁸⁸

The judicial branch's application of the political incidence test to determine political offenses is generally effective in light of the underlying rationale behind the exception. A proper application of the political incidence test can determine the validity of political offenses in a politically neutral manner without becoming mired in the various political beliefs of the offender's ideological foray. The existence of an uprising and the commission of incidental acts are relatively factual, apolitical issues.⁸⁹ Properly applied, the political incidence test does not force the

83. *Id.*

84. *Artukovic v. Boyle*, 107 F. Supp. 11 (S.D. Cal. 1952), *rev'd sub nom.*, *Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818, *reh'g denied*, 348 U.S. 889 (1954), *on remand sub nom.*, *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom.*, *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded sub nom.*, *United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959), *Artukovic v. INS*, 693 F.2d 894 (9th Cir. 1982), *Matter of Extradition of Artukovic*, 628 F. Supp. 1370 (C.D. Cal. 1986) (denying Artukovic's request for a writ of *habeas corpus*), *Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986) (denying Artukovic's appeal for an emergency stay). Artukovic was extradited a few days after his final appeal was denied. *N.Y. Times*, Feb. 13, 1986, at A3, col. 1.

85. See *Matter of Extradition of Artukovic*, 628 F. Supp. 1370, 1373-74 (C.D. Cal. 1986) (describing crimes allegedly committed by Artukovic).

86. See *Treaty of Extradition of 1901*, October 25, 1901, *United States-Serbia*, 32 Stat. 1890, T.S. 406; see also *Ivancevic v. Artukovic*, 211 F.2d 565, 566-74 (9th Cir. 1954) (discussing the issue of state succession with relation to Serbia and Yugoslavia and concluding that the extradition treaty between the United States and Yugoslavia was valid).

87. *Matter of Extradition of Artukovic*, 628 F. Supp. 1370, 1376 (C.D. Cal. 1986).

88. *Id.* (noting that the mere occurrence of the acts during a time of turmoil was not a sufficient connection to bring the incident within the political offense exception).

89. See *Quinn v. Robinson*, 783 F.2d 776, 806-10 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986) (evaluating the components and the policies behind the political incidence test). The court in *Quinn* noted that the test developed from a concern for indi-

magistrate to debate the legitimacy of the offender's motives or goals, or the appropriateness of means employed to further his cause.⁹⁰

B. MISAPPLICATION OF THE POLITICAL INCIDENCE TEST

Though in theory the political incidence test remains politically neutral, in practice its neutrality depends upon the factfinder in the requested state. If the magistrate misapplies the political incidence test by improperly considering the goals of the actor, the political incidence test begins to resemble the motives test.⁹¹ The motives test's major flaw is that it tends not to examine whether the offender's motives were truly political in nature, but whether the requested state is willing to recognize the political motives of the offender as legitimate.⁹² Under such a test there is the danger and temptation that in the United States, under the political offense exception, an individual striving for democracy might receive protection from extradition, while a person working for the establishment of an authoritarian, totalitarian, theocratic, or communist government may face extradition.⁹³ By comparison, proper application of the political incidence test does not require the factfinder to debate the legitimacy of the means or the goals of the requested individual. The following two cases demonstrate the contrast between the proper and improper application of the political incidence test.

1. *In re Mackin*

In *In re Mackin*, a magistrate appointed by the District Court for the Southern District of New York denied Great Britain's extradition request for Desmond Mackin, a resident of Northern Ireland.⁹⁴ Mackin was sought in connection with the shooting of a British soldier on a street in Belfast. He was accused of attempted murder, wounding with

viduals engaged in political activity and not from a desire to protect all politically motivated violence. *Id.*

90. See Note, *State Department Determination*, *supra* note 12, at 159 (noting that it is not within the province of a United States court to "pass judgment on the ideological proximity of the requesting state to the ideal of American democratic government").

91. See *supra* notes 41-44 and accompanying text (discussing the motives test).

92. *Id.*

93. Pyle, *supra* note 17, at 21-22.

94. *In re Mackin*, 668 F.2d 122 (2d Cir. 1981) (affirming the magistrate's decision to deny the United Kingdom's request for extradition); see generally Note, *In re Mackin: Is the Application of the Political Offense Exception an Extradition Issue for the Judicial or Executive Branch*, 5 FORDHAM INT'L L.J. 565 (1981-1982) (discussing the case of Desmond Mackin).

intent to do grievous bodily harm, and possession of firearms and ammunition with the intent to endanger life.⁹⁵ The magistrate found that there was an uprising within the vicinity at the time of the alleged act, and that the acts committed against the British soldier were incidental to that uprising.⁹⁶ The court's determination did not require inquiry into either the legitimacy of the uprising nor the appropriateness of the means. The court in *In re Mackin* was therefore able to remain faithful to the underlying principles of the political offense exception.

2. *Eain v. Wilkes*

In *Eain v. Wilkes*, the court failed to maintain the neutrality of the political incidence test.⁹⁷ Abu Eain was accused of planting a bomb that exploded in the marketplace in Tiberias, Israel, killing two people and injuring more than thirty.⁹⁸ Eain contended, *inter alia*, that because he was a resident of the West Bank and a member of the Palestine Liberation Organization (PLO), the alleged crimes were political in nature and accordingly fell within the political offense exception to the extradition treaty between the United States and Israel.⁹⁹ Narrowly defining the uprising requirement of the political incidence test,¹⁰⁰ the court ignored the test's neutrality principles and distinguished between cases involving "on-going, organized battles between contending armies" and those involving dispersed forces such as the PLO.¹⁰¹ Exceeding the level of inquiry required by the incidence test, the court then passed judgment on acceptable methods of revolution and rebellion, concluding that the tactics of the PLO were generally unacceptable.¹⁰² The court further proceeded to judge the legitimacy of the goals of the PLO and concluded that the PLO's desire to alter the social structure

95. *In re Mackin*, 668 F.2d 122, 124 (2d Cir. 1981).

96. *Id.* at 125 (concluding that the crimes in question were of a "political character"). Those concerned that such decisions will result in the United States becoming a haven for terrorists should note that Desmond Mackin was deported to Ireland in 1981. N.Y. Times, Jan. 1, 1982 at A2, col. 3.

97. *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

98. *Id.* at 507.

99. *Id.* Eain also contended that his alleged function within the PLO placed him sufficiently within the scope of the political offense exception. *Id.* at 519.

100. *Id.* at 519 (discussing the criticisms of the political offense exception but concluding that current law is flexible enough to avoid abuses).

101. *Id.*; see also *Quinn v. Robinson*, 783 F.2d 776, 807 (9th Cir.) (noting that the PLO's tactics fell outside the political offense exception), *cert. denied*, 107 S. Ct. 271 (1986).

102. See *Eain v. Wilkes*, 641 F.2d 504, at 519-20 (7th Cir.) (distinguishing modern international terrorism from more conventional expressions of dissatisfaction with the political structure of the world), *cert. denied*, 454 U.S. 894 (1981).

in the area was unacceptable.¹⁰³ Returning to its application of the incidence test, the court stated that the requisite political disturbance permitting application of the political offense exception is limited to "acts that disrupt the political structure of the state, and not the social structure that established the government."¹⁰⁴

These two examples illustrate contrasting applications of the political incidence test. *In re Mackin* preserved the test's political neutrality,¹⁰⁵ while the court in *Eain* adopted additional restrictions that resembled the elements of the motives test.¹⁰⁶ Since 1981, when the two cases were decided, court decisions in the United States have been inconsistent, adopting either the *Eain* or *In re Mackin* approach through various interpretations.¹⁰⁷ Consequently, there is no trend in the courts showing a preference for either rationale. At present, the Seventh Circuit has adopted the political incidence test with certain additional restrictions¹⁰⁸ while the Ninth Circuit has recently rejected those added restrictions in favor of the traditional application of the two-prong test.¹⁰⁹ The additional restrictions and the possibility that they exceed the scope of the political incidence test are important considerations when examining the Supplementary Treaty and its potential effect on the treatment of political offenses.

103. See *id.* at 520 (explaining that if a violent political disturbance included destructive acts on civilian populations in an effort to destroy a state's political structure, the United States would become a safe haven for terrorists).

104. *Id.* at 520-21.

105. See *supra* notes 94-96 and accompanying text (discussing the political incidence test's application in *In re Mackin*).

106. See *supra* notes 97-104 and accompanying text (discussing the political incidence test's application in *Eain v. Wilkes*).

107. See *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), *motion to dismiss granted*, 615 F. Supp. 755 (S.D.N.Y. 1985) (accepting a number of restrictions set forth in *Eain*). *Doherty*, a PIRA member, was accused of attacking a convoy of British soldiers. *Id.* at 272. The District Court for the Southern District of New York concluded that although the political offense exception applied in this case, it would not apply in cases involving bombing of public places, *id.* at 274, or violations of international law. *Id.* The court also concluded that the acts of amorphous or fanatic groups, without structure or clearly defined political objectives, would not be protected by the political offense exception. *Id.* at 276. But see *Quinn v. Robinson*, 783 F.2d 776, 807-08 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986) (rejecting the *Eain* restrictions as unnecessary). The Ninth Circuit noted that a primary concern of the court in *Eain* was to keep the United States from becoming a haven for international terrorists. Through proper application of the political incidence test and without resort to subjective and judgmental considerations, this goal was achievable. *Id.* at 808.

108. *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); see *supra* notes 97-104 and accompanying text (discussing the acceptance of the political incidence test in *Eain*).

109. *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986); see *supra* notes 80-82 and accompanying text (discussing the application of the political incidence test in *Quinn*).

III. THE SUPPLEMENTARY TREATY BETWEEN THE UNITED KINGDOM AND THE UNITED STATES

A. TERMS AND JUSTIFICATIONS OF THE TREATY

Article V of the 1972 Extradition Treaty between the United States and Great Britain¹¹⁰ is similar to the political offense exception contained in many of the extradition treaties signed by the United States.¹¹¹ The Supplementary Treaty between the United States and Great Britain, however, substantially limits the political offense exception's application, specifying particular crimes which are not regarded as offenses of political character.¹¹² These crimes include air piracy,

110. Extradition Treaty, *supra* note 5, at 230. Article V states in pertinent part: 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; or

(c) (ii) the person sought proves that the request for his extradition has been made with a view to try to punish him for an offense of a political character.

Id.

111. See Extradition Treaty, May 4, 1978, United States-Mexico, art. V, 31 U.S.T. 5059, 5063-65, T.I.A.S. No. 9656 (stipulating that extradition shall not be granted when the offense is political or of a political character); Extradition Treaty, Dec. 3, 1971, United States-Canada, art. 4(1)(iii), 27 U.S.T. 983, 988, T.I.A.S. No. 8237 (stipulating that extradition is not granted when the offense is political in character).

112. Supplementary Treaty, *supra* note 8, at art. 1. The Supplementary Treaty states in article 1 that:

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

(a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at the Hague on 16 December 1970;

(b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;

(c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;

(d) an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;

(e) murder;

(f) manslaughter;

(g) maliciously wounding or inflicting grievous bodily harm;

(h) kidnapping, abduction, false imprisonment, or unlawful detention, including the taking of a hostage;

(i) the following offenses relating to explosives:

(1) the causing of an explosion likely to endanger life or cause serious damage to property, or

(2) conspiracy to cause such an explosion, or

(3) the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;

assassinations of diplomats, murder, manslaughter, kidnapping, the use of firearms to resist arrest, reckless endangerment, and attempts to commit any of the enumerated crimes.¹¹³

On July 17, 1985, President Reagan submitted the Supplementary Treaty to the Senate for its advice and consent. The President maintained that the Treaty provides a means to improve law enforcement cooperation because it excludes serious offenses typically committed by terrorists from the scope of the political offense exception.¹¹⁴ Abraham D. Sofaer, the Legal Advisor to the Department of State, testifying before the Senate Committee on Foreign Relations, expressed the desire of the United States to avoid becoming a haven for terrorists who use indiscriminate violence against citizens of other countries.¹¹⁵ Sofaer added that the Supplementary Treaty was a valuable tool because under its provisions, terrorists who "commit . . . wanton acts of violence and destruction" are not immune from extradition merely for acting to advance a political objective.¹¹⁶

Sofaer cited further justification for the Supplementary Treaty after comparing the provisions of the Supplementary Treaty with recent legislative attempts at extradition reform.¹¹⁷ Sofaer commented that the Supplementary Treaty was "more narrow, and carefully drawn" than extradition reform legislation, that would apply to any nation having extradition relations with the United States.¹¹⁸ The underlying rationale for the Supplementary Treaty was that the political offense exception had "no place in extradition treaties between stable democracies in which the political system is available to redress legitimate grievances

(j) the following offenses relating to firearms or ammunition:

(1) the possession of firearms or ammunition by a person who intends either through himself or through another person to endanger life; or

(2) the use of a firearm by a person with the intent to resist or prevent the arrest or detention of himself or another person;

(k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;

(l) an attempt to commit any of the foregoing offenses.

Id.

The revised version of the Supplementary Treaty approved by the Senate Foreign Relations Committee omits possession of firearms and conspiracy to commit any of the included offenses from the list of offenses that shall not be considered of a political character. N.Y. Times, June 13, 1986, at A7, col. 4.

113. N.Y. Times, June 13, 1986, at A7, col. 4.

114. Letter of Transmittal from President Reagan to the Senate, 21 WEEKLY COMP. PRES. DOC. 1334 (July 17, 1985).

115. Sofaer, *supra* note 3, at 21.

116. *Id.* at 3.

117. *Id.* at 21.

118. *Id.* at 22.

and the judicial process provides fair treatment.”¹¹⁹ Sofaer also indicated that the United States intended to negotiate similar agreements with other nations meeting that criteria.¹²⁰

B. CRITICISMS OF THE TREATY AND ITS JUSTIFICATIONS

1. *Weakening Philosophical Underpinnings of the Political Offense Exception*

The Supplementary Treaty accomplishes an end that the United States judiciary has carefully and artfully avoided through the application of the political incidence test. In adopting the Supplementary Treaty's negative definition of a political offense, the United States does not recognize the Provisional Irish Republican Army's (PIRA) means of effecting revolt, implying that only nonviolent forms of rebellion and revolution are permissible.¹²¹ Because the Supplementary Treaty is bilateral, as opposed to multilateral, in addition to judging the PIRA's means impermissible, the United States government has also effectively adjudged the political goals of the PIRA impermissible.¹²² Through the Supplementary Treaty, the United States seeks to impose its standards of political conduct on other nations and populations despite the divergent social and political ideologies behind the internal political struggles.

2. *Amending Current Extradition Process*

In addition to countering the philosophical underpinnings of the political offense exception, the Supplementary Treaty weakens the framework of extradition as codified under Title 18 of the United States Code and developed through judicial precedent.¹²³ Section 3184 of Title 18 governs the extradition of individuals from the United States.¹²⁴ As a prerequisite to extradition, section 3184 requires a judge or magistrate to determine whether an individual is extraditable.¹²⁵ In making this determination, a judge or magistrate must consider the evidence of

119. *Id.*

120. *Id.*

121. See *supra* notes 97-109 and accompanying text (discussing *Eain* and the debate concerning the acceptable methods of revolt).

122. See M. BASSIOUNI, UNITED STATES LAW AND PRACTICE, *supra* note 2, at § 1-1 (discussing the United States extradition process and cases involving the extradition of a foreign offender).

123. 18 U.S.C. § 3184 (1982).

124. *Id.*

125. *Id.*

criminality and the provisions of the Treaty.¹²⁶ If these requirements are satisfied, the extradition request is certified to the Secretary of State.¹²⁷ The Secretary of State then has the discretion to surrender the individual certified pursuant to section 3184.¹²⁸ Under section 3184, the person whose extradition is sought benefits from a process that requires the approval of two branches of government prior to extradition. Each branch, however, has different interests to protect when considering an extradition request. An appreciation of these interests is imperative to an understanding of a major shortcoming of the Supplementary Treaty.

The executive branch, through the State Department, is responsible for conducting foreign relations between the United States and the international geopolitical community.¹²⁹ Consequently, the refusal to return a technically extraditable individual based on differences in policy between the United States and the requesting state is a powerful political tool of the executive branch.¹³⁰ Accordingly, it is in the interest of the United States to fulfill an ally's extradition request and preserve friendship and alliance with that nation, regardless of its ideological orientation.¹³¹

This paradigm makes the judiciary's role in the extradition process important. Under section 3184, the judiciary has the duty to ensure the protection of the individuals' rights, insulating the process from geopolitical considerations.¹³² Under the Supplementary Treaty, the role of the courts is reduced to that of rubber stamping extradition warrants after merely determining the identity of the accused and the sufficiency of the evidence.¹³³ Application of the political incidence test is entirely preempted with respect to the crimes enumerated under the Treaty. The Treaty thus constitutes the legislative equivalent of a motives test, directed specifically at Irish Republican Army (IRA) activities. For ex-

126. *Id.* at § 3186. The executive branch does not, however, have the power to extradite an offender in the absence of a magistrate's certification. *Id.*

127. U.S. CONST. art. II, § 2.

128. *See* N.Y. Times, Feb. 13, 1986, at A3, col. 1 (suggesting that an underlying reason for Artukovic's long delayed extradition was the executive and judicial branches' pervasive reluctance to return him to a communist country).

129. *See supra* notes 117-20 and accompanying text (noting the recent proposed reform legislation and the State Department's interest in revising the current extradition process).

130. 18 U.S.C. § 3184 (1982).

131. Pyle, *supra* note 17, at 17-18.

132. *See* Supplementary Treaty, *supra* note 8 (reprinting the revised political offense exception in the Supplementary Treaty).

133. *See supra* notes 94-96, 105-09 and accompanying text (discussing the application of the political incidence test in *In re Mackin*).

ample, if considered today, a judge or magistrate would have no choice but to certify the extradition warrant of Desmond Mackin. Under the Supplementary Treaty, Mackin's offenses are no longer of political character.¹³⁴ The fact that his alleged crimes were committed in connection with a political uprising in Belfast would not protect Mackin from extradition.

Under the terms of the Supplementary Treaty, the executive branch has the ability to undermine the principles of the political offense exception. The forms of rebellion commonly used in past uprisings to revolt, i.e., terrorist tactics, are now specifically excluded from the political offense exception.

The executive branch has two choices after an individual is certified by the judiciary for extradition. First, it might decide not to extradite, based on the authority delegated to the executive branch under Title 18.¹³⁵ This approach is unlikely, however, because the United States is committed to discouraging terrorism and is intent on remaining a strong ally of Great Britain. Second, the executive branch might extradite the offender to Great Britain. Taking this action, the United States effectively passes judgment on the legitimacy of the revolt in Northern Ireland and corrupts the political offense exception.

The United States would benefit from preserving, rather than diluting the judiciary's role in the extradition process. In addition to the safeguards provided for the requested individual, the judiciary also performs an important role of insulating the executive branch against both external and internal pressures.¹³⁶ The executive branch could effectively avoid the pressure that a requesting party exerts if the judiciary determines that the individual was nonextraditable as a matter of law. This result leaves no discretion to the Secretary of State concerning the question of surrendering the individual. The judiciary's role might also insulate the executive branch from political pressure concerning individuals who have committed an offensive act, but do not qualify for extradition under United States law. Therefore, in addition to protecting the individual, there are additional reasons for preserving the role of the judiciary in the extradition process. In response to problems in applying the political offense exception, critics have suggested further modification of the exception.

134. See *supra* notes 97-109 and accompanying text (discussing the application of the political incidence test in *Eain*).

135. 18 U.S.C. § 3186 (1982).

136. See C. VAN DEN WIJNGAERT, *supra* note 10, at 133-62 (discussing the loopholes created by the negative approach to political offenses).

IV. RECOMMENDATIONS FOR A MORE EFFECTIVE EXCEPTION

Critics contend that while the policies behind the political offense exception are sound, loopholes in the political incidence test allow terrorists to escape prosecution by invoking the exception.¹³⁷ Two recommendations have been proposed to remedy this perceived problem. The first is the abolition of the political offense exception.¹³⁸ This proposal is based on the belief that the political offense exception developed largely as a reaction against tyrannical governments of the eighteenth and nineteenth centuries.¹³⁹ Because democratic institutions have replaced many of these governments, the underlying justifications for the exception are groundless.¹⁴⁰ The ballot box now enables the citizens to exercise influences making revolutions unnecessary.¹⁴¹

The proposal to abolish the political offense exception, however, does not consider situations in which the democratic government is unresponsive to citizen's needs. For example, the United States pursued an extradition treaty with the Philippines that limited the political offense exception's availability at a time when Ferdinand Marcos was oppressing all opposition.¹⁴² During that time, the United States government continued to express its support for the democratic Marcos government, while no opportunity for the electorate to express its voice existed.¹⁴³

The fact that democratic institutions have replaced the tyrannical governments does not mitigate the justifications for the political offense exception. Although the exception developed as a reaction to tyrannical

137. Sofaer, *supra* note 3, at 21.

138. Epps, *The Validity of the Political Exception on Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61 (1979) (concluding that the political offense exception has outlived its usefulness and needlessly hampers harmonious and pragmatic international relations).

139. See *supra* notes 14-20 and accompanying text (discussing the development of the political offense exception).

140. See C. VAN DEN WIJNGAERT, *supra* note 10, at 18-23 (discussing the rise of democratic governments in opposition to despotic regimes); *Quinn v. Robinson*, 783 F.2d 776, 804 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986) (noting that some commentators contend that the exception only guarantees the right to rebel against tyrannical government).

141. Sofaer, *supra* note 3, at 22 (stating that the political offense exception has no place in extradition treaties between stable democracies because the political system is available to redress legitimate grievances).

142. See LandXe & Hooley, *Aquino Takes Charge*, 64 FOREIGN AFF. 1087-1107 (1986) (surveying the state of the Philippines as Marcos's legacy ended).

143. See N.Y. Times, Feb. 19, 1986, at A14, col. 1 (discussing the Reagan Administration's attempts to prevent Congress from cutting aid to the Philippines); Wash. Post, Feb. 6, 1986, at A15, col. 1 (describing the strategic interest of the United States in the Philippines); Wash. Post, Oct. 27, 1985, at A1, col. 1 (discussing the problems for United States policy in light of the Philippines situation).

governments,¹⁴⁴ its justification is much broader in that the political offense exception is based on respect for the right of self-determination.¹⁴⁵ Taking these considerations into account, the proposal to abolish the political offense exception is not appropriate.

The second recommendation proposed to eliminate loopholes in the political offense exception concerns a negative definition of a political offense.¹⁴⁶ The Supplementary Treaty contains an example of a negative definition of a political offense,¹⁴⁷ enumerating actions that are not, by definition, a political offense. The negative definition approach requires an examination of the qualifications that characterize acts as nonpolitical according to the Supplementary Treaty. The enumerated crimes not considered political are "specified, wanton acts of violence and destruction" typically committed by terrorists.¹⁴⁸ The included offenses range from aircraft hijacking to murder.¹⁴⁹ This approach is too arbitrary, however, because of the random selection of excludable crimes. Moreover, this approach is not necessary for the exclusion of terrorist or violent activity from the political offense exception¹⁵⁰ because a terrorist's use of indiscriminant violence is not incidental to any uprising, as required by the political incidence test.¹⁵¹

A different use of the negative definition of political offenses avoids the drawbacks of using the Supplementary Treaty. Instead of composing an arbitrary list of "depoliticized" offenses,¹⁵² the definition of political offenses should exclude international crimes.¹⁵³ International

144. See *supra* notes 14-20 and accompanying text (discussing the development of the political offense exception).

145. See The Declaration of Independence para. 1 (U.S. 1776) (guaranteeing the people the right to alter or abolish government); U.N. CHARTER art. 1, para. 2 (citing respect for equal rights and self-determination of peoples); U.N. CHARTER art. 55, para. 1 (noting respect for the principle of self-determination of peoples).

146. See C. VAN DEN WIJNGAERT, *supra* note 10, at 133-62 (discussing the negative approach which involves exceptions to the political offense exception); M. BASSIOUNI, WORLD PUBLIC ORDER, *supra* note 18, at 416-25 (noting exceptions to the political offense exception).

147. See Supplementary Treaty, *supra* note 8, at art. I (stipulating that certain offenses shall not be regarded as having a political character).

148. Sofaer, *supra* note 3, at 3.

149. See *supra* note 112 (providing the complete text).

150. C. VAN DEN WIJNGAERT, *supra* note 10, at 134. The negative definition, or "depoliticizing" approach is based on a legal fiction which ignores the impossibility of advance determination concerning political character. *Id.*

151. See *supra* notes 82-88 (discussing the requirement that the act be incidental to an uprising).

152. C. VAN DEN WIJNGAERT, *supra* note 10, at 133-35.

153. See *id.* at 139-58 (discussing the question of whether international crimes are subject to extradition regardless of political character); M. BASSIOUNI, WORLD PUBLIC ORDER, *supra* note 18, at 416-29 (concluding that international crimes cannot fall within the political offense exception); see M. BASSIOUNI, INTERNATIONAL CRIMINAL

crimes are acts that are deemed crimes under existing international conventions.¹⁵⁴ The basis for excluding international crimes from the definition of political offenses is that those crimes "should not go unpunished and the perpetrators of such crimes should be prosecuted and punished as 'enemies of mankind.'"¹⁵⁵

One example of an international crime is genocide.¹⁵⁶ Article 7 of the Convention on the Prevention and Punishment of the Crime of Genocide provides that genocide is not considered a political offense for extradition purposes.¹⁵⁷ Consequently, states who have ratified this Convention cannot refuse to extradite someone accused of genocide on the grounds that the offense was political.¹⁵⁸

Several of the Supplementary Treaty's enumerated offenses are considered international crimes.¹⁵⁹ For example, the Supplementary Treaty states that offenses within the scope of an international convention on airplane hijacking are not regarded offenses of political character.¹⁶⁰ International crimes, as evidenced by international convention and customary international law, can limit the use of the political offense definition. International crimes differ in two ways from other unacceptable offenses enumerated in the Supplementary Treaty. First, many nations reject international crimes as unacceptable conduct.¹⁶¹ Second, because acts constituting international crimes are widely rejected, all extradition treaties could include provisions on the crimes. This would avoid the abuse of extradition by countries that differ on what activity and groups deserve political protection.¹⁶² These differences would ensure equitable application of the political offense exception¹⁶³ consistent with

LAW: A DRAFT INTERNATIONAL CRIMINAL CODE 49-106 (1980) [hereinafter M. BASSIOUNI, INTERNATIONAL CRIMINAL CODE] (discussing a proposed standard for international crimes).

154. M. BASSIOUNI, INTERNATIONAL CRIMINAL CODE, *supra* note 153, at 40. International crimes may also include acts which are deemed international crimes pending international conventions before the United Nations where the adoption is impending. *Id.*

155. C. VAN DEN WIJNGAERT, *supra* note 10, at 140.

156. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, G.A. Res. 260, U.N. Doc. A/181, at 174 (1948).

157. *Id.*

158. C. VAN DEN WIJNGAERT, *supra* note 10, at 140.

159. Supplementary Treaty, *supra* note 8, at art. 1(a)-(d).

160. *Id.* at art. 1(a).

161. See C. VAN DEN WIJNGAERT, *supra* note 10, at 140 (noting that international crimes should not go unpunished); M. BASSIOUNI, INTERNATIONAL CRIMINAL CODE, *supra* note 153, at 40 (requiring international crimes to be established by multilateral conventions).

162. See Pyle, *supra* note 17, at 21 (discussing the need of a uniform standard for the treatment of political refugees).

163. *Id.*

the justifications for the exception¹⁶⁴ and the political incidence test.¹⁶⁵

CONCLUSION

The political offense exception is the product of our respect for the right to change one's government. Application of the political incidence test is an effective apolitical means of determining a political offense. Any limitations on the political offense exception must remain consistent with the underpinnings of the exception.

The Supplementary Treaty limits the availability of the political offense exception through the use of a negative definition. The Supplementary Treaty's negative definition is too arbitrary because it denies the Provisional Irish Republican Army the option of exercising many of the most common means of revolution.

An acceptable limitation of the political offense exception is the preclusion of international crimes from being considered political. Several international crimes are included among the Supplementary Treaty's enumerated offenses. The other enumerated offenses arbitrarily and unacceptably limit the political offense exception. It is for these reasons that the Supplementary Treaty fails as an acceptable means of combating terrorism.

164. See *supra* notes 14-20 and accompanying text (describing the justifications for a political offense exception).

165. See *supra* notes 71-90 and accompanying text (discussing the underlying rationale for the political incidence test).