Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists

Steven Lubet

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The unprecedented attention given to three recent cases of international extradition, each involving an incident of terrorism,1 has led to the first full-scale legislative evaluation of the...
extradition law of the United States since 1882. The cases illustrate the inadequacy of both the substantive and procedural law governing the political offense exception to extradition. Congressional deliberations have resulted in extensive public debate and scholarly analysis of the definition of a political offense and of the process for determining whether political offenders are extraditable.

This article discusses the history and current status of the political offense exception in the extradition law of the United States, highlighting the deficiencies in the antiquated process. The article analyzes the reform proposals which have been presented to Congress and recommends substantive and procedural changes in the law of extradition. The contemporary international environment requires an extradition law that reduces the ability of terrorists to claim the protection of the political offense exception, but which retains the vitality of the concept of political asylum for legitimate dissidents. This article recommends a process that preserves the strengths of the tradition of the United States, and satisfies the requirements of the contemporary environment.

I
THE ORIGIN AND FUNCTION OF THE POLITICAL OFFENSE EXCEPTION

The political offense exception to extradition emerged in the nineteenth century. When it first developed, extradition was used as a tool for the apprehension of political dissidents; however, as


3. See infra notes 35-42 and accompanying text.


5. See Harvard Draft Convention on Extradition, 29 AM. J. INT'L L. SUPPLEMENTS 1, 107-19 (1935). The "practice of non-extradition of political offenders [in the early part of the 19th century] . . . may be explained by two main factors: (1) the evolution of political institutions following the French Revolution; (2) the growing consciousness of the interdependence of nations following the Industrial Revolution." Id. at 108. See also M.R. GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 73-76 (1956).
constitutional government evolved, sovereigns began to accept the legitimacy of political dissent. In 1833 Belgium enacted the first legislation exempting political offenders from extradition; the first treaty containing a political offense exception to extradition was executed between Belgium and France in 1834.

The United States has never enacted a domestic statute embodying the political offense exception, undoubtedly because such legislation was viewed as redundant to the widely accepted principle that extradition could not lie for a political offense. As early as 1853 the United States recognized that political offenders were protected from rendition, notwithstanding the absence of a specific treaty clause or statute.

The political offense exception is now so well accepted in international law that it has become more than simply an optional provision to be found in bilateral treaties. The concept of political asylum is included in the United Nations Declaration of Human Rights,

6. Before the 19th century, with fragmented medieval dynasties, the extreme hardship associated with the extradition process necessitated limiting its use to the apprehension and punishment of those who threatened the political system. Garcia-Mora, supra note 5, at 73. In the late 18th and early 19th centuries, however, political dissent became acceptable. Id. at 73-76; Harvard Draft Convention on Extradition, 29 AM. J. INT'L L. SUPPLEMENTS 108-09 (1935). See also Letter from Thomas Jefferson to James Madison (Jan. 30, 1787) (“I hold it, that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical.”); and J.S. Mill, On Liberty 2 (A. Oostell ed. 1947) (“political liberties or rights which it was to be regarded as a breach of duty in the rule to infringe, and which, if he did infringe, specific resistance, or general rebellion, was to be held justifiable.”).

7. Laws of 1 October 1833, art. 6 (Belgium).

8. See I.A. Shearer, Extradition in International Law 17-19 (1971); M.R. Garcia-Mora, International Law and Asylum as Human Right 75, 94 (1956) (Article 4 of the Convention on Extradition of November 22, 1834, between France and Belgium provided: “It is expressly stipulated that a foreigner whose extradition has been granted, cannot, in any case, be prosecuted or punished for a political crime antecedent to the extradition or for any act connected with such a crime.”) (quoting from A. Billot, Traité de l’Extradition III (1874)).


10. Ex parte Kaine, 14 F. Cas. 79, 81-82 (C.C.S.D.N.Y. 1853) (No. 7597).

11. The Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. Doc. A/810, at 74 (1948) (3d Sess., 1st Part), provides in Article 14: “1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecution genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations.” The General Assembly voted on each of the Declaration and on the Declaration as a whole. Article 14 was adopted by 44 votes to six with two abstentions. No roll call was taken for the vote on each article; therefore, there is no record of the members casting negative votes or abstaining. The Declaration as a whole was adopted by 48 votes with eight abstentions. The abstaining members were Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Saudi Arabia, Ukranian Soviet Socialist Republic, Union of South Africa,
and many states protect political offenders from rendition by domestic legislation. Indeed, a form of the political offense exception is contained in the constitutions of Brazil, Mexico, Italy, and Spain. The United States, though lacking a constitutional or statutory provision, has included the political offense exception in each of its 96 treaties of extradition. Given the near universality of the


12. For example, the extradition statute of the Federal Republic of Germany provides in part: “Extradition is not permissible when the act for which extradition is sought is a political one or is connected with a political act in such a way that it prepared, secures, or covers it, or guards against it. Deutsches Auslieferungsgesetz [DAG] § 3(1), Vom. 23. December 1929 Reichsgesetzblatt [RGB1] I 239, as amended by 1974 Bundesgesetzblatt [BGBI] I 469 (W. Ger.). Similarly, Extradition Act, 1870, 33 & 34 Vict., ch. 52, § 3, of the United Kingdom provides:

A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character, or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

The Israeli statute on Extradition Law provides at Section 10: “[T]he Court shall not declare a wanted person subject to extradition if it finds that there are reasonable grounds for assuming . . . that the request for extradition aims at prosecuting or punishing him for an offence of a political character, though prima facie it is not made in connection with such an offence.” Extradition Act, 5714-1954, § Laws of the State of Israel 145 (Authorized Translation from the Hebrew, Prepared at the Ministry of Justice).

13. CONSTITUIÇÃO art. 153 (Brazil).
14. CONSTITUCION art. 15 (Mexico).
15. CONSTITUZIONE art. 1, app. A (Italy).
16. CONSTITUCION art. 1, para. 3 (Spain).
17. See 18 U.S.C.A. § 3181 (Supp. 1982). The United States has entered into bilateral extradition treaties with the following nations:

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exception, it is now possible to speak of an international right to, or at least an international norm of, political asylum.

Two policies underlie the political offense exception. From the perspective of the requested state, the exception permits a sovereign (1) to refuse to become involved in the domestic affairs of another country, and (2) to extend humanitarian relief to political dissidents. These two policies reflect the "neutrality function" and the "fairness function" of the political offense exception.

The neutrality function exists purely for reasons of state. It allows a government to decline to surrender a fugitive in order to avoid embarrassing involvement in the political affairs of another country. This function recognizes that today's rebels may become tomorrow's victors and that today's government officials may become tomorrow's fugitives. Thus, all other considerations aside, a state may wish to remain aloof from the political turmoil in another country, against the day when such involvement might be seen as sponsorship of one contending side or the other. This aspect of the political offense exception is value free, and may explain why the adoption and acceptance of the exception is not limited to states with democratic governments.20

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In addition, an extradition treaty has been negotiated by the executive authorities of the United States and the Philippines, although it has not yet come before the Senate for
The fairness function reflects a principled desire to give haven to political dissidents. This approach necessarily implies a value judgment as to the motives of the fugitive and the nature of the requesting government. It has been argued that the fairness function precludes the return of any rebel to the government against which he has taken up arms, on the theory that he will never receive a fair trial under such circumstances. The courts of the United States have rejected this last theory with regard to extradition requests originating from democratic countries, but otherwise have recognized the validity of the fairness function in evaluating an individual's right to assert the political offense exception in defense of an extradition action.


21. See Hearings on S. 1639, supra note 18, at 49-50 (testimony of W. Hannay, attorney at law):

As extradition treaties became prevalent in the 19th century, democratic nations undoubtedly found themselves facing the unpleasant task of sending a political dissenter or activist back to a tyrannical regime to stand trial for acts which they did not perceive as "criminal" in any ethical or moral sense. Through the mechanism of the "political offense" exception, a conflict between the affirmative obligation to extradite under a treaty and the desire to grant political asylum was avoided. The fugitive newspaper editor charged with sedition or the fugitive political candidate charged with treason merely for expressing their opinions could be sheltered from extradition for these "pure" political offenses, the sort of offense directly implicating cherished democratic values. In addition, the fugitive dissident charged with criminal trespass during a protest or rally could be sheltered for this "relative" political offense, the sort of offense that smacks of a "trumped up" charge.

On pure and relative political offenses, see infra notes 26-28 and accompanying text. On the historical perspective, see supra note 6 and accompanying text, and M.R. GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 73-76 (1956).

22. See, e.g., GARCIA-MORA, supra note 21, at 75:

The raison d'être of the [political offense exception] can be found in the well-founded apprehension that to surrender unsuccessful rebels to the demanding state would surely amount to delivering them to their summary execution, or, in any event, to the risk of being tried and punished by a justice colored by political passion.

See also 2 C.C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1019 (1951) (discussing the "reluctance to surrender a fugitive who might be exposed to summary and arbitrary treatment if restored to the clutches of the demanding government").

23. See generally Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981). But the State Department recognized the problem of a fair trial in Mexico when it refused to extradite General Huertas in 1915. See GARCIA-MORA, supra note 21, at 95 n.17.

24. See, e.g., In re Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13), aff'd, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981); In re McMullen, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979). But cf. Hearing on S. 1639, supra note 18, at 48-49 (testimony of W. Hannay, attorney at law) (emphasizing the lack of substantive rights on the part of the accused to assert the political offense exception).
The enlightened statesmen who originated the exception left the term "political offense" undefined in order to encompass a broad range of protected activity. Two categories of political offenses evolved, however, that aided in the conceptualization of the exception: "pure" and "relative" political offenses. The purely political offenses are never extraditable and are limited to crimes such as treason, sedition and espionage, which comprise acts directed against the state. The concept of a relative political offense provides protection for a far greater range of activity; common crimes may not be extraditable if committed in connection with a political act. Thus, a homicide committed in the course of a general uprising may be non-extraditable if a sufficient nexus exists between the crime and the political event.

In recent times, however, the philosophic concept of broad protection for political offenders has eroded in view of the phenomenon of terrorism. The nobility of asylum, and even the desirability of neutrality, necessarily must pale when we realize that the exemption has been invoked on behalf of men like Abu Daoud, the author of the massacre at the Munich Olympics. Thus, the imprecision which was adequate in simpler times, now should give way to a more careful definition of "political offense." The definition must combine the breadth necessary to protect legitimate dissidents with the stringency sufficient to exclude those whose chosen form of expression is to engage in wanton violence. The word "political" has different meanings in different contexts, and a nation should be under no legal or moral obligation to shelter an international fugitive simply because he claims a revolutionary motive for his crime.

The extradition law of the United States essentially ceased

25. Sir Charles Russell, Q.C., found that the British legislature "purposely abstained from attempting to give an exhaustive definition" to the words "offence of a political character" in Extradition Act, 1870, 33 & 34 Vict., ch. 52. In re Castioni, [1891] 1 Q.B. 149, 153.

26. See, e.g., In re Castioni, supra note 25, at 152-68; In re Ezeta, 62 F. 972, 997-1004 (N.D. Cal. 1894); and Garcia-Mora, supra note 21, at 76-82.


28. See Garcia-Mora, supra note 27, at 1239-56; and In re Ezeta, supra note 26, at 1000-04.


30. See Hearings on S. 1639, supra note 18, at 48-51 (testimony of W. Hannay, attorney at law).
developing at the turn of the century.\(^3\) The extradition process is governed by a statute which has not been revised substantially since 1882\(^3\) and courts considering the political offense exception have adhered to a substantive test adopted in 1896.\(^3\) Thus, the United States has never modified the extradition process to take into account the changes in the modern world. International crime and violence exist today in a form which was unimaginable even one generation ago.\(^3\) It is ironic that United States extradition law should attempt to cope with modern terrorism through legal tests and procedures which predate the advent of air travel, guerilla warfare and urban revolution. It is as though the United States had set out to apprehend jet-age terrorists through the use of devices that were developed in the era of the horse and buggy.

The inadequacy of the extradition process was underlined sharply when three recent cases brought the question of political terrorism into United States courts. In two of these cases, \textit{In re McMullen}\(^3\)\(^5\) and \textit{In re Mackin},\(^3\)\(^6\) the United States was unable to effectuate the extradition to Great Britain of Provisional Irish Republican Army gunmen, because the courts found that the offenses charged were "political" in that they had been directed at British soldiers.\(^3\) In the third case, \textit{In re Abu Eain},\(^3\)\(^8\) the defendant was extradited successfully to Israel to stand trial for a marketplace bombing,\(^3\) but only after a two year legal battle over the applicabil-

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37. The \textit{McMullen} court found that the Provisional Irish Republican Army (PIRA) had been a legitimate political force in Ireland since 1970, that McMullen was a member of the PIRA and that British Army barracks were prime targets for the PIRA. \textit{In re McMullen}, supra note 35, at 6; \textit{Hearings on S. 1639}, supra note 18, at 294-95.

The \textit{Mackin} court found that the crime charged was "substantially linked to the traditional goal and strategy of the IRA and the PIRA." \textit{In re Mackin}, supra note 36, at 98; \textit{Hearings on S. 1639}, supra note 18, at 7.


ity of the political offense exception.\textsuperscript{40}

These cases created substantial concern in the executive branch of the federal government. The inability of the United States to extradite McMullen and Mackin for crimes of which there was substantial evidence of guilt\textsuperscript{41} was perceived as damaging to the diplomatic relationship between the United States and the United Kingdom.\textsuperscript{42} The \textit{Abu Eain} case, although ultimately satisfactory to the government in its result, was marked by delay, uncertainty, and controversy due to imprecision in the extradition law.\textsuperscript{43}

The United States judicial system was confronted three times in short succession with the problem of transnational terrorism. On each occasion, the process of applying the political offense exception was found to be lacking as a consequence of its antiquated framework. The courts found that they had no fixed procedure for implementing the political offense exception\textsuperscript{44} and no reliable definition of its scope.\textsuperscript{45} Furthermore, the judiciary and the executive, based upon ambiguities in the treaty law, were in complete disagreement as to the jurisdiction of the courts even to entertain the political offense question.\textsuperscript{46}

\textsuperscript{40} After a federal magistrate determined on Dec. 18, 1979, that Abu Eain should be extradited to Israel, Abu Eain sought a Writ of Habeas Corpus from a district court. The court denied the writ and the defendant appealed. The Seventh Circuit Court of Appeals affirmed the denial in April 1981. Abu Eain then sought a Writ of Certiorari in the Supreme Court, which was denied on October 13, 1981, nearly twenty-three months after the original case began. \textit{See supra} note 39.

\textsuperscript{41} Probable cause to believe that the Defendant committed an offense was found by the presiding magistrates in both cases. \textit{See In re McMullen, supra} note 35, and \textit{In re Mackin, supra} note 36.

\textsuperscript{42} \textit{Hearings on S. 1639, supra} note 18, at 43 (testimony of W. Hannay, attorney at law).

\textsuperscript{43} \textit{See supra} note 40.

\textsuperscript{44} \textit{See} Lubet and Czaczkes, \textit{The Role of the American Judiciary in the Extradition of Political Terrorists}, 71 J. CRIM. L. & CRIMINOLOGY 193, 206 (1980).

\textsuperscript{45} \textit{See}\textit{ Hearings on S. 1639, supra} note 18, at 50 (testimony of W. Hannay, attorney at law). Hannay states that the "circumstances in which a state should refuse to cooperate with injustice by sending a dissident back for certain persecution or refuse to allow the mechanism of extradition to be used for mere vengeance simply cannot be defined." \textit{Id.} He further states that "[t]here is no test or rule which meaningfully defines a 'political offense.'" \textit{Id.} at 57 (emphasis in original).

\textsuperscript{46} The United States—United Kingdom Extradition Treaty provides: "Extradition shall not be granted if . . . the offense for which extradition is requested is regarded by the requested party as one of a political character." June 8, 1972, art. 5(1) (c)(f), 28 U. S. T. 22F, T.I.A.S. No. 8468 (Emphasis added). In the \textit{Mackin} case the government argued that "requested party" meant the executive department and not the courts. \textit{See} Brief for Appellant at 28, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981), reprinted in \textit{Hearings on S.1639, supra} note 18, at 241, 274. The court held this interpretation to be incorrect, based on the ambiguity of the phrase "requested party" and the fact that many other United States treaties specifically provide that the judiciary shall make decisions concerning the political offense exception. United States v. Mackin, 668 F.2d 122, 132-35 (2d. Cir. 1981).
The situation clearly called for reform, and the federal executive responded by proposing broad revisions of United States extradition law. The first proposal came in the form of a draft Extradition Act of 1981, which was prepared jointly by the Department of State, the Department of Justice and the Senate Judiciary Committee. This bill addressed numerous procedural and technical shortcomings in the law, but it was clear to most observers that the primary impetus for reform came from dissatisfaction with the results in the Mackin and McMullen cases. The process advocated by the executive branch spawned alternative reform proposals. Much debate centered around the definition of a political offense, the procedure and allocation of burden of proof in the extradition process, and the appropriate roles of the judiciary and executive in the determination of the extradition question. Before discussing this and subsequent proposals for extradition reform, the following section presents an overview of the current extradition law of the United States.

II
CONTEMPORARY EXTRADITION LAW OF THE UNITED STATES

A. THE EXTRADITION PROCESS

International extradition is controlled by federal statute. A foreign state may invoke the process only if there is a treaty in force between the United States and the requesting country. An author-

47. See H.R. REP No. 627, 97th Cong., 2d Sess. 2 (1982); and Hearings on S.1639, supra note 18, at 14-19.
50. See, e.g., 127 CONG. REC. S9956, S9959 n. 61 (daily ed. Sept. 18, 1981) (Memorandum on Extradition Legislation). See also Hearings on S. 1639, supra note 18, at 25 (testimony of W. Hannay, attorney at law). Hannay cites the decisions in McMullen, supra note 35, and In re Mackin, supra note 36, as support for removing the jurisdiction of the courts to decide the applicability of the political offense exception, id. at 25-27. Hannay also states that the purpose of S.1639, supra note 48, is to correct a fundamental flaw in extradition procedure revealed by those cases. Hearings on S.1639, supra note 18, at 39.

The Arguelles case is apparently the sole exception of record to the rule that the United States may extradite a fugitive only in pursuance of treaty terms. Here,
ized representative of the requesting country\textsuperscript{53} initiates the process by filing a verified complaint charging that a person has committed an extraditable offense within the jurisdiction of the requesting government.\textsuperscript{54} No formal diplomatic request is required prior to the filing of the complaint,\textsuperscript{55} but the foreign government may supplement the complaint by submitting a requisition to the Secretary of State at any time during the proceeding.\textsuperscript{56}

While current law allows an extradition complaint to be filed in any federal or state court if the fugitive is found within its jurisdiction,\textsuperscript{57} the consistent practice is to conduct these proceedings in the Federal Courts.\textsuperscript{58} Similarly, although the statute authorizes a hearing to be held before any federal district court judge or authorized magistrate,\textsuperscript{59} recent cases almost invariably have been referred to magistrates—\textsuperscript{60} the lowest ranking officers in the federal judiciary.

The role of the court of extradition is to determine whether there is sufficient evidence to warrant the return of the fugitive to the requesting country.\textsuperscript{62} The accused is extraditable only if the requesting country establishes that a valid treaty is in effect,\textsuperscript{63} that the person named in the complaint or requisition is the same individual who is before the court,\textsuperscript{64} and that the acts charged in the complaint constitute a crime in both the requesting country and the United

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the accused [Don Jose Augustin], a Spanish subject charged with engaging in the slave trade, was surrendered to Spanish authorities in 1864 under summary circumstances as an act of comity by Presidential Order and returned. The incident provoked considerable criticism in Congress. (citing 1 J.B. Moore, EXTRADITION AND INTERSTATE RENDITION § 27 (1891)). According to Evans, supra at 529, "[t]hat the instance is sui generis proves the rule as far as American extradition practice is concerned."

53. Although the representative often will be a consular or diplomatic officer, it is only necessary that the person filing the complaint have authorization from the requesting country. This necessitates the court's determination of the legitimacy of the authorization. See United States ex rel. Caputo v. Kelly, 92 F.2d 603, cert. denied, 303 U.S. 635 (1937).

54. See Hearings on S. 1639, supra note 18, at 320 (memorandum on Extradition Legislation, Prepared by the Staff of the Committee on the Judiciary, U.S. Senate, in Cooperation with the Departments of State and Justice).

55. Id. See also United States ex rel. Caputo v. Kelly, supra note 53.

56. Id.

57. See 18 U.S.C. § 3184 (1976); and supra note 54.

58. See supra note 54.


60. See cases cited in supra note 1.


63. See Ivancevic v. Artukovic, 211 F.2d 565, 566 (9th Cir.), cert. denied, 348 U.S. 818 (1954). See also Note, United States Extradition Procedures, 16 N.Y.L. FORUM 420, 441 (1970); and cases cited in supra note 52.

64. See, e.g., Benson v. MacMahon, supra note 62.
Finally, the court must determine whether there is sufficient proof that an offense has actually occurred. This final requirement generally is satisfied by a showing of "probable cause" to believe that the accused committed the acts charged, that being the standard for commitment for trial under the Federal Rules of Criminal Procedure.

Because an extradition hearing is not a plenary proceeding involving the guilt or innocence of the accused, wide latitude is given with regard to the production and admissibility of evidence. The Federal Rules of Evidence need not apply, and hearsay is admitted freely in the form of affidavits, depositions or other pertinent documents, subject only to a requirement of authentication. The requesting country need not produce witnesses.

The defendant's right to present evidence is limited to that
which tends either to explain the circumstances of the offense,\textsuperscript{72} or to show that he is not the actual person sought by the requesting country.\textsuperscript{73} The defendant may not present evidence which is generally exculpatory or which merely contradicts or challenges the veracity of the prosecution's case,\textsuperscript{74} since such evidence would have no bearing on the issue of probable cause and its admission would transform the proceeding into a trial on the merits.\textsuperscript{75}

The decision of the court of extradition is final and is not subject to direct appeal to a higher court.\textsuperscript{76} Although there is authority to the effect that the requesting country may, following an adverse decision, refile its request before a different trial court,\textsuperscript{77} this route adds delay, expense and complication to the process, but does not bring the case before a higher court for the correction of judicial errors.\textsuperscript{78} As a practical matter, a magistrate's decision against extradition ultimately may terminate the proceeding with no opportunity for meaningful review.\textsuperscript{79}

\textsuperscript{72} See Collins v. Loisel, 259 U.S. 309, 315-16 (1922); Charlton v. Kelly, 229 U.S. 447, 462 (1913); Application of D'Amico, supra note 67, at 929-30.

\textsuperscript{73} See Benson v. MacMahon, supra note 62; and Whiteman, supra note 65, at 998-99.

\textsuperscript{74} See Collins v. Loisel, supra note 72, at 315-16; Shapiro v. Ferrandina, 478 F.2d 894, 900-02 (2d Cir. 1973), cert. dismissed, 414 U.S. 884 (1974); and Sindona v. Grant, supra note 48, at 204-05. In Collins the Court noted that to allow the accused to present exculpatory evidence:

would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties.

259 U.S. at 316 (quoting from \textit{In re Wadge}, 15 F. 864, 866 (S.D.N.Y.), aff'd, 16 F. 332 (2d Cir. 1883)).


\textsuperscript{76} See United States v. Mackin, 668 F.2d 122, 125-30 (2d Cir. 1981).


\textsuperscript{78} See Collins v. Loisel, 259 U.S. 309 (1922); Hooker v. Klein, supra note 77; \textit{In re Kelly}, 26 F. 852 (8th Cir. 1886); \textit{In re Gonzalez}, supra note 77; and \textit{Ex parte Schorer}, supra note 77.

\textsuperscript{79} See \textit{Hearings on S. 1639}, supra note 18, at 6 (statement of M. Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice); at 10 (state-
The defendant similarly is precluded from taking a direct appeal from an unfavorable decision, but may seek collateral relief by filing a petition for a Writ of Habeas Corpus. Although such review is more limited than is a direct appeal, it does provide the defendant with a vehicle for the correction of error that is unavailable to the government. The denial of a Writ of Habeas Corpus is appealable to the higher federal courts.

If the court ultimately authorizes extradition, the Department of State must decide independently whether to deliver the accused to the requesting government. The Secretary of State does not make this decision until the completion of all judicial proceedings and has broad discretion to deny extradition based upon the executive's view of the facts and interpretation of the treaty. The Department of State generally conducts a de novo examination of the issues and court proceedings, but is not bound by the judicial record. The secretary may consider such additional factors as competing requests from different countries, humanitarian considerations, or public policy with respect to international relations.

This general procedure, although unnecessarily circuitous, may be adequate to deal with ordinary cases of extradition for criminal behavior. Once the political offense exception is raised, however, the shortcomings of the system become apparent.

B. THE POLITICAL OFFENSE EXCEPTION

As with the general procedure, the court initially determines the applicability of the political offense exception. If the court decides in favor of the extradition request, the Secretary of State may then...
review the determination; however, if the magistrate concludes that the political offense exception obtains, then extradition is denied and the requesting country is foreclosed from pursuing an appeal. Thus, the lowest ranking officer in the federal judiciary is empowered to make a decision which is binding upon the conduct of United States foreign affairs and immune from review by a higher court.

This odd rule appears to have arisen virtually by accident, but it is unquestionably the current law in the United States. The origin of the rule of non-appealability lies in the relationship between extradition and domestic criminal procedure. Extradition proceedings are preliminary in nature and are analogous to the preliminary hearing in a criminal case. Since the general standard of proof is only "probable cause," the ruling is not deemed a final one and is not given the effect of res judicata. Consequently, although the requesting government is free to refile its complaint before a different magistrate, no appeal may be taken. This approach corresponds directly to the Federal Rules of Criminal Procedure, and it is certainly adequate to deal with the "criminal law" aspects of extradition which are preliminary to the ultimate trial on guilt or innocence.

The magistrate's ruling on the political offense exception, however, is the ultimate decision on that issue. The magistrate makes

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88. See generally United States v. Mackin, 668 F.2d 122 (2d Cir. 1981).

89. After careful review of the legislative and judicial history of current United States extradition law, Judge Friendly concluded, "we think it clear that no appeal lies under 28 U.S.C. § 1291 from the Magistrate's decision here." United States v. Mackin, supra note 88, at 130.

90. The non-appealability of orders granting or denying extradition requests is generally believed to have originated with In re Metzger, 46 U.S. (5 How.) 176 (1847). The case was decided by a district judge in his chambers, and it was held that the law made no provision for review of the special authority exercised by a judge, not sitting in court. Subsequently, a new extradition law was passed, that law was the predecessor to the current extradition law of the United States. Neither the new law nor its legislative history, however, shows any intention to alter the Metzger decision with respect to reviewability, and the doctrine of non-appealability of judicial extradition decision became entrenched in United States law. See United States v. Mackin, supra note 88, at 125.

91. See supra note 60 and accompanying text. But see supra notes 76-82 and accompanying text (the defendant may file a petition for Writ of Habeas Corpus and the requesting state may refile its request before a different court).


94. Fed. R. Crim. P. 5.1(6) provides:

Discharge of Defendant: If from the evidence it appears that there is no probable cause to believe that an Offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.
findings of fact and conclusions of law which are not preliminary to those of any other forum; the standard of proof employed is at least the "preponderance of the evidence" test rather than merely a probable cause standard. The magistrate's hearing on the political offense exception is nothing less than a full-scale trial on that issue. The decision is non-appealable only because of its role in the extradition process, but the policy reasons precluding the appeal of preliminary evidentiary findings simply do not apply to the political offense question. It can only be seen as an historical accident that the two aspects of extradition—proof of the crime versus the political nature of the offense—have not been separated procedurally so as to allow direct appeal of the political offense decision.

The difficulty created by the lack of appellate review is compounded by the inadequate substantive and procedural guidelines available to federal magistrates. The United States cases apply the outmoded "incidence test" as the substantive rule governing the political offense exception. In addition, the current law neither specifies the party on whom the burden of proof rests nor defines the standard of proof that must be met in order for the party with the burden to prevail.

The "incidence test," first enunciated in 1891 in the British case In re Castioni, provides that a crime is not subject to extradition if it was committed in furtherance of a political rising or disturbance. This emphasis on the existence of a rising or rebellion has resulted in a rule which is both under-inclusive and over-inclusive. The tradi-
tional test is under-inclusive in that it appears to exclude from protection all political offenses which were not part of a general rising or rebellion. The over-inclusive aspect of the test is that it lays the framework for the claim that all acts committed during times of political disorder, without regard to the character or victim of the crime, should be insulated from extradition.\(^{100}\)

The mechanical application of the *Castioni* test has led to results which commentators have called cruel and insane.\(^{101}\) In the mid-1950's the Yugoslavian government sought the extradition of Andrija Artukovic, the former minister of internal affairs in the pro-Nazi government of Croatia during World War II, on the charge that he had ordered the murder of 200,000 inmates of Yugoslavian concentration camps.\(^{102}\) The indictment specifically accused Artukovic of issuing “orders based on criminal motives, hatred, and the desire for power to members of bands . . . to carry out mass slaughters of the peaceful civilian population.”\(^{103}\) Three separate federal courts, however, determined the offenses charged to be “political” on the ground that they had occurred during the German invasion of Yugoslavia and the subsequent establishment of the short-lived independent government of Croatia.\(^{104}\) The courts specifically declined to rule that war crimes against civilians were beyond the purview of the *Castioni* test,\(^{105}\) simply because the offenses were committed in the course of a struggle for political power.\(^{106}\)

A similar analysis recently led a United States magistrate to conclude that “[e]ven though the offense be deplorable and heinous, the criminal actor will be excluded from [extradition] if the crime is committed under these pre-requisites.”\(^{107}\) Thus, the *Castioni* test, carried to its “insane but logical” end,\(^{108}\) would appear to protect terrorists from extradition. Such a result virtually is unavoidable.

\(^{100}\) See Lubet and Czaczkes, *supra* note 95, at 201-06.

\(^{101}\) See *Hearings on S. 1639, supra* note 18, at 40 (statement of W. Hannay, attorney at law) (“absurdity and ultimate cruelty of applying” the *Castioni* test).


\(^{103}\) 24 F.2d at 204. The events took place in 1941 and 1942 when Yugoslavia was occupied by German and Italian troops. *Id*.

\(^{104}\) 140 F. Supp. at 246-47; 247 F.2d at 204-05; and 170 F. Supp. at 392-94.

\(^{105}\) 140 F. Supp. at 246-47; 247 F.2d at 204-05; and 170 F. Supp. at 392-94.

\(^{106}\) 170 F. Supp. at 393.

\(^{107}\) *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979), reprinted in *Hearings on S. 1639, supra* note 18, at 294.

\(^{108}\) See *Hearings on S. 1639, supra* note 18, at 55-56 (statement of W. Hannay, attorney at law) (The Castioni test “more often leads courts away from the right result than towards it.”).
when the courts apply a test that focuses on the context of the crime as opposed to the content of the act. The British courts doubtless recognized this problem, as they have departed from the Castioni test to the point of virtual abandonment.\footnote{109} Unfortunately, the courts of the United States, in the absence of guiding legislation, have failed to keep pace with the realities of the modern world in the substantive development of the political offense doctrine.\footnote{110}

The Castioni test, despite its inadequacies and pitfalls, is nonetheless an accepted rule of law which is capable of analysis and application; it is useful as a benchmark for courts to guide their substantive understanding of the political offense exception. No such benchmark exists, however, with regard to the procedure for considering the exception. There is no statutory treatment of the issue, and the courts have not developed a uniform process to govern the manner in which the political offense exception may be raised, or the standard under which it is to be determined.\footnote{111}

The procedural concept of burden of proof may be divided into three components: burden of production, burden of persuasion, and standard of proof.\footnote{112} The allocation of the burden of production controls which party is obliged to present evidence first on a given point of law,\footnote{113} and the assignment of the burden of persuasion determines which party ultimately must convince the trier of fact.\footnote{114} Finally, the standard of proof sets the level of certainty which must be met in order for the party with the ultimate burden to prevail.\footnote{115}

In criminal cases, the general rule is that the defendant bears the

\footnote{109} Id. at 55 ("England does little more than pay lip service to the Castioni rule."). For example, in 1954 the British courts applied the political offense exception in the absence of a political disturbance in the requesting country. Seven crew members of a Polish fishing trawler who had taken control of their boat from a communist crew in international waters were granted asylum. Regina v. Governor of Brixton Prison, \textit{ex parte} Kolczynski, [1955] 1 Q.B. 540 (1954).

\footnote{110} In Abu Eain v. Wilkes, 641 F.2d 504, 519-21 (7th Cir. 1981), \textit{cert. denied}, 454 U.S. 894 (1981), the court held that the killing and maiming of children in a crowded Israeli marketplace could not be considered a political offense, but the court based the holding, at least in part, on the ground that the evidence had failed to show "a direct tie between the [Palestine Liberation Organization] and the specific violence alleged. Id. at 520. Though the court arrived at the praiseworthy conclusion that "the indiscriminate bombing of a civilian populace is not recognized as a protected political act," \textit{id.} at 521, the court nevertheless felt contrained to mold its analysis to the limitations imposed by the Castioni rule. \textit{Id.} at 519-21.

\footnote{111} See generally Lubet and Czaczkes, supra note 95, at 206-10.


\footnote{113} \textit{Id.} at 895.

\footnote{114} \textit{Id.}

\footnote{115} \textit{Id.}
burden of production for any affirmative defense.\textsuperscript{116} In some extradition cases, however, the courts have required the requesting country to establish in the initial requisition that the offense charged was not political.\textsuperscript{117} Furthermore, even those courts holding that the initial burden is on the defendant have disagreed as to the quantum of evidence that is necessary to satisfy the burden of production. Some courts have required substantial expert testimony concerning the surrounding political situation,\textsuperscript{118} while others have required only the assertion of the defense.\textsuperscript{119}

The cases show a similar confusion concerning the burden of persuasion. In \textit{Ramos v. Diaz},\textsuperscript{120} for example, the court held that "when evidence offered before the Court tends to show that the offenses charged against the accused are of a political character, the burden rests on the demanding government to prove to the contrary."\textsuperscript{121} This is clearly a defense-oriented approach, as the "tending to show" standard would require the requesting country, in

\textsuperscript{116} See, e.g., \textit{Fed. R. Crim. P. 12}.

\textsuperscript{117} This approach was adopted by both the district court and the court of appeals in Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956), \textit{aff'd sub nom.} Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), \textit{supra note 102}. The Supreme Court ultimately rejected the approach in reversing per curiam, 355 U.S. 393 (1958).


\textsuperscript{119} The court in \textit{Ramos v. Diaz}, 179 F. Supp. 459, 463 (S.D. Fla. 1959), followed the approach that requires only the assertion of the defense: "American authority indicates clearly that when evidence offered before the Court tends to show that the offenses charged against the accused are of a political character, the burden rests upon the demanding government to prove the contrary." \textit{Id.} at 463. See \textit{supra} note 119.

\textsuperscript{120} 179 F. Supp. 459 (S.D. Fla. 1959).

\textsuperscript{121} \textit{Id.} at 463. See \textit{supra} note 119.
almost every case, to disprove the political nature of any charged offense, presumably by at least a preponderance of the evidence. 122

More recently, the court in Abu Eain v. Wilkes held that the burden of persuasion rested on the defense to establish facts that brought the specific crime within the ambit of the political offense exception. 123 To meet this burden, the defendant would have to adduce evidence showing a "direct link between the perpetrator, a political organization’s political goals and the specific act." 124 Although this decision represents the modern trend, 125 the courts have been far from unanimous in adopting a clear rule governing the burden of persuasion. 126

Finally, questions regarding the applicable standard of proof have received scant attention. Those decisions that have addressed the issue generally have utilized the "preponderance of the evidence" standard, 127 but most courts have issued their rulings without discussing the standard of proof. 128

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122. See Ramos v. Diaz, supra notes 119-21, at 463. The requesting country in an extradition hearing only bears the burden of showing probable cause, as the ultimate issue of guilt or innocence is not under consideration by the extraditing court. See supra notes 66-67 and accompanying text. At the same time, however, the court does resolve the merits of the political offense exception issue. In order for the court to reach a decision, one party or the other must establish its case by the greater weight of the evidence. See also In re Abu Eain, supra note 118. In his habeas corpus brief to the Seventh Circuit, Abu Eain argued that he had met the "tending to show" standard by presenting evidence of the general tactics of the Palestine Liberation Organization. He had offered evidence at trial that bombings directed as Israeli civilians were "typical and common" undertakings of the P.L.O., but he did not testify himself and he did not offer any evidence concerning the motivation behind the specific bombing with which he was charged. Brief for Appellant at 25-29, Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). On this basis Abu Eain argued that the requesting state was required to disprove that the charged murders were political crimes. Id. at 29.

123. 641 F.2d 504, 520-21 (7th Cir. 1981).

124. Id. at 521.

125. See In re Mackin, No. 80 Cr. Misc. 1, 45-46 (S.D.N.Y., opinion filed August 13), aff'd, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981). The magistrate's opinion is reprinted in Hearings on S. 1639, supra note 18, at 140.

126. Id. See also In re Abu Eain, supra note 118; and In re McMullen, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979).

127. See, e.g., In re Mackin, supra note 125, at 45-46.

128. The magistrate noted in In re Mackin, id., that neither Abu Eain v. Wilkes, supra note 123, nor In re McMullen, supra note 126, is helpful in establishing the requisite burden and standard of proof. The Abu Eain court, while requiring the defendant to show a link between the act charged and the political objective, did not explicitly overrule the "tends to show" standard enunciated in Ramos v. Diaz, 179 F. Supp. 459, 463 (S.D. Fla. 1959).

The McMullen court also complicated the issue by articulating two different standards of proof. The court found that the respondent had met its burden of establishing each element of the political offense exception, then concluded that this government had failed to meet its burden of presenting contradicting evidence. This would seem to indicate that a defendant only need introduce evidence which "tends to show" the political nature of the crime for the burden to shift to the government. In re McMullen, supra note 126, at 5. In the following paragraph the court implied that the applicability of the political excep-
The foregoing overview of the process for determining the extradition question in the United States illustrates the need for a clear legislative response to the present inadequacies in the substantive and procedural law.\(^{129}\) The following section analyzes the proposed responses to the problems and recommends an extradition process that preserves the strengths of United States tradition and satisfies the requirements of the contemporary environment.

III

EXTRADITION REFORM

The call for statutory reform of the extradition law of the United States has met with no dissent. Academics, practitioners, government officers and other interested observers agree that the entire extradition process must be reformed both for the benefit of the government, future defendants, and the vitality of the political offense exception.\(^{130}\) The commentators are nearly unanimous on the need for several technical changes in the law. Thus, it is nearly certain that any legislative reform will abolish the rule of non-appealability.\(^{131}\) In the future, both the defendant and the prosecution will be able to appeal decisions directly. It also appears that extradition hearings will be held exclusively in the federal courts, and that at least important cases will be removed from the magistrates to full district court judges.\(^{132}\)

The consideration of the political offense exception, however, has stirred considerable controversy. The proposed changes in the treatment of the exception raise three principal questions: (1) How shall "political offense" be defined; (2) How shall the burden of proof be allocated; and (3) Should the political offense determination must be established by a preponderance of evidence. \textit{Id}. at 6. \textit{See also} Abu Eain v. Wilkes, \textit{supra} note 123 at 520.

\(^{129}\) \textit{See supra} notes 31-50 and accompanying text (citing executive disapproval of recent extradition proceedings as impetus for reform).

\(^{130}\) \textit{See Hearings on S. 1639, supra} note 18, at 20 (statement of M.C. Bassiouri, professor, School of Law, De Paul University); at 69 (statement of W.M. Goodman, attorney at law); at 86 (statement of R.T. Capulong, chairperson of the Human Rights Committee of the Philippine-American Lawyers Association of New York, dated Dec. 5, 1981); at 4 (statement of M. Abbell, director, Office of International Affairs, Criminal Division, Department of Justice); and at 89 (statement of the American Civil Liberties Union, Letter dated Dec. 8, 1981).


be removed from the courts? Although the abolition of the judicial role has been the most controversial proposal of the three, the definitional and procedural questions may prove to be equally important in the long run. Furthermore, the satisfactory resolution of the definitional and procedural problems in the law could be determinative of congressional willingness to leave the political offense question in the hands of the judiciary.

A. THE DEFINITION OF A POLITICAL OFFENSE

The extradition reform bills presented to Congress define political offenses by exclusion. These definitions follow identical patterns and state that an offense of a political character "normally" does not include:

(A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;
(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;
(C) a serious offense involving an attack against the life, physical integrity, or liberty or internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;
(D) an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of the offense;
(E) an offense that consists of homicide, assault with intent to commit serious bodily injury, rape, kidnapping, the taking of a hostage, or serious unlawful detention;
(F) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;
(G) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs; or


134. S. 1639, supra note 133, does not contain a definition, because, under the bill, the determination of the political offense exception would not be made by the courts. S. 1940, supra note 133, defines political offenses by exclusion in § 3194(e). H.R. 6046, supra note 113, defines political offenses by exclusion in § 3194(e)(2). See infra notes 135-36 and accompanying text.

135. The language in each proposed definition varies only in minor aspects. Prior to amendment, S. 1940, supra note 133, provided the exclusions quoted in the text accompanying infra note 136. Amended S.1940 § 3194(e) contains two subsections: (1) subsection one states that "a political offense does not include" provisions A, B, C, D, and G in text accompanying infra note 136; (2) subsection two states that "a political offense, except in extraordinary circumstances, does not include" provisions E and F in text accompanying infra note 136. Both subsections include a provision similar to H in the text accompanying infra note 136. The amended version of S.1940, unlike the other proposed definitions, does not state that an offense of a political character "normally" does not include the particular crimes in provisions A, B, C, D, and G in text accompanying infra note 136. H.R. 6046, supra note 133, uses the language "except in extraordinary circumstances" in lieu of "normally."
an attempt or conspiracy to commit an offense described in clauses (A) through (G) of this subparagraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.\textsuperscript{136}

The reticence of the drafters to define the term political offense in a comprehensive manner indicates their recognition of the impossibility inherent in that task. In an area as volatile and diverse as international violence there can be no single test or rule which meaningfully and reliably defines a "political offense." It is possible to define what a political offense is not, however, through the process of excluding that conduct which is unacceptable, regardless of its motivation or context.\textsuperscript{137}

The first four proposed exclusions essentially codify existing obligations under a variety of international conventions.\textsuperscript{138} These exclusions represent a strong international consensus that crimes such as aircraft hijacking,\textsuperscript{139} hostage taking,\textsuperscript{140} and attacks on diplomats\textsuperscript{141} cannot be shielded from prosecution. This approach, which also was taken in the 1977 European Convention on The Suppression of Terrorism,\textsuperscript{142} avoids the overinclusiveness of the *Castioni*
test, at least with regard to those offenses which, due to current or future treaties, obligate the United States either to extradite or prosecute the accused.

Two of the subsequent exclusions, which are not treaty-related, are far too restrictive in limiting the availability of the political offense exception. Sections (E) and (F) exclude all offenses involving the use of a firearm, homicide, assault with intent to commit serious bodily injury, kidnapping, and serious unlawful detention. Under certain circumstances, courts previously applied the relative political offense doctrine to precisely these types of offenses. Accordingly, the exclusionary definition in these sections represents a substantial departure from prior law and interpretation of the political offense exception.

Without question, this approach excludes virtually all acts of terrorism from the ambit of the political offense exception. It also offers the benefit of simple application. A rule that excludes all crimes of violence from the political offense exception will make it possible to apply the exception based upon nothing more than an examination of the underlying complaint. It will become unnecessary for any court to hold a hearing on the political offense question, since the exception never would apply to any situation that also involves the charge of a violent crime. Thus, had the proposed rule been applied to the Abu Eain, McMullen, and Mackin cases, all of which required lengthy evidentiary hearings, each could have been

b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Id. See also 16 I.L.M. 233 (1977) (noting that the convention was signed on Jan. 27, 1977 by seventeen countries).

143. See supra notes 97-100 and accompanying text.
144. See, e.g., S.1940, 97th Cong., 2d Sess. § 3196(a)(3): “A political offense or an offense of a political character normally does not include . . . (D) an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of the offense.”

145. See, e.g., In re Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13), aff’d, United States v. Mackin, 688 F.2d 122 (2d Cir. 1981); In re McMullen, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979); Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959); In re Ezeta, 62 F. 972 (N.D. Cal. 1894); Regina v. Governor of Brixton Prison, ex parte Kulczynski, [1955] 1 Q.B. 540 (1954); and In re Castioni, [1891] 1 Q.B. 149.

146. See infra notes 147-49.
decided without trial at least with regard to the political offense question. Abu Eain was charged with placing a bomb which killed two children,\textsuperscript{147} Mackin was charged with shooting a British policeman,\textsuperscript{148} and McMullen was charged with the bombing of an army barracks in which a charwoman was killed.\textsuperscript{149} Under the proposed violent crimes exclusion, none of these three defendants could have claimed the protection of the political offense exception, and indeed, no hearings would have been necessary to determine the inapplicability of the defense.

The problem with this exclusion of all violent offenses is that it sweeps too broadly and denies the protection of the political offense exception to some offenders the United States might wish, and indeed ought, to protect. The evolution of the political offense exception reveals a clear intent to apply the doctrine to at least some persons sought for violent acts committed in the course of rebellion or revolution.\textsuperscript{150} Although the value-free application of the protection to heinous acts committed in the name of a political cause carries the concept too far,\textsuperscript{151} it is nonetheless possible to shape an approach which excludes random terror, but which will not require the extradition of legitimate rebels against a tyrannical government. It is conceivable, for example, that one of the detained leaders of Poland’s Solidarity movement might have escaped to the West using a firearm in the course of evading his captors. The United States would not wish to return a fugitive for trial under these circumstances. A carefully drafted requisition pursuant to the United States-Poland Treaty of Extradition,\textsuperscript{152} however, coupled with the proposed “firearm exclusion,” legally could compel rendition.

A better resolution of the definitional problem is to focus upon the nature of the violent activity charged, rather than upon the fact that violence of a specified type was involved. To effect this alternative focus, the definition could incorporate the existing legal notion that acts aimed against civilians, rather than at installations of gov-


\textsuperscript{149} In re McMullen, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979), reprinted in Hearings on S.1639, supra note 18, at 294.

\textsuperscript{150} See Lubet and Czaczkes, supra note 4, at 194.

\textsuperscript{151} See, e.g., In re McMullen, supra note 149; and Artukovic v. Boyle, supra notes 102-06 and accompanying text.

\textsuperscript{152} Treaty of Extradition, Apr. 5, 1935, United States-Poland, 46 Stat. 2282, T.S. No. 908.
ernment, are not political offenses. An additional subsection might be drafted to exclude from the definition of a political offense:

( ) an offense involving an attack against the life, physical integrity or liberty of any civilian or non-combatant; or an offense, comprising an act or acts of violence or a conspiracy or attempt to perform an act or acts of violence, which is intended to, or has the principal effect of, creating fear, terror, or disruption among the civilian populace, or which has the principal effect of disrupting the social order.

Such a provision would exclude terrorist activities such as the bombing of public places, kidnapping, and other acts of social disruption that are directed solely at the civilian populace. The decision-maker, however, would retain the ability to extend the protection of the exception to legitimate rebels or actual contenders in a struggle for national power.

One commentator noted that the specific exclusion of crimes against civilians from the ambit of the political offense exception may have the undesirable effect of sanctioning political murder "merely because the victim wears a uniform," and cautioned against the adoption of a law that declares "open season on soldiers" and police. There remains a distinction, however, between murder and rebellion when the victim is an armed officer of the state.

No United States law defines the difference between crime and revolution, and the recent extradition cases offer little assistance in resolving the problem. The international law of war, however, seeks to distinguish precisely between privileged acts of combat and punishable atrocities or war crimes. Protocol I to the 1949 Geneva Conventions contains the list of "grave breaches" of the humanitarian rules of war for which individual soldiers may be subjected to trial or extradition.

The International Law Association's Committee on International Terrorism suggested that, although the law of armed conflict does not apply to those acts commonly considered to comprise international terrorism, the jurisprudence of war could be extended by

153. See Abu Eain v. Wilkes, 641 F.2d 504, 520-523 (7th Cir. 1981); In re Meunier, [1894] 2 Q.B. 415. Cf. In re Ezeta, 62 F. 972 (N.D. Cal. 1894). (San Salvador requested that its former President, Antonio Ezeta, and four of his military officers be extradited from the United States to stand trial for crimes Ezeta and his officers committed while attempting to maintain their government against the revolutionary forces that eventually overthrew them. The trial court held that all but one of the alleged crimes were political because they occurred during a period of armed rebellion. The one crime ruled not political involved the attempted murder of a civilian.)

154. Hearings on S.1639, supra note 18, at 55 (testimony of W. Hannay, attorney at law).

155. Id.

156. See, e.g., In re Ezeta, supra note 153.

analogy to develop the humanitarian law of international violence. Since the parties to the Geneva conventions voluntarily bound their armed forces to a code of conduct, there is no reason to insulate insurrectionists or other groups from the punishment to which soldiers may be subjected.\textsuperscript{158} The committee’s Fourth Interim Report reasoned: “[T]here is no reason in theory or practice why states should be willing to concede to politically motivated foreigners a license to commit atrocities while saddling their own organized armed forces with the restraints contained in the 1949 Geneva conventions against committing the same atrocities.”\textsuperscript{159}

Thus, the committee concluded that the humanitarian law requiring states to cooperate in the suppression of war crimes should apply with equal force to similar acts committed by persons not entitled to the soldiers’ privilege.\textsuperscript{160} The committee proposed that no person should be permitted to escape trial or extradition on the ground of political motivation, if the same acts, performed by a soldier engaged in an international armed conflict, would subject the soldier to trial or extradition.\textsuperscript{161}

The committee’s formulation, if adopted, would draw a bright line between acts of actual insurrection and random assaults by politically disaffected individuals. This approach, however, would be useful only as the definition of a lower limit for the protection of political violence. Standing alone, it would appear to invest every terrorist with the privileges normally reserved for organized combatants. Since it is necessary to hold self-styled revolutionaries to a standard higher than that allowed to soldiers, it is essential that the “rules of war” test be employed only in conjunction with defined statutory exclusions from the political offense exception.

In summary, the definitional approach to the political offense exception contained in the proposed reform bills is admirable both in its departure from the Castioni test and its attempt to exclude terrorists from political sanctuary. The exclusion of virtually all violent acts from the protection of the political offense exception, however, is too restrictive and threatens to require the extradition of legitimate dissidents. The definition would be strengthened if it were to eliminate the blanket exclusion of all violent acts, and focus instead on crimes against civilians and those that, by analogy, violate the law of war.


\textsuperscript{159} \textit{Id.} at 11.

\textsuperscript{160} \textit{Id.} at 11-12.

\textsuperscript{161} \textit{Id.} at 12.
B. Procedure and Burden of Proof

The rules that govern the manner in which the political offense exception is to be raised and determined are of the utmost importance. Must the defendant assert and prove, by whatever standard, that his offense was political, or must the requesting country prove that it was not? Although the answer to this question may often be outcome determinative, the United States cases have not provided a consistent approach to the problem. Similarly, and inexplicably, the original extradition reform bills also ignored the burden of proof issue. Through the process of public hearing and committee deliberation, however, two distinct proposals have emerged to govern the procedure for asserting the political offense exception.

House of Representatives Bill 6046 contains a bifurcated hearing procedure under which the presiding judge would not hear evidence on the political offense question unless and until the court determined that the defendant was otherwise extraditable. This is a reasonable measure aimed at conserving judicial resources. It surely would serve no purpose to conduct a lengthy and complicated hearing on the political offense exception, only to determine later that there was insufficient evidence linking the defendant to the crime, or that the applicable statute of limitations had already passed. This approach is also contained in Senate Bill 1940 proposed by the Committee on Foreign Relations.

Once the political offense issue is ripe for adjudication, there is agreement among the proposals that the defendant must bear the burden of proof. Although the legislation does not divide this concept into its “production” and “persuasion” aspects, it is clear that the intent of the drafters is to require the defendant both to raise the defense through the production of evidence and ultimately to persuade the trier of fact of its applicability.

162. See supra notes 112-28 and accompanying text.
165. See, e.g., id. at §§3194(d)(1)(A-C); and supra notes 62-68 and accompanying text.
166. See, e.g., H.R. 6046, supra note 164, at §3194(d)(2)(A).
168. Id. at 19, §3194(e); and H.R. 6046, supra note 164, at §3194(d)(2)(c).
169. See supra note 112 and accompanying text.
170. See S. REP. No. 475, supra note 167, at 9: “Shifting the burden of the proof to the person seeking application of the political offense exception reinforces the Senate Foreign Relations Committee's belief that its legitimate application should be infrequent and also in accords [sic] with the guidelines established in section 3194(e)(1) and (2),” which provides that for crimes involving the use of firearms, explosives or violent behavior, a person resisting extradition must satisfy a higher standard by demonstrating extraordinary circumstances. H.R. 6046, supra notes 164, 168, also contemplates that the
The placement of the full burden of proof on the person seeking the benefit of the political offense exception will add both regularity and predictability to the extradition process. This approach will resolve the conflict between the *Diaz* and *Abu Eain* cases, and will eliminate the possibility that some court will refuse to extradite an admitted terrorist solely on the basis of evidence which “tended to show” that the charged offense was political.

As a matter of judicial policy, the political offense exception should be viewed in the same manner as an affirmative defense. The party pleading the exception has put forward an affirmative claim that seeks to avoid the consequence of an otherwise valid extradition request. Since this matter is new to the proceeding, affirmative in nature, and comes from beyond the four corners of the requisition for extradition, it is a reasonable conclusion that the party that raises the claim must also be the one to establish it.

Practical considerations also mandate placing the burden on the party pleading the exception. Political motivation is a necessary, though not sufficient, condition for the invocation of the political offense exception. Consequently, the applicability of the exception will rest at least in part upon an evaluation of the goals, affiliations, activities and principles of the defendant. Only the defendant can...
produce evidence of his political motivation, and conversely, it is virtually impossible for the requesting country to provide evidence that a defendant was apolitical. Placing the burden on the requesting country would call for the proof of a negative, a task which in other contexts universally is seen as overwhelmingly difficult, if not impossible.  

The practical difficulty involved in placing the ultimate burden of proof on any party other than the defendant is illustrated by an example drawn from the *Abu Eain* case. It was Abu Eain's claim that once he provided evidence which "tended to show" that the crimes with which he was charged were political, the burden of proof shifted to the prosecution to prove by a preponderance of the evidence that the offenses were not political. Following this construction, he claimed that he had met his burden by showing that bombings directed at Israeli civilians were "typical and common" undertakings of the Palestine Liberation Organization. Although Abu Eain neither testified nor offered any evidence concerning the motivations behind the specific bombings, he claimed on the basis of this "typicality," that the government was required to disprove the political nature of the crimes. The government, of course, had no ability to provide such evidence, beyond a description of the crime itself. Indeed, it is virtually impossible to conceive of the form that such proof might take. How could the government of Israel or the United States prove that certain crimes were not secretly political? Arguably, if such a burden were to be placed on the government simply because the defendant in an extradition case had claimed the protection of the political offense exception, the process of extradition would grind to a standstill.

Every policy consideration dictates that the defendant bear both the initial burden of producing evidence and the ultimate burden of persuasion on the political offense issue. This will require the defendant to present a prima facie case that the offense was a political one by producing sufficient evidence as to every element of his claim.

The placement of the burden of proof does not, of course, resolve the question of standard of proof: what quantum of proof...

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175. See Lubet and Czaczkes, supra note 4, at 209-20.
176. See supra note 1.
177. Brief for Appellant at 25-29, Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). The presiding magistrate rejected this contention and ruled that the defendant was required to demonstrate the link between the alleged crimes and his political objectives. *In re* Abu Eain, Magis. No. 3-78-1899 (N.D. Cal., Opinion filed May 11, 1979).
should be required in order to prevail in claiming the political offense exception? The various reform proposals are divided on this issue. House of Representatives Bill 6046 would deny extradition where the political nature of the offense is proven by a "preponderance of the evidence." Senate Bill 1940 would require the higher standard of proof by "clear and convincing evidence.

The choice of a standard of evidence is an appropriate exercise of legislative discretion, which should be made with a view toward advancing a substantial public policy. As in the judicial context, this may be done through the process of balancing the competing interests involved.

With regard to the political offense exception, the strongest policy arguments all favor the imposition of the higher standard of evidence upon the party seeking to assert the defense. The "mere preponderance" standard, which is generally employed in civil litigation, is not demanding enough, since it requires the production of only a minimally greater weight of the evidence in order for a party to prevail. This is the most subjective of all standards, focusing on the relative strength of the evidence produced by the parties. It is suitable for the trial of tort and contract cases where the only issue to be resolved is which party is entitled to prevail in a claim for damages and where there is no strong public interest in the outcome. The application of the political offense exception, however, involves weighty issues of international impact which should be decided by a more objective standard.

179. See supra note 95.
180. See H.R. 6046, supra note 164, at § 3194(d)(2)(c): "The court shall not order a person extraditable after a hearing under this section if the court finds— . . . the person has established by the preponderance of the evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense."
181. See S. REP. No. 475, supra note 167, at § 3194(e).
185. Justice Blackmun, for the court in Santosky v. Kramer, 455 U.S. 745, 755 (1982), stated: "[W]hile private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants would 'share the risk of error in roughly equal fashion,'" (quoting from Addington v. Texas, 441 U.S. 418, 423 (1979)). See also Se-Ling Hosiery v. Marguilles, 364 Pa. 45, 70 A.2d 854 (1950): "[P]roof 'by a preponderance of the evidence' is the lowest degree of proof recognized in the administration of justice."
186. "Clear and convincing evidence is 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations...
The requirement of proof by clear and convincing evidence will strengthen foreign policy by making it more difficult for terrorists to find haven in the United States. The higher standard will limit the extension of sanctuary, at least at the judicial level, to those who can clearly prove that they are entitled to it. The clear and convincing evidence test also will serve the goal of preserving executive flexibility in matters touching upon foreign affairs, because it will ensure that courts will decline to bar extradition in close or doubtful cases. Courts, instead, will certify such matters for consideration by the Secretary of State.

These governmental interests outweigh the interests of individual defendants in avoiding extradition solely by meeting a lower burden of proof, because an adverse ruling will have greater consequences for the government than for the accused. As noted above, a final judicial ruling which upholds a political offense claim will bar

sought to be established.” Hobson v. Eaton, 399 F.2d 781, 784, n.2 (6th Cir. 1968). “Clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty. . . . This high standard may be required to sustain claims which have serious social consequences or harsh or far-reaching effects on individuals.” United States v. Bridges, 133 F. Supp. 638, 641, n.5 (N.D. Cal. 1955). See also Schneiderman v. United States, 320 U.S. 118, 125 (1943) (“To set aside such a grant [of citizenship] the evidence must be clear, unequivocal and convincing—‘it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt,’”) quoting from Maxwell Land-Grant Case, 121 U.S. 325, 381 (1887); Carpenter v. Union Insurance Society of Canton, Ltd., 284 F.2d 155, 162 (4th Cir. 1960) (assertion of a criminal act as a defense in a civil action must be established by clear and convincing proof); Regenold v. Baby Fold Inc., 68 Ill. 2d 419, 369 N.E.2d 858 (1977) (court should not set aside consent for adoption without proof by clear and convincing evidence that its execution was procured by fraud or duress); Pontano v Obbisso, 580 P.2d 1026, 1027 (Or. 1978) (“Proof of conduct creating a constructive trust must be strong, clear and convincing evidence—evidence that is of ‘extraordinary persuasiveness.’")

187. See, e.g., Abu Eain v. Wilkes, 641 F.2d 504, 520 (7th Cir. 1981), where Judge Harlington Wood, for the court, expressed his resolution that the United States not become a “safe haven” for terrorists: “We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.” It has been the policy of the State Department to strictly construe extradition treaties when terrorist activities are involved. Former Secretary of State Cyrus Vance, for example, stated on the floor of the Senate that the United States seeks to apprehend, bring to trial, and penalize international terrorists. See An Act to Combat International Terrorism: Hearings on S.2236 Before the Senate Comm. on Governmental Affairs, 95th Cong., 2nd Sess. 30 (1978) (Statement of Secretary of State Cyrus Vance). See also Lubet and Czaczkes, supra note 175, at 196.

188. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (“[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved”). Cf. Baker v. Carr, 369 U.S. 186, 211-13 (1962) (Although questions involving foreign relations are generally political questions, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance“).
extradition permanently, leaving the government without recourse;\textsuperscript{189} the enactment of any version of the pending reform legislation will eliminate the government's option of refile the extradition request in a new forum. A ruling against the exception, however, merely certifies the matter to the Secretary of State,\textsuperscript{190} who may nonetheless deny extradition on the basis of the political offense exception or other humanitarian or policy grounds.\textsuperscript{191} Finally, even a defendant who is extradited still will be afforded a full trial on the issue of guilt or innocence in the requesting country.

The initial political offense decision is binding for the government, but it is strictly preliminary with regard to the defendant. Under these circumstances it is appropriate, again at the judicial level, that the risk of error be resolved in favor of extradition. This is accomplished by requiring that the defendant prove the political nature of the crime by clear and convincing evidence.

C. THE JUDICIAL ROLE

In the debate over extradition reform the most controversy has been generated by the proposal to remove the consideration of the political offense exception from the judiciary and place the decision solely with the Secretary of State. The Departments of State and Justice initiated this proposal,\textsuperscript{192} which the Senate Judiciary Committee expressed in Senate Bill 1639.\textsuperscript{193} Some commentators lauded the suggestion for sole executive authority over the dispensation of political asylum as an essential move toward preserving the integrity

\begin{itemize}
\item \textsuperscript{189} See supra note 89.
\item \textsuperscript{190} See supra notes 83 and 88 and accompanying text.
\item \textsuperscript{192} See Hearings on S.1639, supra note 18, at 66 (Department of Justice letter in support of legislation, Aug. 4, 1981); at 67 (Department of State letter in support of legislation, Aug. 25, 1981); and at 319 (memorandum on extradition legislation, prepared by staff of the Senate Committee on the Judiciary in cooperation with the Departments of State and Justice, Sept. 1981).
\item \textsuperscript{193} Id. at 303, § 3194(a):
\begin{itemize}
\item The court does not have jurisdiction to determine the merits of the charge against the person by the foreign state or to determine whether the foreign state is seeking the extradition of the person for a political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.
\end{itemize}
See also, id. at 307-08, § 3196(a)(3):
\begin{itemize}
\item If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter, may—\ldots decline to order the surrender of the person if the Secretary is persuaded, by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.
\end{itemize}
of United States foreign policy. Others condemned the approach as an assault on fundamental civil liberties. Alternative proposals continue the debate. House of Representatives Bill 6046 preserves the judicial role. Senate Bill 1940, apparently a compromise, provides that the principal determination be made by the Secretary of State, followed by limited judicial review. The three approaches—the executive, judicial and synthesis models—are analyzed in the following sections.

I. The Executive Model

The extreme dissatisfaction with the rulings in the Mackin and McMullen cases has led to mistrust of the ability of the judiciary to apply the political offense exception in a manner consistent with the international political goals of the government. To ensure that the government is able to extradite offenders to friendly countries, the executive model gives the Secretary of State full discretion over the application of the political offense exception. This admittedly result-oriented approach is not, however, an argument of convenience. Substantial theoretical and practical considerations support the position that the courts are not the appropriate forum for resolution of the political offense question.

The theoretical foundation for the executive model is the concept that application of the political offense exception is essentially a political decision. Although the courts consistently have rejected the argument that the political offense exception is a non-justiciable political question under the terms of the United States Constitution, there can be no doubt that the decision is one which has major implications for the conduct of foreign affairs.

194. See Hearings on S.1639, supra note 18, at 18 (testimony of M. Abbell, Director of Office of International Affairs, Criminal Division, Department of Justice); at 53-55 (testimony of W. Hannay, attorney at law); and at 66 (State Department letter in support of legislation, Aug. 25, 1981).
195. Id. at 86-87 (statement of R.T. Capulong, chairperson of the Human Rights Committee of the Philippine-American lawyers Association of New York); and at 351-53 (statement of A.M. Jabara, Esq.).
198. See supra notes 31-41 and accompanying text.
199. See id.; and Hearings on S.1639, supra note 18, at 12 (testimony of D. McGovern, Deputy Legal Adviser, State Department); and at 51-59 (testimony of W. Hannay, attorney at law).
200. See Hearings on S.1639, supra note 18, at 13 (testimony of D. McGovern, Deputy Legal Adviser, Department of State); at 16 (testimony of M. Abbell, Director of Office of International Affairs, Criminal Division, Department of Justice); and at 55 (testimony of W. Hannay, attorney at law).
Application of the political offense exception involves the examination and evaluation of political conditions in foreign countries, and a judicial determination of the issue necessarily injects the court, at least to some extent, into political disputes. Furthermore, the very nature of the extradition process, which is the enforcement of a treaty between two nations for the rendition of fugitives, is part and parcel of the conduct of foreign affairs. Extradition is intergovernmental and therefore political. Consequently, proponents of the executive model argue that, as a matter of policy, the political offense decision should be assigned to the executive branch in order to allow sensitive political judgments to be made by the political department of government.

This policy position is buttressed by the argument that the courtroom is an extraordinarily cumbersome forum in which to determine facts, which lie close to opinion, concerning the internal affairs of other countries. A judge cannot conduct primary investigations and generally has no expertise in foreign affairs. Rather, the court must rely upon the witnesses and experts marshalled by the parties to give evidence concerning conditions thousands of miles, and perhaps even dozens of years, removed from the locus of the hearing. Under these circumstances the jurist is tempted to play the role of amateur historian, sociologist, and political scientist.

In the Mackin case, for example, the magistrate held a broad-ranging hearing in which she took testimonial “evidence” on the history, politics, and religious conflicts in Northern Ireland. The result was a lengthy opinion in which subtleties, nuances, and judgments of opinion were presented as discrete facts. Although the magistrate certainly was diligent, the picture of Irish history and politics which emerged was at best problematic. The executive branch is better able to investigate, evaluate, and determine the nature of events in other countries, and is not restricted by the need to regard every aspect of a dispute as a fact which has been “proven” or “not proven.”

William M. Hannay, a perceptive and persuasive advocate for the executive model, further argues that the judicial mode of decision-making simply is inadequate to the task of applying the political offense exception:

Courts are accustomed to developing tests, rules, or formulas to resolve disputes—pegs on which to hang their decisions—pigeonholes into which to sort

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202. See Hearings on S. 1639, supra note 18, at 52-53 (testimony of W. Hannay, attorney at law).
203. See, e.g., id. at 53.
204. See id. at 188-223 (reprint of In re Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13, 1981)).
their cases. Applying hard and fast rules to foreign affairs, however, is like trying to shove a square plug in a round hole; nothing fits. Foreign affairs is one of those situations where courts should refrain from involvement because a meaningful test or rule simply cannot, indeed should not, be established. These are situations in which the exercise of political judgment is called for; where the risks of damage that may result from inhibiting the exercise of discretion and flexibility by imposing some unbending rule are too great.205

On this basis Hannay urges the adoption of an executive model that entirely precludes judicial review.206 Recognizing that this approach would raise questions of procedural due process, Hannay argues that only the rights of the government need to be ensured in the political offense determination:

It is also misleading to talk of the fugitive's substantive rights. The "political offense" exception—like the concept of political asylum—is not a recognition of some inalienable right of the fugitive. He has no right to commit crimes in another country and escape extradition merely because the offenses were committed with a political purpose. The right involved is that of the state which has an interest in being able, when it deems it appropriate, to give political asylum for humanitarian reasons or, more generally, to refuse to become involved in domestic political disputes.207

In the final analysis the arguments in favor of the executive model rest heavily upon the perceived shortcomings—technical, practical, and theoretical—in past judicial applications of the political offense exception. There can be no doubt that the executive approach will offer a more streamlined, expeditious, and predictable format than has been utilized in the past. These benefits still must be weighed, however, against the traditional virtues of judicial review in the context of reformed definitional and procedural law.

2. The Judicial Model

Under the terms of House of Representatives Bill 6046208 the judiciary will continue to make the initial determination concerning the political offense exception, subject to review by the Secretary of State in those cases where the courts rule in favor of extradition.209

205. *Hearings on S. 1639, supra* note 18, at 52-53.
206. *Id.* at 62.
207. *Id.* at 48-49.
209. See H.R. REP. No. 627, 97th Cong., 2d Sess. 48, § 3194(d)(2): "The court shall not order a person extraditable after a hearing under this section if the court finds—... the person has established by the preponderance of the evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense." The Secretary of State reviews extradition grants under § 3196(a), *id.* at 51:

If a person is ordered extraditable after a hearing under this chapter the Secretary of State, in such Secretary's discretion, may order the surrender of the person... to the custody of an agent of the foreign state requesting extradition, and may condition that surrender upon any conditions such secretary considers
As in the past, a final judicial ruling denying extradition will be binding on the government, and the courts will be bound to refrain from passing judgment on either the motivations or procedures of the requesting state. Although the bill also makes a number of important procedural changes, proponents of the executive model criticize the bill's retention of the primacy of the judicial role as inhibiting government efforts to combat international terrorism.

The argument for preservation of a judicial role is strong. Although in one sense the political offense exception is a matter of governmental grace, the concept of political asylum is so widespread and so well-accepted that it has become something more than simply an optional provision found in bilateral treaties. The United Nations Declaration of Human Rights provides for the fundamental right of political asylum and numerous multilateral treaties and conventions include the asylum concept. In fact, the principle that a nation should not deliver a political offender to the government against which he has taken up arms is held so universally that we now commonly may speak of a right of political asylum. Thus, the political offense exception is a concept which is involved intimately with the international protection of human rights.

Even in the absence of a human rights analysis, extradition proceedings involve significant issues of individual physical liberty. The
consequence of an order of extradition is to compel the accused to stand trial in a country which may be thousands of miles from the place of his apprehension; and this will almost invariably involve the effectuation of an involuntary transfer in the custody of the agents of the requesting country.\textsuperscript{218} Furthermore, though we commonly think of extradition in terms of transient fugitives, there is no bar in United States law to the rendition of resident aliens or even United States citizens.\textsuperscript{219} Thus, an order of extradition may result in virtual banishment from home and family, a punishment which in other contexts has been called the loss of “all that makes life worth living.”\textsuperscript{220}

The tradition of the United States has been to resolve questions of individual rights in a neutral judicial forum. Although neither the Constitution nor any international convention appear to require judicial participation in the extradition process,\textsuperscript{221} the political offense exception has been considered a matter of fundamental human rights for over 100 years: “[E]xtradition without an unbiased hearing before an independent judiciary . . . [is] highly dangerous to liberty and ought never be allowed in this country.”\textsuperscript{222} As the Court of Appeals noted in \textit{Mackin}, the United States traditionally has applied this proposition with equal force to both the “probable cause” and “political offense” aspects of extradition proceedings.\textsuperscript{223}

A major strength of the judicial process is that it provides for decision-making in a public forum, attended by all the trappings of fairness and completeness which a democratic system of government values and ensures. A court may provide an environment which is insulated from expediency and which is dedicated only to the determination of truth and the protection of individual rights. Of course, the courts have no monopoly on fairness, and the executive branch is capable of rendering principled and impartial decisions on the political offense exception. The judicial forum, however, brings with it an appearance of propriety and regularity which cannot be duplicated in a purely executive proceeding. With regard to an issue as sensitive to international public opinion as is the political offense

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\textsuperscript{220} Klapprott v. United States, 335 U.S. 601, 612 (1949) (quoting from Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).
\textsuperscript{221} See, e.g., \textit{Hearings on S. 1639, supra} note 18, at 48 (testimony of W. Hannay, attorney at law).
\textsuperscript{222} \textit{In re} Kaine, 55 U.S. (14 How.) 103, 113 (1852). See also United States v. Mackin, 668 F.2d 122, 132-33 (2d Cir. 1981).
\textsuperscript{223} United States v. Mackin, 668 F.2d 122, 132-37 (2d Cir. 1981).
\end{footnotes}
question, there is substantial force to the adage that the appearance of fairness is as important as fairness itself.

Opponents of judicial participation argue that it is necessary to adopt an executive model in order to avoid the embarrassment to the government which results when the courts deny extradition on political grounds. The determination of the political offense issue by a neutral and judicial forum, however, actually might diminish the possibility of embarrassment to the government in the conduct of foreign affairs. Although the executive model will allow the government to take whatever course it chooses, thereby avoiding the problem of executive inability to render a fugitive despite a governmental desire to do so, a principled application of the political offense exception could require the Secretary of State to refuse to extradite an individual despite the desire of the government to maintain cooperative relations with the requesting country. A rebuff to a friendly government, emanating directly from the office of the State Department, might prove more disruptive to diplomatic relations than would the decision of a neutral court governed by internationally accepted standards.

The *McMullen* case provides an example. McMullen's offense was clearly directed against an installation of the British army. The magistrate may have erred in applying the political offense exception to the particular circumstances of McMullen's crime; however, under certain circumstances, some members of the Irish Republican Army might commit an offense against the British which could only be deemed political. In such a case, it could be more advantageous to the conduct of United States foreign policy if the decision against extradition stemmed from the judiciary rather than directly from the executive. The use of the judicial branch as the initial decision-maker would serve as a shield that would allow the executive to avoid confrontation with friendly governments over matters of international extradition.

The "judicial shield" also may serve to insulate the government from adverse international consequences in cases in which the courts ultimately approve extradition. The decision to extradite Abu Eain to Israel was enormously unpopular both in the United States and abroad. A well-organized "Defense Committee" mounted a substantial publicity campaign on Abu Eain's behalf, and a number of

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224. See, e.g., *Hearings on S. 1639*, supra note 18, at 45-46 (testimony of W. Hannay, attorney at law); *Hearings on H.R. 5227*, supra note 213, at 6 (statement of D. McGovern, Deputy Legal Adviser, Department of State, Jan. 26, 1982). *See also*, United States v. Mackin, 668 F.2d 122, 133 (2d Cir. 1981).

225. *In re* McMullen, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979) (reprinted in *Hearings on S. 1639*, supra note 18, at 294).
Congressmen questioned the government's prosecution of the case.\textsuperscript{226} The ambassadors of several Arab countries vehemently protested the extradition,\textsuperscript{227} and the United Nations General Assembly passed a resolution "strongly deploring" the rendition of Abu Eain.\textsuperscript{228} The Jordanian ambassador denounced the extradition as "a disgrace to human rights, human dignity, international law, and moral imperatives."\textsuperscript{229}

The United States responded to this storm of protest both by defending the extradition on its merits and by invoking the fairness of United States judicial procedures. The State Department's Memorandum Decision allowing the extradition repeatedly relied upon the comprehensive nature of the judicial process as proof of the inapplicability of the political offense exception.\textsuperscript{230} The United States representative to the United Nations, speaking on the floor of the general assembly, argued against the resolution of condemnation by detailing the fairness of the judicial process afforded to Abu Eain.\textsuperscript{231} Although the United Nations resolution eventually was

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\item \textsuperscript{228} See 36 U.N. GAOR, supra note 227, at 22 (statement of Ambassador Razzooqi, Kuwait, introducing the draft resolution): "In operative paragraph 1 the General Assembly 'Strongly deplores the action of the Government of the United States of America in extraditing Mr. Ziad Abu Eain to Israel, the occupying power.'"
\item \textsuperscript{229} Id. at 2 (statement of Ambassador Nuseibeh, Jordan).
\item \textsuperscript{230} See Hearings on S. 1639, supra note 18, at 133 (Memorandum of decision of the Department of State in the case of the request by the State of Israel for the extradition of Ziad Abu Eain).
\item \textsuperscript{231} See 36 U.N. GAOR, supra note 227, at 26 (statement of Ambassador Adelman, United States):
\end{itemize}

Let me state unequivocally that Mr. Abu Eain received a fully independent and impartial judicial review of the extradition request. The United States Magistrate, after hearing all of the evidence presented by the prosecutor and by Abu Eain, found him extraditable under the terms of the United States-Israel extradition treaty.

The findings and the conclusions of the Magistrate were challenged by petition for a writ of habeas corpus. In denying the petition, the United States District Court judge reviewed the Magistrate's findings at length. The United States Court of Appeals for the Seventh Circuit affirmed the order of denial, again reviewing the findings and conclusions of the Magistrate.

Following judgment by the United States Court of Appeals, the defendant petitioned the United States Supreme Court for a writ of \textit{certiorari}. Representing him as one of his attorneys, both in the Court of Appeals proceedings and before the United States Supreme Court, was a former United States Attorney-General. The Supreme Court, after considering full briefs on the issues, decided that the case did not merit further review and denied the request for \textit{certiorari}. There can be no doubt that the defendant was adequately represented and accorded all due process rights guaranteed in such proceedings and that the
adopted by a substantial margin, the effectiveness of the due process argument was evidenced by the decisions of at least two delegations that premised abstention upon respect for the United States judicial system.

The judicial approach to the initial determination of the political offense exception is cumbersome, time consuming, and occasionally unreliable. The principal merit of the system, however, is precisely that the outcome of the process cannot be controlled or determined by the political branches of government. This element of independence gives the judicial model an internationally recognizable appearance of fairness and propriety, which allows the executive to invoke the credibility of the judiciary as a shield against criticism and condemnation.

Proposed definitional and procedural reforms remedy the defects in the past judicial process, while the judicial model preserves the strength of the traditional judicial shield in the United States extradition process. Furthermore, the proposed changes in appealability, and the retention of the Secretary of State’s discretion over ultimate rendition, should allay remaining fears raised by the three recent cases that are cited by proponents of the executive model. The political asylum determination is tied intimately to recognized fundamental human rights; the decision is not solely political.

United States judiciary, on all three levels, accorded the defendant full, independent and impartial review. The General Assembly adopted the resolution by 75 votes to 21, with 43 abstentions. Id. at 111-12.

Ambassador Pinies from Spain stated: “The draft resolution describes the detention of Mr. Abu Eain as illegal which seems to call into question the judicial system of the United States. In those circumstances, we shall be obliged to abstain on the vote on the draft resolution before us.” Id. at 11.

Ambassador Auguste of Saint Lucia also stated that his delegation would abstain out of deference to the judicial system of the United States:

On the other hand, we must jealously guard against the intrusion of third States into the internal affairs of a State, particularly when this applies to the operation of the judicial system. The corporate body of established law, giving evidence of practice throughout the common law countries, establishes beyond doubt the total independence of the judiciary. There is no ground, prima facie, and in consideration of the decision of the United States Supreme Court, to warrant any refutation of the extradition judgment based on an intimation that the Court may have acted less than scrupulously in determining that Ziad Abu Eain had a proper and legitimate case to answer before the Israeli courts within the term of the Penal Code of the State of Israel.

Id. at 91-92.

234. See supra sections III.A. and B, and text accompanying supra notes 224-25.
235. See supra notes 131-32 and accompanying text.
236. See supra note 209 and accompanying text.
237. See supra notes 198-206 and accompanying text.
238. Proponents of the executive model disagree. See supra notes 200-03 and accompanying text.
environment in reforming the definition of a political offense, the judicial inquiry need not be as unreliable as past decisions reflect.\textsuperscript{239} Thus, retaining the primacy of the judicial role in the context of substantive and procedural reform preserves the traditional strengths of the United States process, while it resolves the problems posed by modern international terrorism.

3. \textit{The Synthesis Model}

Following the first round of congressional debate, an amended bill was introduced in the Senate which attempted to synthesize the executive and judicial approaches to the political offense exception.\textsuperscript{240} Senate Bill 1940 creates a system of executive primacy in the decision-making, while maintaining the possibility of limited judicial review.

The synthesis model removes the political offense decision from the jurisdiction of the trial court\textsuperscript{241} and gives the Secretary of State responsibility for the initial determination.\textsuperscript{242} A defendant claiming the benefit of the exception would be entitled to submit written evidence and argument to the State Department, but no adversary hearing would be held and no testimony would be taken.\textsuperscript{243} In those cases in which the Secretary of State has denied the political offense claim, the decision would be appealable to a United States Circuit Court of Appeals, with the provision that the court could not set aside the Secretary's decision if it was based on substantial evidence.\textsuperscript{244}

\textsuperscript{239} See supra section III.A.
\textsuperscript{241} S. REP. No. 331, 97th Cong., 2d Sess. 33, § 3194(a) (1982): "The court does not have jurisdiction to determine . . . whether the foreign state is seeking the extradition of the person for political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions."
\textsuperscript{242} Id. at 35, § 3196(a)(3):

If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter—

. . . shall decline to order the surrender of the person if the Secretary is persuaded by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character, or for the purpose of prosecuting the person for his political opinions.

\textsuperscript{243} Id. at 20.
\textsuperscript{244} Id. at 36, § 3196(a):

A decision by the Secretary . . . denying the person's claim that the foreign state is seeking his extradition for a political offense or an offense of a political character may be appealed by the person to the United States court of appeals to which an appeal under section 3195 would lie. The court shall not set aside the Secretary's decision if it is based on substantial evidence.
At first, this approach appears to answer many of the objections that have been raised to both the executive and judicial models. It eliminates the need to hold lengthy and potentially embarrassing hearing in the trial court and it affirms the primacy of the executive branch in making political decisions of international import. The synthesis model, nonetheless, preserves the possibility of impartial judicial review as a safeguard against arbitrary extradition.

Closer scrutiny, however, reveals that this synthesis actually combines the worst elements of both of its components. The Secretary of State will be required to make a public ruling on the political offense question prior to determination by any court. Thus, the Secretary may be placed in the vulnerable position of having his personal order in favor of extradition rejected as unlawful by a United States court. Alternatively, the Secretary will be unable to defer to the courts the embarrassing decision to deny the extradition request of a friendly country or wartime ally. In short, the synthesis model fails to accomplish the goal of enhancing executive flexibility, while at the same time it denies the Secretary of State the benefit of the judicial shield. Thus, proponents of the executive model should find the synthesis model unacceptable.

Senate Bill 1940 similarly should be unsatisfactory to advocates of the judicial model, because it fails to provide for a public evidentiary hearing. While review by a court of appeals does provide for some participation by an independent judiciary, the substantial evidence standard that the bill imposes, in most cases, will require summary affirmance of the Secretary's decision.

The synthesis model clearly represents an attempt to resolve the conflict between the executive and judicial approaches to the political offense exception. This resolution, however, combines all of the vices of the two pure models, while containing few of their virtues. The synthesis approach, if adopted, will fail to provide adequate due process safeguards for the accused and needlessly will expose the Secretary of State to the possibility of rebuke on sensitive international issues.

CONCLUSION

Current United States extradition treaties do not establish a definition of the political offense exception and do not provide a format

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245. Id. at 20.
247. Id.
248. Id. at 23.
The jurisprudence developed through the judicial process has not proven adequate to deal with the situations confronting it in modern times. Consequently, the entire area of law is ripe for legislative reform. The enactment of a single, comprehensive statute that will govern the application of nearly 100 bilateral treaties is necessarily a complex undertaking. Care must be taken to avoid placing the United States in breach of existing treaties that may have been premised on the traditional process, and due regard must be given to the norms and practices of international custom.

249. See supra notes 17 and 46.

250. It is beyond question that Congress possesses the power to legislate even in direct contravention of both existing treaties and international law. See, e.g., Cook v. United States, 288 U.S. 102, 119-20 (1933); White v. Mechanics Securities Corp., 269 U.S. 283, 300 (1925); Chinese Exclusion Case, 130 U.S. 581, 600 (1889); and Head Money Cases, 112 U.S. 580, 598-99 (1884). Legislation is not to be interpreted as abrogating a treaty provision unless such an intent was clearly manifested by Congress. See, e.g., Pigeon River Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 157-60 (1934); Cook v. United States, 288 U.S. 102, 119 (1933); and United States v. Payne, 264 U.S. 446, 448 (1924).

The current proposals for extradition reform do not appear to be intended to abrogate any treaties. Rather, the proposals have been offered to revise the antiquated statutes which govern the implementation of existing treaties. See Hearing on S. 1639, supra note 18, at 5 (statement of M. Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice). Procedural matters are domestic in nature and are appropriate subjects for congressional determination. Congress may repeal or modify legislation in order to better implement treaty provisions. See G. SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 139 (1919). In any event, the issue of breach of a bilateral treaty is determined by the affected party, id. See also Charlton v. Kelly, 229 U.S. 447, 473-76 (1913). Because each of the proposed reform bills simplifies the extradition process, it is inconceivable that any treaty partners of the United States would declare the United States to be in breach for enacting reforms that are likely to result in fewer denials of extradition requests. Whether a future defendant will be able to raise a defense of "reliance" on the old law is an issue which is yet to be determined.

251. Although the United States is not obliged to follow customary international law in the area of extradition, see supra note 250, the current reform debate has given substantial consideration to international practice. The most commonly proposed definition of "political offense" relies on existing treaties and the European Convention on the Suppression of Terrorism, supra note 142. See supra notes 136-44 and accompanying text. There is no uniform international practice regarding the procedure for applying the political offense exception. The nations of the world use executive, judicial and synthesis models. The judicial model is predominant among the common law countries, although both Canada and Australia follow the executive approach. See, e.g., Extradition Act, 1870, 33 & 34 Vict., ch. 52, § 3 (United Kingdom); and Extradition (Foreign States) Act, [1966]. Austl. C. Acts No. 76 at 660, § 14. Among the European nations France uses a judicial model (Extradition Law of March 10, 1927 D.P. IV 265); West Germany follows a strictly executive approach (supra note 12); and Austria and Switzerland have mixed systems (Statute on Extradition, 1979 ARGH § 14 (Austria); Laws of Jan. 22, 1892 A.S., Art. 10(1) (Switzerland)). Similarly, there appears to be no uniform practice, and consequently no customary international law, concerning matters such as burden of proof or appealability.

Thus, the United States should be relatively free to adopt extradition procedures according to considerations of domestic policy. Although this legislative freedom may be circumscribed by broad international principles (see supra notes 9-11 and accompanying text), those issues cannot be discussed in the abstract and must be saved for consideration upon the passage of legislation.
The debate on the future of the political offense exception has been healthy and productive. It now appears certain that the legislature will provide much needed guidance in this little known but sensitive area, and that a statutory definition of the political offense exception will emerge which is consonant with United States policy toward the apprehension and punishment of international terrorists.

The judicial model for determination of the political offense exception is the approach that best harmonizes the protection of political dissent with the punishment of wanton violence. Although the past judicial practice had its shortcomings, procedural and substantive reforms will resolve those problems. The enactment of a definition of political offense which abandons the overinclusive Castioni test will ensure that the courts do not extend the protection of the exception to those who practice violence against civilians. Furthermore, placing the burden of proof on the defendant and adopting a clear and convincing evidence standard will reduce the potential for judicial error and will maximize executive flexibility behind a judicial shield. Finally, the availability of direct appeal for all parties will provide for adequate judicial review and will eliminate the potential for a magistrate to thwart the foreign policy goals of the executive.

Following the adoption of these reforms, initial jurisdiction over the political offense exception may continue to reside safely in the judiciary without fear of unduly limiting the discretion of the executive in the conduct of foreign affairs. By maintaining the primacy of the neutral judicial forum, the vitality of the political offense exception, with its intimate ties to fundamental human rights, can be preserved.