Limiting Extradition Law’s Political Offense Exception: The United States-United Kingdom Supplementary Extradition Treaty

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LIMITING EXTRADITION LAW'S
POLITICAL OFFENSE EXCEPTION: THE
UNITED STATES-UNITED KINGDOM
SUPPLEMENTARY EXTRADITION TREATY

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It is holden, and so it hath been resolved, that divided kingdoms under several kings . . . are sanctuaries for servants or subjects flying for safety from one kingdom to another; and, upon demand made by them, are not, by the laws and liberties of kingdoms, to be delivered . . . .

—Lord Coke

The Supplementary Extradition Treaty would exclude specified crimes of violence, typically committed by terrorists, from the scope of the political offense exception to extradition. It therefore represents a significant step to improve law enforcement cooperation and counter the threat of international terrorism and other crimes of violence.

—George Shultz
Secretary of State

I. INTRODUCTION

The United States-United Kingdom Supplementary Extradition Treaty, ratified by the U.S. Senate on July 17, 1986, narrows extradition law's political offense exception by limiting its scope to include only purely political and non-violent crimes. The Supplementary Treaty is largely a response to recent cases in which federal magistrates have used the political offense exception to refuse British extradition requests for accused or convicted Provisional Irish Republican Army terrorists. This Note first discusses extradition generally and the political offense exception in particular. The Note then examines the Supplementary Treaty as submitted and the legislative debate which resulted in the finally ratified compromise version. The Note contends that, although the compromise version of the Supplementary Treaty represents a reasonable approach to closing the terrorist loophole in extradition relations between the United States and the United Kingdom, the treaty as originally submitted reflected a more responsible approach than does the compromise version.

II. BACKGROUND

Formal extradition is the legal process by which one state (the "requested state") delivers to another state (the "requesting state") a person charged with or convicted of a criminal offense against the laws of the requesting state so that the person may be tried or punished under the laws of the requesting state.³

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3. According to the United States Supreme Court, "[e]xtradition is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished." Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893).
A. EXTRADITION GENERALLY

International law establishes no legal duty to extradite. Many countries rely on general principles of international law to govern extradition; the United States and United Kingdom, however, rely exclusively upon extradition treaties.\footnote{See generally M. Bassiouuni, International Extradition and World Public Order 6-9 (1974). Although almost all nations possess some extradition treaties, many possess relatively few. For example, some states enter into treaties only with states with which they have territorial contiguity or close commercial ties, or with states that extradite only pursuant to a treaty. Id. The United States, in contrast, has treaties with nearly one hundred states, an approach to extradition shared by Great Britain. Id. at 9. British practice has been consistent in refusing to extradite apart from statute and treaty. Id. at 7. In the United States, the Supreme Court laid down a similar principle in 1840. Holmes v. Jennison, 14 Pet. 540 (1840); see also M. Bassiouuni, supra, at 7. Since 1840, the United States has steadfastly maintained this attitude. Id.; see infra note 23 and accompanying text.} The extradition process allows two sovereign states to cooperate in rendering fugitives to one another without diminishing either state’s sovereignty.\footnote{Blakesley, Extradition Between France and the U.S.: An Exercise in Comparative and International Law, 13 Vand. J. Transnat’l L. 653, 655 (1980).} The practice of extradition dates to relations between the different provinces of the Roman Empire.\footnote{E. Clarke, supra note 1, at 18. “Nations felt little need to cooperate in the suppression of ordinary crime, while political and religious dissidents remained a threat to the sovereign’s power as long as they found sanctuary elsewhere.” Comment, Unraveling the Gordian Knot: The United States Law of International Extradition and the Political Offender Exception, 3 Fordham Int’l L.J. 141, 143 (1980).} The earliest known treaty, the Egyptian-Hittite Peace Treaty of 1280 B.C., included an extradition agreement for the surrender of political enemies.\footnote{I. Shearer, Extradition in International Law 5 (1971).} In contrast to modern practice, extradition in early history usually involved requests for the surrender of persons accused of political offenses.\footnote{E. Clarke, supra note 1, at 16.} Such ancient cooperation evolved into an international network of treaties specifying both the offenses covered and the substantive requirements for extradition.

B. THE POLITICAL OFFENSE EXCEPTION

Even where the requesting state complies with the substantive requirements of extradition, the requested state may nevertheless deny extradition on the basis of certain specific exceptions or exclusions.\footnote{2 M. Bassiouuni, International Extradition in U.S. Law and Practice ch. VIII (1983). Extradition may be denied for grounds relating to: the offense charged; the relator; the criminal charge or the prosecution of the offense charged; or the penalty and punishability of the relator. The political offense exception relates to the offense charged. Id.} The political offense exception recognizes that circumstances may exist under which, in the interest of free expression of political dissent, acts which might normally be cause for extradition should be
exempted from the extradition process.\textsuperscript{10}

The political offense exception “evolved both from benevolent attitudes towards the underlying conduct of which the refugee was accused and concerns for the fairness of trial and punishment in the requesting state.”\textsuperscript{11} Although the earliest extradition cases generally involved political offenses, the eighteenth and nineteenth centuries saw increasing toleration of political and religious dissidents.\textsuperscript{12} Today, almost all extradition treaties provide that persons accused or convicted of political offenses need not be extradited.\textsuperscript{13} Such treaties, however, seldom define the term “political offense.”\textsuperscript{14} Although no uniform international definition of a political offense exists,\textsuperscript{15} most attempts to define the term include two major classifications of political offenses: pure and relative.\textsuperscript{16}

Pure political offenses are acts directed against the existence and functioning of the state.\textsuperscript{17} These offenses affect the public interest, not private rights.\textsuperscript{18} Examples include treason, sedition, and espionage.\textsuperscript{19}

Unlike the pure political offense, a relative political offense affects a private right or interest. Relative political offenses are ordinary crimes committed with political motives.\textsuperscript{20} For example, when a ter-

\begin{enumerate}
\item Comment, supra note 8, at 143.
\item 6 M. WHITEMAN, \textsc{Digest of International Law} 800 (1968).
\item In \textit{In re Castioni}, [1891] 1 Q.B. 149, which remains the leading case construing the phrase political offense, Justice Denman stated that it is not “necessary or desirable . . . to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offense of a political character.” \textit{Id.} at 155; see also infra notes 39-40 and accompanying text.
\item Most extradition laws and treaties provide that extradition need not or shall not be granted when the acts with which the accused is charged constitute a political offense or an act connected with a political offense. Generally, a distinction is drawn between “purely” political offenses . . . and “relative” political offenses . . . .
\item Garcia-Mora, supra note 15, at 1239. The distinction between a “pure” and a “relative” political offense is particularly significant because extradition treaties often grant extradition in terms of “pure” and “relative” offenses. 6 M. WHITEMAN, supra, at 800.
\item C. \textsc{Van den Wuingaert}, \textit{The Political Offense Exception to Extradition} 106 (1980).
\item \textit{Id.} at 377.
\end{enumerate}
rorist bombs a crowded department store, injuring customers and destroying the private premises, the offense is nonetheless political because its goal was to further a political objective.\textsuperscript{21}

\section{C. United States Extradition Procedures and Policy}

United States extradition law derives from two sources: treaties and statutes.\textsuperscript{22} The United States will not extradite an individual to a requesting state unless it has an extradition treaty with that government.\textsuperscript{23} These treaties, however, are generally silent as to the internal procedures the signatories will employ to meet their treaty obligations. In the United States, federal statutes govern extradition proceedings in the absence of such procedures.\textsuperscript{24}

The United States has developed a two-tiered set of proceedings to govern its response to extradition requests. Once a request is received pursuant to a treaty, it is sent to a federal court for determination.\textsuperscript{25} By statute, any magistrate or judge in whose jurisdiction the defendant is found may hold a hearing to consider the sufficiency of the evidence offered.\textsuperscript{26} The magistrate should grant the extradition

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\textsuperscript{21} One commentator defines a relative political offense as one “in which a common crime is so connected with a political act that the entire offense is regarded as political.” Garcia-Mora, supra note 15, at 1230-31.

\textsuperscript{22} United States courts have not recognized asylum and extradition as part of customary international law. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933); United States v. Rauscher, 119 U.S. 407, 411-12 (1886); see also 6 M. WHITEMAN, supra note 13, at 732.


\textsuperscript{24} 18 U.S.C. §§ 3181-3195 (1984 & Supp. III 1985); see also 1 M. BASSIOUNI, supra note 9, at § 2-4 to -28.

\textsuperscript{25} See, e.g., Eain v. Wilkes, 641 F.2d 504, 513 (7th Cir. 1981).

\textsuperscript{26} 18 U.S.C. § 3184 (1984) reads as follows:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such a treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of his criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipu-
request if “he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention.”27 Evidence is deemed sufficient if it would justify commitment for trial had the offense been committed in the requested state.28 In the United States, courts apply the probable cause standard in judging the sufficiency of evidence.29 If the magistrate denies the extradition request, the process is formally over.30 A decision by the judiciary to refuse an extradition request is not appealable, either by the executive branch or the requesting state.31

If a magistrate concludes the evidence is sufficient to justify extradition, however, he certifies the proceedings to the Secretary of State.32 The Secretary of State has discretion to decide whether to extradite in accordance with the magistrate’s decision.33 Although the final decision whether to extradite vests exclusively in the executive,34 the executive seldom exercises this discretionary power.35

D. THE POLITICAL OFFENSE DOCTRINE UNDER U.S. LAW

A magistrate bases his decision of first instance on the sufficiency of the evidence in light of the language of the extradition treaty. Almost every extradition treaty to which the United States is a party contains a political offense exception. This exception allows each party to exempt certain acts from extradition because of their political char-

ations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Id.

27. Id.
29. Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980) (probable cause standard is employed in extradition cases); see also Application of D’Amico, 185 F. Supp. 925, 928 (S.D.N.Y. 1960). The probable cause standard requires competent legal evidence leading to the reasonable conclusion that the accused committed the offense for which he is sought. Collins v. Loisel, 259 U.S. 309 (1922); Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973); see also Brinegar v. United States, 338 U.S. 160, 174-75 (1949).
30. 2 M. Bassiouni, supra note 9, at ch. IX, § 1-3. Although no appeal lies from a magistrate’s decision not to commit the individual for surrender, the extraditee may challenge the lawfulness of the extradition or the legality of his detention by filing a petition for a writ of habeas corpus. 28 U.S.C. § 2241 (1987).
32. Terlinden v. Ames, 184 U.S. 270, 288 (1902); In re Stupp, 23 F. Cas. 296, 302 (C.C.S.D.N.Y. 1875) (No. 13563); 18 U.S.C. § 3186 (1948); see also G. Hackworth, DIGEST OF INTERNATIONAL LAW § 338 (1942); 1 J. Moore, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION § 359 (1891).
34. Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965); see also Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980).
35. See Note, supra note 33, at 1328.
acter. By invoking the political offense exception, a magistrate may deny an extradition request based on an otherwise extraditable offense, thereby terminating the extradition proceedings.

Because extradition treaties seldom define the term "political offense," judicial interpretations are the leading source for its meaning and application. In the seminal case In re Castioni, a British court first articulated a test for determining whether an extraditee's act constituted a political offense. In Castioni, the court refused to extradite a Swiss citizen who shot a government official because (1) a political uprising existed at the time and place of the offense, and (2) the offense committed was incidental to and in furtherance of the uprising.

A federal district court incorporated this two-pronged political incidence test into American case law in 1894. In subsequent cases, federal courts have consistently applied this test, defining political offenses as acts "committed in the course of and incidental to a violent political disturbance such as war, revolution, or rebellion." This definition requires a magistrate to determine not only whether the act was committed to further a political conflict, but also whether a sufficient political disturbance existed. The recent proliferation of political terrorism, however, has compounded the inherent difficulty of applying such tests, a difficulty exemplified by four recent and unsettling

36. See supra text accompanying note 13.
37. Lubet & Czackes, supra note 23, at 199.
38. 2 M. Bassiouni, supra note 9, at §§ 2-6 to -7.
39. [1891] 1 Q.B. 149.
40. Id. at 158-60. The court concluded that Castioni, a member of the uprising group, committed his acts with a sufficient nexus to the political insurrection as to render his acts "political" and therefore nonextraditable. Id.
41. In re Ezeta, 62 F. 972, 997 (N.D. Cal. 1894) (alleged acts nonextraditable because they were incidental to a political uprising and committed during the progress of actual hostilities).
43. See, e.g., Eain, 641 F.2d at 519. The only statement from the United States Supreme Court regarding the political offense exception came in Ornelas v. Ruiz, 161 U.S. 502 (1896). In Ornelas, the Court interpreted the political offense exception as requiring the defendant's actions to be not only contemporaneous with the political disturbance, but also to be in furtherance of a genuine political revolt. Id. at 511. The Court considered the "character of the foray, the mode of attack, the persons killed or captured, and the kinds of property taken or destroyed" as important factors in determining whether the defendant's actions were in aid of a political revolt. Id. at 511-12.
44. For a discussion of modern political terrorism, see generally Note, Modern Terrorism, supra note 23, at 632-34. See also Bassiouni, Ideologically Motivated Offenses and the Political Offenses Exception in Extradition - A Proposed Juridical Standard for an Unruly Problem, 19 De Paul L. Rev. 217 (1969).
judicial decisions.45

E. THE NEED TO REFORM: EXAMPLES FROM CASE LAW

Desmond Mackin, a member of the Provisional Irish Republican Army (the “PIRA”), was indicted in Northern Ireland on charges of attempting to murder a British soldier, of wounding that soldier with intent to do grievous bodily harm, and of possession of firearms and ammunition.46 Mackin, released on bail, failed to appear for trial and entered the United States illegally.47 Following Mackin’s arrest by the U.S. Immigration and Naturalization Service, the United Kingdom filed a formal extradition request.48 During his extradition hearing, Mackin asked the U.S. magistrate to deny this request on the basis of the political offense exception contained in the United States-United Kingdom Extradition Treaty.49 The magistrate found that Mackin’s acts were “of a political character” within the meaning of the Treaty and therefore denied the United Kingdom’s extradition request.50

Mackin and three other recent cases highlight the inadequacies of the political-incidence test in the context of terrorism.51 In each case, the British government sought extradition for persons who committed

45. Quinn v. Robinson, 783 F.2d 776 (9th Cir.), cert. denied, ___ U.S. ___, 107 S. Ct. 271 (1986); In re Mackin, 668 F.2d 122 (2d Cir. 1981); In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984); In re McMullen, No. 3-78-1099 (N.D. Cal. May 11, 1979); see infra notes 46-51 and accompanying text.
46. Mackin, 668 F.2d at 124; see also Note, In re Mackin: Is the Application of the Political Offense Exception an Extradition Issue for the Judicial or the Executive Branch?, 5 FORDHAM INT’L L.J. 565, 566-69 (1982).
47. Mackin, 668 F.2d at 124.
48. Id.
50. Magistrate Buchwald pointed to In re Castioni, [1891] 1 Q.B. 149, for the proposition that the political offense exception applies not only to pure political offenses, but also to relative political offenses, i.e., crimes against persons committed in furtherance of revolution or political uprising. The magistrate found that Mackin’s crime was committed against the soldier incidental to Mackin’s role in the PIRA’s political uprising in Belfast. Mackin, 668 F.2d at 124-25.
51. In the first of these cases, In re McMullen, No. 3-78-1099, slip op. at 3 (N.D. Cal. May 11, 1979), the United Kingdom sought the extradition of a PIRA member for the alleged bombing of a British Army installation. The court, applying the political incidence test, found “an insurrection and disruptive uprising of a political nature” did exist at the time of the alleged bombing. Id. at 4. The court denied the extradition request because the “bombing was a crime incidental to and formed as a part of a political disturbance, uprising or insurrection and in furtherance thereof.” Id. at 5-6.

In the second case, In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984), the defendant escaped from a Belfast prison while awaiting a court’s decision on charges including the murder of a British army officer, attempted murder, and possession of firearms with intent to endanger life. Id. at 272.
acts of violence in the United Kingdom and Northern Ireland and subsequently fled to the United States. In each case, a U.S. court invoked the political offense exception to deny the extradition request.  

III. THE SUPPLEMENTARY EXTRADITION TREATY

Responding in large measure to Mackin and the three very similar cases in which federal magistrates denied British extradition requests for PIRA fugitives, the United Kingdom and the United States recently concluded a Supplementary Treaty on Extradition (the "Supplementary Treaty" or the "Compromise Treaty"). The Supplementary Treaty significantly altered the political offense exception.
contained in the original treaty.\textsuperscript{55} The Treaty as originally negotiated, however, met stiff opposition upon submission for Senate ratification. After considerable debate, the Senate Foreign Relations Committee, working in close consultation with the U.S. State Department and the British Government, amended the Supplementary Treaty and thereafter adopted a compromise version.\textsuperscript{56} As Senator Lugar\textsuperscript{57} noted during floor debate, "[w]hile both governments would have preferred that the Senate approve the treaty as submitted, both are willing to accept the committee's changes."\textsuperscript{58}

A thorough appreciation of the Supplementary Treaty, then, requires an examination and comparison of (1) the original United States-United Kingdom Extradition Treaty (the "Prior Treaty"); (2) the negotiated version of the Supplementary Treaty which was submitted for Senate ratification (the "Submitted Treaty"); and (3) the amended Supplementary Treaty which was ratified and is now in force (the "Compromise Treaty" or the "Supplementary Treaty").

A. THE PRIOR TREATY

The first U.S. extradition agreement was the Jay Treaty of 1794 with the United Kingdom.\textsuperscript{59} "Since then...[the U.K.] has remained one of our best partners in extradition."\textsuperscript{60}

The prior United States-United Kingdom Extradition Treaty\textsuperscript{61} contained a political offense exception similar to corresponding exceptions in other extradition treaties. It provided:

Extradition shall not be granted if... (e)(i) the offense for which extradition is requested is regarded by the requested party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.\textsuperscript{62}

The Supplementary Treaty as submitted for Senate ratification (the "Submitted Treaty") substantially altered the preceding language so that individuals such as Desmond Mackin could no longer find refuge under the broad political offense exception of the Prior Treaty.\textsuperscript{63}

\textsuperscript{55} See infra notes 64-77 and accompanying text.
\textsuperscript{56} See Supplementary Treaty, supra note 54.
\textsuperscript{57} Richard P. Lugar (R-Ind.), Chairman of the United States Senate Committee on Foreign Relations and chief floor spokesman for the Supplementary Extradition Treaty.
\textsuperscript{59} The Jay Treaty included an article for the extradition of murderers and forgers. Comment, supra note 8, at 146.
\textsuperscript{60} Committee Hearings, supra note 52, at 7 (testimony of D. Lowell Jensen, Deputy Attorney General, U.S. Department of Justice).
\textsuperscript{61} Extradition Treaty, supra note 49.
\textsuperscript{62} Id. art. V, paras. (1)(e)(i)-(ii).
\textsuperscript{63} See infra notes 64-77 and accompanying text.
B. The Submitted Treaty

The Submitted Treaty amended the political offense exception contained in the Prior Treaty by use of a broad negative definition of political offenses and a precise limit on the role of the judiciary in extradition cases. Article I of the Submitted Treaty identified particular crimes that could no longer be regarded as political offenses under the exception. The Submitted Treaty, therefore, would have precluded U.S. magistrates from invoking the political offense exception to deny extradition for any act contained in article I of the Treaty.

1. What the Treaty Did

Article I of the Submitted Treaty excluded two categories of acts from the traditional political offense exception. First, article I excluded international crimes already the subject of international criminal law conventions. These conventions cover offenses relating to the hijacking of aircraft,64 aircraft sabotage,65 crimes against diplomats and other internationally protected persons,66 and the taking of hostages.67 The Submitted Treaty, however, was more restrictive than these various conventions. The conventions allow the requested state the option of itself prosecuting rather than extraditing. Under the Submitted Treaty, however, both Great Britain and the United States obligated themselves to extradite.68

Second, article I of the Submitted Treaty excluded from the political offense exception many relative political offenses.69 These offenses

68. See infra note 86. According to Professor Bassiouni, "the formulation of these exclusions in the [Submitted] Treaty are more restrictive than their counterpart in the relevant conventions because the [Submitted] Treaty obligates unconditionally the parties to extradition whereas the relevant conventions provide for the alternative right to prosecute instead of extraditing." Committee Hearings, supra note 52, at 284.
69. See supra notes 20-21 and accompanying text.
included murder,\textsuperscript{70} manslaughter,\textsuperscript{71} inflicting bodily injury,\textsuperscript{72} and kidnapping or unlawful detention.\textsuperscript{73} Article I also removed from the political offense exception certain offenses involving explosives,\textsuperscript{74} various acts relating to use or possession of firearms or ammunition,\textsuperscript{75} and acts resulting only in property damage but committed with intent to endanger life or with reckless disregard.\textsuperscript{76} Article I also excluded an attempt to commit any of the foregoing offenses from the political offense exception.\textsuperscript{77} Thus, the Submitted Treaty would have excluded all of these ordinary violent crimes from the political offense exception, even if politically motivated.

2. Rationale for the Submitted Treaty

The Governments of the United Kingdom and the United States negotiated the Submitted Treaty in an effort to combat terrorism.\textsuperscript{78} A terrorist seeks political change through violent actions. Proponents of the Submitted Treaty argued that, in a stable democracy, violent actions must \textit{never} replace peaceful resort to the political process as a means for resolving political disputes. The U.S. State Department Legal Advisor asserted that “the rationale for this new Supplementary Treaty is simple: with respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legiti-

\textsuperscript{70} \textit{Submitted Treaty, supra} note 54, art. 1(e).

\textsuperscript{71} \textit{Id.} art. 1(f).

\textsuperscript{72} Article 1(g) excluded from the political offense exception “maliciously wounding or inflicting grievous bodily harm.” \textit{Id.} art. 1(g).

\textsuperscript{73} Article 1(h) excluded from the political offense exception “kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage.” \textit{Id.} art. 1(h).

\textsuperscript{74} Article 1(i) excluded from the political offense exception “the following offenses relating to explosives: (1) the causing of an explosion likely to endanger life or cause serious damage to property; or (2) conspiracy to cause such an explosion; or (3) the making of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property.” \textit{Id.} art. 1(i).

\textsuperscript{75} Article 1(j) excluded from the political offense exception “the following offenses relating to firearms or ammunition: (1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or (2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person.” \textit{Id.} art. 1(j).

\textsuperscript{76} Article 1(k) excluded from the political offense exception crimes involving “damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered.” \textit{Id.} art. 1(k).

\textsuperscript{77} Article 1(l) excluded from the political offense exception “an attempt to commit any of the foregoing offenses.” \textit{Id.} art. 1(l).

\textsuperscript{78} According to President Reagan, the Submitted Treaty “represents a significant step in improving law enforcement cooperation and combating terrorism, by excluding from the scope of the political offense exception serious offenses typically committed by terrorists . . . .” Letter from Ronald Reagan to the Senate of the United States (July 17, 1985) (letter of transmittal of the Supplementary Treaty), \textit{reprinted in Submitted Treaty, supra} note 54, at III.
mate grievances and the judicial process provides fair treatment." Thus, the all-inclusive language of the Submitted Treaty's negative definition of "political" offense excluded from the political offense exception all violent acts committed in the United Kingdom or the United States.

C. THE COMPROMISE TREATY

The Supplementary Treaty as submitted aroused immediate, vigorous, and lengthy public debate. Indeed, the Senate Foreign Relations Committee characterized the Submitted Treaty as "one of the most divisive and contentious issues the committee has faced this Congress." While opposition kept the Submitted Treaty stalled in com-

79. Committee Hearings, supra note 52, at 265 (statement of Abraham D. Sofaer, State Department Legal Adviser).

80. The New York Times, for example, supported the Treaty as submitted: "The right of asylum is not jeopardized when democratic countries with similar legal systems agree to extradite all those accused of violent offenses—without 'political' exceptions. An old and generous impulse is mocked when the lawless can play one nation's laws against another's." Sealing a Terrorist Foxhole, N.Y. Times, July 11, 1985, at A22, col. 1 (editorial). In response, however, one Treaty opponent stated, "I believe the editorial in The New York Times . . . was prior to the submission of the treaty and the language was not yet clear, nor the manner in which it would be set forth . . . so I am not sure whether or not that is their current position." Stenographic Transcript, United States-United Kingdom Supplementary Extradition Treaty, Treaty Doc. 99-8: Hearings Before the Senate Comm. on Foreign Relations, 99th Cong., 1st Sess. 104-05 (1985) (statement of Sen. Kerry).

The Supplementary Treaty also caused a heated debate, centering on violence in Northern Ireland, before the American Bar Association's 47th annual midyear convention in Baltimore. See Extradition, Visa Issues Top ABA Agenda, Nat'L J., Feb. 10, 1986, at 3, col. 1. Judge Abner J. Mikva, chairman of the ABA's Section on Individual Rights and Responsibilities, said he had received a "boxful of mail" objecting to endorsement of the Treaty. Id. at 8, col. 2. The ABA ultimately decided to support the Treaty, but only after a rare, direct appeal to the ABA House of Delegates by State Department Legal Adviser Abraham D. Sofaer. Political Stakes Raised at ABA Meeting, Nat'L J., Feb. 24, 1986, at 3, col. 1. Regarding the ABA delegates, Abraham Sofaer, a former federal judge, later stated, "[t]hey were totally uninformed - the people who were speaking against this . . . . They weren't interested in being informed. Many of them were just emotionally connecting the treaty with the Irish cause." Id. at 36, col. 1.

81. COMMITTEE REPORT, supra note 54, at 6. According to Senator D'Amato, "[t]he supplementary treaty emasculates the political offense exception, which the United States has historically used as a cornerstone of its extradition policy." July 16 Floor Debate, supra note 58, at S9153. Arguing that "[i]f this treaty had been in effect in 1776, or even after the Treaty of Paris in 1783, this language would have labeled the boys who fought at Lexington and Concord as terrorists," Senator Helms objected to the treaty on the grounds that "[n]once the legal distinction has been abolished between terrorists and freedom fighters, it will be very difficult to sustain support for the Afghan Mujahideen, Savimbi's UNITA fighters, the Nicaraguan resistance, the Cambodian resistance, or any other group fighting against an established tyranny." Id. at S9161. The American Civil Liberties Union opposed the treaty, citing "the very important question of whether this nation will abandon its two hundred year old tradition of refusing to return unsuccessful revolutionaries to their homeland to suffer victor's justice." Committee Hearings, supra note 52, at 411 (statement of Morton H. Halperin). In part to allay such concerns, the Senate included in its Resolution of Ratification a declaration that

[[the Senate of the United States declares that it will not give its advice and consent to any treaty that would narrow the political offense exception with a totalitarian...]
mittee, extraneous political considerations, *inter alia*, gave the treaty new momentum and prompted pro-treaty senators to propose a modified Supplementary Treaty.\(^8^2\) The new version (the "Compromise Treaty" or the "Supplementary Treaty") attempted to ameliorate concerns regarding the due process rights of individuals while preserving the Submitted Treaty’s antiterrorism goals. The Compromise Treaty proved acceptable to both parties and ultimately was ratified.\(^8^3\)

The Compromise Treaty reflects a concern that, under the Submitted Treaty, the broad negative definition of political offense, coupled with a circumscribed role for the judiciary in applicable cases, would sacrifice individual justice to broader foreign policy issues.\(^8^4\) The Compromise Treaty, therefore, pairs a modified negative definition of political offense with an affirmative role for U.S. courts.

Article I of the Compromise Treaty excludes from the political offense exception a narrower list of violent crimes than did the Submitted Treaty.\(^8^5\) Like the Submitted Treaty, the Compromise Treaty excludes those offenses for which multilateral international agreements...
oblige extradition, as well as murder and voluntary manslaughter, assault causing grievous bodily harm, and kidnapping, abduction, or serious unlawful detention (including taking a hostage). The Compromise Treaty, however, generalizes language relating to explosives and firearms or ammunition that was specific and precise under the submitted version. In addition, the Compromise Treaty deletes all references in the Submitted Treaty to property damage, possession, intent, and conspiracy.

In addition to modifying the Submitted Treaty's negative definition of political offense, the Compromise Treaty adds an affirmative role for U.S. courts in applicable extradition cases. Article III of the Compromise Treaty allows an individual wanted for an article I offense the opportunity to establish in court that he is being sought, not for his alleged crime, but because of his race, religion, nationality, or political opinions. Alternatively, the individual sought has the opportunity to establish that, if surrendered, he would be prejudiced or punished because of these factors.

Article IV amends the Prior Treaty to provide that the requesting state shall have up to 60 days following the provisional arrest of a fugitive to submit evidence in support of its extradition request. The Prior Treaty allowed only 40 days for submission of such evidence.

Under article V, the Compromise Treaty applies to any offense committed before or after the Treaty's entry into force. The United States has entered into supplementary extradition treaties with over 20 nations, and virtually every one was made retroactive to the date of entry into force of the original treaty. Additionally, courts have consistently upheld the retroactive application of extradition treaties. See, e.g., In re Burt, 737 F.2d 1477 (7th Cir. 1984).

86. Article 1(a) states that "[f]or the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character: (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution." Supplementary Treaty, supra note 54, art. 1(a).

87. Id. art. 1(b). The Committee Report also includes a section-by-section comparison of the Submitted treaty with the Compromise treaty. COMMITTEE REPORT, supra note 54, at 6-9.
88. Supplementary Treaty, supra note 54, art. 1(b).
89. Id. art. 1(c).
90. Id. art. 1(d).
91. See COMMITTEE REPORT, supra note 54, at 4.
92. Article 3(b), with reference to section 3(a), states that "the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for defenses listed in article I of this Supplementary Treaty." Supplementary Treaty, supra note 54, art. 3(b).
93. Article 3(a) states:

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

Id. art. 3(a); see also infra note 142.
preponderance of the evidence, he can defeat the extradition request."94

The Senate further modified the Submitted Treaty by adding article II, which addresses the procedures governing consideration of an extradition request in U.S. courts. Article II states that a person sought for extradition under the Supplementary Treaty may introduce evidence in a court regarding probable cause.95

IV. ANALYSIS

As ultimately enacted, the Supplementary Treaty represents an admirable effort to combat terrorism. The Supplementary Treaty is both extraordinary and commendable for its limitation on the political offense exception to extradition. By shifting judicial discretion to the executive, however, the Treaty as originally submitted would have more effectively eliminated the terrorist loophole which has plagued extradition relations between the United States and the United Kingdom.96

A. UNDERLYING POLICY DETERMINATIONS

Three important policy determinations underlie the U.S. decision to conclude the Supplementary Treaty. First, the Treaty represents a

95. Article 2 states:
Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party.

In determining whether an individual is extraditable from the United States, the judicial authority of the United States shall permit the individual sought to present evidence on the questions of whether:
(1) there is probable cause;
(2) a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the courts, exists; and
(3) the act upon which the request for extradition is based would constitute an offense punishable under the laws of the United States.

Probable cause means whether there is sufficient evidence to warrant a man of reasonable caution in the belief that:
(1) the person arrested or summoned to appear is the person sought;
(2) in the case of a person accused of having committed a crime, an offense has been committed by the accused; and
(3) in the case of a person alleged to have been convicted of an offense, a certificate of conviction or other evidence of conviction or criminality exists.
Supplementary Treaty, supra note 54, art. 2.
96. This Note acknowledges, but does not discuss, certain separation of powers concerns, along with constitutional issues relating to the President's article II power "to make treaties," in light of the Senate's major overhaul of the submitted version of the Supplementary Treaty.
recognition of the need to narrow the scope of the political offense exception. Second, the Supplementary Treaty reflects the U.S. decision to limit the political offense exception on a country-by-country basis, rather than seek to amend the federal extradition statute applicable to all U.S. extradition treaties. Third, with the Supplementary Treaty the United States has chosen to initiate this country-by-country approach with the United Kingdom.

1. **Narrowing the Political Offense Exception**

   By narrowing the political offense exception to include only purely political and non-violent crimes, the Submitted Treaty would have significantly decreased the possibility of denying extradition for any violent act. One expert characterized the Submitted Treaty’s article I exclusions as follows: “These exclusions unconditionally remove the enumerated acts of violence from the ‘political offense’ exception, irrespective of their nature, intensity, the harm they produced, the motives and goals of the actor, [or] the circumstances that may have compelled the actor to commit such acts.”

   The Submitted Treaty’s restriction of the political offense exception reflected the confidence the United Kingdom and the United States have in each other’s political and judicial systems. Unfortunately, the Compromise Treaty softens the Submitted Treaty’s sharp restriction of the political offense exception. Nevertheless, the Treaty as enacted still evidences an understanding of the need to narrow the scope of the exception as between the United States and the United Kingdom.

2. **Country-by-Country Approach to Making Treaties**

   The United States only maintains extradition relations with nations with which it has made extradition treaties. Most of these extradition treaties possess political offense exception clauses phrased in general language. By supplanting this general language with an explicit limitation of the political offense exception, the Compromise Treaty grants one country special, albeit reciprocal, treatment respect-

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97. See supra notes 86-91 and accompanying text.
98. Committee Hearings, supra note 52, at 292 (statement of M.C. Bassiouni).
99. Id.
100. According to State Department Legal Adviser Abraham D. Sofaer, the Supplementary Treaty strikes the right balance precisely because “it narrows the political offense exception as applied to United Kingdom requests to pure political and non-violent crimes.” Id. at 4. The Treaty “reflects the basic principle that terrorist violence should not be tolerated against stable democracies in which the political process is available to redress legitimate grievances and in which the judicial system provides fair treatment.” Id.
101. See supra note 23 and accompanying text.
102. See supra note 14 and accompanying text.
ing the political offense exception. Some Supplementary Treaty opponents argue that narrowing the political offense exception through individual treaties wrongly implies special relationships with some nations to the exclusion of others. The United States, however, obviously has special relationships with some nations, such as its allies. More fundamentally, it would be inappropriate to apply the Supplementary Treaty's narrower political offense exception to all countries with which the United States maintains extradition relations. A narrower exemption is appropriate only for those countries in which the freedom and fairness of the political system is beyond doubt. Certainly this is not the case in all nations with which the United States maintains extradition treaties.

3. Starting with the United Kingdom

Accepting a country-by-country approach to limiting the political offense exception, the merit of initiating the approach with the United Kingdom is clear. By narrowing the political offense exception to

103. A country-by-country approach, however, ought not on its face receive a suspect glance. According to one commentator:

It does not follow . . . that each of these [extradition] treaties should or must be identical. Considering the nature of the particular regime and its relationship to the United States, we might well want to negotiate either a broad or a restrictive extradition treaty as circumstances warrant. For example, our relationship with Canada no doubt calls for the maximum level of cooperation, while we would obviously not choose to be as forthcoming with Poland, Albania, or South Africa. If we were required to treat every nation in the same manner that we regard our closest allies and neighbors, we would no doubt have to curtail drastically our number of treaty partners, thereby defeating the goal of maximum extraditability.

Committee Hearings, supra note 52, at 396 (statement of Steven Lubet).

104. See, e.g., id. at 302 (statement of M.C. Bassiouni).

105. This point received particular attention in an exchange between Senator Dodd and State Department Legal Adviser Sofaer during a hearing before the Senate Foreign Relations Committee:

Senator Dodd: Would you like to see this kind of treaty adopted as a boiler-plate language for all extradition treaties around the globe?

Judge Sofaer: Absolutely not.

Senator Dodd: Why not?

Judge Sofaer: Because there are nations with whom [sic] we will not make this kind of treaty.

Senator Dodd: Why not?

Judge Sofaer: First of all, most significantly, there are nations where there is no open system of political opposition and dissent. Second of all is where the system of justice is fundamentally unfair. We would not make this kind of treaty with those nations.

Id. at 20.


107. According to the State Department, the United States is considering similar treaties with other nations. "However, a threshold issue will be - and has been in our negotiations to date - whether the country allows free expression of views, including unpopular or dissenting views." Committee Hearings, supra note 52, at 707 (State Department response to questions posed by Foreign Relations Committee staff).
exclude all politically-motivated violent crimes, the Supplementary Treaty obligates both parties to extradite persons accused or convicted of such crimes. United States opponents of the Supplementary Treaty resisted creation of such an unconditional obligation, largely because of the continuing conflict within Northern Ireland relating to its political status within the United Kingdom.\footnote{108} The PIRA\footnote{109} continues to use violent means to attack the British presence in Northern Ireland. The United Kingdom has responded through the promulgation of special criminal procedures to combat this violence.\footnote{110}

Although the debate on the political status of Northern Ireland remains divisive, the Supplementary Treaty does not necessarily support one side over the other.\footnote{111} Certainly, the Supplementary Treaty seeks to prevent the political offense exception from providing refuge for violent criminals. To that extent, PIRA members will no longer be able to invoke the exception. Apart from the PIRA, however, those groups most strongly resisting a British presence in Northern Ireland have renounced violence as a vehicle for political change. Recent governments of the Republic of Ireland, like many who strongly support Irish sovereignty in Northern Ireland, have denounced the PIRA's violent offenses against British forces and civilians.\footnote{112} The Supplementary Treaty is unobjectionable, therefore, for its target is violence, not ideology.

B. THE BASES OF CONTROVERSY

The Supplementary Treaty nonetheless prompts three legitimate concerns. First, the limitation on the political offense exception resembles prior congressional attempts to legislate such a limitation. Some favor legislation over a treaty-based approach. Second, the fairness of the United Kingdom's administration of Northern Ireland comes into question. Finally, the broad sweep of the Supplementary

\footnote{108} For one view of the historical background of this controversy, see O'Brien, Irish Terrorists and Extradition: The Tuite Case, 18 TEX. INT'L L.J. 249, 249-60 (1983).
\footnote{109} The Provisional Irish Republican Army (PIRA) is the ideological successor to the Irish Republican Army (IRA). V ENCYCLOPEDIA BRITANNICA 427 (15th ed. 1983).
\footnote{110} See infra notes 122-27 and accompanying text.
\footnote{111} Some Supplementary Treaty opponents label the acts enumerated in article I as the "IRA Exclusions." See, e.g., Committee Hearings, supra note 52, at 290 (statement of M.C. Bassiouni).
\footnote{112} For example, Sean MacBride, former Foreign Minister of the Republic of Ireland, has said:

I am not in favour of the use of physical force, or the activities of the different paramilitary groups. I do not think they are justified, and I think that Partition could be ended by political means provided our political parties made the necessary effort.

Id. at 325 (address to the Irish-American Unity Conference, January 16, 1984).
Treaty’s exclusions raises certain concerns even after the Compromise Treaty curtailed these exclusions.

1. Treaty Approach Versus Legislation

The outdated system of international extradition, coupled with the recent proliferation of terrorist activity, has resulted in wholly unsatisfactory cases of terrorists escaping extradition. Recognizing that “[t]he 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,” Congress attempted to reform U.S. extradition laws in the early 1980s. Congress’ treatment of the political offense exception, with one important difference, closely resembled that of the Supplementary Treaty.

Some members of Congress sought to define political offenses by exclusion. The exclusions included codification of existing international conventions dealing with aircraft hijacking and sabotage, hostage taking, and attacks on diplomats. Additional exclusions covered offenses relating to firearm use, homicide, assault with intent to commit serious bodily injury, kidnapping, and unlawful detention. However, where the Supplementary Treaty states that “none of the following” constitute political offenses, legislative definitions adopted language stating that the political offense exception “normally” or “except in extraordinary circumstances” excludes the enumerated acts. This difference in language reflects the reluctance of the United States to bind itself unconditionally to all nations with which it maintains extradition treaties.

113. See supra notes 45-52 and accompanying text.
116. Lubet, supra note 114, at 248.
118. For example, S. 220, 98th Cong., 1st Sess. § 3194 (1983) contained the “except in extraordinary circumstances” language. See Note, Statutory Definition, supra note 117, at 446-52.
119. Legislation containing the “extraordinary circumstances” language, reported by the Senate Foreign Relations Committee in 1982 and again in 1983, was of general application. Since that legislation would have applied to every nation with which the United States maintained extradition relations, the phrase was added as a precaution on the theory that it should also not be the policy of the United States to render up automatically to foreign authorities an individual who, in the course of seeking to exercise legitimate
Because any legislative narrowing of the political offense definition must apply to every country with which the United States maintains an extradition treaty, any legislative enactment will inevitably suffer from one of two fatal infirmities. On the one hand, if Congress seeks a set of exclusions applicable to all countries, the new political offense definition will be so conditional as to render it virtually useless. On the other hand, if Congress seeks a meaningful set of exclusions, such exclusions would be appropriate only for those U.S. extradition partners whose free and fair political and judicial systems guarantee due process to the accused. The efficacy of the Supplementary Treaty, therefore, stems from its narrow definition of the political offense exception, a definition which applies only to extradition relations between the United States and the United Kingdom, a country whose due process safeguards meet the requisite standard.

2. Is the Regime Democratic and Fair?

A second important controversy concerns the continuing conflict within Northern Ireland. The Supplementary Treaty requires extradition for virtually all violent crimes. A decision to extradite, however, presupposes that the requesting state possesses a fair system of justice. On this basis, some critics have opposed the Supplementary Treaty because of British judicial organs operating in Northern Ireland.

In the early 1970s, in an effort to control escalating violence in Northern Ireland, the British government altered ordinary criminal justice procedures for terrorists. Such reforms resulted in what are known today as the “Diplock Courts.” The Diplock Courts differ

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S. REP. NO. 475, 97th Cong., 2d Sess. 8 (1981). According to the State Department, however, “[t]his Supplementary Treaty is with a specific country—a country which guarantees the legitimate exercise of civil and political rights, and which affords a fundamentally fair judicial system. The caution which the ‘extraordinary circumstances’ provision embodies is not applicable to the United Kingdom.” Committee Hearings, supra note 52, at 709 (State Department response to questions posed by Senate Foreign Relations Committee staff).


122. The administration of justice in Northern Ireland became the focus of the “Commission on Legal Procedures to Deal with Terrorist Activity in Northern Ireland,” chaired by Lord Diplock. Id.
most significantly from Northern Ireland’s ordinary criminal courts in that defendants are tried before a single judge, not a jury.123 This reflects the fear that jurors might be intimidated or killed by terrorists.124

Although trial by jury is an integral part of the Anglo-Saxon legal heritage, the Diplock Court system is not inconsistent with the necessary procedural safeguards contemplated by the Supplementary Treaty.125 Numerous protections buttress the system. Defendants in Diplock Courts have an absolute right to counsel, both at trial and in the police station before indictment. The prosecution bears the burden of proof, and all defendants have a right to confront hostile witnesses at trial. Judges in Diplock courts must also state the reasons for their decisions, and both decisions of fact and of law are subject to appeal.126 According to the U.S. State Department, “[a]cquittal rates in Diplock courts are very similar to those in the jury courts of Northern Ireland; indeed in 1983 the rate for Diplock courts was higher.”127

123. This and other recommendations contained in The Diplock Commission’s Report were adopted through Parliament’s enactment of the 1973 Emergency Provisions Act. The Act sets forth a schedule of common law offenses prosecuted in a manner different from normal criminal law procedures. Id. at 551.

124. According to former Prime Minister of Ireland Garrett Fitzgerald, “[w]e do not have trial by jury in our country for terrorist crimes. That has not been possible in any part of Ireland for over ten years because trial by jury means that the jurors’ lives are threatened, and, in the past, jurors and their families have been murdered.” See Committee Hearings, supra note 52, at 13; see also State Department Report, supra note 121, at 557. The Report states that the reason for “trying terrorist cases before a judge alone is Lord Diplock’s observation that the jury system was in danger of a complete breakdown in Northern Ireland. Terrorists were engaging in actual intimidation of juries, and there was widespread fear of retaliation for ‘bad’ jury verdicts.” Id.

125. Indeed, even in In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984), where the United Kingdom’s extradition request was denied on the basis of the political offense exception, Judge Sprizzo concluded that British authorities in Northern Ireland possessed the capacity to justly try an alleged PIRA gunman:

The Court also specifically rejects [Doherty's] claim that the Diplock Courts and the procedures there employed are unfair, and that [Doherty] did not get a fair trial and cannot get a fair trial in the courts of Northern Ireland. The Court finds the testimony of the Government witnesses as to this issue both credible and persuasive. The Court concludes that both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and that the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard.

Id. at 276. In addition, according to the State Department Legal Advisor, “[t]he Diplock Courts afford defendants the essential components of procedural fairness: open trials, witnesses may be called and cross-examined, the prosecution has the burden of proving guilt beyond a reasonable doubt, the defendant has the right to legal counsel and an absolute right to [ap]peal.” Committee Hearings, supra note 52, at 5 (statement by Abraham D. Sofaer).


127. Id. at 558.
3. Is the Treaty’s Sweep Too Broad?

A third controversial feature of the Supplementary Treaty is the broad sweep of the article I exclusions. The Supplementary Treaty narrows extradition law’s political offense exception to include only purely political and non-violent crimes. Critics contend that the Supplementary Treaty’s exclusions, so broad as to embrace most relative political offenses, risk binding U.S. courts in a manner likely to produce unjust results.\textsuperscript{128}

When the treaty was first submitted for Senate ratification, it was suggested that the article I exclusions be altered to allow courts more discretion in applying the Supplementary Treaty.\textsuperscript{129} For example, deletion of offenses such as possession of firearms or damaging property\textsuperscript{130} would have no effect on those exclusions aimed at offenses such as murder or kidnapping,\textsuperscript{131} but would decrease the chance that a U.S. court would be bound to grant extradition for an offense committed under “questionable” circumstances. Another suggested change would have limited the applicability of the article I exclusions to only those relative political offenses directed against non-soldiers or persons who are not government agents.\textsuperscript{132} A third suggestion would have made article I’s exclusions applicable “in all but extraordinary circumstances” or merely “normally.”\textsuperscript{133}

The Senate obviously saw merit in some limitation on the Submitted Treaty’s broad negative definition of the political offense exception. In its compromise version, the Senate narrowed the sweep of the negative definition by deleting references to, \textit{inter alia}, property damage, possession, intent, and conspiracy. As ultimately ratified, therefore, the Supplementary Treaty’s negative definition of the political offense exception represents a compromise between the expansive sweep of the Submitted Treaty, and the alternative extreme of the Prior Treaty, which had provided a loophole for PIRA terrorists.

The merit of both the suggested and adopted limitations on the Submitted Treaty’s broad negative definition increases in direct proportion to the unfairness of the political system to which the Supplementary Treaty applies. For example, if the United States concludes

\textsuperscript{128} See, e.g., \textit{Committee Hearings}, supra note 52, at 308, 323 (testimony of Professor Charles E. Rice, University of Notre Dame Law School).

\textsuperscript{129} \textit{Id.} at 66 (statement of Senator De Concini).

\textsuperscript{130} See supra notes 75-76.

\textsuperscript{131} See supra notes 70, 73 and accompanying text.

\textsuperscript{132} Indeed, Professor Pyle, testifying before the Senate Foreign Relations Committee in opposition to the Supplementary Treaty, stated: “I cannot extend my concern with that kind of killing to people who shoot at soldiers, because I remember that Americans also shot at British soldiers, and shot in a kind of ‘cowardly’ fashion, from behind farmhouses and stone walls . . . .” \textit{Committee Hearings}, supra note 52, at 97.

\textsuperscript{133} \textit{Id.} at 76 (testimony of Congressman Hughes).
such an extradition treaty with a country not possessing a free and fair political and judicial system, or a recent democracy with questionable stability, then some limitation on the scope of the article I exclusions would be appropriate.

Clearly, the Compromise Treaty is better than no treaty at all. The Submitted Treaty, however, stood for the proposition that violence is never an acceptable means toward political ends in a stable democracy. As former Secretary of State William P. Rogers told the United Nations General Assembly: “Political passion, however deeply held, cannot be a justification for criminal violence against innocent persons. Certainly... terrorist acts... are totally unacceptable attacks against the very fabric of international order. They must be universally condemned, whether we consider the cause the terrorists invoke noble or ignoble, legitimate or illegitimate.” The sweeping article I exclusions in the Submitted Treaty effectuated that policy. Although the Compromise Treaty narrows the political offense exception to some degree, the original version as concluded between the British and American governments unambiguously affirmed that both countries are stable democracies possessing fair political and judicial systems. The Compromise Treaty, with its narrower negative definition of the political offense exception, undermines the goal of unfettered extradition.

4. Shifting Judicial Discretion to the Executive

Perhaps the most controversial aspect of the Submitted Treaty was its shift of judicial discretion to the executive. Under the prior extradition treaty between the United Kingdom and the United States, the judiciary made extradition decisions on a case-by-case basis. Typically, after the United Kingdom would make an extradition request, the extraditee would seek a denial of that request on the basis of the political offense exception. The U.S. magistrate would then decide whether the act in question fell within the political offense exception. If the magistrate found the exception controlling, the magistrate would deny the extradition request and terminate the proceedings.

The Submitted Treaty would have significantly limited judicial discretion regarding invocation of the political offense exception. When confronted by any relative political offense, the magistrate would no longer have decided on a case-by-case basis whether that act was incidental to or in furtherance of some political goal. All such

136. See supra notes 30-31 and accompanying text.
acts would have been prospectively excluded from the political offense exception.

Whenever the Submitted Treaty precluded a magistrate from denying an extradition request, the magistrate would then certify the request to the Secretary of State. At that point, the Secretary of State would examine any peculiar circumstances of the case and retain executive discretion to deny the extradition request. Thus, the Submitted Treaty shifted any discretion attached to the political offense exception from the judiciary to the executive. Since extradition decisions in the United States have traditionally been made by the judicial branch, this shift would have been a significant reform.

Because of fear that “taking the political offense exception away from the courts left the executive branch with the sole discretion to determine whether to extradite when political issues were involved,” the Senate added articles II and III to the Compromise Treaty. Article II adds nothing new to U.S. extradition law, but merely makes clear the right of the person accused to introduce evidence on the question of probable cause. Article III, however, clearly exists in the Compromise Treaty to address the Senate’s concern. Article III restores broad discretionary power to the courts. For example, it establishes an affirmative right of inquiry by U.S. courts into the administration of justice in Northern Ireland with respect to the individual sought. A U.S. court must deny extradition where the person

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137. The magistrate in Mackin, No. 80 Cr. Misc. 1, p. 54 (S.D.N.Y. Aug. 13, 1981) (LEXIS, Genfed library, Courts file), argued that one reason the judiciary should decide such cases is that courts would not embarrass the executive or U.S. foreign policy in applying the political offense exception, since “in rendering such determinations the Courts are not being called upon to make delicate foreign policy decisions, to debate the political climate in a certain country, or to pass judgment on the merits or demerits of the political affairs of another nation.” Id. Yet, this is precisely what courts do in applying the political offense exception. The Mackin court itself engaged in a lengthy discussion of “the political crisis” in Northern Ireland, including examination of “the historical conflict” and “the years 1969 to date.” Id. The magistrate concluded that “when viewed in the context of a continuous uprising spanning at least a decade, with historical antecedents, the level of violence in . . . Northern Ireland in March 1978 was of sufficient severity and in the nature of the political uprising as contemplated by In re Castioni . . . “ Id. It may be that a politically-motivated determination will prove less embarrassing to the U.S. government if made by the independent judiciary, rather than the foreign policy-making executive. This depends, however, on whether foreign anger will focus on the single branch that made the decision in Mackin, or on the U.S. government as a whole.

138. In some respects, this purported shift of judicial discretion to the executive is illusory. Under the Prior Treaty, the executive and the judiciary shared concurrent authority to determine whether the accused committed a political crime. Under the Submitted Treaty, the executive would have gained no new authority in such cases. However, because the judiciary would have lost much of its discretion through the Submitted Treaty’s broad negative definition of political offense, the apparent effect would have been a shift of authority to the executive.

140. See supra notes 92-94 and accompanying text.
141. See supra note 95 and accompanying text.
sought establishes by a preponderance of the evidence that the request for extradition has been made for reasons of that person's race, religion, nationality, or political opinions, or that the person would be prejudiced at trial or punished for any of these reasons.142

The Senate's insistence in the Compromise Treaty on an affirmative role for U.S. courts in extradition requests involving the political offense exception, however, risks reopening the judicial loophole which the Submitted Treaty sought to close. The Submitted Treaty would have allowed extradition upon the establishment of probable cause, although the executive always retained discretion to deny the extradition request.143 Under the Compromise Treaty, however, a sig-

142. See supra note 93. In floor debate, Senator Kerry inserted the following colloquy among himself, Senator Biden, and Senator Lugar, the Chairman of the Senate Committee on Foreign Relations, "[t]o assure that a judge would be clear as to what was the committee's intent as it related to article 3(a)." 132 CONG. REC. S9253 (daily ed. July 17, 1986).

Senator Kerry: Mr. Chairman, as part of the report language I would ask you if it is your understanding and intention as principal sponsor of this amendment that an individual, as part of showing that he would, and I quote the language of article 8 (now article 3), "if surrendered be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinion," would that individual be able to challenge the fairness of the judicial system to which he would be returned and thereby raise a right of inquiry [sic] into the fairness of that system?

Mr. Chairman: Yes.

Senator Kerry: And that is your intention in this particular amendment as well as in the treaty?

The Chairman: That is correct.

Senator Biden: Let me make sure as part of this colloquy that I understand the nature of the rule of inquiry into the justice system in Northern Ireland that we are establishing here.

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

The Chairman: My answer is yes.

Id. The colloquy also appeared in floor statements by Senator Levin, id. at S9259, and Senator Biden, id. at S9260.

143. Once the magistrate certifies an approved extradition to the Secretary of State, the Secretary still possesses the executive discretion to deny the request. For example, the executive has authority to withhold extradition for humanitarian reasons. See Peroff v. Hylton, 542 F.2d 1247 (4th Cir. 1976). Relief is also available in the form of asylum. In the United States, asylum claims are governed by the Immigration and Nationality Act, 8
significant role for the courts remains even after the establishment of probable cause.

First, the accused retains the right to force judicial inquiry into the administration of Northern Ireland’s justice system. Under the Submitted Treaty, such a right of inquiry did not exist in the context of a political offense defense, demonstrating absolute U.S. opposition to the use of terrorism as a means of effecting political change in a democracy. More importantly, U.S. courts are neither equipped nor intended to make judgments about the internal politics of foreign states.

Second, article III’s various defenses to extradition are couched in general and imprecise language. Despite the assurance of Senator Lugar, Chairman of the Senate Committee on Foreign Relations, that even under the Compromise Treaty, Mackin “would, without question, have been decided against the defendant,”144 the Compromise Treaty may in fact provide a loophole for such defendants. For example, even if a defendant like Mackin could not find protection under the Compromise Treaty’s political offense exception, he still could plausibly argue—in the words of article III—that the extradition request was made to try or punish him for his political views. Thus the Prior Treaty’s unacceptably vague discretionary power, which the Submitted Treaty would have abolished, reappears in the Compromise Treaty as article III.

Even though the Compromise Treaty closes one terrorist loophole in the form of the political offense exception, it reopens another loophole, in the form of the various article III rights of inquiry. The extent to which those sought for extradition will be successful in abusing this reopened loophole remains to be seen. Such abuse would have been impossible under the Submitted Treaty.

V. CONCLUSION

International law recognizes no duty to extradite; rather, extradition law exists to further cooperation between nations for purposes of maintaining the lawful order and security on which all liberty ultimately depends. The political offense exception, however, enables sovereign nations to refuse to extradite, for humane or ideological reasons, certain defendants who would otherwise be extraditable under the legal obligations created between two nations.

U.S.C. §§ 1101(a)(42), 1158 (1982), and by the regulations of the Immigration and Naturalization Service, 8 C.F.R. § 208 (1986). According to the State Department, “[t]he Supplementary Treaty would not revise . . . provisions of law, nor affect their application in practice. The Supplementary Treaty relates solely to the extradition process, not to the application of our immigration laws.” Committee Hearings, supra note 52, at 701.

Each nation must determine how far it will extend the political offense exception, based on its own political values. The Supplementary Extradition Treaty reflects a determination by both the United States and the United Kingdom that the political offense exception ought not be used to shield from justice individuals who would destroy the freedoms and lives of others to gain political advantage. In a practical sense, the Supplementary Treaty is a reasonable and responsible solution to the demonstrated terrorist loophole in the prior extradition treaty between the United States and the United Kingdom. Although the Submitted Treaty would have closed this loophole more effectively, the Compromise Treaty is nonetheless a major reform, worthy of support.

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