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THE ROLE OF THE AMERICAN JUDICIARY IN THE EXTRADITION OF POLITICAL TERRORISTS

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INTRODUCTION

On August 21, 1979, Ziyad Abu Eain was arrested in Chicago and informed that the government of Israel was seeking his extradition on the charge of murder. The charges resulted from an Israeli police investigation which linked him to a bombing in a crowded market area in Tiberias, Israel, which killed two children.[1] Abu Eain asserted that he was not extraditable because of the political offense exception that exists in the extradition treaty between the United States and Israel.[2] He claimed that Israel sought his extradition because of his past association with the Palestine Liberation Organization and that in any event, the bombing was a political act aimed at the State of Israel. Following a lengthy hearing, a federal magistrate in Chicago found that probable cause existed to extradite Abu Eain and that the charged offenses did not fall under the political offense exemption.[3]

Six months earlier Peter Gabriel John McMullen successfully raised the same defense when Great Britain sought his extradition from the United States[4] for involvement in the 1974 bombing of a British Army Installation in England by the Provisional Irish Republican Army.[5] The federal magistrate concluded that this bombing was part of a political disturbance and was directed at the British army—a prime target for guerilla warfare.[6]

These cases illustrate a highly intricate extradition jurisprudence. The political offense exemption is found in virtually every modern treaty of extradition and its application calls for findings of fact and conclusions of law concerning crimes, events, and political situations halfway around the world. In *Abu Eain*, for example, the magistrate declined to take judicial notice "that there is now, and has existed for more than three decades, a military and political conflict between the government of Israel and the several Arab states and the people of Palestine."[7] In *McMullen*, however, the magistrate did take notice that "an insurrection and a disruptive uprising of a political nature" existed in Northern Ireland in 1974.[8]

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[1] The bombing occurred on May 14, 1979. Tiberias is a resort area on the Sea of Galilee. The area was unusually crowded with young people who were participating in a youth rally and holiday vacationers who had traveled to the city for the feast of Lag B'Omer. The blast, which was centered along one of the city's main thoroughfares, killed two youngsters instantly. Thirty-two others required hospitalization and still others were treated for minor injuries. N. Y. Times, May 15, 1979, at 5, col. 5.

[2] The Convention on Extradition between the United States and Israel in relevant part provides:

> Extradition shall not be granted in any of the following circumstances: ...
> 4. When the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character.

Dec. 10, 1962, art. VI, 14 U.S.T. 1707, T.I.A.S. No. 5476 (effective Dec. 5, 1963).

[3] *In re* Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.). There is no provision for direct appeal from orders of a federal magistrate in extradition proceedings. The United States District Court for the Northern District of Illinois denied a petition for a writ of habeas corpus on March 28, 1980. No. 79 C 5477 (N.D. Ill. March 28, 1980) (mem.). Abu Eain has appealed this denial to the Seventh Circuit. No. 80-1487.

[4] The Extradition Treaty between the United States and Great Britain provides in part:

> A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

Dec. 22, 1931, art. VI, 47 Stat., pt. 2, 2122, T.S. No. 849 (effective Aug. 4, 1932).

[5] Evidence presented in the proceeding established Mr. McMullen's membership in the Provisional Irish Republican Army at the time of the bombing. The political objective of the PIRA is nationalization of Northern Ireland. In 1964, the PIRA's terrorist activities created heightened tension in England and Northern Ireland. The British government responded by outlawing the Irish Republican Army and conferring upon police unprecedented power to fight terrorist activities. N.Y. Times, Nov. 30, 1974, at 4, col. 3.

[6] *In re* McMullen, No. 3-78-1099 MG, mem. at 5 (N.D. Cal. May 11, 1979).

[7] *In re* Abu Eain, No. 79 M 175, mem. at 12–13.

[8] *In re* McMullen, No. 3-78-1099 MG, mem. at 4.

In an area that concerns American foreign policy as deeply as does extradition, it is imperative that the judiciary develop a uniform approach to the application of the political offense exemption. Although there is a significant body of American case law that seeks to substantively define the term "political offence" the courts have paid considerably less attention to the procedural requisites of the defense. This article explores the American judiciary's procedural and substantive role in extradition proceedings as a framework for developing an approach to the political offense exemption within the fundamental principles of individual liberty and human rights.

Extradition of Political Offenders

Extradition originally served as a device for surrendering political dissidents and as a means by which medieval rulers attempted to secure their political structure.[9] Often political offenders were extradited in the absence of any treaty.[10] As various forms of constitutional government supplanted monarchies, however, political dissent increasingly gained acceptability and the use of extradition as a political tool diminished in importance.[11] The political offense exception first emerged in the extradition treaty between Belgium and France in 1834.[12] Philosophical concepts generated by the French revolution[13] encouraged political participation and political change and legitimized resistance to tyrannical rule. Granting asylum to political offenders was therefore conceived as a duty in almost all cases.[14]

The heightened concern for individual liberty, political dissent, and human rights in the world has led recently to various international enactments.[15] International concern perhaps peaked with the adoption of the Universal Declaration of Human Rights by the United Nations in 1948. The framers of the Declaration sought to promote uninhibited political debate by providing that foreign nations grant asylum to those accused of political acts.[16]

The political offense exception is not limited to nonviolent dissent; revolutionary or counterrevolutionary violence may also be protected from extradition. While this view might, from time to time, lead to distasteful results, it is clear that revolution falls within the ambit of political activity.

Certain acts of violence, however, existing at the fringe of legitimate revolution, challenge the conscionability of protecting such activities from extradition and punishment. It is the objective of the political offense exception to protect those violent

[9] Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britian and the Republic of Ireland*, 60 Marq. L. Rev. 777 (1977).

[10] Deere, *Political Offense in the Law and Practice of Extradition*, 27 Am. J. Int'l L. 247 (1933).

[11] *Id.* at 248.

[12] *See* García-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. Pitt. L. Rev. 371, 372 (1953). One of the first countries to provide specific domestic legislation exempting political offenders from extraditon was Belgium in 1833. The first treaty exempting the political offense from extradition appeared in the treaty between France and Belgium in 1834. I. A. Shearer, Extradition in International Law 16 (1971)

[13] Another reason provided by the authors of the 1933 Harvard Draft Convention on Extradition included the growing sense of interdependence between nations brought on by the Industrial Revolution and the appearance of a variety of modes of transportation which made escape from one country to another relatively easy. 29 Am. J. Int'l L. 1, 108 (1953); *see also* Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L. J. 71, 71-78 (1978).

[14] Deere, *supra* note 10, at 249.

[15] *See* Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, G.A. Res. 2391, U.N. GAOR, Supp. (No. 18) 40, U.N. Doc. A/7218 (1968); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; International Covenant on Economic, Social, Cultural, Civil, and Political Rights; G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A16316 (1966); International Convention on the Elimination of all Forms of Racial Discrimination, 660 U.N.T.S. 195 (1966); Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 (registered June 6, 1960); Convention on Political Rights of Women, March 31, 1953, 193 U.N.T.S. 135 (registered July 7, 1954); Protocol Amending the Slavery Convention Signed at Geneva on 25 September 1926, Dec. 7, 1953, 182 U.N.T.S. 51; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (registered April 22, 1954); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (registered Jan. 12, 1951).

[16] The Universal Declaration of Human Rights, U.N. GAOR, 217A, U.N. Doc. A1810 (1948) provides: "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 prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." It should be noted that while voting members of the General Assembly unanimously approved the Declaration, eight states abstained: Byelorussian S.S.R., Czechoslovakia, Poland, Saudi Arabia, Ukrainian S.S.R., U.S.S.R, Union of South Africa, and Yugoslavia. The Soviet Union did sign *A Convention for the Prevention and Punishment of Terrorism* in 1937 at Geneva. This resolution was never passed. Apparently Soviet policy, at least prior to the Afghanistan invasion, rejects international terrorism as a political offense. *See* Gold, *Non-extradition for Political Offenses: The Communist Perspective*, 11 Harv. Int'l L. J. 191, 202 (1970).

acts which are necessary and corollary to political activity, not to sanction gratuitous assaults on human life. Acts of international terrorism directed at civilians,[17] whether undertaken by governments, quasi-governments, or liberation movements, pose serious threats to world order and stability. Considering the vulnerability of the world community to destructive use of scientific and technological advancement, the ultimate impact of terrorist activity is yet unknown. Nevertheless, terrorists, armed with incendiary, chemical, biological, or even nuclear weapons presently might be capable of maiming or killing hundreds or thousands in a single attack without regard to the status or identity of their victims.[18] Such activities threaten basic human rights as surely as does government repression of dissent.[19] Furthermore, actions aimed at disrupting various vital services might result in more anarchy than change of government.[20]

Commentators have thus challenged on both a philosophic and practical level the view that international terrorist activities, whether undertaken by governments or individuals, fall within the same purview of traditional human rights as either dissent or revolution.[21] One author in the field has offered the following distinction:

> Although rebellion cannot be separated from conflict, violence directed against innocent parties is destructive not only of law and legal systems, but of civilized society. It is true that revolution and rebellion are recognized remedies in customary international law. The difference between legality and illegality, however is that violence directed against governments and governmental officials is not an international crime (except for an attack upon a head of state) whereas terror, violence directed against internationally protected personnel and noncombatant third parties, is a criminal act. Terrorist activity on the international level is basically a political maneuver designed to disrupt personal freedom and impair fundamental human rights. In this sense, international terrorism represents abominable means utilized for contemptible ends.[22]

Expressing similar concerns in its administration of the ninety-three extradition treaties now in force,[23] the United States has strictly construed

[17] Terrorism may be defined in a number of ways depending upon the extent and nature of the activities undertaken. *See* Lowry, *Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law*, 53 NOTRE DAME LAW. 49, 66 (1977); Tran-Tam, *Crimes of Terrorism and International Criminal Law*, in A TREATISE ON INTERNATIONAL CRIMINAL LAW 490 (M. Bassiouni ed. 1973). For purposes of this article, however, the essential elements of international terrorism are: (1) the involvement of citizenry of two or more countries or of acts occurring in one country committed by nationals of another country; (2) the involvement of a violent criminal act; and (3) the aim of creating overwhelming fear for politically coercive purposes within a country. R. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 3-4 (1979).

[18] *See* Jenkins & Rubin, *New Vulnerabilities and the Acquisition of New Weapons by Non-government Groups* in EVANS & MURPHY, LEGAL ASPECTS OF INTERNATIONAL TERRORISM 221 (1978).

[19] The Universal Declaration of Human Rights, U.N. Doc. A/1811, while seeking to guarantee political dissent, also seeks to guarantee a social and international order which provides that everyone shall have the right to life, liberty, and security of the person. *See also* Paust, *Nonprotected Persons or Things* in EVANS & MURPHY, *supra* note 18, at 354.

[20] *See* Jenkins & Rubin, *supra* note 18. The authors discuss the impact of terrorist activities on such modern systems as water, transportation, energy, communication, and computerized management and information systems.

[21] *See* M. BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES (1973) [hereinafter cited as TERRORISM]; M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974) [hereinafter cited as EXTRADITION]; A. CAMUS, RESISTANCE, REBELLION AND DEATH (1963); EVANS & MURPHY, *supra* note 18; R. FRIEDLANDER, *supra* note 17.

[22] R. FRIEDLANDER, *supra* note 17, at 44.

[23] *See* 18 U.S.C. § 3181 (Supp. II 1978) (Appendix C). The United States has entered into bilateral extradition treaties with the following nations:

Albania	Greece
Argentina	Guatemala
Australia	Guyana
Austria	Haiti
Bahamas	Honduras
Barbados	Hungary
Belgium	Iceland
Bolivia	India
Brazil	Iraq
Bulgaria	Ireland
Burma	Israel
Canada	Italy
Chile	Jamaica
Columbia	Japan
Congo	Kenya
Costa Rica	Latvia
Cuba	Lesotho
Cyprus	Liberia
Czechoslovakia	Liechtenstein
Denmark	Lithuania
Dominican Republic	Luxembourg
Ecuador	Malawi
Egypt	Malaysia
El Salvador	Malta
Estonia	Mauritius
Fiji	Mexico
Finland	Monaco
France	Nauru
Gambia	Netherlands
Fed. Repub. Germany	New Zealand
Ghana	Nicaragua
Granada	Nigeria

these laws when terrorist activities are involved. Former Secretary of State Cyrus Vance, for example, has stated on the floor of the Senate that the United States seeks to apprehend, bring to trial, and penalize international terrorists.[24]

The policy of providing asylum for dissidents without becoming a haven for terrorists is easier to state than to implement.[25] All terrorists, and certainly all invoking the political offense exemption, claim the mantle of political justification. Courts have found drawing a line of demarcation between protected political activity and criminal terror to be quite difficult.

Neither Congress nor the Supreme Court has defined the term "political offense."[26] Consequently, the lower courts are left to decide the issue on a case by case basis. Although the courts have paid considerable attention to the substantive law, they have not developed a coherent procedural approach to the political offense exemption.

The Extradition Process in the United States

Extradition of a fugitive may be based upon comity or reciprocity, or upon a treaty obligation.[27] In certain extreme cases, a country might use abduction, kidnapping, or some informal procedure to obtain jurisdiction over an individual.[28] Although the extent of the United States' obligations to grant an extradition request absent a treaty was

Norway
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Poland
Portugal
Romania
San Marino
Sierra Leone
Singapore
South Africa
Spain
Sri Lanka
Surinam
Swaziland
Sweden
Switzerland
Tanzania
Thailand
Tonga
Trinidad and Tobago
Turkey
United Kingdom
Uruguay
Venezuela
Yugoslavia
Zambia

[24] I think the president and the administration has made it very clear that we do not condone or accept terrorism in any way, that we oppose all of its aspects, and we will do everything we can to see that those who are involved in it are apprehended and are brought to trial and penalized for their action.

An Act to Combat International Terrorism: Hearings on S. 2236 Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 30 (Jan. 23, 1978) (statement of Secretary of State Cyrus Vance).

[25] In the trial of Ziyad Abu Eain, Louis Fields, a member of the Office of the Legal Advisor of the Department of State testified that "[i]t is the view of the Department of State that indiscriminate use of violence against civilian populations, innocent, is a prohibited act, and as such is a common crime of murder, punishable in both states." *In re* Abu Eain, No. 79 M 175, mem. at 17 (quoting record at 1041). The State Department also submitted the following statement of policy, signed by Mr. Knute E. Malmborg, the Assistant Legal Advisor directly responsible for international extradition matters:

> Murder and causing serious bodily harm are patently not political offenses but common crimes. I understand that the accused asserts that the bombing (in Tiberias on May 14, 1979) was politically motivated. Based upon my examination of the evidence and the official definition of terrorism, I have concluded that, whatever the motivation, planting and exploding a bomb with intent and result of killing and wounding civilians indiscriminately is not an offense of a political character but an act of terrorism, pure and simple. It is the view of the Department of State that Article VI, paragraph 4, of the treaty is not applicable to acts of terrorism.

Record at 945. Similarly, the view presented by the United States to the United Nations Ad Hoc Committee on International Terrorism was that violence against civilians falls beyond the scope of legitimate political activity:

> The subject of international terrorism has, as the Secretary-General has already emphasized, nothing to do with the question of when the use of force is legitimate in international life. On that question, the provisions of the Charter, general international law, and the declarations and resolutions of the United Nations organs, in particular those of the General Assembly relating to national liberation movements, are not and cannot be affected. But even when the use of force is legally and morally justified, there are some means, as in every form of human conflict, which must not be used: the legitimacy of a cause does not in itself legitimize the use of certain forms of violence, especially against the innocent. This has long been recognized even in the customary law of war.

U.N. Doc. A/C 6/418 (1979).

[26] In Karadzole v. Artukovic, 355 U.S. 393 (1958), *rev'g per curiam*, 247 F.2d 198 (9th Cir. 1957), the most well known recent Supreme Court opinion on political extradition, the Court simply remanded the case to the district court without commenting on the definition of a political offense.

[27] Extradition based solely upon comity or reciprocity often has been resorted to by a number of foreign nations. *See generally* Evans, *Legal Bases of Extradition*, 16 N.Y.L.F. 525, 530 (1930).

[28] The kidnapping of Adolf Eichmann is a prime example of such irregular seizures. Attorney General of Israel v. Adolf Eichmann, 36 I.L.R. 277 (1962). In certain instances, deportation of an individual may result in de facto extradition. *See* O'Higgins, "*Disguised Extradition*": *The Soblen Case*, 27 Mod. L. Rev. 521 (1964); *see also* M. Bassiouni, Extradition, *supra* note 21, at 121–201.

the subject of much debate in the nineteenth century,[29] it is now generally well established that the United States will honor an extradition request only pursuant to its treaty obligations.[30] Furthermore, Congress has required implementation of certain safeguards before returning an individual to the requesting country.[31]

Extradition is a criminal proceeding[32] which the authorized representative of a requesting country may initiate[33] by filing a verified complaint with the nearest court having jurisdiction over the individual.[34] A judicial officer then may issue a warrant for the individual's arrest and further detention if the complaint satisfies all requirements.[35] Once the individual is in custody, the presiding judicial officer may set or deny bail.[36]

The requesting nation may supplement this procedure by filing a requisition with the Secretary of State asking that the accused be returned in accordance with the terms of the existing treaty. The requesting nation may file the requisition either prior to or during the judicial proceedings. If filed prior to the judicial proceedings, the Secretary of State may issue a preliminary mandate to the proper judicial officer on behalf of the foreign government. The mandate usually includes a copy of the verified complaint as well as other supporting documentation. The judicial officer then issues a warrant as if the foreign country had itself filed the complaint.[37]

[29] *See generally* Evans, *supra* note 27.

[30] Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); United States v. Rauscher, 119 U.S. 407 (1886); *see also* Evans, *supra* note 27, at 528 (citing 1 MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 23 (1891)), where Professor Evans notes, the *Arguilles* case is the only known case where the United States granted extradition in the absence of a treaty. Arguilles was actively involved in slave trading and was turned over to the Spanish government by Executive Order in 1864 as an act of comity.

[31] 18 U.S.C. § 3184 (1976) provides:

> 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 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 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 stipulations 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.

[32] Grin v. Shine, 187 U.S. 181 (1902); Rice v. Ames, 180 U.S. 371 (1901); First National City Bank of New York v. Aristequieta, 287 F.2d 219 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49 (1963).

[33] Although the representative often will be a consul or diplomatic officer, it is only necessary that the person filing the complaint have authorization from the requesting country. *See* United States *ex rel.* Caputo v. Kelly, 92 F.2d 605, *cert. denied*, 303 U.S. 635 (1938).

[34] A careful reading of 18 U.S.C. § 3184 reveals that jurisdiction over the extradition proceedings is vested in judicial persons and not in any court. The theory underlying this delegation of power assumes that extradition is not a judicial function, but rather one reposed in the Department of State. Laubenheimer v. Factor, 61 F.2d 626 (7th Cir. 1932). However, it is generally agreed that in the first instance, extradition is a matter of judicial competence. *See* Jimenez v. Aristeguieta, 290 F.2d 106, 108 (1961) where Judge Brown, in his concurrence, stated:

> Repeated often in the cases is the loose generality that the extradition hearing is not a judicial proceeding. It may not be when measured by the usual indicia of a formal judgment of commitment, appeal, and the like. But the very essence of 18 U.S.C.A. § 3184 is a reflection of the fundamental concept among civilized nations that there shall be a non-partisan, unbiased, objective hearing by a judicial officer acting solely because of his judicial position—and hence training and discipline—to determine whether there is a sufficient basis to sustain the charge under the treaty.

[35] The authorized representative may file the complaint upon an information or belief that is properly sworn and attested. Ordinarily the complaint should include the name of the individual sought; the nature of the extradition treaty between the United States and the requesting country; sufficient information to show that the crime charged is an offense under the treaty and under both the laws of the area where the complaint is filed and the laws of the requesting country; a certified copy of the indictments or conviction of the individual sought by the requesting country by competent authorities showing the offense charged; accompanying affidavits, documents and other pertinent evidence proving the foreign law and the facts alleged. M. BASSIOUNI, EXTRADITION, *supra* note 23, at 514; *see also* Note, *United States Extradition Procedures*, 16 N.Y.L.F. 420 (1970).

[36] *In re* Gannon, 27 F.2d 362 (E.D. Pa. 1928). Bail need not be set because procedures for release on bail are purely statutory and are not provided for in 18 U.S.C. § 3184.

[37] *See* note 33 *supra*.

The role of the court of extradition is ultimately to determine whether there is sufficient evidence in support of the request.[38] The requesting country bears the burden of establishing probable cause to believe that the accused committed the charged offense.[39] To reach the issue of probable cause, the court must make three additional findings. First, the extradition treaty must be in effect and applicable to the case.[40] Second, the person named in the complaint must be the same individual who is before the magistrate or extraditing judge.[41] Finally, the "rule of dual criminality" requires that the acts charged constitute a criminal offense in both the requesting country and the forum state.[42] This decision-making process, which has been recognized either implicitly or explicitly by most courts of extradition,[43] does not specifically contemplate a political offense defense. The defense, however, is clearly invocable as either a challenge to the applicability of the treaty or to the criminality of the acts charged. In either case, it remains unresolved which party bears the burden of producing evidence on this issue and which bears the ultimate burden of proof.

The Supreme Court has analogized the extradition hearing to a preliminary hearing in a criminal case.[44] Because the hearing is not a plenary proceeding involving the actual guilt or innocence of the accused,[45] the judicial officer may afford the requesting country wide latitude in producing evidence to establish the commission of the offense and probable cause. The evidence may consist of hearsay in the form of affidavits, depositions, or other pertinent documentation. The requesting country need not produce witnesses.[46]

Evidence admissible on behalf of the accused is restricted, again on the theory that the proceeding is preliminary.[47] The extraditee has a limited right to present, and even subpoena,[48] witnesses material to his defense. However, the court only will permit the defendant to introduce evidence which is offered either to show that he is not the actual person being sought by the requesting country,[49] or to explain the circumstances of the offense.[50] The defendant may not present any other evidence in defense of the charge, such as an alibi, because it would have no bearing on whether the requesting country has established a prima facie case.[51] The

[38] Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *see also* Benson v. MacMahon, 127 U.S. 457, 460 (1888).

[39] Glucksman v. Henkel, 221 U.S. 508, 512 (1911); Peroff v. Hylton, 542 F.2d at 1249; United States v. Artukovic, 170 F. Supp. 383, 388 (1959).

[40] *See* Ivancevic v. Artukovic, 211 F.2d 565, (9th Cir.), *cert. denied*, 348 U.S. 818 (1954). *See also* Note, *supra* note 37, at 441.

[41] Ivancevic v. Artukovic, 211 F.2d 565.

[42] Factor v. Laubenheimer, 290 U.S. 276 (1933).

[43] *See* M. BASSIOUNI, EXTRADITION, *supra* note 21, at 515-24, and cases cited therein.

[44] Charlton v. Kelly, 229 U.S. 447 (1913); Benson v. McMahon, 127 U.S. 457.

[45] Sayne v. Shipley, 418 F.2d 679 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970).

[46] 18 U.S.C. § 3190 (1976) provides:

> Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunal of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

[47] Charlton v. Kelly, 229 U.S. at 461-62.

[48] 18 U.S.C. § 3191 (1976) provides:

> On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or magistrate hearing the matter may order that such witnesses be subpoenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpoenaed in behalf of the United States.

[49] 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 998-99 (1968).

[50] Collins v. Loisel, 259 U.S. 309, 315-16 (1922); Charlton v. Kelly, 229 U.S. at 462. *Cf.* Sindona v. Grant, 461 F. Supp. 199, 204 (S.D.N.Y. 1978); Application of D'Amico, 185 F. Supp. 925, 929-30 (S.D.N.Y. 1960).

[51] Collins v. Loisel, 259 U.S. at 315-16; Shapiro v. Ferrardino, 478 F.2d 894, 901 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1974). In *Collins* the Supreme 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

accused, however, may offer evidence of the political nature of the crime, to show that the offense is not extraditable under the treaty. Evidence of the crime's political nature is admissible exclusively to explain the circumstances of the crime. It is not admissible, for example, in aid of a defense of justification or necessity.[52] The decision as to the admissibility of evidence lies within the sound discretion of the extraditing judge, and it is not reversible unless it negates the purposes of the hearing.[53]

Review of the magistrate's decision within the judicial system is limited. Although upon an adverse ruling, the requesting country may refile its request,[54] the particular ruling terminates the proceeding and is not thereafter subject to direct appeal to a higher court. This restriction reflects the theory that, because a judicial officer administering the hearing does not sit as a member of any court, his decision is not a final order open for direct appeal. However, the accused may collaterally attack the decision by filing a petition for a writ of habeas corpus.[55] The only issues generally reviewable in these proceedings are those relating to jurisdiction, the existence, application, or interpretation of the treaty, and the identity of the individual appearing at the hearing.[56]

If the courts ultimately authorize extradition, the Department of State must independently decide whether to deliver the accused to the requesting government.[57] The Secretary of State will not consider the request until the completion of all judicial proceedings.[58] Further action by the Secretary will be foreclosed if the court holds that an extraditable offense did not occur within the meaning of the treaty. If the courts find the accused extraditable, the secretary has broad discretion to deny extradition if conditions so warrant. Generally, the Department of State conducts a de novo examination of the issues and court proceedings and bases its decision on the available record.[59] The Secretary, however, may consider matters outside the record such as competing requests from different countries, a time lapse barring prosecution, or public policy in light of current international relations.[60] Thus, the courts often defer consideration of whether an individual is being sought for political reasons to the Department of State.[61]

In addition to reviewing matters beyond the record, the Secretary may differ from the committing magistrate on the weight or sufficiency of the evidence.[62] Such a disparate reading of the record occurred when the Russian government requested the extradition of Krishian Rudewitz in 1908 on charges of murder and arson. A committing magistrate held that the offenses were not political and thus certified extradition. After his own careful review of the record, however, the Secretary of State denied the request because he determined that the charges were the result of activities undertaken by the accused as a member of the Social Democratic Labor Party.[63]

Despite this broad discretion, the Secretary has in fact seldom overruled a court decision in favor of extradition.[64] This apparent deference to the

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of the extradition treaties.

259 U.S. at 316 (quoting *In re* Wadge, 15 F. 864, 866 (S.D.N.Y.), *aff'd*, 16 F. 332 (1883)).

[52] 6 M. WHITEMAN, supra note 49, at 999-1001. Evidence concerning the motives of the requesting government or the procedures which await the accused upon his return to the requesting country are irrelevant to the judicial officer's determination and hence inadmissible. Peroff v. Hylton, 542 F.2d at 1249; Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Wacker v. Bisson, 348 F.2d 602 (5th Cir. 1965); Sindona v. Grant, 461 F. Supp. at 204.

[53] *See* Collins v. Loisell, 259 U.S. 309; Merino v. United States Marshall, 326 F.2d 5 (9th Cir.), *cert. denied*, 377 U.S. 997 (1963).

[54] *See* 2 M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 367-70 (1973).

[55] 28 U.S.C. § 2241 (1976).

[56] Fernandez v. Phillips, 268 U.S. 311 (1925); Garcia-Guillern v. United States, 450 F.2d 1189.

[57] 18 U.S.C. § 3186 (1976) provides:

> The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.
>
> Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.
>
> A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

[58] 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 334 (1944) (citing a memorandum from counselor Anderson of the Department of State to Secretary of State Knox, February 1912, Department of State File 211.42R67116).

[59] *See* Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313 (1962); *see also* 4 G. HACKWORTH, *supra* note 58, at § 334.

[60] *See* 4 G. HACKWORTH, *supra* note 58, at § 334.

[61] Garcia-Guillern v. United States, 450 F.2d 1189; *In re* Lincoln, 228 F. 70 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916); *In re* Locatelli, 468 F. Supp. 568 (S.D.N.Y. 1979); *In re* Gonzalez, 217 F. Supp. 717 (S.D.N.Y. 1963).

[62] *See* 4 G. HACKWORTH, *supra* note 58, at § 334.

[63] *Id.*

[64] *See generally* Note, *supra* note 59.

courts reflects a political sensitivity to international *estime.* Judicial determination of extradition issues permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations.

Thus, the role of the judicial officer in the extradition process, although theoretically preliminary to that of the State Department, might well be determinative of the entire proceeding and might effectively preempt the Executive Branch in the conduct of American foreign policy. From a practical perspective, the danger of vesting this decision-making in the judiciary is that a judicial officer hearing the case might lack the expertise to determine the political or nonpolitical nature of an offense arising in an intricate international fact situation. This danger is especially acute with respect to cases involving terrorists because of the complex and ambiguous interplay between their avowed goals and actual conduct.

Development of the Substantive Law

The question of what constitutes a political offense has been the subject of international scholarly debate, diplomatic discussion, and judicial opinion.[65] Certain international agreements to which the United States is a party prohibit the signatories from treating slavery,[66] genocide,[67] and aircraft hijacking[68] as political offenses.[69] Several European bilateral extradition treaties provide that acts against heads of state and diplomatic personnel are nonpolitical.[70] Several more recent treaties pro ide that offenses aimed at transportation or communication networks are extraditable.[71] Others have gone even further and include offenses against domestic laws relating to firearms, explosives, or incendiary devices.[72] Finally, certain treaties provide that any drug offense is extraditable.[73]

Political offenses historically have been defined as either relative or purely political. Relative political offenses are otherwise common crimes committed in connection with a political act, such as a homicide committed in the course of a general uprising.[74] If the nexus between the crime and the political act is sufficiently close, the offense is "relatively political" and not extraditable; if the connection is remote or non-existent the accused may be extradited.[75] Purely political offenses are acts aimed directly at the government and are definitionally limited to treason, sedition, and espionage. It is generally agreed that the purely political offenses are not extraditable.[76]

Purely political offenses are easily recognizable, whereas relative political offenses often are difficult to distinguish from common crimes unconnected with a political act. Accordingly, the case law in the political offenses area has concentrated on the definition and interpretation of relative political offenses. In order to gain a full and critical under-

[65] *See generally* 4 G. Hackworth, *supra* note 58, at §§ 313–17; 2 C. Hyde, International Law Chiefly as Interpreted and Applied by the United States 1019–26 (2d ed. 1945); 6 M. Whiteman, *supra* note 49, at 799–858; *See also* sources cited in note 21 *supra.* Forsythe, *Political Prisoners: The Law and Politics of Protection*, 9 Vand. J. Transnat'l L. 295 (1976); García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Va. L. Rev. 1226 (1962).

[66] *See* Slavery Convention of 25 September 1926, as amended, 212 U.N.T.S. 17 (registered July 7, 1955); Supplementary Convention on the Abolition of Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 (registered April 30, 1957).

[67] *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (registered Jan. 12, 1951).

[68] *See* Convention on Aviation: Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6788, 704 U.N.T.S. 219 (Effective Dec. 4, 1969); Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971).

[69] García-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders*, 62 Mich. L. Rev. 927 (1964).

[70] M. Bassiouni, Extradition, *supra* note 21, at 410.

[71] Article II of the Extradition Treaty between the United States and New Zealand provides that the following shall be deemed to be extraditable offenses: "26. [a]rson and damage to property, utilities, or means of transportation or communication by fire or explosive; [and] 27. [a]ny malicious act done with intent to cause danger to property or endanger the safety of any person in connection with any means of transportation." Jan. 12, 1970, 22 U.S.T. 1, 2-3, T.I.A.S. No. 7035 (effective Dec. 8, 1970).

[72] *See* Extradition Treaty, United States-Italy, Jan. 18, 1973, 26 U.S.T. 493, T.I.A.S. No. 8052 (effective March 11, 1975).

[73] Article II of the Convention on Extradition between the United States and France provides that the following shall be deemed to be extraditable offenses: "16. Offenses against the laws relating to the traffic in, possession, or production or manufacture of, opium, heroin, and other narcotic drugs, cannabis, hallucinogenic drugs, cocaine, and its derivatives, and other dangerous drugs and chemicals; or poisonous chemicals or substances injurious to health." Feb. 12, 1970, 22 U.S.T. 407, 409, T.I.A.S. No. 7075 (effective April 3, 1971).

[74] García-Mora, *supra* note 65, at 1239.

[75] *See, e.g., In re* Ezeta, 62 F. 972 (1894).

[76] *See* 6 M. Whiteman, *supra* note 49, at 800; García-Mora, *supra* note 65.

standing of the American approach to relative political offenses it is instructive first to examine British precedent on which the American courts initially relied.

THE BRITISH APPROACH

British extradition law has been governed by statute since the passage of the Extradition Act of 1870.[77] This act specifically provides exceptions for offenses of a political character and offenses for which the offender has been sought with the intent to punish him for a political action.[78] The term "political character," however, is not defined either in the Extradition Act or elsewhere in British statutes. The court in *In re Castolini*[79] made the first judicial attempt to supply content to the phrase. *Castolini* created the basic substantive test which has dominated Anglo-American law in this area since 1891.

Angelo Castolini was arrested in England after Switzerland sought his extradition for the murder of Luigi Rossi, a Swiss government official. The people of the Swiss town of Bellizona had petitioned the government for revision of the Constitution of the province. The government, apparently fearing a loss of power, refused to hold a popular vote on the issue as required by law. The townspeople then raided the town's arsenal and marched to the municipal palace. After being denied entry to the building by Rossi and another government official, the group stormed the building. Castolini, who was one of the first to enter, shot Rossi as he appeared in the palace's passageway. The record is silent as to whether Rossi offered any armed resistance, but testimony by a leader of the uprising indicates that he did not.[80] Following the takeover of the palace a provisional government controlled the province until the government of the Republic restored order.

Justice Denman concluded that the events in Bellizona at the time of the killing amounted to a state of war within the province and that Castolini was an active participant at a very early stage of the uprising.[81] In finding Castolini not extraditable, Justice Denman formulated the now classic test for application of the political offense exception: first, there must be a political disturbance at the time of the offense; and second, the offense must constitute an overt act incidental to or part of the political disturbance.[82]

A terrorist attack by an avowed anarchist provided the British courts with opportunity to further define the *Castolini* political disturbance test two years later in *In re Meunier*.[83] Meunier had set off various explosive devices at the Cafe Very in Paris and in military barracks outside the city. The explosions killed several individuals, and Meunier sought refuge in England. The French government requested his extradition for murder, attempted murder, and willful damage to buildings. A British divisional court rejected Meunier's habeas corpus petition and held the political offense exception inapplicable to anarchist-inspired offenses.

This holding reflected hostility to the anarchist movement which characterized the period. Non-aligned terrorist-type activities aimed at promoting disorder and disharmony were viewed not as politically related but as a common evil unworthy of protection. Justice Case spoke for the Court:

> [I]n order to constitute an offense of a political character, there must be two or more parties in the state, each seeking to impose the Government of their own choice on the other, and if the offense is committed by one side or the other in pursuance of the object, it is a political offense, otherwise *not*. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the separate body of citizens.[84]

The Court's rationale appears to address both the intent of the offender and the impact of his act.

[77] Extradition Act, 1870, 33 & 34 Vict., c. 52.

[78] The Extradition Act of 1870, 33 & 34 Vict., c. 52, reads in pertinent part:

> (1) A fugitive criminal shall not be surrendered if the offense to which is surrendered or 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 to punish him for an offense of a political character.

[79] [1891] 1 Q.B. 149.

[80] *Id.* at 151.

[81] *Id.* at 152.

[82] *Id.* at 159. According to Justice Denman:

> The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part.

[83] *Id.* [1894] 2 Q.B. 415.

[84] *Id.* at 419.

An offense which is intended only to disrupt the social order, but not to maintain or alter the government, is not political. Likewise, an offense having its impact upon the citizenry, but not directly upon the government, does not fall within the political offense exception.

The English courts first considered the motives of a requesting government in 1895. In *In re Arton* the French government sought a fugitive on charges of embezzlement and fraud.[85] The accused claimed that the French government actually sought to regain jurisdiction over him in order to interrogate him about a political matter. He therefore argued that he was not extradictable because "the requisition for his surrender ha[d] in fact been made with a view to punish him for an offense of a political character."[86] Rejecting this argument, Lord Russell held that the provision under which Arton claimed protection was analogous to the doctrine of speciality,[87] and that it was therefore outside the province of the courts to determine the good faith of the requesting country.[88] He further held that an offense of a political character must be readily defineable and not subject to future definition.[89]

These three cases provided a relatively narrow framework for the application of the political offense exception until the middle of this century: a political offense was defined as incidental to or part of a political disturbance, excluding crimes aimed at the civilian population or undertaken only to create social disorder. The good faith of the requesting country was not questioned. In 1955, however, the case of *Regina v. Governor of Brixton Prison, ex parte Kolczynski*[90] extended the political offense exception.

In *Kolczynski* the British court first allowed the defense to be raised in the absence of a political disturbance in the requesting country.[91] The case involved seven crew members of a Polish fishing trawler who sought political asylum in England after taking control of their boat from a communist crew in international waters. The Polish government requested extradition of the sailors for the common crimes of use of force, depriving superiors and other members of the crew of their freedom, wounding a member of the crew, damaging the trawler's wireless, and preventing the ship's captain from maintaining command, thus exposing the crew to the danger of calamity at sea and loss of life.[92] The Court permitted the fishermen to introduce various documents showing that any trial in Poland ostensibly for the extradited offenses would in fact result in punishment for the treasonous act of defecting to a capitalist country.[93] This evidence led the Court to deny extradition under the political offense exception. Justice Cassels concluded that extradition was being sought with a view toward punishing the defendants for political acts and that therefore the motives of the requesting country precluded surrender of the fugitives under the second part of the Extradition Act.[94] Justice Goddard, on the other hand, reached the same result without emphasizing the motives of the Polish government. Rather, he suggested that a humanitarian perspective of changing world conditions required a more liberal interpretation of *Castolini* even where the offenses did not form part of a general uprising. He reasoned that the evidence admitted on the prisoners' behalf showed that their crimes were political in that they were aimed at the Polish government which suppressed any meaningful dialogue within its border.[95]

Although the justices differed in their reasoning, the ultimate result in *Kolczynski* was to apply the political offense exception to an act unconnected to a general disturbance solely because of the motives of the parties involved. The Court's divided opinion did not make clear whether future decisions would rest on the motives of the requesting country or on those of the defendant, but it was apparent that the Court was willing to consider the nature of the requesting government in applying the political offense exception. The *Kolczynski* case marked the British courts' farthest extension of the political offense exception, and many scholars believed that it offered hope to those who must commit crimes to escape persecution in their homeland.[96]

[85] [1896] 1 Q.B. 108; [1896] 1 Q.B. 509.

[86] [1896] 1 Q.B. 108.

[87] The doctrine of specialty allows the requesting country to try the accused only for the offense for which extradition was sought. *See* note 128 *infra.*

[88] [1896] 1 Q.B. at 115.

[89] *Id.* at 114. *See also* concurring opinion of Wills, J. *Id.* at 115–16.

[90] [1954] 1 Q.B. 540; *See* discussion in I.A. SHEARER, *supra* note 12, at 175–78.

[91] [1954] 1 Q.B. 540.

[92] *Id.* at 543.

[93] *See* [1955] 3 All E.R. 33.

[94] [1955] 1 Q.B. at 548.

[95] *Id.* at 549–50 (Goddard, C.J.). It is at least arguable that such decisions involving humanitarian considerations are better left to the executive branch of government as in American extradition proceedings.

[96] Cantrell, *supra* note 9; *see* García-Mora, *supra* note 65, at 1244.

The *Kolczynski* decision was later refined in *Schtraks v. Israel.*[97] In *Schtraks* the defendant, Shalom Schtraks, had attempted to have his nephew educated as an Orthodox Jew against the wishes of the boy's parents. After hiding the youth in a settlement in Israel he fled to England. Israel sought Schtraks' extradition on the charge of child stealing and perjury. During the extradition proceeding, Schtraks attempted to show the close interrelationship of politics and religion within Israel. He also attempted to demonstrate that the question of religious orthodoxy was a highly charged political issue in Israel. The Court, however, refused to find that the act was political. Although Schtraks' actions were intended to avoid what he perceived as political persecution, the Court concluded that they were based ultimately on personal motivations and that the political nature of the act was only a tangential factor.[98]

The Court thus declined to adopt a "pure motive" approach. Like the justices in *Kolczynski*, Viscount Radcliffe pointed out that the test in *Castolini* was still valid, but not conclusive in determining whether an offense was political.[99] Offering a refinement of the *Kolczynski* holding, the Viscount Radcliffe stated that it was necessary to evaluate the objective conditions surrounding the accused's actions and to determine whether the requesting nation seeks his extradition primarily for "criminal" or for "political" reasons.[100] If the posture of the requesting government is politically neutral, then the accused may be extradited regardless of motive:

> There may, for instance, be all sorts of contending political organizations or forces in a country, and members of them may commit sorts of infractions of the criminal law in the belief that by so doing they will further political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders.[101]

Reconciling *Castolini* and *Schtraks* appears to require the continued application of the nexus test to offenses which form part of a disturbance or uprising. When the exception is claimed for isolated acts, the British courts seem willing to examine the accused's motives as well as those of the requesting country. Implicit in this approach is the courts' constant reevaluation of the political offense exception in light of the existing international environment.

THE AMERICAN APPROACH

The approach of the American judiciary to the political crimes exception has not substantially deviated from the *Castolini* test, which required that an overt act be committed in furtherance of a political disturbance. The American courts, unlike their British counterparts, have not been willing to consider the motivations of either the defendant or the requesting country.[102] This narrow interpretation of the exception may be characterized as both underinclusive and overinclusive, as it tends to exempt from extradition all crimes occurring during a political disturbance, but no offenses which were not contemporaneous with an uprising.[103] The strict adherence to the requirement that the act be tied to an uprising or disturbance may operate to exclude from protection many individual acts of

[97] [1962] 3 All E.R. 529.

[98] *Id.* at 540.

[99] *Id.*, where the Justice states:

> In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country. The analogy of "political" in this context is with "political" in such phrases as "political refugee," "political asylum" or "political prisoner." It does indicate, I think, that the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international aspect.

[100] *Id.*

[101] *Id.*

[102] *See* note 64 *supra*; *see also* Peroff v. Hylton, 542 F.2d 1247; Garcia-Guillern v. United States, 450 F.2d 1189.

[103] *See, e.g.*, United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). *CF.* Schtraks, v. Israel [1962] 3 All E.R. 529. With regard to the question of contemporaneity, Viscount Radcliffe noted:

> Generally speaking, the courts' reluctance to offer a definition has been due, I think, to the realisation that it is virtually impossible to find one that does not cover too wide a range. This is seen in the very full consideration that was given to the question in *Re Castioni* particularly when counsel for the applicant's argument in that case is set against the subsequent observations of the three judges who decided it, Denman, Hawkins and Stephen, JJ. It was recalled that during the debate of 1866 that preceded the Extradition Act, John Stuart Mill, then a member of the House of Commons, had suggested as a definition,"any offence committed in the course of or furthering of civil war, insurrection, or political commotion." Stephen, J., himself had offered the view in his *History of the Criminal Law of England*, Vol.

legitimate political resistance. Conversely, the overinclusive aspect of the approach may operate to protect common criminals simply because their crimes occur during times of political disorder. Theoretically, review of certifications of extradition by the Secretary of State may justify and partially remedy the problem of underinclusiveness,[104] however, the State Department's traditional policy of noninterference has resulted in almost uniform enforcement of judicial orders of extradition.[105] In those cases where a strict construction of *Castolini* results in a denial of extradition, the Secretary of State is, of course, entirely precluded from acting.[106]

The narrow interpretation of *Castolini* was first adopted by a United States court in an 1894 case, *In re Ezeta*,[107] involving a request by San Salvador to extradite its former President, Antonio Ezeta, and four of his military officers from the United States. The requisition charged these individuals with the crimes of murder, robbery, and arson. These charges allegedly arose from acts that Ezeta and his aides undertook while attempting to maintain their government against the revolutionary movement that eventually overthrew them.[108] The trial court held that all but one of the alleged events were political because they occurred during a time of armed rebellion within the country. The exception involved an individual charged with the attempted murder of a civilian. The court held *Castolini* inapplicable to this charge because the crime took place four months prior to the start of armed violence in San Salvador. In responding to the defendant's contention that San Salvador's request was politically motivated, the Court deferred the issue to resolution by the Secretary of State.[109]

Two years later the Supreme Court refined the *Ezeta* court's application of the political offense exception. In *Ornelas v. Ruiz*[110] the government of Mexico sought the extradition of three individuals who had crossed the Rio Grande with a group of approximately 140 other armed men. The group subsequently attacked forty Mexican soldiers in the village of San Ignacio and terrorized the town and its citizenry. The magistrate first hearing the case concluded that the defendants' actions were personally motivated and not intended to further the political disturbances then occurring within Mexico. The Supreme Court affirmed the magistrate's ruling as supported by the record, thus interpreting *Castolini* as requiring that the defendants' actions be not only contemporaneous with some political disturbance, but also unqualifiedly connected with the furtherance of the political revolt.[111]

The history of the extradition proceedings against Andrija Artukovic[112] underscores the importance of the distinction between "furtherance" and contemporaneity. The Yugoslavian government sought Artukovic, the former Minister of Internal Affairs for the pro-German government of Croatia during World War II, for allegedly ordering the execution of two hundred thousand inmates of concentration camps in Yugoslavia during the war. While awaiting an extradition hearing on the matter, Artukovic filed a petition for a writ of habeas corpus with the District Court for the Northern District of California.[113] The Ninth Circuit affirmed the district court's decision to grant the writ prior to any evidentiary hearing.[114] Both courts determined that the offenses charged were political because they occurred during the German invasion of Yugoslavia and subsequent establish-

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2, p. 71, that political offences comprised only those crimes that were "incidental to and formed a part of political disturbances." The court was unanimous in holding Mill's definition to be altogether too wide. The offender must be at least politically motivated. 3 All E.R. at 539.

[104] *See* note 64 *supra*, and accompanying text.

[105] *Id.*

[106] *In re* McMullen, No. 3-78-1099 MG, serves as such an example.

[107] 62 F. 972 (N.D. Cal. 1894).

[108] The acts alleged in the extradition complaint included: (1) robbery of a bank to pay soldiers involved in fighting revolutionary forces; (2) the murder of a civilian who was thought to be a spy; (3) the hanging of four individuals who refused to defend the then existing government against the revolutionary forces; (4) the murder of an individual who helped the revolutionary forces in overthrowing the Ezeta government; 62 F. 972, 979-80 (N.D. Cal. 1894).

[109] 62 F. at 986 (N.D. Cal. 1894).

[110] 161 U.S. 502 (1896).

[111] *Id.* at 511.

[112] 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *rev'd per curiam*, 355 U.S. 393 (1958), *decision on remand sub nom.* United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). The Yugoslavian indictment accused Artukovic of "having, in the course of 1941 and 1942, when Yugoslavia was occupied by German and Italian troops, issued orders based on criminal motives, hatred, and the desire for power to members of bands of which he was one of the leaders, to carry out mass slaughters of the peaceful civilian population of Croatia, Bosnia and Herzegovina." 247 F.2d at 204.

[113] 140 F. Supp. 245 (S.D. Cal. 1956).

[114] 247 F.2d 198 (9th Cir. 1957).

ment of the short-lived independent government of Croatia.[115] Neither court considered the civilian status of Artukovic's alleged victims or analyzed whether the murder of two hundred thousand persons was actually in furtherance of a political end.[116]

The United States Supreme Court, in a one paragraph per curiam opinion, reversed the Ninth Circuit and remanded the case for an evidentiary hearing.[117] The hearing was subsequently held before a federal magistrate and extradition again was refused, this time on the ground that there was insufficient evidence to establish probable cause of Artukovic's guilt.[118] In dicta, however, the magistrate adopted the earlier Ninth Circuit opinion which concluded that because the crimes were committed during a struggle for power they were political in character.[119] Neither court analyzed, nor did they seem to consider, the requirement that a nexus be shown between the mass killings and the political struggle. This conclusion, although not the ultimate holding in the *Artukovic* case, is unsettling because it places greater emphasis on the timing of the defendant's acts than on whether he in any sense furthered a political revolt. Both the circuit and district courts refused to interpret war crimes against civilians as being beyond the purview of the *Castolini* test.[120]

Since *Artukovic*, the courts have applied the *Castolini* test with a relatively consistent regard for whether the accused committed the offense in furtherance of political revolt. In *Ramos v. Diaz*,[121] for example, the Cuban government requested extradition of two former soldiers who had escaped from prison following Castro's rise to power. A Cuban court had convicted the men for killing an escaping prisoner shortly following Batista's downfall. The United States district court concluded that the victim had been a political prisoner captured in furtherance of the uprising and that the offense therefore was political in character. The court looked beyond the existence of the Castro uprising to consider the identity and political position of the victim as well as the manner in which the acts of the accused played a part in the revolution.[122] Similarly, in *In re Gonzalez*[123] the district court held that, in the absence of an uprising, the murder of two prisoners by a guard in the Dominican Republic could not have been in furtherance of a political goal.[124]

Other than in scattered dicta, the American courts have refused to inquire into the motive behind the requesting country's requisition.[125] For example, in *Jimenez v. Aristeguieta*[126] the Venezuelan government sought the extradition of the recently deposed President Jimenez on charges of murder, embezzlement, and fraud, all extraditable offenses under the treaty between the United States and Venezula. After a finding of probable cause on the embezzlement and fraud charges,[127] the court certified Jimenez to the Secretary of State who ordered his extradition to Venezuela.[128] The case is significant because it indicates the strictness of the American judiciary's interpretation of the political offense exception. Even where a former head of state was sought by those who forcibly overthrew him, the court declined to examine the motives behind the request.[129]

[115] 140 F. Supp. at 246–47; 247 F.2d at 204.

[116] *Id.*

[117] 355 U.S. 393 (1958) (hearing to be conducted pursuant to 18 U.S.C. § 3184).

[118] 170 F. Supp. 383 (S.D. Cal. 1959).

[119] *Id.* at 393.

[120] 140 F. Supp. at 247; 247 F.2d at 204–05; 170 F. Supp. at 392–94. *See also* M. BASSIOUNI, EXTRADITION, *supra* note 21, at 420–26.

[121] 179 F. Supp. 459 (S.D. Fla. 1959).

[122] *Id.* at 462–63. Although the court cited *Artukovic* as authority, it is clear from the opinion that the analysis in *Diaz* went well beyond a determination of contemporaneity.

[123] 217 F. Supp. 717 (S.D.N.Y. 1963).

[124] *Id.* at 721. The district judge did suggest in dicta that under some circumstances it might be appropriate to relax the political disturbance requirement, particularly where the requesting government is a totalitarian state. The court concluded, however, that Gonzales had been in no sense politically motivated and was therefore definitely liable to extradition under any approach. *Id.* at 721 n.9.

[125] *See In re* Gonzalez, 217 F. Supp. at 721.

[126] 311 F.2d 547 (5th Cir. 1962), *aff'd per curiam sub nom.* Jiminez v. Hixon, 314 F.2d 654 (5th Cir.), *cert. denied*, 373 U.S. 914 (1963).

[127] Similarly, it appears that the American judiciary has not considered financial crimes whether committed by governmental officials or businessmen as falling within the political crimes exception. *See* Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976); Garcia-Guillern v. United States, 450 F.2d 1189; *In re* Locatelli, 468 F. Supp. 568 (S.D. Fla. 1979); *In re* Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978); Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77, *cert. denied*, 364 U.S. 851 (1960).

[128] Prior to extradition, the Secretary of State received the assurances of the Venezuelan government that Jimenez would be tried only for those offenses for which he was extradited. Jimenez v. Aristeguieta, 311 F.2d 547.

[129] *See* I.A. SHEARER, *supra* note 12, wherein the author, after reviewing the American approach, severely criticizes it as narrow and outdated.

What emerges from the American decisions is a considerably greater adherence to the political disturbance requirement than that of Great Britain.[130] The potential harshness of this requirement upon individuals undertaking individual actions of conscience is somewhat mitigated, however, by the fact that purely political offenses, such as sedition, are never extradictable.[131] Furthermore, the rule of dual criminality[132] will prevent the extradition of persons sought for nonviolent speech or assembly offenses since those acts are not crimes in the United States. Thus, political dissent which does not include the commission of a common crime is protected under the treaty exception whether or not undertaken in aid of a general uprising. Finally, it always remains the prerogative of the executive branch to refuse extradition on political grounds.[133]

The American approach, however, provides a workable standard only when the courts avoid the pitfall of mechanistic application. Contemporaneity with a political disturbance must be viewed as a prerequisite to the defense, not as its embodiment. In order to distinguish actual revolution from random terror the judiciary must undertake the difficult and delicate task of deciding what acts are or are not attempted in furtherance of a political uprising. Unfortunately, the courts have not to date developed a uniform procedural approach to this determination.

Raising the Political Offense Exception in American Courts

American law has not developed a uniform procedure for raising or sustaining the political offense exception. In many ways the exception resembles both a jurisdictional issue and an affirmative defense. Because a political connection makes an offense nonextraditable, it may be seen as depriving the court of jurisdiction.[134] On the other hand, a court might treat the political nature of the offense as a collateral fact which defeats or negates the claim for extradition and which thus amounts to an affirmative defense. The principal distinction between these two approaches is in their relative placement of the burden of production and the ultimate burden of proof.

The jurisdictional approach implies that the requisition for extradition must allege the nonpolitical nature of the crime as an element of the court's jurisdiction. Since the requesting country must allege that the treaty of extradition is operative and applicable to the particular case,[135] the request should then also contain sufficient facts to demonstrate that the underlying offense is not political in nature. The burden of pleading such facts is on the requesting country, and a request which failed to meet this burden could be challenged in a pretrial motion akin to a motion to dismiss.

This approach, adopted by both the district[136] and circuit courts[137] in the *Artukovic* case, was ultimately rejected by the Supreme Court.[138] Artukovic, it will be recalled, was charged by the Yugoslavian government with the murder of thousands of concentration camp inmates.[139] The defendant contended that the crimes charged were political offenses and prior to any evidentiary hearing he filed a petition for writ of habeas corpus.[140] The district court granted the writ on the ground that the political nature of the crimes was apparent on the face of the indictment.[141] The circuit court affirmed, recognizing that the case was one which dealt with relative political offenses.[142] Both lower courts determined that the crimes were political primarily because the indictment referred to the German occupation of Yugoslavia and to the defendant's position in the Croatian government. Thus, the burden was placed on the requesting country to include in its requisition sufficient information to remove the charged murders from the political sphere, or at least to refrain from inserting any information that even suggested a political connection. Because the Yugoslavian indictment of Artukovic did not meet this burden, the lower courts dismissed the requisition prior to trial. The Supreme Court, however, subsequently vacated the writ and remanded the case for hearing.[143] Although the Court's one paragraph per curiam

[130] *Cf. In re* Gonzalez, 217 F. Supp. at 721 (murder in absence of uprising not political). *See also* Cantrell, *supra* note 9, wherein the author urges American courts to extend the *Gonzalez* interpretation to make the American approach to extradition consistent with England.

[131] *See* note 74 *supra* and accompanying text.

[132] *See* note 37 *supra* and accompanying text.

[133] *See* text accompanying notes 57–63 *supra.*

[134] M. Bassiouni, Extradition, *supra* note 21, at 515.

[135] *See* note 37 *supra.*

[136] Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956).

[137] Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957).

[138] Karadzole v. Artukovic, 355 U.S. 393 (1958) (per curiam).

[139] Artukovic v. Boyle, 140 F. Supp. at 246.

[140] *Id.*

[141] *Id.* at 247.

[142] Karadzole v. Artukovic, 247 F.2d at 203–04.

[143] 355 U.S. 393.

opinion did not set forth the basis for decision, the reason was clearly the failure of the district court to hold an evidentiary hearing.[144]

Artukovic, though, actually charged with the common crime of murder, claimed that the acts were committed in a political context.[145] His defense, therefore, was that the extradition request was for a relative political offense.[146] If the American test for a relative political offense was mere contemporaneity with a political disturbance, then the issue might reasonably be resolved on a motion to dismiss or pretrial habeas corpus petition. The actual test, however, is whether the acts were committed in furtherance of a political goal.[147] Determination of this issue requires consideration of the motives of the defendant as well as both the context and impact of the act. Since this information cannot be gathered from an examination of the requisition, the extraditing court must hear evidence on the issue. This requirement accords with the often stated principle that the political offense exception is a mixed issue of law and fact, but primarily one of fact.[148]

An additional consideration against the jurisdictional approach is the burden that it places on the requesting country. In order to insulate its requisition from a claim of a relative political offense, the requesting country must allege sufficient information to demonstrate that the crimes were not in furtherance of a political objective. Not only would this require the requesting country to "plead proof," it would require proof of a negative. The better approach, comporting with the purposes of extradition treaties, requires only that the requisition set forth the ultimate facts in support of the request and leaves the finer factual issues for resolution at trial.

There are, however, two political defenses that the accused might raise by motion prior to trial. A requisition for extradition charging a purely political offense rather than a common crime, obviates the need for any factual determination because purely political offenses are never extraditable.[149] Similarly, a defense based upon the doctrine of dual criminality, requiring only an examination of the relevant foreign and American statutes,[150] could also be raised on motion. A claim of relative political offense however, is an issue of substance which requires evidentiary support and must be resolved at trial. Although it seems clear that the defendant bears the initial burden of raising the defense,[151] two procedural questions remain: (1) what quantum of evidence, if any, is required to raise the defense, and (2) who bears the ultimate burden of proof?

The fact that no court has specifically or systematically addressed these questions[152] might, in part, be attributable to the very nature of the extradition process that intertwines domestic law and foreign affairs. The judiciary, consistent with a policy of preserving flexibility in matters touching upon foreign policy,[153] has allowed each magistrate to define his own procedural approach.[154] To shift the burden to the requesting courts, some courts have required expert testimony pursuant to statute[155] to explain the surrounding political situation,[156] whereas others appear only to have required an assertion of the defense.[157] This case by case ap-

[144] This was the interpretation of the federal magistrate who heard the case on remand. United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

[145] Artukovic v. Boyle, 140 F. Supp. 245.

[146] Karadzole v. Artukovic, 247 F.2d 198.

[147] *See* text accompanying notes 121–24 *supra.*

[148] Ornelas V. Ruiz, 161 U.S. at 504; M. BASSIOUNI, EXTRADITION, *supra*, note 21 at 400.

[149] *See* note 74 *supra* and accompanying text. The formal charge will always appear on the face of the request. *See* note 37 *supra.*

[150] *See* note 44 *supra.*

[151] *See In re* Gonzalez, 217 F. Supp. 717; Ramos v. Diaz, 179 F. Supp. 459. In *Artukovic* the district court on remand referred to the political offense exception as an affirmative defense. United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. at 392.

[152] *See* 2 C. HYDE, *supra* note 65, at 1025; Proceedings of The American Society of International Law, Third Annual Meeting (April 23 & 24, 1909). The test as applied by American courts is "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 to the contrary." Ramos v. Diaz, 179 F. Supp. at 463 (quoting 2 C. HYDE, *supra* note 65, at 1025).

[153] United States v. Curtiss-Wright Export Corporation v. United States, 299 U.S. 304 (1936). *Cf.* Baker v. Carr, 369 U.S. 186 (1962) (judiciary may interfere in function of another branch of government).

[154] *See* First National City Bank of New York v. Aristeguieta, 287 F.2d 219, 226 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49 (1963).

[155] 18 U.S.C. § 3191.

[156] *See In re* Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.).

[157] This appears to be the case from the court's language in Ramos v. Diaz, 199 F. Supp. at 463.

It appears, after a careful review of the literature and case law, that the first and only major dialogue on this issue occurred before the American Society of International Law in 1909. Two experts on extradition matters addressed this issue and came to two entirely opposite conclusions based upon policy considerations. J. Reuben Clark, Jr., a solicitor with the Department of State,

proach might be adequate for an infrequently raised defense. At a time, however, when the extradition of Iranians, Palestinians, Irish, Haitians, and others is a topic of almost daily political, legal, and popular concern, it clearly is insufficient.

RAISING THE DEFENSE

Anglo-American law has long depended on the allocation of burdens of production to achieve basic policy goals.[158] In criminal cases this allocation reflects not only a concern for fairness to the defendant, but also a social judgment that it ought to be difficult for the state to deprive persons of their liberty.[159] Thus, the defendant is presumed innocent until proven guilty, and the prosecution must prove every element of the crime beyond a reasonable doubt.

Even within this framework, however, defendants may be required to meet certain burdens of production when raising certain defenses. These burdens vary according to policy considerations relevant to the defense involved. Thus, a defendant claiming that his confession was obtained in violation of his *Miranda* rights need only assert involuntariness in order to require the state to prove compliance with the rule by a preponderance of the evidence.[160] On the other hand, a defendant seeking to suppress evidence of a suggestive pretrial identification must himself establish suggestiveness by a preponderance of the evidence.[161] This disparity in the defendant's burden reflects the primacy in our system of the privilege against self incrimination, in contrast to the lesser importance accorded to the less intrusive nature of a pretrial identification. Similarly, in *Leland v. Oregon*[162] the United States Supreme Court held that the states are free to place the burden of establishing affirmative defenses upon the defendant, and may even require that defendants prove certain defenses beyond a reasonable doubt.[163]

The burden of establishing the political offense exception also may be seen as a question of policy rather than one of constitutional rights or fundamental fairness.[164] It is necessary to balance the competing considerations of international comity, enforcement of treaty provisions, and protection of political dissent, within a procedural framework that allows the defendant a fair opportunity to raise the defense without unduly burdening the requesting state.

In *Ramos v. Diaz*[165] the district judge addressed the question of relative burdens and concluded 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 to the contrary."[166] This interpretation is most advantageous to the defense because the "tending to show" standard can easily be met in virtually every case where the defendant claims the benefit of the treaty exception. The burden then would shift to the requesting country to disprove the political connection, presumably by at least a preponderance of the evidence.[167] The difficulty with this standard is that its operation requires the requesting country to negate all possible political connections without first requiring the defendant to establish the parameters of his claim.

The presiding magistrate in *Abu Eain* recognized this problem. Abu Eain argued that in order to shift the burden of proof to the requesting state, he need only produce some evidence which tended to

argued that the accused bore the burden of raising and proving the political offense defense by a preponderance of the evidence. His opinion was based upon general principles involved in the pleading of jurisdictional issues and the fact that the defense ran to the Court's jurisdiction under habeas corpus. On the other hand, Julian W. Mack, a practitioner from Chicago, argued that the raising of the political offense exception went to the merits of the extradition request and once raised by the introduction of some evidence by the accused, the burden shifted to the requesting country to show that the act was a common crime by some unspecified standard of proof. Thus, it was Mr. Mack's position, at that time, that the underlying policy of the political offense exception, namely the promotion of political change, required that special protection be afforded to anyone claiming to fall under the exception, as long as some political rationale could be applied under domestic law. Proceedings of the American Society of International Law, *supra* note 152, at 95–124 & 144–65 (addresses of J. Reuben Clark, Jr., and Julian W. Mack).

[158] McCORMICK ON EVIDENCE 786–88 (2d ed. 1972).

[159] *In re* Winship, 397 U.S. 358 (1970).

[160] Miranda v. Arizona, 384 U.S. 436 (1966).

[161] United States v. Crews, 48 U.S.L.W. 4325 (1980).

[162] Patterson v. N.Y., 432 U.S. 197 (1977).

[163] 343 U.S. 790 (1952).

[164] Patterson v. N.Y., 432 U.S. 197 (1977).

[165] 179 F. Supp. 459.

[166] *Id.* at 463.

[167] *See* Ramos v. Diaz, 179 F. Supp. at 463. The requesting country in an extradition hearing only bears the burden of showing probable cause because the ultimate issue of guilt or innocence is not under consideration by the extraditing court. *See* note 39 *supra* and accompanying text. The court, however, does resolve the merits of the political offense exception defense. 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.

show the political nature of the crime.[168] The magistrate, however, rejected this contention, and ruled that the defendant was required to show the link between the alleged crimes and their political objective.[169] This requirement recognizes that while mere contemporaneity might tend to show a political connection, more evidence is necessary to meet the test of the substantive law. In essence, the magistrate in the Abu Eain case ruled that in order to raise the political offense exception the defendant must present evidence of each of the substantive elements of the defense.[170]

The better approach is to require the defendant to present a prima facie case that the offense is a political one. The defendant would have to present evidence, either through cross-examination or pursuant to 28 U.S.C. § 3191, which standing alone would be sufficient to show: (1) the existence of a political disturbance; (2) the political motivation or goal of the defendant; and (3) that the acts charged were undertaken in furtherance of the political goal. This evidentiary requirement increases the burden on the defendant, but only with regard to specificity. He may not simply claim the defense, but must establish its elements. He still might do this solely upon his own testimony, or he might rely upon expert witnesses, judicial notice, or even cross-examination. In any event, the requesting state would be given notice of the nature of the claimed political connection. The prosecution could then adduce its own evidence as to the nature and impact of the charged crimes,[171] but would not face the obligation of contradicting all possible political connections.

Assuming that both parties meet their burden of production, one final question remains: which party bears the ultimate burden of proof? On this issue the courts of extradition have been neither consistent nor clear. Some courts have held that the defendant must bear the burden,[172] others have placed it on the requesting government,[173] and still others appear to have voiced both positions in the same opinion.[174]

The nature of the decision to be made, however, indicates that the burden of proof by a preponderance of the evidence should be placed on the defendant.[175] As noted above, the absence of a political connection need not be pled in the extradition requisition; it is rather the proof of a political act which defeats the request.[176] The defense does not negate any of the facts of the charge, but constitutes instead an entirely separate issue dependent upon facts which are beyond the elements of the crime.[177] Since the issue is wholly collateral, the burden of proof must remain upon the party who asserts the claim.[178]

This conclusion will accomplish the basic policy of international cooperation in extradition without seriously compromising political dissent. The placement of the burden of proof will not affect persons charged with either purely political offenses or with offenses involving speech and assembly. Those who have been charged with common crimes will be required to establish a political nexus, but proof of such a connection is uniquely under the control of the defendant. In any event, once it is accepted that the defendant bears the responsibility of establishing a prima facie case for the exception, and that preponderance of the evi-

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[168] *In re* Abu Eain, No. 79 M 175 at 19. 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 at 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 motivations behind the specific bombing with which he was charged. Brief for Petitioner at 25–29, No. 80-1487. On this basis he argued that the requesting state was required to disprove that the charged murders were political crimes. *Id.* at 29.

[169] *Id.* at 20.

[170] *Id.* at 19–21.

[171] The requesting state may meet its burden of production by relying on legal presumptions, rather than by actually introducing evidence. Such presumptions include (1) the rule of speciality, (2) the presumption of good faith on the part of the demanding government, and (3) the presumption that crimes directed against civilians are not "political." Regarding the presumption of good faith, *see In re* Gonzalez, 217 F. Supp. 717; Gallina v. Frazer, 278 F.2d 77. For cases concerning the nonpolitical nature of crimes against civilians, *see* Ornelas v. Ruiz, 161 U.S. 502; *In re* Meunier, [1894] 2 Q.B. 415. *See also In re* Wisconsin and Armstrong, 28 D.L.R.3d 513 (Country Ct. of York, Ontario, Canada, 1972), *aff'd*, 32 D.L.R.3d 265 (Fed. Ct. App. 1973); *In re* Kaphengst, (Fed. Ct. Switz. 1930) 7 Ann. Dig. 292 (Case No. 188) in 6 M. WHITEMAN, *supra* note 49, at 840.

[172] *In re* Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.).

[173] Ramos v. Diaz, 179 F. Supp. at 463.

[174] *In re* McMullen, No. 3-78-1099 MG, mem. at 2, 6 (N.D. Cal. May 11, 1979).

[175] *Id.* at 6.

[176] *See* Karadzole v. Artukovic, 355 U.S. 393.

[177] Patterson v. N.Y., 432 U.S. at 206-07.

[178] *Id.* The British courts require that the defendant prove the political character of the crime. *See, e.g.*, Schtraks v. Government of Israel, [1962] 3 All E.R. at 534.

dence is the standard of proof, the question of ultimate burden recedes in importance. This is because in virtually every case the greater weight of the evidence will either establish or not establish that the offense was committed in furtherance of a political objective. The court then may make its decision based upon what actually was proven, rather than upon which party had the obligation of proving it.

The question of burden of proof will remain important only in those cases where the evidence approximates equipoise. In those cases it is appropriate that the balance tip in favor of the requesting state. Our courts generally presume the good faith of those governments with whom we have entered into extradition treaties,[179] and there is scant reason to abandon this principle in favor of individuals who have not established that their actions were in furtherance of political ends. This burden will disadvantage only those who have been charged with common crimes and who have not satisfactorily shown a political nexus. Even in these cases the defendant will continue to have recourse to the Secretary of State. Therefore, it is reasonable to place the ultimate burden of proof on the party claiming the benefit of the political offense exception.[180]

[179] *In re* Gonzalez, 217 F. Supp. 717; M. BASSIOUNI, EXTRADITION, *supra* note 21, at 466.

[180] *See* Patterson v. N.Y., 432 U.S. at 207–09; Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 997 (5th Cir. 1977).

CONCLUSION

The role of the American judiciary in the extradition process is mainly preliminary. The courts do not pass upon guilt or innocence, nor do they actually order extradition. Rather, it is the function of the judicial officer to ensure that the defendant is afforded basic due process before the Secretary of State makes the ultimate decision on extradition. Recognition of this limited judicial role no doubt contributes to the limited judicial development of procedural law in this area.

With regard to the political offense exception, however, the courts may actually make the final determination. A judge's decision that a crime falls within the exception may not be reviewed. The importance of this decision to both domestic law and foreign affairs requires not only a strict interpretation of the substantive law but also a coherent procedural framework.[181]

Although the courts have substantially developed a workable interpretation of the political offense exception, no consistent procedural approach has emerged. Congress could provide such an interpretation by enacting new legislation which both defines the meaning of political offense and provides a detailed procedural guide for raising the exception. This would undoubtedly promote both American foreign policy and the international right of political dissent.

[181] The lack of review of judicial decisions applying the political offense exemption also provides an argument in favor of deferring consideration of the issue to the Department of State. *See* note 61, *supra*.