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## The Evisceration of the Political Offense Exception to Extradition

### Keywords

Extradition, Political Crimes, States

# CRITICAL ESSAYS

## The Evisceration of the Political Offense Exception to Extradition

CHRISTOPHER L. BLAKESLEY\*

The Supplementary Convention to the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, was signed on June 25, 1985, and transmitted to the U.S. Senate on July 17, 1985.<sup>1</sup> This article will focus on the portion of the supplementary treaty which effectively eliminates the political offense exception, and on the statement made by the Legal Adviser to the Department of State, the honorable Judge Abraham D. Sofaer, made in favor of the Supplementary Treaty, on August 1, 1985. This article suggests that approval of the convention was a mistake and criticizes this Convention's evisceration of the political offense exception and recommends that the supplementary treaty, in its present form, not be approved.

First, this author will provide a comparative analysis of the political offense exception and its application by various jurisdictions around the world. This article's purpose is to demonstrate that the attempt to fight international terrorism by way of an evisceration of the political offense exception to extradition is not an efficient means of fighting terrorism and, — more dangerously — is inconsistent with the United States Constitution, legal traditions and social values. Moreover, this analysis will also demonstrate that the various approaches adopted by the nations with which the U.S. negotiates on extradition matters provide the necessary means for courts to fight terrorism, while not eroding basic U.S. institutions.

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1. Extradition Treaty, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468.

## II. POLITICAL OFFENSES: HISTORICAL AND CONCEPTUAL BACKGROUND

The political offense exception to extradition is one of the more controversial topics in extradition law today. This is because, paradoxically, it is one of the most universally accepted, but still contested rules of international law.<sup>2</sup> It remains heatedly contested because it is generally invoked by many who have participated in wanton violence (terrorism) and who, therefore, should not be able to benefit by receiving its protection.<sup>3</sup> Further, it is often difficult for courts to discern whether the conduct generating the criminal charge fits the criteria for the exception.

Virtually all extradition treaties contain the political offense exception or defense. Yet, in spite of its universality, no extradition treaty and virtually no legislative act, has attempted to define the terms "political offense" and "offense of a political character."<sup>4</sup> Thus, courts have had to provide the guidelines for determining whether or not a particular offense committed falls within the exception. The term "political offense" has been characterized as referring not to a well-determined criminal transaction which can be specified in terms of a moral and mental element, but as a "descriptive label" to be considered vis-a-vis otherwise extraditable offenses.<sup>5</sup> This view of the political offense exception provides insight into the courts' various approaches to its application. Three basic types of conduct have been found to exist in the political offense exception to extradition.<sup>6</sup> The exception applies to those offenses which may be called

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2. C. Van den Wijngaert, *The Political Offense Exception to Extradition: Defining the Issues and Searching a Feasible Alternative*, 1985 REV. BELGE DE DROIT INT'L. 1 (1985), presented at the International Seminar on Extradition, International Institute of Higher Studies in Criminal Science, Noto, Italy (June 1983). It is universally accepted in that virtually all domestic extradition laws and international treaties contain the exception. *Id.*

3. *Extradition Treaty Between the United States and the United Kingdom: Hearing on Proposed Anti-Terrorism Legislation Before the Senate Committee on Foreign Relations*, 99th Cong., 1st Sess. (1985) (statement of Abraham D. Sofaer, Legal Advisor, Department of State).

4. See authority in note 6, *supra*. Some scholars have suggested that the term is impossible to define. 1 OPPENHEIM, *INTERNATIONAL LAW* 707-08 (H. Lauterpacht 8th ed. 1955); *Cf.*, Hammerich, *Rapport general sur la definition du delit politique*, in [1938] *Actes de la Sixieme Conference Int'l. pour l'Unification du Droit Penal* 61; Van den Wijngaert, *supra* note 2, at 4.

5. Van den Wijngaert, *supra* note 2, citing M.C. BASSIOUNI, *The Political Offense Exception in Extradition Law and Practice*, in *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 408 (Bassiouni ed. 1975).

6. See generally Van den Wijngaert, *supra* note 2; J. MURPHY, *PUNISHING INTERNATIONAL TERRORISTS: THE LABORS OF SISYPHUS* (1985); Note, *Extradition Law: Applicability of the Political Offense Exception*, 23 HARV. INT'L L.J. 124 (1983); Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorist: Old Doctrine Reformulated and New Norms Created*, 1 AM. SOC'Y INT'L L. PROC. 1 (1977); Blakesley, *Jurisdiction Over Extraterritorial Crimes*, in 2 *INTERNATIONAL CRIMINAL LAW (Procedure)* (Bassiouni ed. 1986); M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (1982); Blakesley, *Extradition Between France and the United States: An Exercise in Comparative and International Law*, 13 VAND. J. TRANSNAT'L. 653 (1980); Blakesley, *The Practice of Extradition From Antiquity to Modern France and the United States*, 4 B.C.

“purely political offenses” such as treason, sedition, or espionage. There does not appear to be a significant problem with the application of the exception in the context of so-called “purely political offenses.”<sup>7</sup> In addi-

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INT'L & COMP. L. REV. 39 (1981); see also Travers, *La Loi Francaise d'extradition du 10 mars 1927*, 54 JOURNAL DU DROIT INTERNATIONAL 595, 600 (1927), for an analysis of the political offense exception in the French Extradition Law of 1927. GRIVAZ, *L'EXTRADITION ET LES DELITS POLITIQUES* (1894); LAIRE, *L'EXTRADITION ET LES DELITS POLITIQUES* (1911); SOLDEN, *L'EXTRADITION DES CRIMINELS POLITIQUES* (1892); Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247 (1933); de Hart, *The Extradition of Political Offenders*, 2 LAW Q. REV. 177 (1886); Evans, *Reflections Upon the Political Offenses in International Practice*, 57 AM. J. INT'L L. 948 (1963); Garcia-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders*, 62 MICH. L. REV. 927 (1964); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962); Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses under the Law of Extradition*, 26 U. PITT. L. REV. 65 (1964); Martens, *L'Extradition Pour Delits Politiques*, 11 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE [R.D.I.L.C.] 44 (1881); Rolin, *Du Principe de la Non-Extradition Pour Delits Politiques*, R.D.I.L.C. 17 (1892); Rolin, *Les Infractions Politiques*, 15 REVUE DE DROIT INTERNATIONAL 545 (1887); Scott, “Political Offense” in *Extradition Treaties*, 3 AM. J. INT'L L. 459 (1909); Weiss, *Les crimes et delits politiques dans les rapports de l'Autriche-Hongrie et de la Russie*, 10 JOURNAL DU DROIT INTERNATIONAL PRIVE 247 (1883); Yoshitomi, *Extradition de Coupables Politiques Chinois par les Autorites Britanniques de Tien-Tsin en novembre 1926*, 34 REVUE GENERAL DE DROIT INTERNATIONAL PUBLIC 85 (1927). Objectivized definitions of the notion of “political crime” have been attempted by many writers. Some are listed by S. SCHAFER, *THE POLITICAL CRIMINAL* 10-11, n. 5 (1977).

7. Harvard Research, *In International Law: Extradition*, 29 AM. J. INT'L L. 15 (Supp. 1935); and Garcia-Mora, *supra* note 6, at 1239, provide some examples. For example, when the Allies sought the extradition of William II of Germany from the Netherlands after World War I by invoking article 227 of the Versailles Treaty, the Government of the Netherlands rejected the request as being based on a political offense. The German Extradition Law of Dec. 23, 1929, art. 3(2), attempted to define political offenses. It stated that they are:

[T]hose punishable offenses . . . which are directed immediately against the existence of the security of the State, against the head or member of the government of the State, as such, against a body provided for by the constitution, against the rights of citizens in electing or voting, or against the good relations with foreign states.

Quoted in Harvard Research, *supra*.

This definition has been criticized as being both too broad and too narrow in light of the modern totalitarian states. See S. SCHAFER, *THE POLITICAL CRIMINAL* (1977); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1230 (1962). Finally, after much dispute, French jurisprudence opted for the opposite view. It was determined that the offense of this order would be considered nonpolitical for purposes of punishment.

Even purely political offenses have caused wavering on the part of the judiciary during certain periods of time. For example, article 84, para. 3, of the French Penal Code of 1939, and treaties between France and Luxembourg executed at about the same time, provided that for the application of penalties, crimes and delicts against the security of the state would be considered as common crimes. This created hesitation and considerable dispute in French jurisprudence. During this dispute, certain *chambres d'accusations* allowed extradition for these offenses, thus abrogating the political offense exception as far as these offenses were concerned. These courts proclaimed the validity of this type of accord and affirmed that, since 1939, offenses against the security of the state had lost their political character for all intents and purposes. The *ordonnance du 4 Juin 1960* completely resolved the ques-

tion, it may apply to "offenses of a political character," or common crimes like burglary or homicide when committed for political purposes. The exception may also apply when the requested state's officials believe that the extradition was requested for a political purpose.

The more difficult application of the defense relates to "crimes, the circumstances of which give them a political character." This concept may be broken down into several more specific approaches incorporated by the judiciaries of various countries for determining whether to apply the defense or exception to extradition.

Specifically, the various approaches developed by American and foreign courts include: the political motivation test (subjective); the injured rights theory (objective); the model of connexity (objective); the political incidence or disturbance test (objective); and the mixed approach (combines the political incidence, connexity, and motivation tests).

The subjective approach focuses on the intentions of the perpetrator of the alleged crime.<sup>8</sup> The objective "political motivation test" has been applied on a few occasions by French<sup>9</sup> and American<sup>10</sup> judiciaries. For

tion when it reinstated the political nature of these violations even for purposes of punishment. See discussion in MERLE & VITU, *TRAITE DE DROIT CRIMINEL: PROBLEMS GENERAUX DE LA SCIENCE CRIMINELLE* 333 (2d ed. 1973). Today, France is very careful to apply the political exception even in cases of common crimes committed for a political purpose. See decision on the extradition of Holder and Kerkow, *reprinted in* 1975 DIG. U.S. PRAC. INT'L L. 168-75, and discussed at note 9 *infra*.

8. Van den Wijngaert, *supra* note 2, at 5.

9. *In re Holder*, *reprinted in* 1975 DIG. U.S. PRAC. INT'L L. 168-75. This is the case of an extradition request by the United States for the alleged hijacker of a Western Airlines aircraft from San Francisco to Algeria. Holder was indicted for violation of several Federal criminal statutes arising out of the hijacking of a plane in June 1972, during a domestic commercial flight. Threatening to set off a bomb during flight, the accused allegedly obtained complete control of the plane. It landed in San Francisco where a replacement flight crew and a second plane were obtained. Holder demanded and received \$500,000; some 40 passengers were transferred to the second aircraft, which then flew to New York. That plane refueled in New York, and then the passengers disembarked before the flight continued to Algeria.

The United States extradition request was denied by the Paris Chambre des Mises en Accusation, apparently on the basis of either the fugitive's political motives or the believed risk of aggravated treatment because of his race (a European Extradition Convention criterion, 359 U.N.T.S. 273, art. 3, *reprinted in* 15 I.L.M. 1272, art. 13 (1)(a)-(c) (1957)). Record of the extradition request and its denial are in the extradition files of the Office of the Legal Advisor to the Department of State. The legal briefs in opposition to the Holder decision and the diplomatic note protesting it are reported in 1975 DIG. U.S. PRAC. INT'L L. 168-75. See also *In re Henin*, Cours d'Appel (Paris), *La Semaine Juridique* 15274 (1967).

10. *In re Gonzales*, 217 F. Supp. 717 (S.D.N.Y. 1963). In approving the extradition to the Dominican Republic of an alleged former agent of the late dictator Trujillo's intelligence apparatus, a United States district court declared that "nothing in the record . . . suggest[s] that Ortiz acted with such essential political motives or political ends as might justify substantial relaxation of the political disturbance requirement . . . [T]he political offense principle is inapplicable here." *Id.* at 722.

British cases also have occasionally had a tendency to consider the political motivation of fugitives: see *Ex parte Kolczynski*, [1955] 2 Q.B. 540, in which extradition was denied for

example, some American decisions have hinted that the motivation behind the offense may be considered as a separate test for determining the political character of the offense.<sup>11</sup> However, as Judge Sofaer rightly suggests, the judiciaries in France, Switzerland, and the United States have clearly moved away from the political motivation test. The French courts appear now to have begun to follow the "predominance test" or "proportionality theory", a form of the "mixed approach" developed by Swiss jurisprudence. This test appears to use both subjective and objective criteria to determine whether a given offense is of sufficient political character to warrant exception of its perpetrator from extradition.<sup>12</sup> The test was refined in 1951 by the opinion in the *Ockert* case where the Swiss court defined political offenses, as those "acts which have the character of an ordinary crime appearing on the list of the extraditable offenses, but which, because of the attendant circumstances, in particular because of the motive and the object, are of a predominantly political complexion."<sup>13</sup> The definition of political offense was modified by the Swiss again in 1952 in order to provide the flexibility to allow exception from extradition for those who commit a crime, such as air piracy, and in order to escape from a "modern totalitarian regime."<sup>14</sup> In 1961, the Swiss Federal Tribunal summarized the jurisprudential development of the basic tenets of the preponderance test and further refined the definition of political offense so that even when the motive is largely political, the means employed must be the only means available to accomplish the end pursued.<sup>15</sup> In *Ktir*, the Swiss court granted a French extradition request for a French national who was a member of the Algerian Front de Liberation Nationale (F.L.N.), who had been charged with the murder of another member

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seven Polish seamen who had revolted aboard ship, wounded a political officer of the Polish Government, and forced the ship into a British port where the crew asked for asylum. See also Garcia-Mora, *The Nature of Political Offenses*, *supra* note 6, at 1242-43; and *Schtraks v. Government of Israel*, [1962] All E.R. 529 (House of Lords), in which the Government of Israel had sought the extradition of an Israeli national who had helped his parents in refusing to surrender a child left with them temporarily, because they feared the child would not be given a religious education. Extradition was granted.

11. *In re Gonzales*, 217 F. Supp. at 717. *But see*, *Quinn v. Robinson*, No. 83-2455, 783 F.2d 776 (9th Cir. 1986), 86 L.A. Daily J. D.A.R. 581 (Feb. 26, 1986) (rejecting the political motivation test as the sole test for the political offense exception and applying the so-called "incidence test" to internal insurgencies. The court holds that for the political offense exception to apply, there must be an "uprising" and conduct giving rise to the charges must be incidental to the uprising).

12. The test was developed in a series of cases, the most important of which are: *In re Vogt*, 2 Ann. Dig. 285 (Tribunal Federal, Suisse (1924)); *In re Kaphengst*, 5 Ann. Dig. 292 (Tribunale Federal, Suisse (1930)); *In re Ockert*, 7 I.L.R. 369 (Tribunal Federal, Suisse (1951)). See also *Della Savia Case*, 25 Nov. 1968, 95 A.T.F., I, at 462 (Tribunal Federal, Suisse (1968)); *Morlacchi Case*, 12 Dec. 1975, 101 A.T.F., Ia., at 605 (Tribunal Federal, Suisse (1975)); *Castori Case*, 19 March 1975, 101 A.T.F., Ia., at 65 (Tribunal Federal, Suisse (1975)); *Van den Wijngaert*, *supra* note 2, at 8.

13. *In re Ockert*, *supra* note 12, at 370.

14. *In re Kavic, Bjelanovic & Marsenijevic*, 19 I.L.R. 371 (Tribunale Federal, Suisse (1961)).

15. *Ktir v. Ministere Public Federal*, 34 I.L.R. 143 (Tribunal Federal, Suisse (1961)).

of the F.L.N.<sup>16</sup>.

The court made it clear that for the political offense exception to apply to the circumstances, the motives inspiring the acts of the accused fugitive, and the purpose behind these acts must all indicate that the acts were predominantly political in character. According to the court, the test presupposes the following:

. . . [T]hat the act was inspired by political passion, that it was committed either in the framework of a struggle for power or for the purpose of escaping a dictatorial authority, and that it was directly and closely related to the political purpose. A further requirement is that the damage caused be proportionate to the result sought, in other words, that the interests at stake should be sufficiently important to excuse, if not justify, the infringement of private legal rights.<sup>17</sup>

Thus, under this test, extremely serious offenses would rarely succeed in being excepted from extradition. A crime, such as murder, would be required to meet the "ultima ratio" test, i.e., that the act constituted the only means to accomplish the political end sought.<sup>18</sup>

However, the test developed and applied by-and-large over the years in the United States and Britain has been the "political incidence" test. For example, in 1891, a British judge established the political incidence approach,<sup>19</sup> ruling that political offenses are those which are "incidental to and form a part of political disturbances."<sup>20</sup> This is an example of an objective approach which focuses on the act, without attention to the author's motivation.<sup>21</sup>

The United States and British decisions have tended to adopt this approach. For example, in 1894, a United States federal district court held the political offense exception applied to government agents seeking to suppress an uprising, as well as to the participants.<sup>22</sup> In so holding, the court stated a political offense is "any offense committed in the course of or furthering of civil war, insurrection, or political commotion."<sup>23</sup> This political incidence test is the basis for the predominant United States definition of the relative political offense. In a 1959 dictum, the District Court for the Southern District of California gave the following definition:

Generally speaking it is an offense against the government itself or

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16. *Id.* at 145.

17. *Id.* at 144. For a thorough analysis of the Swiss predominance test, see Carbonneau, *supra* note 6. See also McCann Case, Cours d'Appel, Aix-en-Provence, 14 April 1975, (unpublished) English translation by Carbonneau, MICH. Y.B. INT'L LEG. STUDIES, at 341 (1983); Da Palma Case, Cours d'appel, Paris, 14 Dec. 1967, *La Semaine Juridique*, No. 15387 (1968).

18. Van den Wijngaert, *supra* note 2, at 8.

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

20. *Id.* at 166.

21. Van den Wijngaert, *supra* note 2 at 5

22. *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894).

23. *Id.* at 998.



incident to political uprisings. . . The crime must be incidental to and form a part of political disturbances. It must be in furtherance of one side or another of a bona fide struggle for political power.<sup>24</sup>

Some decisions have appeared to detract from this political disturbance test, hinting that the motivation behind the offense may be considered as a separate test for determining the political character of the offense.<sup>25</sup> Other nations have rejected the motivation test and adopted an objective "injured rights" theory. For example, the decision in the *Gatti* extradition case<sup>26</sup> rejected the political motivation test and applied this political objective test. This objective test requires the criminal action be directed against the state's political organization. In the *Gatti* case, the Republic of San Marino sought the extradition of a person accused of attempting to murder a local communist cell-member. The French court held that the offense was not of a political nature, stating:

. . . [T]he fact that the reasons of sentiment which prompted the offender to commit the offense belong to the realm of politics does not itself create a political offense. The offense does not derive its political character from the motive of the offender but from the nature of the rights it injures.<sup>27</sup>

Another objective approach is the model of connexity, wherein the common crime is considered a political offense based on its connection to a purely political offense.<sup>28</sup> Thus, a person who aids the escape of a spy, who happens to be a son, daughter or friend, would fit within this defini-

24. *Karadzole v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). Here a Yugoslav extradition request for a man charged with murdering a Croatian government official during World War II was denied on the basis of insufficient evidence. After determining that the evidence was insufficient, the court considered the political offense question, and offered its dictum that the offense, if committed as alleged, would be political. Subsequently, this fugitive was found to have been a participant in Nazi war crimes and found extraditable. *Matter of Artukovic*, Case No. CV84-8743-R(B), (C.D. Cal. 1984), cited in C. Pyle, *Extradition, Political Crimes and the U.K. Treaty*, Statement before the Senate Committee on Foreign Relations, September 18, 1985, at 36. Some commentators have suggested that the Castioni political incidence test is adequate to deal with the severe modern problems of terrorism and extradition. It has been criticized as being both over- and under-inclusive, "in that it appears to exclude from protection all political offenses which were not part of a general uprising or rebellion," [and it] "lays the framework for the claim that all acts committed during times of political disorder, without regard to the character or victim of the crime, should be insulated from extradition." Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 14 CORNELL INT'L L.J. 247, 263 (1982). The Ninth Circuit Court of Appeals disagreed and recently adopted and refined this political incidence test in *Quinn v. Robinson*, *supra* note 11.

25. *In re Gonzales*, 217 F. Supp. at 717; discussed in notes 10-11 and accompanying text.

26. Judgment January 13, 1947, Cours d'appel, 1947 Ann. Dig. 145 (No. 70, France).

27. *Id.*, at 145-6. The French Court of Appeal also stated: "We can only demand that the motive which inspired the agent should not be considered an aggravation of the offense, and that the extradited person should not be tried by an extraordinary tribunal." *Id.*, at 146.

28. Van den Wijngaert, *supra* note 2, at 5.

tion of the political offense exception.<sup>29</sup>

French legislation is illustrative of the third general type of political offense. For example, French legislation extends the political offense exception to deny extradition when officials believe the extradition request was politically motivated. The French Extradition Law of 1927 provides that extradition will be denied "when the crime or the offense has a political character or when it results from circumstances indicating that the extradition is requested with a political purpose."<sup>30</sup>

With regard to offenses relating to insurrections or internal wars (the political incidence approach), article 5(2) of the French Extradition Law of 1927, provides:

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance [*dans l'intéret*] of its purpose, they *may not* have grounds for extradition *unless* they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended.<sup>31</sup>

This provision has been criticized by French commentators<sup>32</sup> because

29. *Bourke v. Attorney General*, 107 IRISH LAW TIMES 126 (1973).

30. Extradition Law of March 10, 1927, *La loi Relative a l'Extradition des Etrangers* [1927] D.P. IV, art. 5(2), reprinted in *Code de Proc. Penal*, after art. 696 (Daloz 1984) (emphasis added). The European Convention on Extradition, 359 U.N.T.S. 273 (1957), art. 3, (reprinted in 15 I.L.M. 1272, art. 13 (1)(a)-(c) (1957)) goes beyond both the Extradition Law of 1927 and the United States—French Extradition Treaty by providing that extradition will be denied: when the offense is of a political nature; when it is connected to other political offenses of a political nature; or when the requested state has reason to believe that the request is presented with a view to punish the fugitive for considerations of race, religion, or nationality, or for his political opinions. It even provides for refusal of extradition when the requested state has reason to believe that the accused's treatment by the requesting state risks being aggravated because of his race, religion, nationality, or political opinion. See generally SCHULTZ, *LA CONVENTION EUROPEENNE D'EXTRADITION ET LA DELIT POLITIQUE*, MELANGES CONSTANT, at 313 (1971). Cf., European Convention on Terrorism, Europ. T. S. No. 90, art. 1(e) (1977). The Convention on Terrorism does exclude certain offenses from coverage of the political offense exception, the use of a bomb, grenade, rocket, automatic firearm, letter bomb, or parcel bomb, if the use endangers persons, but allows the parties to the Convention to reserve the right "to refuse extradition in respect of any offense mentioned in Article I which it considers to be a political offense," as long as the reserving state promises that, when it makes such a decision in individual cases, it will take due account of three factors: the "collective danger to the life, physical integrity or liberty of persons" or, that the crime "affected persons foreign to the motives behind it," or that "cruel or vicious means have [or have not] been used" in its commission. European Convention on Extradition *supra* 15 I.L.M. 1272, art. 13(1)(a)-(c); noted in statement by Pyle, *supra* note 24, at 29. Certainly, the European Convention on Extradition does not eliminate the authority of a party's judicial branch from making the difficult political offense decision or, worse, suggest use of their courts as an arm of the foreign victor in a civil conflict to punish its opponents. *Id.*

31. Extradition Law of 1927, *supra* note 30, art. 5(2), para. 2 (emphasis added).

32. See, e.g., MERLE & VITU, *TRAITE DE DROIT CRIMINEL: PROBLEMES GENERAUX DE LA SCIENCE CRIMINELLE*, at 334 n. 1 (2d ed. 1973); and Donnedieu de Vabres, *Le Regime*

both the commencement and termination of civil war are difficult to determine today. Moreover, these commentators find a moral flaw in the provision. For example, after a civil war, the people extradited would not necessarily be criminals in the non-political, common crime sense of that term, but vanquished partisans of a cause.<sup>33</sup> French tribunals have become sensitive to these criticisms and have denied extradition under circumstances that would appear to be covered by the terms of the exception to the political crime exception, described in the article 5(2) of the Extradition Law of 1927.<sup>34</sup> For example, most of the *chambres d'accusations* refused to extradite Spanish Republicans, sought by the Franco regime after the Spanish Civil War, on the ground that their offenses were of a political character.<sup>35</sup>

French extradition treaties are similar to most other treaties in providing for exemptions to the political offense exception clause. Extradition is allowed, for example, for counterfeiting, even for political ends, and for many forms of terrorism.<sup>36</sup> Thus, the famous "clause Belge" allows extradition for the murder of the head of state or anyone in his family.<sup>37</sup> Extradition is also allowed for offenses falling within the French term "*infraction sociale*," as it relates to the "*doctrine de gravite*." This term represents those offenses directed against the social structure, rather than the government per se.<sup>38</sup> This approach provides an extremely narrow perception of political offenses, and does not generally permit offenses of extreme gravity to fit within the political offense exception. These exceptions to the defense have developed over the years and have been called the "humanitarian exceptions" to the political offense clause, and are consistent with the concept that some offenses will not be excepted from extradition. These include the offenses of barbarous or wan-

*Nouveau de l'Extradition d'après la Loi du 10 Mars 1927*, 1927 REV. CRITIQUE DE LA LEGISLATION ET DE LA JURISPRUDENCE 503; DONNEDIEU DE VABRES, *TRAITÉ ÉLÉMENTAIRE DE DROIT CRIMINEL*, at no. 1795 (2d ed. 1943).

33. See authorities in note 38, *infra*. One commentator in the United States believes that the vanquished "heroes" of a civil conflict are, by definition, political criminals. They would thus not be extraditable, although "mere followers" or partisans are not "heroes" and hence, when they fail they are not real political criminals; if this were a legal definition, they would be extraditable. See SCHAFER, *supra* note 7. Obviously, this is not a legal definition.

34. Extradition Law of 1927, *supra* note 30.

35. See, e.g., Judgment of June 6, 1941, G.P. 1953.2.113 (Toulouse); but see judgment of October 19, 1941, G.P. 1942.1.16 (Algeria), in which extradition was allowed although it was for offenses related to civil war.

36. Merle & Vitu, *supra* note 32, at 333.

37. This is also called the "assassination clause" ("*clause d'attentat*"). Virtually every extradition treaty contains one.

38. MERLE & VITU, *supra* note 32, at 334. This is quite similar to what the Third Reich developed and several socialist regimes have frankly espoused; the ideology-directed social defense, perhaps, recognizes crimes as being political, yet punishable because they are attacks against the "supreme ideology." Thus, the social danger of "anarchy" makes it a punishable "nonpolitical crime" in the Soviet Union. Indeed, the essence of any crime in German and Soviet criminal law is its "social dangerousness." G. FLETCHER, *RETHINKING CRIMINAL LAW* 864, § 10.5 (1978). See SCHAFER, *supra* note 7, at 1.

ton violence, and crimes aimed at civilians rather than the military opposition. Thus, the judiciaries of several countries with whom the United States has consistent relationships in extradition matters, have developed sufficient standards for distinguishing a political offense from wanton terrorism. Thus, contrary to what the Executive Branch suggests, as its reason for wanting the extradition treaty under discussion, the offenses that are reputed to be non-extraditable are extraditable.

## II. CRITIQUE OF THE TREATY

Article I of the Supplementary Treaty "amends the political offense exception to extradition, contained in Article V, paragraph (1)(c) of the current extradition treaty, by identifying particular crimes that "shall not be regarded as offenses of a political character."<sup>39</sup> This article will focus directly on this portion of the supplementary treaty which effectively eliminates the political offense exception, and will analyze the statement in favor of the treaty by the Honorable Judge Abraham D. Sofaer. The purpose of this section is to reveal that the evisceration of the political offense exception to extradition is an inefficient means of fighting international terrorism and is inconsistent with the U.S. Constitution, legal traditions and social values. For example, the elimination of the political offense exception undermines the function of the judiciary provided by the Constitution. Questions of fact and law, particularly concerning individual liberty, are issues for the courts. To undermine this role, by use of a treaty or any other means, threatens the balance within the separation of powers requirement. The proposed U.S.-U.K. Treaty presents such a danger.

Judge Sofaer in his Senate testimony argues the U.S. Government's position on the need for the proposed treaty by setting up a straw man. He argues that the political offense exception is measured by the motivation of the actor, and that the judiciary is incapable of distinguishing acts of wanton terrorism from political offenses. Judge Sofaer then destroys the straw man by suggesting that allowing such criminals to avoid prosecution promotes terrorism and, therefore, the political offense exception must be eliminated. Judge Sofaer argues that some courts have applied the political offense exception to refuse extradition to fugitives in cases in which the fugitives were, in the United States Government's view, actually terrorists. The political offense exception, therefore, must not be applied to any crimes which may be committed by terrorists. The political offense exception, therefore, must not be applied to hijacking or aircraft sabotage, to hostage taking or crimes against internationally protected persons. Further, the exception must not apply to murder, manslaughter, malicious assault, kidnapping, or property damage. The political offense

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39. *Extradition Treaty Between the United States and the United Kingdom: Hearings on Proposed Anti-terrorist Legislation Before the Senate Committee on Foreign Relations*, 99th Cong., 1st Sess. (1985) (statement of Abraham D. Sofaer, Legal Adviser, The Department of State).

exception must not apply to these offenses, argues Judge Sofaer, because terrorists sometimes commit them and its application runs the risk of courts not finding terrorists extraditable, thereby allowing those who have committed wanton acts of violence to avoid prosecution. Thus the Government contends that the risk that terrorists will escape justice via the political offense exception is very serious, based on the apparent risk that it hinders the fight against terrorism, that the exception must be eliminated. Eliminating the risk of allowing some terrorists immunity from extradition and prosecution is worth the cost of eradicating the political offense exception.

Underlying this rationale is the belief that courts are often unable to render proper decisions on the political offense exception; they cannot or do not distinguish terroristic from non-terroristic conduct. It is true, no doubt, that courts have made errors in the past and will continue making errors in the future on this and many other subjects. However, the dominant issue before the Senate and the American people is whether the risk of erroneous decisions on questions of terrorism and the political offense exception is so serious that it justifies removing from the judiciary the authority to render decisions on matters which are quintessentially and constitutionally judicial. Is this risk of error so great that we should allow the elimination of the judiciary's role in determining matters of human liberty? It is submitted that this sort of reaction to terrorism is more dangerous than the terrorism itself.

In addition, it is not necessarily true, as suggested by Judge Sofaer and the Executive Branch, that the war on terrorism will not succeed if the political offense exception is preserved. Rather, the risk to the constitutional system of removing the issue from the judiciary is far greater than the risk that judicial decisions will promote terrorism.

Close scrutiny of the specifics of the treaty and of Judge Sofaer's statement before the Foreign Relations Committee in support of it will serve to illustrate the dangers of the treaty and the misleading nature of the Administration's argument. For example, Judge Sofaer suggests that the amendment recognizes that "terrorists who commit the specified, wanton acts of violence and destruction should not be immune from extradition, merely because they believe they were acting to advance a political objective."<sup>40</sup> One cannot quarrel with such an observation in general. One certainly does not desire that persons who commit wanton acts of violence escape extradition and prosecution. Judge Sofaer's statement, however, suggests that the sole, or most significant test applied by the courts for the appropriateness of the political offense exception is the "political motivation test."

More accurately however, there are several tests applied by United States and foreign courts which allow them to distinguish terrorist acts of wanton violence from those subject to the political offense exception. In

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40. *Id.* at 3 (emphasis added).

addition, Judge Sofaer's use of the phrase ". . . terrorists who commit the specified, wanton acts of violence. . . should not be immune from extradition. . ." suggests that the current state of the law relating to the political offense exception would allow "wanton acts of violence" to fit within the protection of the defense, or that the courts are incapable of distinguishing "wanton acts of violence" or "terrorism" from political offenses. Once again Judge Sofaer is incorrect. The current state of the law regarding the political offense exception to extradition does not provide immunity to perpetrators of wanton violence or terrorists, nor does it promote terrorism. In essence, the U.S. Executive Branch wishes to amend an extradition treaty in a manner that will undermine the role of the judiciary, by arguing primarily that the legal decision as to whether or not an act of violence is wanton, and therefore not a political offense is one that cannot, and thus must not, be made by the judiciary.

However, under the current state of the law, nationally and internationally, the courts are capable of distinguishing wanton acts of violence or terrorism from political offenses, and of allowing extradition of fugitives who have committed the former. Other tests exist which are more acceptable than the political motivation test for determining the appropriateness of asserting the political offense exception. It is true that none of the theories nor the application thereof provide a panacea. Indeed, a court may have difficulties in a given case distinguishing between "wanton violence" or terrorism and "political offenses," but the courts are constitutionally designated to draw lines in difficult circumstances. The courts, like any institution or person, may err occasionally, but they are capable of distinguishing wanton violence and terrorism from crimes fitting within the political offense exception to extradition. The studies emanating from the Senate and House of Representatives in relation to the proposed federal criminal code have provided guidance as to how the line ought to be drawn and the bills propounded therein have shown that it is possible to make this differentiation.<sup>41</sup>

### III. FOCUS ON THE SPECIFICS OF THE TREATY

Specifically, the Supplementary Treaty seeks to exempt hijacking, sabotage of aircraft, crimes against internationally protected persons, in-

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41. See e.g., S.1940, 97th Cong., 2nd Sess., § 3194(e)(2) (1982) (Extradition Reform, Part M, of Title X, 1983 CIS S523-19 Senate Rpt. 98-225, at 346-50 (1983). 18 U.S.C. § 3184(e) makes it clear that offenses which have been made international crimes via international conventions (on hijacking, for example), may not be subject to the political offense exception. Moreover, § 3194(e)(2) severely limits the application of the political offense defense in cases of the use of firearms or bombs in a manner that might injure another person. The defense will obtain in such cases only under extraordinary circumstances. "Extraordinary circumstances" is purposefully left undefined. *Id.* See also, *Anti-terrorism Act: Hearings on Proposed Anti-Terrorism Legislation Before the House of Representatives Committee on the Judiciary, Subcomm. on Crime*, 99th Cong., 2nd Ses. (1986) (statement of Christopher L. Blakesley) (manuscript available upon request from the McGeorge School of Law, University of the Pacific, or the University of Denver College of Law).

cluding diplomats and hostage-taking, among other offenses, from coverage under the political offense exception to extradition. These are probably appropriate exceptions. These crimes appropriately may be, and indeed likely already are, excepted from the political offense exception under the current state of the law, although Judge Sofaer claims the contrary.<sup>42</sup> Thus, extradition would likely be available for them without the proposed treaty. If the U.S. Government wants to be certain that this conduct would not be excepted from extradition, it seems appropriate to indicate that these offenses are now excepted from the defense. It should also be noted, however, that Judge Sofaer inaccurately suggests<sup>43</sup> that generally the state with custody of the fugitive cannot, for jurisdictional reasons, prosecute persons who have committed these offenses of hijacking and sabotage of aircraft, piracy or crimes against internationally protected persons. However, these are offenses of such magnitude and danger that they provide jurisdiction to prosecute pursuant to the universality principle of jurisdiction, and pursuant to several multilateral treaties, such as those on airplane hijacking and sabotage, and that on punishment of crimes against internationally protected persons including diplomatic agents.<sup>44</sup> In addition, jurisdiction obtains under the protective principle of jurisdiction, in any country whose sovereignty, national security or other important governmental interest is endangered.<sup>45</sup> Thus, it is misleading for Judge Sofaer to suggest that prosecution for such crimes would not be possible. Stated more accurately, prosecution by the state obtaining jurisdiction over the perpetrators would be available.

The other listed crimes for which the political offense exception would not apply pursuant to the new treaty include murder, manslaughter, malicious assault, kidnapping and specified offenses involving firearms, explosives, and serious property damage. However it poses a problem to lump these offenses together with hijacking, piracy and crimes against internationally protected persons. For example, murder, malicious assault, manslaughter, etc. are common crimes. They are also offenses committed wantonly by terrorists against innocent, non-military targets. These offenses should be and currently are extraditable. On the other hand, and this is crucial, the listed offenses are also crimes which could be charged by the winning side against its opponents in virtually any civil war or significant insurrection, even though the conduct was engaged against military targets during armed combat. Excepting these offenses wholesale from the political offense exception would prevent courts from determining whether or not the conduct occurred under those circum-

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42. See Sofaer, *supra* note 39, at 5.

43. Sofaer, *supra* note 39, at 5-6.

44. See Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH L. REV. 685 [hereinafter referred to as *Extradition and Jurisdiction*]; Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982).

45. *Id.*

stances. It could require extradition, even in cases in which the conduct was necessary in self-defense.<sup>46</sup>

True, murder, manslaughter, and malicious assault are heinous crimes. War, also, is heinous. However, it is unwise to enter into a treaty which reverses the legal tradition that prevents the state institutions from participating in a foreign victor's justice. Even worse, this amendment puts at risk the paramount constitutional principle that the judiciary decide questions of fact and law relating to human liberty. To allow this erosion may well undermine the extradition process as an institution controlled by the rule of law. The implications of this evisceration are important and dangerous, not only to United States foreign policy, but also to the domestic constitutional system.

Judge Sofaer's statement indicated that more treaties would take a similar line. If the Supplementary Convention with Great Britain under consideration were finally promulgated, one must ask what are the implications of the treaties with South Korea,<sup>47</sup> South Africa, El Salvador, or the Philippines? Some states are seen as having strategic importance to the United States, but also having a questionable reputation for democracy and fairness to political enemies. Indeed, there is evidence that some regimes who fit this category have used their criminal laws and procedure to harrass and eliminate political opposition. Is it the function of the Executive Branch to decide matters related to human liberty, faced with the political and strategic pressures involved today? The evisceration of the political offense exception allows the risk of the U.S. Government participating as part of these states' "long arm of the law." We must question the wisdom and constitutionality of such an approach.

Other serious and practical implications need to be addressed. Suppose, hypothetically, that the U.S. entered into this treaty with a friendly ally of longstanding. Suppose also, tensions developed domestically for that ally to the point that civil war and a revolution occurred, wherein an opposition government became ensconced in power. The treaty, as amended by the Supplementary Convention, would require us either to extradite those who had fought and caused death or property damage through their fighting, or to violate the treaty. Obviously, the choice would be an unhappy one. The proposed treaty in those circumstances would either cause the U.S. to extradite fugitives who ought not to be extradited, or to make a mockery of the treaty and the rule of law by refusing to abide by its terms. If the Executive Branch tells us that treaties such as this will only be entered into with stable, democratic regimes, do we want to leave the decision on that point to the Executive and bar the judiciary from considering the questions of human liberty implicated by the political offense exception?

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46. Blakesley, *Extradition and Jurisdiction*, *supra* note 44., at 60, notes 167 and 168.

47. *Talks on Extradition Treaty Soon to Begin*, *The Korean Herald*, June 26 1985, at 1; as noted in C. Pyle, *supra* note 24.



It should not be forgotten that the courts themselves, both in the United States and abroad, have developed approaches to the application of the political offense exception, such as the so-called "wanton violence" or "violence against civilian population" exception.<sup>48</sup> These provide the foundation for a judicial determination of whether to conduct of a given fugitive was a political offense or mere terrorism. Thus, the current state of the law, both domestically and internationally, already provides methods for the courts to differentiate between "terrorists" or wanton killers of innocent people, and those who kill active-duty military personnel or damage government property during a political/military uprising. There is a difference between a hijacking and a skirmish between non-governmental fighters and governmental military personnel.

Judge Sofaer suggests the killing of Robert Stethem on TWA-847 would not be an extraditable offense.<sup>49</sup> The distinction between the killing of an off-duty, civilian clothed military person during the hijacking of a civilian aircraft, and a firefight during a civil war seem significant enough for courts to distinguish. Extradition pursuant to U.S. anti-hijacking treaties and the modern approaches to distinguishing acts of terrorism, would most likely render the perpetrators of this and most acts of murder extraditable. Similarly, the recent tragic piracy on the Achille Lauro would fit within the parameters of our extradition treaty with Italy and, although the political offense exception is part of that treaty, the courts could certainly determine whether the violence and hostage-taking was perpetrated against innocent civilians and not military opponents.<sup>50</sup> True, if the judiciary must make this decision, it might make a mistake. A mistake would be tragic. However, even if the government believes the Executive Branch would not make such mistakes, it seems the judiciary, armed with jurisprudence developed over the past two-hundred years and the constitutional mandate to decide such issues of fact and law, is best equipped to render just decisions case by case. More importantly, failure to leave this as a judicial prerogative is a failure to abide by our primordial constitutional principles of checks and balances, the separation of powers, and the notion that questions of law and fact relating to human liberty are within the province of the judiciary. It behooves the legislature to draft guidelines to assist the judiciary in rendering appropriate and correct decisions in this arena.<sup>51</sup>

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48. *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894, 102 S.Ct. 390 (1981).

49. Sofaer, *supra* note 39, at 5.

50. Treaty of Extradition between the United States and Italy, arts. II, III, and IV, U.S. Senate, Treaty Doc. 98-20 (1984). Hostage taking, even when done extraterritorially, was made a federal crime in 1984, "Act for the Prevention and Punishment of the Crime of Hostage Taking, 18 U.S.C. § 1203 (1984). It would be extraditable under the universality principle (piracy) and article II of the Extradition Treaty, which provides that extradition will obtain when the conduct constitutes an offense in both contracting parties and is punishable for one year imprisonment or a more serious penalty.

51. Such legislation has been proposed. *See*, Blakesley's testimony in favor thereof and

The Senate needs to address the fundamental questions underlying the deliberations on this proposed treaty to eliminate the risk of error—if the elimination of the political offense exception would accomplish that—and whether these cases are worth the concomitant damage that the government's approach would risk to the basic constitutional system. The risk of error in extradition matters, as in all criminal law matters, is the price of liberty. It is shocking that the U.S. Government, in the face of the constitution, could suggest such decisions ought to be made by the Executive Branch. The Senate should carefully consider the implications before removing this type of decision from the judiciary and placing it in the Executive Branch.

In conclusion, the conceptual and theoretical framework is available for deciding whether an act is one of terrorism or should fit within the political offense exception. Development of more efficient or just models or approaches is necessary, but that is not to say that the courts are incapable of applying the current standards in a manner that will not only assist in the battle against terrorism, but which will maintain the integrity of the constitutional system of checks and balances, the separation of powers, and the integrity of the judiciary. The new treaty with Great Britain assumes the courts are too incompetent or otherwise incapable of deciding questions of law and fact relating to human liberty. The Executive Branch has proposed a treaty which will usurp for itself the quintessential and constitutionally mandated judicial calling because the Executive Branch and the British Government have been unhappy with the results in some cases. The Senate and the American people should be aware of that reality and understand its implications.

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Judge Sofaer's testimony in opposition thereto, *Anti-terrorism Act: Hearings on Proposed Anti-terrorist Legislation Before the House of Representatives Committee on the Judiciary, Subcommittee on Crime*, 99th Cong., 2nd Sess. (1986)(manuscript at 43-50).