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Unraveling the Gordian Knot: The United States Law of International Extradition and The Political Offender Exception

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Abstract

A comprehensive summary offered to clarify the nature of this hybrid and the policy forces shaping it by tracing the main themes in the development of extradition law and practice in the United States and placing extradition into context with alternative means of dealing with international crime.

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INTRODUCTION

The concept of extradition is related to but distinct from the concepts of asylum, deportation and exclusion. The right of asylum refers to the discretionary right of the sovereign to grant refuge to a foreign fugitive.¹ Although somewhat regulated by custom, asylum is generally regarded as a purely political, non-legal concept.²

1. Walker, *Asylum*, in ENCYCLOPEDIA OF AMERICAN FOREIGN POLICY 49 (A. DeConde ed. 1978); see generally 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 428-502 (1968).

2. Walker, *supra* note 1, at 49.

Deportation is the unilateral expulsion of an alien by the sovereign,³ and exclusion the refusal to admit an alien.⁴ In contrast, extradition is the surrender by one nation to another of a person found in the asylum nation's jurisdiction and wanted by the requesting nation for the prosecution or punishment of a crime.⁵ These four concepts represent alternatives for dealing with the fugitive or undesirable alien. Extradition, however, may also be applied to the asylum country's nationals.⁶ Another distinguishing characteristic of extradition is that it depends on some form of initial request by a foreign government.⁷

International extradition occupies an especially peculiar place in United States law. By all indications the Founding Fathers gave the subject virtually no consideration in framing the Constitution;⁸ forging a place for it within the constitutional framework of American government proved exceedingly difficult.⁹ The result after decades of trial and error is a remarkable hybrid, accommodating elements of state,¹⁰ federal¹¹ and foreign law,¹² executive¹³ and judi-

3. See *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893); BLACK'S LAW DICTIONARY 394 (5th ed. 1979).

4. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893); 8 U.S.C. § 1182 (1976). Exclusion is sometimes used broadly so as to encompass deportation. 3 AM. JUR. 2D *Aliens and Citizens* § 71 (1962).

5. *Terlinden v. Ames*, 184 U.S. 270, 289 (1902); *Research in International Law under the Auspices of the Faculty of the Harvard Law School, I. Extradition*, 29 AM. J. INT'L L. 15, 21 (Supp. 1935) [hereinafter cited as *Harvard Research*] "Extradition is the formal surrender of a person by a State to another State for prosecution or punishment." *Id.* While the practice has extremely ancient roots, see notes 15-17 *infra* and accompanying text, the etymology of the word "extradition" is from the French, and first came into the English language in the nineteenth century. I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 12 (1971). The first official United States use dates from 1848. *Id.*

6. The United States will extradite nationals unless expressly forbidden by treaty. *Charlton v. Kelly*, 229 U.S. 447 (1913); see 1 J. MOORE, *A TREATISE ON EXTRADITION IN INTERNATIONAL RENDITION* §§ 119-147 (1891) [hereinafter cited as *MOORE ON EXTRADITION*]. Many nations refuse to extradite nationals as a general rule, and express provisions exempting nationals from surrender are a common treaty feature. *Id.* §§ 119-128; I. SHEARER, *supra* note 5, at 94-131.

7. See, e.g., President of United States *ex rel.* *Caputo v. Kelly*, 92 F.2d 603 (2d Cir. 1937), *cert. denied*, 303 U.S. 635 (1938).

8. 1 MOORE ON EXTRADITION, *supra* note 6, §§ 16-17.

9. See notes 38-53 *infra* and accompanying text.

10. *Collins v. Loisel*, 259 U.S. 309 (1922) (sufficiency of the evidence to justify apprehension and commitment for trial of accused is determined according to the laws of the asylum state); *cf.* *Freedman v. United States*, 437 F. Supp. 1252 (N.D. Ga. 1977) (state's substantive law provides initial guidance but unique or extraordi-

cial functions,¹⁴ and a measure of politics in a delicately orchestrated system.

This comment is a comprehensive summary offered to clarify the nature of this hybrid and the policy forces shaping it by tracing the main themes in the development of extradition law and practice in the United States and placing extradition into context with alternative means of dealing with international crime.

I. GENERAL HISTORICAL BACKGROUND

The earliest treaty known to history, the Egyptian-Hittite peace convention of 1280 B.C., included an extradition agreement for the surrender of political enemies.¹⁵ Extradition and extradition treaties in the ancient and medieval world were concerned primarily with the surrender of the king's enemies.¹⁶ Nations felt little need to cooperate in the suppression of ordinary crime, while political and religious dissidents remained a threat to the sovereign's power as long as they found sanctuary elsewhere.¹⁷ This focus on political rather than common criminals dominated extradition practice until the nineteenth century.

The political and economic changes of the eighteenth and nineteenth centuries produced a reversal in this policy. The growth of international commerce, urbanization and wealth led to a concomitant growth of crime,¹⁸ while the development of liberal political philosophies led to an increasing tolerance of political and religious dissidents.¹⁹ Hence, common criminals eclipsed political

nary provisions of asylum state's laws should not be applied where such application would impair effectuation of intent of treaty).

11. Extradition is within the treaty making power of the Executive branch of the federal government. *Peroff v. Hylton*, 563 F.2d 1099 (4th Cir. 1977); *In re Edmondson*, 352 F. Supp. 22 (D. Minn. 1972); 18 U.S.C. § 3181 (1976).

12. 18 U.S.C. § 3190 (1976) (Authentication of documents shall be according to the laws of the demanding nation); see notes 95-102 *infra* and accompanying text.

13. See, e.g., 18 U.S.C. §§ 3184, 3186 (1976).

14. See, e.g., *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); 18 U.S.C. § 3184 (1976).

15. I. SHEARER, *supra* note 5, at 12.

16. *Id.* at 5, 166-69; 1 MOORE ON EXTRADITION, *supra* note 6, §§ 6-7, 205-207; *Harvard Research*, *supra* note 5, at 108-09.

17. I. SHEARER, *supra* note 5, at 7; *Harvard Research*, *supra* note 5, at 108.

18. I. SHEARER, *supra*, note 5, at 8-9, 11-12; 1 MOORE ON EXTRADITION, *supra* note 6, § 3; *Harvard Research*, *supra* note 5, at 35-38.

19. See, e.g., Report of Thomas Jefferson, Secretary of State, to President George Washington (Mar. 22, 1792), *reprinted in* J. LATANE, A HISTORY OF AMERICAN FOREIGN POLICY 86 (1927).

offenders as the focus of extradition practice,²⁰ and by the mid-nineteenth century non-extradition of political offenders had become the widely accepted rule.²¹ This political offender exception has remained the principle source of international controversy ever since.²²

Grotius argued that nations had a duty arising under natural law to surrender another nation's criminals on demand or else to punish them themselves.²³ This view never gained favor in practice, as it conflicted with the ancient right to grant asylum²⁴ and the rule that one state does not enforce the penal laws of another.²⁵

Extradition was fairly rare until the mid-eighteenth century, when the French embarked on an aggressive treaty signing campaign with their neighbors.²⁶ By the nineteenth century the rule that an obligation to extradite existed only under treaty was established.²⁷ In other cases, extradition could be granted as a matter of comity.²⁸

The Anglo-American view on extradition was more restrictive. The British refused to participate in this trend led by their enemies and held themselves out as the champions of asylum.²⁹

II. FOUNDATIONS OF THE UNITED STATES LAW AND PRACTICE

A. *The Letters of Thomas Jefferson, Secretary of State*

The Constitution nowhere expressly addresses international

20. I. SHEARER, *supra* note 5, at 166-69.

21. *Harvard Research*, *supra* note 5, at 107-08.

22. See I. SHEARER, *supra* note 5, at 166-93; García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

23. 2 DE JURE BELLIS AC PACIS, Book II, ch. 21 (1625).

24. *Harvard Research*, *supra* note 5, at 41; Walker, *supra* note 1, at 49.

25. Oda, *The Individual in International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 519 (M. Sorenson ed. 1968); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 78-79 (8th ed. 1866). This concept should not be confused with extraterritorial jurisdiction. See, e.g., 2 C. HYDE, INTERNATIONAL LAW §§ 259-265A (2d rev. ed. 1945).

26. 1 MOORE ON EXTRADITION, *supra* note 6, §§ 6-7; A. BILLOT, TRAITÉ DE L'EXTRADITION 37-46 (1874); *Harvard Research*, *supra* note 5, at 41.

27. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933); I. SHEARER, *supra* note 5, at 24; 2 C. HYDE, *supra* note 25, § 310.

28. I. SHEARER, *supra* note 5, at 30-31; 2 C. HYDE, *supra* note 25, § 312.

29. A. BILLOT, *supra* note 26, at 38; *Harvard Research*, *supra* note 5, at 41-43, 43 n.2; see also I. SHEARER, *supra* note 5, at 8-9, 12-15.

extradition,³⁰ for at the time the Constitution was framed the practice was virtually nonexistent in Anglo-American law.³¹

The earliest authority comes from the correspondence of Secretary of State Thomas Jefferson in 1791 and 1792.³² At President Washington's request,³³ Jefferson examined both the British and Continental practice. He observed that British law granted the executive no power to extradite as a matter of comity, and he adopted this principle into American law.³⁴ Jefferson's successors on several occasions requested extradition from nations whose laws permitted the practice, but Jefferson's rule forced them to qualify their requests with the caveat that reciprocity could not be granted without a treaty.³⁵

In examining the Continental practice, Jefferson was deeply concerned about the use of extradition against political dissidents, but he did not agree with the British answer of granting blanket asylum.³⁶ He believed that treaties could be drawn up in such a manner as to distinguish common criminals from patriots, and he urged Washington to break with British precedent and negotiate treaties along these lines.³⁷

30. The Constitution expressly provides for interstate extradition, properly called rendition. U.S. CONST. art. IV, § 2, cl. 2.

31. Clarke lists only five extradition treaties concluded by England between 1174 and 1794. E. CLARKE, *A TREATISE UPON THE LAW OF EXTRADITION* 18-22 (4th ed. 1903), noted in I. SHEARER, *supra* note 5, at 5. Jefferson reported to Washington in 1791 that England then had no extradition treaties and English law gave the executive no power to surrender fugitives absent a treaty. 1 MOORE ON EXTRADITION, *supra* note 6, § 17. England's first modern extradition treaty was entered into with the United States in 1794. I. SHEARER, *supra* note 5, at 12-13; see note 38 *infra*.

32. J. LATANE, *A HISTORY OF AMERICAN FOREIGN POLICY* 85-86 (1927); 4 J. MOORE, *DIGEST OF INTERNATIONAL LAW* § 581 (1906) [hereinafter cited as MOORE'S DIGEST]; 1 MOORE ON EXTRADITION, *supra* note 6, § 17.

33. Governor Charles Pinckney of South Carolina had sought Washington's advice concerning two accused forgers who had apparently fled to Spanish East Florida. Washington assigned to Jefferson the task of investigating the scant law available on the subject. 4 MOORE'S DIGEST, *supra* note 32, § 581, at 246-47; 1 MOORE ON EXTRADITION, *supra* note 6, §§ 17-21.

34. 1 MOORE ON EXTRADITION, *supra* note 6, §§ 17, 22. This rule is still the law. 18 U.S.C. § 3181 (1976).

35. 1 MOORE ON EXTRADITION, *supra* note 6, §§ 34-36; but see *id.* §§ 37-39; see generally 4 MOORE'S DIGEST, *supra* note 32, § 582.

36. *Harvard Research*, *supra* note 5, at 45 n.4; Kohler, *The Right of Asylum with Particular Reference to Aliens*, 51 AM. L. REV. 381, 405 (1917).

37. Kohler, *supra* note 36, at 405.

B. *The Jay Treaty*

Under Jefferson's influence the Jay Treaty of 1794 included an article for the extradition of murderers and forgerers.³⁸ Surrender was conditioned on the production of evidence sufficient to justify the arrest and commitment for trial under the laws of the place where the fugitive was found.³⁹ Unfortunately, the Jay Treaty failed to specify the procedure for deciding this issue.

The extradition article of the Jay Treaty was invoked only once, in *United States v. Robins*.⁴⁰ Robins was sought by the British for murder and mutiny committed aboard a British frigate.⁴¹ The proceeding was conducted almost entirely through diplomatic channels. President Adams personally presided over the case and ordered the surrender of Robins.⁴² Robins then applied for a writ of habeas corpus.⁴³

Robins raised fundamental issues of due process and the separation of powers, unfortunately compounded by a sensitive political issue.⁴⁴ His attorneys argued that the surrender of a citizen to a

38. Treaty of Amity, Commerce and Navigation (Jay Treaty), Nov. 19, 1794, United States-Great Britain, art. XXVII, 8 Stat. 116, T.S. No. 105.

39. *Id.*

40. 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175); see 1 MOORE ON EXTRADITION, *supra* note 6, § 78.

41. 27 F. Cas. at 826.

42. Judge Bee of the United States District Court for the District of South Carolina issued a warrant for Robins' arrest on the complaint of the British consul, but he informed the consul that he could not surrender Robins under the treaty until Britain's chief diplomatic officer made a requisition to the Federal Executive as required by the terms of the treaty. Letter from Robert Liston, Esq., Minister Plenipotentiary, to Timothy Pickering, Secretary of State (May 23, 1799), reprinted in 38 ANNALS OF CONG. 515 (1800) and in 27 F. Cas. at 841 app. Pickering submitted the matter to President Adams and then relayed the President's instructions to Judge Bee to surrender Robins to the British. Letter from Pickering to Judge Bee (June 3, 1799), reprinted in 38 ANNALS OF CONG. at 516 and in 27 F. Cas. at 841-42 app.

43. 27 F. Cas. at 826.

44. While the British claimed Robins was in reality an Irishman named Thomas Nash, *id.* at 826, 869 app., there was evidence indicating that Robins was an American citizen who had been impressed into the British naval service, *id.* at 827. However, the only evidence presented at trial were the prisoner's own affidavits, *id.*, which Judge Bee held to be insufficient. *Id.* at 832. Still, the case caused a public furor that materially contributed to Adams' defeat in the election of 1800. 1 MOORE ON EXTRADITION, *supra* note 6, § 78, at 90. The reporter thoughtfully added an appendix to the case chronicling this controversy. 27 F. Cas. at 833-70 app. A newspaper investigated the issue of Robins' citizenship, discovered the records of his claimed hometown had been destroyed by fire during the Revolution, and obtained statements from persons claiming to know him. Reprinted in 27 F. Cas. at 869-70 app. The public outrage the case provoked is exemplified in a popular handbill. Reprinted in 27 F. Cas. at 870 app.

foreign tribunal could only be accomplished through a judicial proceeding in which the accused enjoyed the same constitutional guarantees as in an American criminal trial.⁴⁵ The judge pointed out that the Constitution did not change the Anglo-American territorial rule of jurisdiction,⁴⁶ and that this case was in the criminal jurisdiction of Great Britain;⁴⁷ but he otherwise passed over this argument on the grounds that there was insufficient evidence that Robins was a citizen.⁴⁸ He denied the writ and ordered the prisoner's surrender to the British.⁴⁹

The case caused long angry debate in Congress and became a major election issue in 1800.⁵⁰ Republicans argued that Adams had unconstitutionally encroached on judicial powers in ordering Robins' surrender,⁵¹ and that only Congress could constitutionally prescribe procedure.⁵² Representative John Marshall articulated the Federalist view that, until Congress acted, the Executive had the power to prescribe procedure, for otherwise duly ratified treaties could be nullified.⁵³ The latter view prevailed, although forty years would pass before the United States entered into another extradition treaty.

C. *State Action in International Extradition: 1822-1872*

In 1821 the Governor of Canada, at the request of New York State Governor DeWitt Clinton, ordered the arrest and surrender of one Jacob Smith, alias Redington, wanted by New York State on charges of forgery.⁵⁴ As New York criminals could easily slip into Canada, Clinton wished to encourage the practice by offering a guarantee of reciprocity.⁵⁵ However, the federal government could not extradite without a treaty,⁵⁶ and the United States Constitution

45. 27 F. Cas. at 827-30.

46. *Id.* at 832.

47. *Id.*

48. *Id.* See note 44 *supra*.

49. This was pursuant to Adams' original order. 27 F. Cas. at 832.

50. 38 ANNALS OF CONG. at 515-18, 526, 532-34, 541-78, 584-621, *excerpted at* 27 F. Cas. 843-70 app.

51. 38 ANNALS OF CONG. at 548-58. A resolution to censure Adams for unconstitutionally encroaching on the judicial power was defeated. *Id.* at 558.

52. *Id.* at 532-33.

53. *Id.* at 613-14, *quoted in* Evans, *Legal Bases of Extradition in the United States*, 16 N.Y.L.F. 525, 527 (1970).

54. 4 MOORE'S DIGEST, *supra* note 32, § 579, at 240; 1 MOORE ON EXTRADITION, *supra* note 6, § 49, at 59-60.

55. 4 MOORE'S DIGEST, *supra* note 32, § 579, at 240.

56. See note 34 *supra* and accompanying text.

does not permit the States to enter into international treaties or agreements without congressional consent.⁵⁷ In order to overcome these obstacles, the New York State Legislature enacted a statute in 1822, authorizing the governor to surrender to foreign nations persons charged with crimes in those nations if the crimes with which they were charged were also punishable either by imprisonment or death under New York State law.⁵⁸ An 1827 amendment provided that no one would be surrendered for the crime of treason.⁵⁹

Other states quickly followed New York's example, with the approval and active encouragement of the federal executive.⁶⁰ In some states the governor simply exercised the power without an enabling statute.⁶¹ For twenty years international extradition in the United States was conducted entirely on a state level, with the Federal Department of State referring foreign ministers to the appropriate state government.⁶²

In 1839 Governor William Seward temporarily suspended operation of the New York statute because he doubted its constitutionality. President Van Buren and Secretary of State Forsyth urged him to execute the statute until it was declared unconstitutional by an appropriate judicial tribunal.⁶³

Only a year later, the problem was confronted by the United States Supreme Court, in *Holmes v. Jennison*.⁶⁴ At Canada's request, Vermont Governor Jennison had issued a warrant for the arrest and surrender of murder suspect George Holmes.⁶⁵ Holmes applied for a writ of habeas corpus, and the case eventually came before the Supreme Court of the United States on a writ of error.⁶⁶ The Court split evenly on the issue of jurisdiction, and the case was therefore dismissed.⁶⁷ Chief Justice Taney wrote a

57. U.S. CONST. art. I, § 10, cl. 1.

58. 1822 N.Y. Laws ch. CXLVIII.

59. 1829 N.Y. Laws Rev. ch. VIII, tit. I, § 8; 1 MOORE ON EXTRADITION, *supra* note 6, § 49, at 59 n.2.

60. 4 MOORE'S DIGEST, *supra* note 32, § 579, at 240-41; *see* 1 MOORE ON EXTRADITION, *supra* note 6, § 48, at 55-59.

61. 4 MOORE'S DIGEST, *supra* note 32, § 579, at 241-42; 1 MOORE ON EXTRADITION, *supra* note 6, § 48.

62. 4 MOORE'S DIGEST, *supra* note 32, § 579, at 240-43; 1 MOORE ON EXTRADITION, *supra* note 6, § 48.

63. 4 MOORE'S DIGEST, *supra* note 32, § 579, at 242; 1 MOORE ON EXTRADITION, *supra* note 6, §§ 54-55.

64. 39 U.S. (14 Pet.) 540 (1840).

65. *Id.* at 540-41.

66. *Id.* at 541-42.

67. *Id.* at 598.

strongly worded opinion to the effect that international extradition was an exclusive power of the federal government, and that state action in this area was repugnant to the Constitution.⁶⁸ Because of the outcome on the jurisdictional issue, this opinion was technically dictum. However, three other Justices joined in Chief Justice Taney's opinion,⁶⁹ and two others, though differing on the jurisdictional issue, openly expressed agreement on the constitutional issue.⁷⁰ On remand, the Vermont Supreme Court declared the practice unconstitutional on the strength of this dictum and ordered Holmes released.⁷¹

State action in international extradition did not end abruptly with Taney's opinion in *Holmes v. Jennison*,⁷² but the practice gradually died out under its influence.⁷³ After a long period of disuse, the New York statute was declared unconstitutional in 1872 by the New York State Court of Appeals,⁷⁴ thereby eliminating this form of extradition from American law.⁷⁵

D. *The Beginning of the Treaty Making Period*

Taney's opinion in *Holmes v. Jennison*⁷⁶ served as a warning that the federal government could no longer neglect its duties in reliance on state action.⁷⁷ Two years later the United States entered into the Webster-Ashburton Treaty with Great Britain, Article X of which was an extradition agreement.⁷⁸ A treaty with

68. *Id.* at 561-79.

69. *Id.* at 561 (Story, McLean & Wayne, JJ.).

70. *Id.* at 581 (Thompson, J.), 586 (Baldwin, J.).

71. *Ex parte Holmes*, 12 Vt. 631 (1840).

72. 39 U.S. (14 Pet.) 540 (1840); see 1 MOORE ON EXTRADITION, *supra* note 6, §§ 54-65.

73. 1 MOORE ON EXTRADITION, *supra* note 6, § 58; see *United States v. Rauscher*, 119 U.S. 407, 414 (1886).

74. *People v. Curtis*, 50 N.Y. 321 (1872); see 1 MOORE ON EXTRADITION, *supra* note 6, § 57.

75. 1 MOORE ON EXTRADITION, *supra* note 6, § 79, at 93.

76. 39 U.S. (14 Pet.) 540 (1840).

77. See notes 64-71 *supra* and accompanying text. The opinion had a heightened impact because of severe Canadian border troubles between 1837 and 1841 due to an armed insurrection in that colony; Secretary of State Palmerston proposed an extradition treaty to the British in 1840. 5 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 32-33 (S. Bemis ed. 1928).

78. Treaty to Settle Boundaries, Suppress Slave Trade and Surrender Fugitives (Webster-Ashburton Treaty), Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119.

France was signed the following year.⁷⁹ By 1868 the United States had entered into thirteen such agreements, and by 1880, twenty-five.⁸⁰

E. Forging a Workable Procedure

The Webster-Ashburton Treaty bore the belated fruits of the congressional debates over *United States v. Robins*.⁸¹ To insure the accused's right to a hearing, the treaty carved out a role for the judiciary.⁸² Judges and other magistrates were authorized to issue an arrest warrant upon a complaint made under oath and to conduct a hearing on the sufficiency of the evidence.⁸³ If the evidence was sufficient under the laws of the place where the fugitive was found, so as to justify arrest and commitment for trial if the offense had been committed there, the judge or magistrate was to certify this finding to the "proper Executive authority, that a warrant may issue for the surrender of such fugitive."⁸⁴

Congress elaborated on this basic scheme in the first federal

79. Convention for the Surrender of Criminals, Nov. 9, 1843, United States-France, 8 Stat. 580, T.S. No. 89.

80. *Harvard Research*, *supra* note 5, at 42 n.3; see 2 MOORE ON EXTRADITION app. 1060-162 (texts). International legal historians observed a worldwide upsurge in interest in extradition treaties during the mid-nineteenth century, which they attributed to a number of factors. Perhaps most important was the advent of steamship and railway travel, providing fugitives with a quick and inexpensive means of escape. See I. SHEARER, *supra* note 5, at 11-16; 1 MOORE ON EXTRADITION, *supra* note 6, § 3; *Harvard Research*, *supra* note 5, at 35-40. In addition, American supporters of slavery, such as Secretaries of State Abel Upshur and John C. Calhoun, regarded extradition principally as a means for recovering and discouraging fugitive slaves. This was a central issue in the Webster-Ashburton negotiations, but the abolitionist British consistently refused to extradite escaped slaves. See 5 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 19, 32-36, 111-12, 211-12 (S. Bemis ed. 1928); 1 MOORE ON EXTRADITION, *supra* note 6, § 79.

81. 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175); 38 ANNALS OF CONG. at 515-18, 526, 532-34, 541-78, 584-621; see notes 50-53 *supra* and accompanying text.

82. Webster-Ashburton Treaty, Aug. 9, 1842, United States-Great Britain, art. X, 8 Stat. 572, T.S. No. 119.

83. [T]he respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered, and if on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive.

Id.

84. *Id.*

extradition statute, enacted in 1848.⁸⁵ The procedural framework it established has been substantially retained in the present law.⁸⁶ Judicial authority to issue an arrest warrant on a complaint under oath and to conduct a hearing on the evidence of criminality was vested in federal and state court judges and commissioners appointed by the federal courts.⁸⁷ If the evidence was "sufficient . . . to sustain the charge under the provisions of the proper treaty or convention," then the judge or commissioner was to certify these findings to the Secretary of State.⁸⁸ The Secretary of State was then authorized to arrange and order the surrender of the accused.⁸⁹

The Act of 1848 established the respective roles of the three branches of government.⁹⁰ The Judiciary's role was strictly limited, for the judge or commissioner acted as a magistrate of the United States.⁹¹ The power of final review was vested in the Executive,⁹² while appeals within the courts were limited to petitions for habeas corpus.⁹³ Congress confined itself to legislating procedure.⁹⁴

85. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302.

86. *Compare id.*, §§ 1, 3, 4, 5 with 18 U.S.C. §§ 3181, 3184, 3186, 3188 (1976).

87. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302.

88. *Id.* The same language is used in the analogous modern statute. 18 U.S.C. § 3184 (1976). However, United States treaties have consistently followed the standard set forth in the Jay Treaty, that sufficient evidence means evidence sufficient to justify the arrest and commitment for trial of the accused under the laws of the place where the accused was found. *E.g.*, *Collins v. Loisel*, 259 U.S. 309, 317 (1922); *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Hyde, *Notes on the Extradition Treaties of the United States*, 8 AM. J. INT'L L. 487, 487 (1914); *see notes* 10, 39 *supra* and accompanying text.

89. Act of Aug. 12, 1848, ch. 167, § 3, 9 Stat. 302.

90. *See note* 86 *supra* and accompanying text.

91. *See, e.g.*, *United States v. Clark*, 470 F. Supp. 976 (D.C. Vt. 1979); *In re Locatelli*, 468 F. Supp. 568 (S.D.N.Y. 1979); 35 C.J.S. *Extradition* § 34 (1960).

92. *In re Heilbronn*, 12 N.Y. Legal Observer 65, 70 (1854) (S.D.N.Y. 1854, No. 6,323); Act of Aug. 12, 1848, ch. 167, § 3, 9 Stat. 302; *see* 1 MOORE ON EXTRADITION, *supra* note 6, §§ 361-363; *see also* 18 U.S.C. § 3186 (1976).

93. *Collins v. Miller*, 252 U.S. 364 (1920); *Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir.), *cert. denied*, 429 U.S. 833, *reh. denied*, 429 U.S. 988 (1976). Congress vested the same powers in commissioners and state judges as it did in Supreme Court Justices, and made no provisions for judicial appeals. *In re Heilbronn*, 12 N.Y. Legal Observer 65, 74 (1854) (S.D.N.Y. 1854, No. 6,323); 18 U.S.C. § 3184 (1976); 1 MOORE ON EXTRADITION, *supra* note 6, § 362. The scope of review is limited to determining whether the magistrate had jurisdiction, whether the offense was covered by the treaty, and whether there was evidence warranting a finding of reasonable grounds to believe the accused guilty. *Jhirad v. Ferrandina*, 536 F.2d at 482. Declaratory judgment proceedings may also be available but only to determine the same limited issues as in habeas corpus. *Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965).

94. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936); 35 C.J.S.

One provision of the 1848 act that proved unsatisfactory was the section governing the admission of documentary evidence.⁹⁵ Extradition proceedings depended on the production of foreign court records as the production of witnesses was impractical. The procedure set out by Congress, while not elaborate, created conflicts with the municipal laws of other nations.⁹⁶

This problem was aggravated by the fact that nineteenth century courts construed extradition treaties and laws strictly against the government, in the same manner as penal laws.⁹⁷ Thus, technical errors could defeat the demanding government's case.⁹⁸ Therefore, in 1860 Congress changed the rule to admit documents or copies thereof if authenticated in such manner "as to entitle them to be received for similar purposes" in the courts of the demanding government.⁹⁹ The certificate of the principal diplomatic or consular officer of the United States in that country was sufficient proof that it was so authenticated.¹⁰⁰ Efforts in the 1870's to restrict this liberal standard were unsuccessful,¹⁰¹ and the language of the 1860 statute has been materially followed since 1882.¹⁰²

In addition, the Supreme Court in 1902 relaxed the rule of *stricti juris* with respect to extradition treaties,¹⁰³ on the ground that "technical noncompliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our [treaty] obligations."¹⁰⁴

It should be noted how these rules work together. Federal law for the most part determines admissibility of the demanding government's evidence,¹⁰⁵ and incorporates foreign law in the authen-

Extradition § 25, at 455; *but see* 18 U.S.C. § 3183 (1976) (where foreign country is under control or occupation by the United States).

95. Act of Aug. 12, 1848, ch. 167, § 2, 9 Stat. 302.

96. 1 MOORE ON EXTRADITION, *supra* note 6, § 312.

97. *See, e.g., In re Farez*, 8 F. Cas. 1001 (S.D.N.Y. 1869) (No. 4,644).

98. 1 MOORE ON EXTRADITION, *supra* note 6, § 312.

99. Act of Jun. 22, 1860, ch. 184, 12 Stat. 84.

100. *Id.*

101. Act of Jun. 19, 1876, ch. 133, 19 Stat. 59; 1 MOORE ON EXTRADITION, *supra* note 6, §§ 313-317.

102. Act of Aug. 3, 1882, ch. 378, § 5, 22 Stat. 215; 18 U.S.C. § 3190 (1976).

103. *Grin v. Shine*, 187 U.S. 181 (1902); *see* 1 MOORE ON EXTRADITION, *supra* note 6, § 97, at 113.

104. 187 U.S. at 185.

105. *United States ex rel. Eatessami v. Marasco*, 275 F. Supp. 492 (S.D.N.Y. 1967); 18 U.S.C. § 3190 (1976).

tication of documents.¹⁰⁶ State law, on the other hand, provides the guideline for determining if the weight of the evidence is sufficient.¹⁰⁷

F. *Treaty Interpretation and the Rights of the Accused*

The right of the accused to present evidence in his defense was early held to be somewhat circumscribed by the treaty rule that the demanding government need only make out a prima facie case to justify surrender. Otherwise, it was reasoned, the hearing could be converted into a full scale trial.¹⁰⁸ As a general rule, the accused can testify in his own behalf, introduce evidence establishing want of probable cause and raise defenses provided by the terms of the treaty, but cannot plead affirmative defenses.¹⁰⁹ The magistrate has considerable discretion in this area, and decisions concerning the admission of evidence are not reviewable, except where so extreme as to constitute a denial of a hearing.¹¹⁰

The Ex Post Facto clause does not apply to extradition treaties because there is no vested right to asylum, but treaties may contain non-retroactivity clauses.¹¹¹ The double jeopardy clause does not apply because extradition is not an adjudication of guilt.¹¹²

Certain defenses arise from the treaty itself. An offense is not extraditable if not covered by the treaty.¹¹³ Political offenses are not extraditable.¹¹⁴ Citizens of the asylum state are exempted by a common treaty provision.¹¹⁵ The statute of limitations of either nation may or may not apply according to treaty provision, but in

106. 18 U.S.C. § 3190 (1976).

107. See note 10 *supra*.

108. *Benson v. McMahon*, 127 U.S. 457, 462-63 (1888); *In re Wadge*, 15 F. 864, 866 (S.D.N.Y. 1883).

109. *Collins v. Loisel*, 259 U.S. 309 (1922); *Charlton v. Kelly*, 229 U.S. 447 (1913); 35 C.J.S. *Extradition* § 39(d).

110. *Collins v. Loisel*, 259 U.S. 309, 317 (1922); see 18 U.S.C. § 3189 (1976).

111. *Cleugh v. Strakosch*, 109 F.2d 330, 335 (9th Cir. 1940); see *Ker v. Illinois*, 119 U.S. 436, 441-42 (1886).

112. See *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *Merino v. United States Marshal*, 326 F.2d 5 (9th Cir. 1963), *cert. denied*, 377 U.S. 997, *reh. denied*, 379 U.S. 872 (1964); *Morse v. United States*, 267 U.S. 80, 84-85 (1925).

113. See, e.g., *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied sub nom. Jimenez v. Hixon*, 373 U.S. 914, *reh. denied*, 374 U.S. 858 (1963).

114. See notes 119-41 *infra* and accompanying text.

115. See note 6 *supra*.

looking to the statute of limitations the extradition magistrate must also look to the tolling provisions.¹¹⁶ As a general rule of international law, the accused may not be tried for offenses other than that for which he was extradited, but this is a contract right of the nations, not a defense the accused can raise.¹¹⁷

In the United States, under a statutory rule traceable to the Jay Treaty, the demanding government must formally requisition the Department of State for the accused's surrender within two months of his commitment following the extradition hearing. Otherwise, the accused may petition the courts for his release.¹¹⁸

III. THE POLITICAL OFFENDER EXCEPTION

The political offender exception had its roots in the eighteenth century¹¹⁹ but first appeared on the Continent in an 1834 treaty¹²⁰ and in the United States in the 1843 treaty with France.¹²¹

Political offenses are classified into two types. Pure political crimes are acts of espionage, treason and sedition. Relative political offenses are common crimes, such as murder, assault or robbery, committed under political circumstances or with political motives.¹²²

Relative political offenses have created considerable controversy. First, there was the problem of establishing a suitable legal test for determining when a common crime had sufficient political connection to fall within the political offender exception.¹²³ Second, there was the question, more political and moral than legal,

116. *Merino v. United States Marshal*, 326 F.2d 5, 12 (9th Cir. 1963), *cert. denied*, 377 U.S. 997, *reh. denied*, 379 U.S. 872 (1964); *Jhirad v. Ferrandina*, 355 F. Supp. 1155, 1161-62 (S.D.N.Y.), *rev'd on other grounds*, 486 F.2d 442 (2d Cir. 1973), *on remand*, 377 F. Supp. 34 (S.D.N.Y. 1974), *on remand*, 401 F. Supp. 1215 (1975), *aff'd*, 536 F.2d 478 (2d Cir.), *cert. denied*, 429 U.S. 833, *reh. denied*, 429 U.S. 988 (1976).

117. *E.g.*, *United States v. Flores*, 538 F.2d 939 (2d Cir. 1973).

118. 18 U.S.C. § 3188 (1976); Jay Treaty, Nov. 19, 1794, United States-Great Britain, art. XXVII, 8 Stat. 116, T.S.No. 105.

119. 1 MOORE ON EXTRADITION, *supra* note 6, §§ 205-206.

120. Extradition Treaty between Belgium and France, Nov. 22, 1834, art. 5, VI Recueil des Traités de France 278 (De Clercq ed.), 84 Parry's T.S. 457.

121. Convention for the Surrender of Criminals, Nov. 9, 1843, United States-France, 8 Stat. 580, T.S. No. 89.

122. *See generally* Bassiouni, *The Political Offense Exception in Extradition Law and Practice*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 398 (C. Bassiouni ed. 1975); García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

123. *See, e.g.*, Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61 (1979).

to what extent acts of violence in the name of political goals could be tolerated.¹²⁴

As to the first issue, the United States adopted the incidence test from English law.¹²⁵ Queen's Bench first set forth this test in the 1891 case of *In re Castioni*.¹²⁶ Justice Denman stated that the offense must be in the furtherance of or with the intention of assisting a political goal,¹²⁷ and that it must be committed within the context of a political uprising or a dispute between two parties over the control of the government.¹²⁸ Judge Morrow of the District Court of California adopted this test three years later in the case of *In re Ezeta*.¹²⁹ The new government of Salvador [*sic*] sought partisans of the deposed government on charges of murder and robbery.¹³⁰ Extradition was refused on the ground that the alleged crimes were committed in furtherance of the former government's efforts to retain control in the face of revolution.¹³¹ Judge Morrow also held that determination of this issue was properly within the jurisdiction of the extradition magistrate.¹³²

Virtually all successful political offender defenses in the United States have involved civil wars or revolutionary movements,¹³³ and the incidence test as set forth in *Ezeta* is still the law.¹³⁴ It should be noted that the incidence test defines the magistrate's powers. The Department of State has the additional, discretionary power to

124. See, e.g., García-Mora, *Crimes against Humanity and the Principle of Nonextradition of Political Offenders*, 62 MICH. L. REV. 927 (1964).

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

126. [1891] 1 Q.B. 149.

127. *Id.* at 156.

128. *Id.*; but see *Ex parte Kolczynski*, [1955] 1 Q.B. 540 (British court expanded on incidence test to encompass political refugees committing assault and mutiny in course of escape).

129. 62 F. 972, 997-99 (N.D. Cal. 1894).

130. *Id.* at 976-79.

131. *Id.* at 1002-05.

132. *Id.* at 995-97.

133. See *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) (political offense must involve uprising or other violent, political disturbance); *Ramos v. Diaz*, 179 F. Supp. 459 (D.C. Fla. 1959) (makes no difference that accused and demanding government were on same side); Hyde, *Notes on the Extradition Treaties of the United States*, 8 Am. J. Int'l. L. 487, 489-95 (1914); see also *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied sub nom.* *Jimenez v. Hixon*, 373 U.S. 914 (1963) (solicitation and receipt of bribes or kickbacks does not constitute political offense within meaning of exception); *In re Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978) (alleged political motivation of prosecution does not make bank fraud a political offense).

134. See *In re Sindona*, 450 F. Supp. at 692-93.

deny extradition on humanitarian grounds if it appears that the accused will be subject to grave injustice.¹³⁵

Much of the international history of the political offender exception has revolved around its qualification on the issue of violence. The French and Belgians introduced the first such qualification in 1856, after two men attempted to assassinate Napoleon III and fled to Belgium.¹³⁶ Under the *clause d'attentat*, the assassination or attempted assassination of a head of state or member of his family was not included in the political offender exception.¹³⁷ This innovation was readily accepted, as evidenced by the nations that pledged their cooperation to the United States in the capture of John H. Surratt, wanted for conspiracy in the assassination of President Lincoln.¹³⁸

Anarchists also were systematically excluded from the political offender exception. For example, in *In re Meunier*,¹³⁹ Queen's Bench held that anarchists did not qualify under the *Castioni* definition since it required a faction "seeking to impose the government of their choice" and anarchists sought no government.¹⁴⁰

The United States had signed treaties excluding assassins and anarchists from the political offender exception,¹⁴¹ but there apparently have been no United States cases invoking these clauses. Instead, changes in American immigration law have acted to prevent such offenders from entering the United States.

IV. DISGUISED EXTRADITION: EXCLUSION AND DEPORTATION

Changes in United States immigration policy between the 1870's and the 1920's obviated, to a great extent, the need for extradition. In that period the United States turned from an open door immigration policy to an extremely restrictive one.¹⁴² Con-

135. *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976); *In re Sindona*, 450 F. Supp. at 694.

136. 1 MOORE ON EXTRADITION, *supra* note 6, § 208.

137. *Id.* Epps, *supra* note 123, at 79.

138. 4 MOORE'S DIGEST, *supra* note 32, § 604, at 353.

139. [1894] 2 Q.B. 415.

140. *Id.* at 419.

141. *E.g.*, Extradition, Sept. 26, 1896, United States-Argentina, art. 2(1), 31 Stat. 1883, T.S. No. 6; Extradition, Jun. 13, 1882, United States-Belgium, arts II(1), IV, 22 Stat. 972, T.S. No. 30.

142. *See, e.g.*, AMERICAN IMMIGRATION POLICY—A REAPPRAISAL 1-21 (W. Bernard ed. 1950).

victed criminals were early targets of these laws.¹⁴³ Political offenders were at first expressly exempted,¹⁴⁴ but beginning in 1903 aliens who advocated anarchy or the forcible overthrow of the United States government were added to the list of excluded aliens.¹⁴⁵ Hence, political offenders whose philosophies were hostile to the United States could no longer find refuge here.

Under the present law even tourists are subject to strict supervision¹⁴⁶ and extensive grounds for exclusion and deportation.¹⁴⁷ Naturally, this has a deterrent effect on foreign fugitives, and has cut down the need for extradition.

In addition to creating these prophylactic and deterrent effects, deportation procedures can serve as an outright substitute for extradition, due to the Attorney General's power to choose the deportee's destination from those nations willing to accept him, including those wishing to prosecute or punish him for a crime.¹⁴⁸ For escaped, alien convicts, deportation is practically a complete substitute.¹⁴⁹ For those charged with a crime the overlap is far less definite. There may not be grounds for deportation if the crime has not been admitted,¹⁵⁰ or the grounds available may have little or nothing to do with the alleged offense.

Lastly, immigration law can negate extradition policy. A political offender exempt from extradition may nonetheless be deportable for his beliefs.¹⁵¹ An accused whose offense is not covered by a treaty may be deported on any applicable ground. In each case the

143. Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477.

144. *Id.*

145. 8 U.S.C. §§ 1182(a)(27)-(29), § 1251(a)(6) (1976); Act of Jun. 28, 1940, ch. 439, tit. II, 54 Stat. 671; Act of Jun. 5, 1920, ch. 251, 41 Stat. 1008; Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012; Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213.

146. 8 U.S.C. §§ 1182, 1251 (1976).

147. *Id.*

148. 8 U.S.C. § 1253(a) (1976). The deportee may designate his destination unless the Attorney General concludes it "would be prejudicial to the interests of the United States." *Id.* The Attorney General and his delegate, the Immigration and Naturalization Service, enjoy broad discretion in the exercise of this power. *Namkung v. Boyd*, 226 F.2d 385 (9th Cir. 1955).

149. 8 U.S.C. §§ 1182(a)(9), (10), 1251(a)(1), (4), 1253(a) (1976); See 4 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 311 (1942); compare *International Criminal Police Organization (INTERPOL): Hearing Before the Senate Comm. on Appropriations*, 94th Cong., 1st Sess. 52 (1976) (escaped Swedish bank robber) [hereinafter cited as *INTERPOL Hearings*] with 1 MOORE ON EXTRADITION, *supra* note 6, §§ 32-36.

150. Exclusion or deportation for the commission of a crime requires either a conviction or an admission. 8 U.S.C. § 1182(a)(9) (1976).

151. 8 U.S.C. §§ 1182(a)(28), 1251(a)(1), (6) (1976).

deportation may conceivably be engineered so that the nation seeking the deportee for prosecution does obtain custody.¹⁵²

This potential of deportation law has given rise to what is critically called "disguised extradition."¹⁵³ The classic case was that of Dr. Robert A. Soblen, wanted by the United States in 1962 on charges of espionage. Exempt from extradition, he was nonetheless deported from Israel to the United States and escorted to a plane upon which a United States marshal was waiting to take custody of him.¹⁵⁴

Congress' power over immigration law is constitutionally one of its most unlimited powers,¹⁵⁵ and, unlike the executive treaty power, does not require the concurrence of a foreign government. The potential for encroachment and policy conflict, insofar as alien fugitives are concerned, is therefore vast.¹⁵⁶

V. WAR CRIMES

Congress has almost completely wrested the subject of war crimes from extradition. Although its historical roots are ancient, the law of war crimes has taken on a special significance since World War II.¹⁵⁷ The United Nations General Assembly in 1946 unanimously passed a resolution recommending that nations take "all necessary measures" to ensure that war criminals were returned to the jurisdictions where they could be tried.¹⁵⁸

The United States has had only two extradition cases involving

152. 8 U.S.C. § 1253(a)(1), (7); *see* *Marcello v. Kennedy*, 194 F. Supp. 748 (D.D.C. 1961).

153. I. SHEARER, *supra* note 5, at 79-81; O'Higgins, *Disguised extradition: the Soblen case*, 27 MOD. L. REV. 521, 530-31 (1964); Evans, *Reflections upon the Political Offense in International Practice*, 57 AM. J. INT'L L. 1, 9-10 (1963).

154. Soblen never made it back to the United States. He slashed his wrists and stomach in the airplane toilet and died in a London hospital; but not until English courts denied a petition for habeas corpus and ordered him deported to the United States. I. SHEARER, *supra* note 5, at 79-80.

155. *See* *Fiallo v. Bell*, 430 U.S. 787 (1977); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Francis v. Immigration and Naturalization Serv.*, 532 F.2d 268 (2d Cir. 1976).

156. *See* *United States ex rel. Giletti v. Commissioner of Immigration*, 35 F.2d 687 (9th Cir. 1929); *Moraitis v. Delany*, 46 F. Supp. 425 (D. Md. 1942) (no bar to deportation that it will have *de facto* effect of extradition); Evans, *Acquisition of custody over the international fugitive offender-alternatives to extradition: a survey of United States practice*, 40 BRIT. Y.B. INT'L L. 77 (1964).

157. I. SHEARER, *supra* note 5, at 185-87 (1971).

158. G. A. Res. 3, U.N. Doc. A/64, at 9 (1946), *reprinted in* U.N.Y.B. 66 (1946-47).

alleged war criminals,¹⁵⁹ and the status of war criminals in American extradition law is in a state of some confusion.

The first case, *United States ex rel. Karadzole v. Artukovic*,¹⁶⁰ involved a Yugoslavian request for the extradition of an ex-official of the Nazi puppet government of Croatia, wanted on several charges of mass murder. After eight years of litigation involving two habeas corpus proceedings,¹⁶¹ the extradition hearing was finally held.¹⁶² Extradition was denied¹⁶³ on the grounds of insufficient evidence¹⁶⁴ and the political offender exception.¹⁶⁵

Curiously, the second petition for habeas corpus had been granted by the District Court on the ground that the charges were political offenses,¹⁶⁶ and the Court of Appeals for the Ninth Circuit affirmed on the ground that the United Nations resolution of 1946 did not have the force of law.¹⁶⁷ The United States Supreme Court, in a terse memorandum, vacated the judgment of the Court of Appeals and remanded the case for an extradition hearing, without explanation or citation to authority.¹⁶⁸ The commissioner interpreted this decision to mean that the political offender issue was not within the jurisdiction of habeas corpus proceedings.¹⁶⁹ At this point Yugoslavia's only recourse for review was to an unsympathetic Secretary of State free to base his decisions on political considerations.

The political offender-war crimes connection did not come up again until 1973. In *In re Ryan*,¹⁷⁰ West Germany sought the ex-

159. *In re Ryan*, 360 F. Supp. 270 (E.D.N.Y. 1973); *United States ex rel. Karadzole v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959).

160. 170 F. Supp. 383 (S.D. Cal. 1959).

161. *Artukovic v. Boyle*, 107 F. Supp. 11 (S.D. Cal. 1952), *rev'd sub nom. Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir. 1954), *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956) (second habeas corpus proceeding), *aff'd sub nom. Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated*, 355 U.S. 393 (1958), *on remand sub nom. United States ex rel. Karadzole v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). A summary of the history of the case is given in 170 F. Supp. at 384-86.

162. 170 F. Supp. 383 (S.D. Cal. 1959).

163. *Id.* at 393-94.

164. *Id.* at 388-92, 393.

165. *Id.* at 392.

166. *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956).

167. *Karadzole v. Artukovic*, 247 F.2d 198, 205 (9th Cir. 1957).

168. *Karadzole v. Artukovic*, 355 U.S. 393 (1958).

169. 170 F. Supp. at 392. The commissioner did have solid precedent. This was exactly the holding in *Ornelas v. Ruiz*, 161 U.S. 502 (1896).

170. 360 F. Supp. 270 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (2d Cir. 1973).

tradition of Hermine Braunsteiner Ryan on charges arising from her role as a supervisory warden in a concentration camp. Chief Judge Mishler of the District Court for the Eastern District of New York, acting as extradition magistrate, took judicial notice of the treaty's political offender clause in a footnote¹⁷¹ but otherwise ignored it in his decision granting extradition.

At the same time, a number of deportation cases concerning Nazis and alleged Nazi war criminals were pending in the Immigration and Naturalization Service (INS).¹⁷² The *Ryan* case eventually led to congressional investigations into charges of INS procrastination in investigating alleged Nazi war criminals for the purposes of denaturalization and deportation.¹⁷³ Hearings in 1977 led to the enactment of an amendment to 8 U.S.C. § 1182, the exclusion law, expressly authorizing the exclusion and deportation of any alien who participated in Nazi persecutions,¹⁷⁴ and the creation of a Special Litigation Unit to expedite these cases.¹⁷⁵ One plain purpose of this belated legislation was the return of these alleged war criminals to jurisdictions wishing to prosecute them for these offenses.¹⁷⁶

This action by Congress is probably too late to have much effect, but it demonstrates Congress' ability to usurp an issue and compensate for the slow process of change in extradition law.

VI. INTERNATIONAL TERRORISM

International terrorism has been principally a legal and political problem of the 1970's, although precedents date back to the anarchists of the nineteenth century.¹⁷⁷ For the purposes of recent

171. 360 F. Supp. at 273 n.4(5).

172. *Alleged Nazi War Criminals: Hearing before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary* (vol. I), 95th Cong., 1st & 2nd Sess. 81, 87-89 (1977-1978) (statistical breakdown and summary of investigations and deportation and denaturalization proceedings against alleged Nazis) [hereinafter cited as *War Criminal Hearings*].

173. *War Criminal Hearings*, *supra* note 172.

174. Immigration and Nationality Act-Nazi Germany, Pub. L. 95-549, 92 Stat. 2065 (1978) (codified at 8 U.S.C. § 1182(a)(33) (1978)); *see* [1978] U.S. CODE CONG. & AD. NEWS 4700.

175. [1978] U.S. CODE CONG. & AD. NEWS 4700, 4702.

176. *E.g.*, *War Criminal Hearings*, *supra* note 172, vol. I at 12 (statement of Hon. Joshua Eilberg, Chairman of the Subcomm. on Immigration, Citizenship and International Law).

177. *See generally* INTERNATIONAL TERRORISM AND POLITICAL CRIMES (C. Bassiouni ed. 1975); LEGAL ASPECTS OF INTERNATIONAL TERRORISM (A. Evans & J. Murphy eds. 1978).

legal developments, international terrorism can be categorized into airline hijacking and related acts of extortion and sabotage, kidnapping and other attacks against diplomats and government officials, and all other acts of terrorism.

The United States was the principal victim of airline hijackings in the mid-1960's and therefore became an early advocate of mandatory extradition of hijackers.¹⁷⁸ It was only after hijacking became an international epidemic in 1969¹⁷⁹ that other nations acted. In December, 1970, the members of the International Civil Aviation Organization (ICAO) signed the Hague Convention for the Suppression of the Unlawful Seizure of Aircraft.¹⁸⁰ The Hague Convention required contracting nations to enact legislation imposing "severe penalties"¹⁸¹ on the offense of hijacking, and to either extradite hijackers or else submit their cases for prosecution in their own tribunals.¹⁸² The crime of hijacking in itself provides several nexus for jurisdiction. The Hague Convention provided therefore that the nation of registry, or of the lessee's principal place of business or residence, or any nation in which the aircraft landed with the hijacker on board all had jurisdiction to try the offense.¹⁸³

178. The United States proposed in 1969 that a protocol be added to the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219, that would require extradition of hijackers, but this was rejected. Report of ICAO Legal Sub-Committee of Unlawful Seizure (1969) *cited in* Lee, *International Suppression of Hijacking*, in *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 248, 250 (C. Bassiouni ed. 1975). A compromise proposal was accepted and incorporated in the Hague Convention. 63 DEP'T STATE BULL. 449 (1970).

179. *See, e.g.,* Evans, *Aircraft Hijacking: What is Being Done*, in *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 219, 221 n.3. (C. Bassiouni ed. 1975). A sense of urgency was created after the Popular Front for the Liberation of Palestine (PFLP) hijacked six commercial airliners from four countries, destroyed three, including a Boeing 747, and damaged a fourth, all within two weeks. *Id.* at 234; *TIME*, Sept. 21, 1970, at 18-20; *N.Y. Times*, Sept. 13, 1970, § 1, at 1, col. 8; *id.* § 4 (Week in Review), at 1, col. 1.

180. Convention for the Suppression of the Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, ___ U.N.T.S. ___; *see also* Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 (basic definitions and jurisdictional concepts).

181. Hague Convention, Dec. 16, 1970, art. II, 22 U.S.T. 1641, T.I.A.S. No. 7192, ___ U.N.T.S. ___. The 1961 amendment to the Federal Aviation Act created the offense of "aircraft piracy" Pub. L. No. 87-197, 75 Stat. 466 (codified at 49 U.S.C. § 1472(i) (1976)).

182. Hague Convention, Dec. 16, 1970, art. VII, 22 U.S.T. 1641, T.I.A.S. No. 7192, ___ U.N.T.S. ___.

183. *Id.* art. IV.

The resulting extradite-or-prosecute formula proved both a politically palatable and effective solution.¹⁸⁴ The key to its success lay in the fact that the asylum nation, if an ICAO signatory, was automatically vested with jurisdiction to try the crime.¹⁸⁵ Nations as a rule are far more willing to prosecute politically motivated crimes themselves than to surrender such offenders to other nations for prosecution. The Hague Convention also avoided possible conflicts with the 1951 United Nations Convention on the Status of Refugees.¹⁸⁶ In 1971, the members of ICAO signed the Montreal Convention extending similar provisions to related acts of air sabotage.¹⁸⁷

In addition, the United States and Cuba, a non-ICAO signatory, signed a five year agreement in 1973 in which each agreed to prosecute air and sea hijackers in lieu of extraditing them.¹⁸⁸

Other forms of terrorism proved far less amenable to legal solution. The Organization of American States signed a convention in 1971 that attempted to use an analogous extradite-or-prosecute formula for the suppression of acts of terrorism against persons "to whom the state has a duty according to international law to give special protection."¹⁸⁹ However, the wording of this convention is extremely vague and ambiguous, and the agreement leaves the formulation of jurisdictional rules entirely to the signatories.

The United Nations has been an exceedingly ineffective forum for solutions to international terrorism. Arab and African nations

184. As evidenced by the political spectrum represented by the signatories, e.g., Israel, Jordan, India, Pakistan, Iran, U.S.S.R. *et al.* 22 U.S.T. at 1669-84, T.I.A.S. No. 7192, ____ U.N.T.S. _____. The incidence of hijacking did drop in ensuing years, although preventive measures also played a role. Evans, *supra* note 179, at 221 n.3. The extradite-or-prosecute formula of the Hague Convention is an ironic echo of Grotius' position. See note 23 *supra* and accompanying text.

185. Hague Convention, Dec. 16, 1970, art. IV(1)(b), 22 U.S.T. 1641, T.I.A.S. No. 7192, ____ U.N.T.S. _____. Note that the laws of some nations would require enabling legislation.

186. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *modified by* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

187. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

188. Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, United States-Cuba, 24 U.S.T. 737, T.I.A.S. No. 7579.

189. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413.

have consistently united against Western proposals for effective deterrents, the Arabs because of the Palestinian issue, the Africans and other Third World nations on the ground that anti-terrorist provisions would be used against legitimate freedom fighters.¹⁹⁰ The United Nations General Assembly in 1973 passed a resolution adopting a convention for the prevention and punishment of acts of terrorism against "internationally protected persons."¹⁹¹ This convention was open for signature for one year¹⁹² and received only lukewarm support.¹⁹³

Western Europe and Israel have been the principal targets of terrorist attacks, and in 1977, seventeen members of the Council of Europe signed a convention removing a wide variety of terrorist acts from the protection of the political offender exception.¹⁹⁴

The United States, in recent extradition treaties,¹⁹⁵ has excluded either hijacking or attacks against diplomats and government officials from the political offender exception.¹⁹⁶ In addition, through statute, executive order¹⁹⁷ and international agreement,¹⁹⁸ the United States has adopted several provisions allowing for the use of various economic sanctions against those nations which harbor terrorists.

190. See, e.g., U.N.Y.B. 639-50 (1972); U.N.Y.B. 832-36 (1976).

191. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, G.A. Res. 3166, 28 U.N. GAOR Supp. (No. 30), U.N. Doc. A/9030 (1973).

192. *Id.* art. 14.

193. 28 U.S.T. 1975, T.I.A.S. No. 8532, ____ U.N.T.S. _____. See *Arab Terrorism* (editorial), N.Y. Times, Dec. 23, 1975, at 24, col. 2.

194. Convention on the Suppression of Terrorism, Jan. 27, 1977, [1977] Europ. T.S. No. 90, reprinted in [1978] Gr. Brit. T.S. No. 93 (Cmd. 7390).

195. E.g., Treaty on Extradition, Dec. 3, 1971, United States-Canada, 27 U.S.T. 983, T.I.A.S. No. 8237; Treaty on Extradition, May 14, 1974, United States-Australia, 27 U.S.T. 957, T.I.A.S. No. 8234; Treaty on Extradition, Jan. 18, 1973, United States-Italy, 26 U.S.T. 493, T.I.A.S. No. 8052; Treaty on Extradition, Jun. 22, 1972, United States-Denmark, 25 U.S.T. 1293, T.I.A.S. No. 7864; Treaty on Extradition, May 24, 1973, United States-Paraguay, 25 U.S.T. 967, T.I.A.S. No. 7838; Treaty on Extradition, Jan. 21, 1972, United States-Argentina, 23 U.S.T. 3501, T.I.A.S. No. 7510.

196. E.g., 22 U.S.C. § 2371 (1976) (foreign aid); 22 U.S.C. § 286e-11 (1978) (International Monetary Fund); 49 U.S.C. § 1487 (1976) (air travel); 19 U.S.C. § 2462(b)(7) (1976) (trade preferences).

197. Exec. Order No. 12,002, 3 C.F.R. 133 (1978), reprinted in 50 U.S.C. app. at 1440 (Supp. I 1977).

198. Joint Statement on International Terrorism by the Participants of the Bonn Economic Summit Conference, 14 WEEKLY COMP. OF PRES. DOC. 1308 (July 24, 1978).

CONCLUSION

Extradition has evolved into an efficient means for dealing with ordinary criminals, especially since the advent of INTERPOL, the international criminal police communications network;¹⁹⁹ but the political offender exception has definitely not fulfilled its original ideal of total political neutrality.

Nations on all points of the political spectrum have found themselves unwilling to tolerate certain political offenders, specifically violent ones.²⁰⁰ Hence, the political offender exception has been riddled with exceptions and its avowed policies undermined by the use of "disguised extradition" and even kidnapping.²⁰¹ A comprehensive legal definition of what the political offender exception covers is an impossibility, its boundaries subject as they are to the vagaries of the political tides.²⁰² These facts have led at least one author to suggest the abolition of the political offender exception as an unworkable legal concept;²⁰³ but such an action would be undesirable for two reasons. First, it would jeopardize the ability of nonviolent political offenders, particularly refugees, to find asylum.²⁰⁴ Second, it would threaten the very structure of international extradition, which is vitally dependent on the premise of political neutrality.²⁰⁵ Nations need a guaranty that their police and courts will not become involved in other nations' internal political problems.²⁰⁶

199. See I. SHEARER, *supra* note 5, at 202-07; *INTERPOL Hearings*, *supra* note 149.

200. See notes 124, 136-41, 157-98 *supra* and accompanying text.

201. *Frisbie v. Collins*, 342 U.S. 519 (1952); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, *Lujan v. Gengler*, 414 U.S. 519 (1976). The rule has developed in international law that abduction of the fugitive is no defense to the subsequent criminal prosecution. *Ker v. Illinois*, 119 U.S. 436 (1886); I. SHEARER, *supra* note 5, at 72-76 (note especially the Eichmann case).

202. See Epps, *supra* note 123; García-Mora, *supra* note 122.

203. Epps, *supra* note 123.

204. See note 186 *supra* and accompanying text. Professor Epps suggests that conventional asylum, granted as a matter of executive discretion, could substitute for the political offender exception, Epps, *supra* note 123, at 87-88, but, query, if the political offender exception is too uncertain as protection, how is unfettered executive discretion an improvement?

205. See, e.g., International Criminal Police Organization [INTERPOL] Constitution and General Regulations, January, 1968, art. 3, reprinted in *INTERPOL Hearings*, *supra* note 149, at 92 (INTERPOL strictly forbidden to intervene in matters of "political, military, religious or racial character"); I. SHEARER, *supra* note 5, at 205.

206. See, e.g., *INTERPOL Hearings*, *supra* note 149, at 57-59, 69-74 (tables showing international participation in INTERPOL).

Extradition procedure should be regarded primarily as a means for apprehending ordinary, non-political criminals. For this purpose, it is efficient and requires a minimum of federal supervision.²⁰⁷ Where the political philosophies and exigencies of individual nations closely concur, certain very narrow categories of violent political offenders may be incorporated into extradition by treaty provision, but extradition's potential in this regard is very limited. Political offenders require much closer federal supervision because of the policy considerations. Extradition procedure, which is streamlined partly due to cost considerations,²⁰⁸ is not adapted to this need.²⁰⁹

There has, therefore, been a split developing in international crime control. On one level, conventional extradition procedures are an effective way of dealing with ordinary criminals. On another level, other procedures, in the form of deportation and extraterritorial jurisdiction, are developing into the preferred means for dealing with politically sensitive crimes, such as war crimes²¹⁰ and hijacking,²¹¹ because they permit much closer federal regulation.

This evolution should be recognized as a necessary development. Where the federal government determines that certain categories of political offender should be surrendered or otherwise submitted to prosecution, it is suggested that conventional extradition is not appropriate. If the offender is not a citizen of the asylum nation, the appropriate federal proceeding can be provided for in the context of deportation. There has long been criticism of the use of deportation as a substitute for extradition, on the ground that the purpose of the two are different, and because the use of deportation as a substitute for extradition has been surreptitious.²¹² Realistically, there is considerable overlap in policy, and the best way to prevent undermining of policy in one by policy in the other is through open acknowledgment and coordination. Where the re-

207. See 18 U.S.C. §§ 3184, 3186 (1976).

208. The expense of extradition proceedings has long been a major concern. See, e.g., 1 MOORE ON EXTRADITION, *supra* note 6, §§ 393-394 (individual extradition proceedings in the mid-nineteenth century cost up to \$20,000). The general rule has been that the demanding government pays the costs. 18 U.S.C. § 3195 (1976); 1 MOORE ON EXTRADITION, *supra* note 6, § 394; I. SHEARER, *supra* note 5, at 210-11.

209. See notes 196-197 *supra*.

210. See notes 151-70 *supra* and accompanying text.

211. See notes 172-82 *supra* and accompanying text.

212. See generally I. SHEARER, *supra* note 5, at 76-91; 6 M. WHITEMAN, *DI-
GEST OF INTERNATIONAL LAW* 748-51 (1968).

questing nation's offender is a citizen of the asylum nation, two solutions suggest themselves. First, citizenship provides an automatic nexus for extraterritorial jurisdiction,²¹³ with the sometimes salutary effect of allowing the asylum nation to define the offense and control the prosecution. Second, specialized extradition proceedings, allowing for much closer federal involvement, could be provided for such rare occurrences.

This is not to suggest that the original ideal of the political offender exception be abandoned, and that it be converted wholly into a mere statement of procedural convenience. The ideal of political asylum for the dissident and the refugee should remain, and the exceptions strictly limited to very narrowly defined categories of violent political offenders.²¹⁴ It is suggested that the foregoing recommendations could advance this ideal and the rule of law, by eliminating much of the potential for extradition by subterfuge.

Separation of procedure will not answer all the problems concerning political offenders. The definition of what political offenders should be surrendered will remain a volatile, political problem, but such separation will eliminate procedural complications from these sensitive political issues.

Where the question is "should this political offender be granted asylum?" extraordinary proceedings are merited. Changing issues of national policy, along with the alternative of deportation to a neutral country, are implicated, and ordinary extradition proceedings are not adapted to deal with these issues.

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213. See 6 M. WHITEMAN, *supra* note 212, at 278.

214. Violence alone could not be justification for surrendering political offenders, since even refugees from dictatorial regimes may be forced to resort to violence in the course of escape. See, e.g., *Ex parte Kolczynski*, [1955] 1 Q.B. 540 (mutiny and assault by Polish sailors); 5 THE AMERICAN SECRETARIES OF STATE AND THEIR FOREIGN POLICY 111 (S. Bemis ed. 1928) (British policy that slaves committing violent acts in course of escape would not be surrendered).