Fordham International Law Journal

Volume 5, *Issue* 2 1981 *Article* 12

In Re Mackin: Is the Application of the Political Offense Exception an Extradition Issue for the Judicial or Executive Branch?

Maria P. Imbalzano*

*

In Re Mackin: Is the Application of the Political Offense Exception an Extradition Issue for the Judicial or Executive Branch?

Maria P. Imbalzano

Abstract

The purpose of this Note is to examine the opinions of the magistrate and court of appeals in In re Mackin, regarding the issue of whether the courts have jurisdiction to determine the applicability of the political offense exception. Part I of this Note will analyze the language of the applicable extradition statute and will compare the courts' interpretation with that of the government of the United States. Part II will attempt to resolve the jurisdictional issue by examining the language of the political offense exception in recent treaties. Part III will discuss the constitutional effect of the political question doctrine on the determination of the threshold issue by the courts.

IN RE MACKIN: IS THE APPLICATION OF THE POLITICAL OFFENSE EXCEPTION AN EXTRADITION ISSUE FOR THE JUDICIAL OR THE EXECUTIVE BRANCH?

INTRODUCTION

On October 6, 1980, Desmond Mackin, a native of Northern Ireland, was arrested in New York City pursuant to a provisional arrest warrant[1] issued under the terms of the United States-United Kingdom extradition treaty (Treaty).[2] The warrant was based on an extradition complaint filed by the government of the United Kingdom.[3] The charges resulted from a shooting incident[4] in

---

1. The provisional arrest warrant was issued by Honorable Irving Ben Cooper in accordance with the terms of the Extradition Treaty between the government of the United States and the government of the United Kingdom of Great Britain and Northern Ireland, which provides as follows:

> (1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on application through the diplomatic channel by the competent authorities of the requesting Party. The application shall contain an indication of intention to request the extradition of the person sought and the statement of the existence of a warrant of arrest or a conviction against that person, and, if available, a description of the person sought, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party.

Treaty on Extradition, June 8, 1972, United States-United Kingdom, art.VIII, 28 U.S.T. 227, 232, T.I.A.S. No. 8468 [hereinafter cited as Treaty]. *See infra* note 3. The terms Great Britain and United Kingdom are used interchangeably throughout this Note.

2. Treaty, *supra* note 1. "Extradition is the process whereby one state delivers to another state, at its request, a person charged with a criminal offense against the law of the requesting state, in order that he may be tried and/or punished." Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 1 (1968).

3. On November 19, 1980, a formal complaint requesting Mackin's extradition was filed by the British government and a warrant of arrest was issued on the same day by Honorable Richard Owen. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 2 (S.D.N.Y. Aug. 13, 1981), *habeas corpus denied*, 668 F.2d 122 (2d Cir. 1981).

Under federal statute, extradition proceedings are initiated when the requesting country files a verified complaint with the nearest court having jurisdiction over the individual, charging the fugitive with the commission of an extraditable offense as set forth in the treaty. A federal magistrate issues a warrant for the fugitive's arrest and conducts a hearing in the fugitive's presence to determine whether the requesting country has demonstrated that the evidence is sufficient to sustain the charge that the fugitive has committed the extraditable offense. If the magistrate deems the evidence submitted by the requesting party sufficient to establish probable cause, he orders the fugitive incarcerated and certifies the evidence and transcripts of the hearing to the Secretary of State. 18 U.S.C. § 3184 (1976).

Review of the magistrate's decision within the judicial system is limited. The particular decision is final and not appealable, Collins v. Miller, 252 U.S. 364, 369 (1920); Laubenheimer v. Factor, 61 F.2d 626, 628 (7th Cir. 1932), although the requesting country may refile its request if extradition is denied. *See* 2 M. BASSIOUNI & V. NANDA, A TREATISE

Northern Ireland between Mackin, a member of the Provisional Irish Republican Army,[5] and a plain clothes British soldier. Mackin

---

ON INTERNATIONAL CRIMINAL LAW 367-70 (1973). If the magistrate determines that the fugitive is extraditable, however, the accused may collaterally attack the decision by filing a petition for writ of habeas corpus. 28 U.S.C. § 2241 (1976); 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW § 33, at 1013 (1968). The only issues to be reviewed in a habeas corpus proceeding are those relating to whether the magistrate had jurisdiction, whether the offense is enumerated in the treaty, and whether there was any evidence warranting the finding of probable cause to believe the accused guilty of the charged offense. Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). Habeas corpus may not be used to rehear the findings of the magistrate. Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Benson v. McMahon, 127 U.S. 457, 461-62 (1888).

If the courts authorize extradition, the Secretary of State must independently decide whether to deliver the accused to the requesting party. 18 U.S.C. § 3186 (1976). The Secretary may lawfully decline to surrender the fugitive either on the ground that the case is not within the treaty or that the evidence is not sufficient to establish the crime charged. The Secretary may also consider matters outside the record, such as public policy in light of current international relations. *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 334, at 174 (1942) (citing a memorandum from Counselor Anderson of the Department of State to Secretary of State Knox, February, 1912, Department of State File 211.42R67/16). The executive branch has discretion to deny extradition on humanitarian grounds, if it should appear that it would be unsafe to surrender an accused to foreign authorities. *See* Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *In re* Sindona, 450 F. Supp. 672, 694 (S.D.N.Y.), *habeas corpus denied sub nom.* Sindona v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978), *aff'd*, 619 F.2d 167, 173-74 (2d Cir. 1980). *See also infra* note 162 and accompanying text.

4. On March 16, 1978, in Andersonstown, Belfast, Northern Ireland, Desmond Mackin and Robert Gamble were searching for Mackin's missing "people's taxi" service cab. This cab was used for the purpose of transporting people from the Catholic neighborhoods of West Belfast to the shopping areas in Belfast because violence had caused local transportation services to be withdrawn. Mackin and Gamble were looking for the cab on foot in the Rossnareen-Ramoan Gardens area when they noticed groups of men conspicuously standing on certain street corners. Mackin claimed he knew the men were strangers to the area because he was familiar with almost everyone in the community, at least by sight, and because the men acted in a manner which was out of the ordinary for residents of Andersonstown. There was also a mini-van travelling through the streets with someone inside the van taking photographs from the window. In addition, two British Army helicopters were flying overhead. Mackin and Gamble concluded that the strangers were British soldiers. They wished to inform the local Provisional Irish Republican Army (PIRA) defense units, *see infra* note 5, which could properly deal with the situation, and sought the easiest way to escape the circle of strangers being formed around them. Mackin and Gamble determined that the "weakest link" in the group of undercover soldiers was the soldier standing at a bus stop. Mackin approached him and asked who he was and what he was doing in the area. The soldier recognized Mackin and Gamble as members of the PIRA. There is some question as to what happened next and who fired at whom, but an altercation ensued in which all three received gunshot wounds. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 8-12 & 92-95.

5. "[T]he PIRA [Provisional Irish Republican Army] is committed to the traditional goal of Irish nationalism, the removal of British presence from Ireland and the unification of Ireland through the use of violent means, directed, to a large extent, against the security forces." *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 64.

was indicted[6] in Great Britain on charges of attempted murder, wounding with intent to do grievous bodily harm, and possession of firearms and ammunition with intent to endanger life.[7]

Magistrate Naomi Reice Buchwald presided over the extradition hearing, which began on February 20, 1981.[8] The magistrate found, initially, that the evidence submitted by the government of the United Kingdom established probable cause[9] to believe that

---

6. *Id.* at 1. Mackin was released on bail and failed to appear for trial on September 25, 1979. A bench warrant for his arrest was issued. *Id.*

7. *Id.* The first charge, of attempted murder, is contrary to common law in Great Britain. *Id.*

> Murder is a Common Law offense, it is not defined by Statute. Murder is committed "where a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the King's peace, with malice aforethought either express or implied, the death following within one year and a day. "

Post Trial Memorandum in Support of the Requested Extradition of Desmond Mackin by the United Kingdom of Great Britain and Northern Ireland Pursuant to 28 U.S.T. 227, T.I.A.S. 8468 (1977) and 18 U.S.C. § 3184, at 9, *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. (S.D.N.Y. Aug. 13, 1981) (citing E. COKE, INSTITUTES OF THE LAWS OF ENGLAND (1572) and J. F. ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES (40th ed. 1979)) [hereinafter cited as Gov. Post Trial Memorandum].

The second charge is contrary to § 18 of the Offenses Against the Person Act of 1861, which provides:

> Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of a felony and being convicted thereof shall be liable to be kept in penal servitude for life.

Gov. Post Trial Memorandum, *supra*, at 12 (citing Offenses Against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 18, *amended by* Statute Law Revision Act, 1892, 55 & 56 Vict., ch. 19, 246, Statute Law Revision Act (No. 2), 1893, 56 & 57 Vict., ch. 54, 227, Criminal Law Act, 1967, N. Ir. Pub. Gen. Acts, ch. 18, § 1).

Penal servitude has been abolished by the Criminal Justice Act, 1953, N. Ir. Pub. Gen. Acts, ch. 14, § 1.

The final charge is contrary to the Firearms Act of Northern Ireland. This Act provides:

> A person shall be guilty of an offence if he has in his possession any firearm or ammunition with intent by means thereof to endanger life or cause serious injury to property or to enable any other person by means thereof to endanger life or cause serious injury to property, whether any injury to person or property has been caused or not.

Firearms Act, 1969, N. Ir. Pub. Gen. Acts, ch. 12, § 14.

8. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 3. The appropriate inquiries for a court to make at an extradition hearing include whether the offense charged is extraditable under the treaty, whether the person brought before the court is the one accused of the crime, and whether probable cause exists to believe that the defendant committed the offense. Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969). *See* Benson v. McMahon, 127 U.S. 457, 463 (1888); Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976).

9. To establish probable cause there must be sufficient evidence warranting a finding that there was reasonable ground to believe the accused guilty of the crimes charged. Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976); Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969); Wacker v. Beeson [sic], 256 F. Supp. 542, 544 (E.D. La. 1966), *aff'd per curiam*,

Mackin committed the offenses for which he had been indicted in Great Britain.[10] Generally, such a finding would be sufficient to support the requested extradition.[11] Magistrate Buchwald ruled, however, that the extradition of Mackin was barred because the charged offenses were of a political character and thus fell within the scope of the political offense exception[12] of the Treaty.

Counsel for the United States, on behalf of the government of the United Kingdom,[13] argued that the threshold issue of this case

---

Wacker v. Bisson, 370 F.2d 552, 553 (5th Cir. 1967). This standard of proof is set forth in 18 U.S.C. § 3184. Under this statute, the hearing before the magistrate is held "to the end that the evidence of criminality may be heard and considered" in order to determine whether "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty . . . ." 18 U.S.C. § 3184. The test as to whether such evidence of criminality has been presented is in essence the same test as that for probable cause. 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW § 28, at 945 (1968); Application of D'Amico, 185 F. Supp. 925, 928 (S.D.N.Y. 1960). *See* Factor v. Laubenheimer, 290 U.S. 276, 291 (1933); Benson v. McMahon, 127 U.S. 457, 462-63 (1888).

10. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 21.

11. *See supra* notes 3 & 8.

12. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 42-43. This exception in Article V(1)(c) of the Treaty expressly prohibits the surrender of persons charged with "any crime or offense of a political character." *See* Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1322 (1962). For the text of the political offense exception, *see infra* text accompanying note 79.

Prior to the nineteenth century, extradition treaties were signed for the specific purpose of surrendering political offenders to their homeland. *See* Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247, 249 (1933). The introduction of the political offense exception to treaties resulted from a reversal of attitudes following the French Revolution and the increased awareness of international world order. Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777, 782 (1976-77). "The historical reason for this practice was the well-founded apprehension that to surrender political criminals would surely amount to delivering them to their summary execution or, in any event, to the risk of being tried and punished by tribunals colored by political passion." Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1226 (1962) (footnote omitted). Because the extradition proceedings have the character of a preliminary examination, Benson v. McMahon, 127 U.S. at 463; Peroff v. Hylton, 563 F.2d at 1102; Jhirad v. Ferrandina, 536 F.2d 478, 484 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976), the fugitive has no right to introduce evidence at the hearing which merely contradicts the evidence supplied by the requesting Party or which only poses conflicts of credibility. *In re* Sindona, 450 F. Supp. at 685. The accused may only introduce evidence which is explanatory. *Id.* The extent of such explanatory evidence to be received is largely in the discretion of the magistrate but the decisions are emphatic that the extraditee may not turn the extradition hearing into a full trial on the merits. Collins v. Loisel, 259 U.S. 309, 315-17 (1922); Charlton v. Kelly, 229 U.S. 447, 461 (1913); *In re* Sindona, 450 F. Supp. at 685.

13. In extradition proceedings, the requesting party is represented by the requested government. The Treaty provides: "[t]he requested Party shall make all necessary arrangements for and meet the cost of the representation of the requesting Party in any proceedings

was whether the court had jurisdiction to determine if the crime charged was a "political offense" under the Treaty, or whether such determination should be made by the executive branch.[14] On this issue, Magistrate Buchwald held that: 1) the applicable statute, 18 U.S.C. § 3184,[15] which gives a magistrate authority to hear and consider evidence of criminality in extradition cases, includes the authority to determine whether the alleged offense falls within the ambit of the "political offense exception;"[16] 2) the language of the Treaty which requires that the political offense exception be determined by the "requested Party" refers to the judiciary and not to the executive branch;[17] and 3) the determination made under the political offense exception of the Treaty does not violate the "political question doctrine,"[18] because it relates only to past political fact and not to the present political climate of the requesting country.[19] The court of appeals subsequently agreed with this holding.[20]

The purpose of this Note is to examine the opinions of the magistrate and court of appeals in *In re Mackin*, regarding the issue of whether the courts have jurisdiction to determine the applicability of the political offense exception. Part I of this Note will analyze the language of the applicable extradition statute and will compare the courts' interpretation with that of the government of the United States. Part II will attempt to resolve the jurisdictional issue by examining the language of the political offense exception in the Treaty, in view of a trend in the language of the political offense exception in recent treaties. Part III will discuss the constitutional effect of the political question doctrine on the determination of the threshold issue by the courts.

I. *INTERPRETATION OF THE EXTRADITION STATUTE*

The foundation of the magistrate's opinion is that no precedent supports adoption of the government's narrow reading of the extra-

---

arising out of a request for extradition." Treaty, *supra* note 1, at art. XIV(1). Consequently, the government of the United Kingdom was represented by the United States Attorney's Office and Mackin was represented by private counsel.

14. Brief for the United States of America, at 26, *In re* Mackin, 668 F.2d 122 (2d Cir. 1981) [hereinafter cited as Gov. Brief]; *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 36.

15. *See infra* note 21 for text of statute.

16. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 36.

17. *Id.* at 40.

18. *See infra* notes 131-32 and accompanying text.

19. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 40-41.

20. *In re* Mackin, 668 F.2d 122 (2d Cir. 1981).

dition statute,[21] which would limit the court's jurisdiction solely to a determination of probable cause.[22] In over eighty years of jurisprudential history, the magistrate noted, the courts have never declined to receive and consider evidence on the application of the political offense exception.[23]

A. *Precedent*

In the United States, the question of the courts' jurisdiction to apply the political offense exception has arisen only twice, once in 1894[24] and again in 1981.[25] In both cases the courts exercised jurisdiction to determine the issue.[26] In *Eain v. Wilkes*,[27] decided in 1981, the court stressed that it "ha[d] not found any case where an American court declined to consider the applicability of the political offense exception when it was squarely presented."[28] The

---

21. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 36-37. The language of 18 U.S.C. § 3184 provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, *that he may be brought before such* justice, judge, or *magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty* or convention, *he shall certify the same*, together with a copy of all the testimony taken before him, *to the Secretary of State*, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person . . . .

Id. (emphasis added).

22. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 36-37.

23. *Id.* at 37.

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

25. Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 50 U.S.L.W. 3278 (Oct. 18, 1981).

26. 641 F.2d at 513-17; 62 F. at 997.

27. 641 F.2d 504 (1981). In *Eain*, Israel sought the extradition from the U.S. of Abu Eain, a revolutionary who was accused of planting a bomb in a crowded market place in Tiberias, Israel. The bomb's explosion killed two young boys and injured more than 30 others. The petitioner was a member of the Al Fatah branch of the Palestine Liberation Organization (PLO) and claimed that the bombing was politically motivated. *Id.*

28. *Id.* at 513. *See, e.g.*, Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971); Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *cert. denied sub nom.* Jimenez v. Hixon, 373 U.S. 914 (1963); United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959);

court stated that other tribunals which have considered the applicability of the political offense exception, without raising or discussing the jurisdictional issue, have done so "presumably relying upon the language in 18 U.S.C. § 3184."[29]

In *Eain*, the court focused on the language of section 3184 that requires "[a] hearing to determine whether there is sufficient evidence 'to sustain the charge *under the provisions* of the proper treaty.' "[30] It interpreted that portion of the statute to include "a clause excepting political offenses [as] a 'provision' of the treaty,"[31] and concluded, therefore, that a determination made by the magistrate under the political offense provision was within the scope of the extradition hearing.[32] Curiously, the magistrate in *Mackin* referred to the *Eain* court's interpretation of the statute, but explicitly declined to pass on the merits of such statutory construction.[33]

Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959); *In re* Lincoln, 228 F. 70 (E.D.N.Y. 1915); *In re* Ezeta, 62 F. 972 (N.D. Cal. 1894).

29. 641 F.2d at 513.

30. *Id.* (emphasis in original). The *Eain* court also argued that when the extradition statute was originally enacted, the courts were to decide preliminarily how to apply the political offense exception. Congress made it "a Judicial determination in the first instance as to whether or not the country requesting extradition had charged an individual with a crime 'under the provisions of' a treaty." 641 F.2d at 513 (quoting 18 U.S.C. § 3184). Up until that time, "the Executive exercised complete control over extradition without reference to the courts." *Id.* n.13 (citing M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 505 (1974)). The *Eain* court stressed that the executive branch had endorsed this new approach "[i]mmediately upon the statute's enactment." *Id.* As proof, the court cited an Attorney General's opinion from 1843. *Id. See* 4 Op. Att'y Gen. 201 (1843). In that opinion, the Attorney General concluded that the extradition treaty gave the court the power to issue warrants for fugitives charged under the treaty and to hear evidence of criminality relating to the charge. *Id.*

There is nothing in the Attorney General's opinion, however, which would lend support to the idea that Congress intended the judiciary to apply the political offense exception. Furthermore, since the Attorney General's opinion was actually rendered five years before section 3184 was enacted, citation of that opinion for the proposition that the executive branch began a policy of deference to the role of the judiciary, as mandated by Congress, "[i]mmediately upon the statute's enactment," 641 F.2d at 513 n.13, is inappropriate.

31. 641 F.2d at 513 n.12.

32. *Id.* at 513.

33. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 38 n.*.

Magistrate Buchwald stated:

> We note, without passing on the merits of such statutory construction, that the Court in *Abu Eain* v. *Wilkes* seemed to endorse a reading of that portion of 18 U.S.C. § 3184, which requires a hearing to determine whether there is evidence "to sustain the charge *under the provisions* of the proper treaty," (emphasis added in *Abu Eain v. Wilkes)*, to mean that a clause excepting political offenses is a "provision" of the treaty and thus, that a determination made under such clause is within the scope of the hearing contemplated by the statute.

Id.

The magistrate chose to rely solely on the outcome, rather than on the rationale, of the *Eain* court's holding.[34]

---

34. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 37-38. In supporting the magistrate, the court of appeals in *Mackin*, noted the case of *In re* Kaine, 55 U.S. 103 (1852), which was decided four years after the enactment of the original extradition statute. In *Kaine*, the government of the United Kingdom requested the extradition of the accused for the crime of attempted murder. Although this extradition case involved no political offense issue, the *Kaine* court made the general observation that "extradition without an unbiased hearing before an independent judiciary [is] highly dangerous to liberty, and ought never to be allowed in this country." *Id.* at 113. The court of appeals in *Mackin* cited *Kaine* to establish the intent of Congress in enacting the extradition statute. 668 F.2d at 135.

In *Kaine*, Justice Catron relied on the case of United States v. Robins, 27 Fed. Cas. 825 (1799). In that case, Jonathan Robins was surrendered by the United States to British naval officers, pursuant to the extradition treaty then in existence. There was no legislation on extradition at the time, and President Adams, believing he had control over the extradition process, arranged for delivery of Robins to the British. This action by the President alone apparently caused a national outcry due to the perception that Robins was an American citizen who had been forced into military service by the British Navy and that the murder, for which he was charged, had occurred during the course of a mutiny on board a British vessel. *See* Speech of John Marshall, 10 Annals of Congress 613 (1800). The public acknowledged the fact that Jonathan Robins had committed a murder, but it was significant that the murder was committed in fleeing from an illegal impressment. The belief that Robins should not have been extradited is analogous to the reasoning supporting the political offense exception. Justice Catron, in *In re Kaine*, noted that this unfortunate event had a controlling influence when Congress passed the Extradition Act of 1848 (Rev. Stat. § 5270). 55 U.S. at 112. From an analysis of *Kaine*, the court of appeals in *Mackin* concluded that when Congress vested magistrates with the authority to determine whether evidence exists to sustain a charge under the provisions of the proper treaty, "it had no intention of silently excepting the political offense issue from the magistrates' consideration." 668 F.2d at 135.

The relevance of the *Kaine* decision is questionable, however. The *Kaine* doctrine (that extradition without an unbiased judicial hearing is highly dangerous to liberty) is not hindered in the slightest by having a magistrate preside over the extradition hearing to determine probable cause, while also having the executive branch determine if the political offense exception applies.

Furthermore, *In re Kaine* was collaterally attacked in *Ex Parte* Kaine, 14 Fed. Cas. 78 (S.D.N.Y. 1853), a habeas corpus proceeding. In *Ex Parte Kaine*, Justice Nelson stated that decisions growing out of political offenses are best left to the executive branch because they involve a political question. 14 Fed. Cas. at 81. Justice Nelson concluded:

> The surrender, in such cases, involves a political question, which must be decided by the political, and not by the judicial, powers of the government. It is a general principle, as it respects political questions concerning foreign governments, that the judiciary follows the determination of the political power, which has charge of its foreign relations, and is, therefore, presumed to best understand what is fit and proper for the interest and honor of the country. They are questions unfit for the arbitrament of the judiciary—especially so for the subordinate magistrates of the country.

Id. at 81. The court of appeals in *Mackin* felt Justice Nelson misunderstood the significance of the Robins incident and that Justice Catron's interpretation of the statute represents the sounder view. 668 F.2d at 135. For a discussion of the constitutional implications of political offense determinations, see Part III on the political question doctrine.

The only previous decision to address the merits of the jurisdictional question regarding determination of the political offense exception was *In re Ezeta*,[35] decided in 1894. In that case, counsel for the Salvadoran government argued that courts do not have jurisdiction to determine the political character of an offense.[36] The foreign government based its argument on the language of the treaty[37] and the extradition statute[38] then in effect. The court noted in particular that authority was given to the President of the United States under the extradition statute to decline to surrender a fugitive to the requesting country on the ground that the case was not within the treaty or that the evidence was not sufficient to establish the charge of criminality.[39] The court held that the delegation of such authority to the President did not deprive the committing magistrate of the jurisdiction to determine preliminarily whether the offense was of a political character.[40] The magistrate's task was to take all the testimony and determine its sufficiency with respect to the offense charged.[41]

35. 62 F. 972 (N.D. Cal. 1894). *Ezeta* was the first judicial opinion in the United States to consider the political offense exception. Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381, 391 (1979-80). In this case the Salvadoran government sought the extradition of General Ezeta, the former president of the Republic of Salvador, on charges of murder and robbery. These crimes were allegedly committed during a revolution in which the fugitive was seeking to maintain the authority of the then existing government.

36. 62 F. at 995.

37. The treaty provided that persons convicted or charged with any of the crimes specified shall be delivered up only " 'upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime had been there committed.' " 62 F. at 995 (quoting the extradition treaty between the United States and Republic of Salvador). The Salvadoran government contended that the applicable provision in the treaty necessarily excluded an inquiry into the character of the political offense by the magistrate, since there could not be a crime of a political character under the laws of the United States unless it were treason. *Id.*

38. The language of the predecessor statute of 18 U.S.C. § 3184, then applicable, provided that any person charged with an extraditable crime under any treaty may be arrested and brought before the magistrate "to the end that the evidence of criminality may be heard and considered." 62 F. at 995 (quoting Rev. Stat. § 5270). Counsel claimed that this provision limited the jurisdiction of the magistrate and "that when [the magistrate] has received and considered the evidence of criminality of the accused as to the crime charged in the complaint the examination is at an end." *Id.*

39. 62 F. at 996.

40. *Id.* at 996-97.

41. In an effort to illustrate judicial acceptance of the principle that the courts have jurisdiction to determine the political offense issue, Magistrate Buchwald erroneously stated that the court in *In re Ezeta* began its discussion of the political offense exception by simply stating " '[h]aving jurisdiction to determine whether the charges against the accused are of a

In taking jurisdiction, the *Ezeta* court analyzed the language of both the statute and the treaty then in effect.[42] The court determined that the statutory phrase which gave the magistrate the power to hear "evidence of criminality" could not be interpreted as limiting the court's jurisdiction to decide if extradition should be granted.[43] Although the rationales of the *Eain* and *Ezeta* holdings were distinctly different,[44] the magistrate[45] and court of appeals[46] in *Mackin* endorsed neither approach, relying instead on the similarity of result in the two cases.[47] What is certain, however, is that

---

political character or not, I proceed to the consideration of that question.' " *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 37 n.** (quoting *In re* Ezeta, 62 F. at 997). The *Ezeta* court, however, discussed at length the jurisdictional issue raised by counsel for the Salvadoran government before concluding that it had jurisdiction. *See* 62 F. at 995-97. *See also supra* notes 36-39 and accompanying text. This oversight was accepted by the court of appeals in *Mackin*. 668 F.2d at 135.

42. The statute in effect at the time of *Ezeta*, Rev. Stat. § 5270, was enacted in 1848. It provided:

> Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner to the end that the evidence of criminality may be heard and considered.

This is similar to the language of 18 U.S.C. § 3184, now in effect. *See supra* note 21 for text of § 3184.

43. 62 F. at 996. After analyzing the statute and the treaty, the court stated:

> Plainly, the duty of the judicial authority is to decide whether extradition is due, according to law and the evidence, and pursuant to the treaty. The whole case must be considered by the magistrate, whether the questions involved arise out of the law, the evidence, or the treaty. There is no limitation in this respect as to his jurisdiction, and his duty is fully and accurately stated.

Id. As a matter of public policy, due to the relations of one nation with another, the court stated that the chief executive should review extradition cases if the accused is found extraditable. *Id.* It concluded, however, that this authority does not deprive the magistrate of jurisdiction to determine preliminarily whether the offense is political in character or not. *Id.*

The court further concluded that since the Constitution of the United States declares that treaties are the supreme law of the land, the judicial branch should be able to see what the terms of the treaty are with respect to the question under consideration. *Id.* Presumably, as a result of this opinion, courts over the years have concluded that they have had jurisdiction to apply the political offense exception. *See, e.g., supra* note 28.

44. *See supra* text accompanying notes 30-32 & 42-43.

45. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 37-38.

46. 668 F.2d at 135.

47. Both courts held that the judiciary has jurisdiction to determine if an offense of a political character has been committed. *See supra* text accompanying notes 27-32 & 35-41.

the question of whether the court may decide the political offense exception rests necessarily, in part, on interpretation of the language of the statute. Both *Eain* and *Ezeta* imply this proposition. Given the lack of agreement in the respective rationales of the two cases, and given the *Eain* and *Mackin* courts' observations that arguments against court determination of the political offense exception are not without merit,[48] blind allegiance to the precedent established by the outcomes of both *Eain* and *Ezeta* is unwarranted and improper. Instead, as these two cases suggest, statutory construction should be dispositive. Accordingly, an analysis of the language of the statute applicable in *Mackin* is appropriate here.

B. *The Language of the Statute*

The language of 18 U.S.C. § 3184[49] provides that a magistrate is authorized to conduct an extradition hearing "to the end that the evidence of criminality may be heard and considered."[50] If on such hearing the magistrate considers the evidence sufficient "to sustain the charge under the provisions of the proper treaty,"[51] he shall certify the evidence and transcripts of the hearing to the Secretary of State.[52] With respect to the language of the statute, two interpretations have thus far been presented: 1) the magistrate has jurisdiction to apply the political offense exception because this exception is a "provision" of the Treaty, as held by the *Eain* court[53] and 2) the phrase "evidence of criminality" does not suggest that the magistrate's jurisdiction in extradition cases is limited to a determination of probable cause, as concluded in *Ezeta*.[54]

A third interpretation was asserted by the government in *Mackin*. According to this view, there is nothing in the language of section 3184 to indicate that the political offense issue should be decided by the magistrate.[55] "The statute does not refer explicitly to political offenses, but provides generally that the extraditee be brought before the committing justice, judge, or magistrate 'to the

48. 641 F.2d at 517; *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 42; 668 F.2d at 137.

49. *See supra* note 21 for text of statute.

50. *Id.*

51. *Id.*

52. *Id.*

53. 641 F.2d at 513. *See supra* notes 30-32 & 42-43 and accompanying text.

54. 62 F. at 995-96. *See supra* notes 30-32 & 42-43 and accompanying text.

55. Gov. Brief, *supra* note 14, at 28.

end that the evidence of criminality may be heard and considered.' "[56] In *Mackin*, the government argued that "evidence of criminality" is the operative phrase, and that this phrase refers solely to the issue of probable cause.[57]

This construction of the statute grants the court jurisdiction to determine only whether there was probable cause[58] to believe the accused guilty of the crime charged and necessarily precludes any further examination into the political offense exception by the magistrate. In *Charlton v. Kelly*,[59] the Supreme Court of the United States upheld this construction, stating that an extradition proceeding is not a trial in the legal sense.[60] The Court held that extradition proceedings are simply inquiries into whether sufficient evidence exists to justify committing an accused to custody while awaiting the requisition of the foreign government.[61] It concluded that the only issue a court should resolve in extradition matters is whether the requesting government has submitted sufficient evidence to establish probable cause.[62] Therefore, although the role

---

56. *Id.* at 28-29. "There exists no legislative enactment exempting political offenders from extradition to foreign nations. The entire collection of written law concerning political offenders is to be found in treaties negotiated between the United States and other nations." Cantrell, *supra* note 12, at 794.

57. Gov. Brief, *supra* note 14, at 29.

58. *See generally* Collins v. Loisel, 259 U.S. 309 (1922); Charlton v. Kelly, 229 U.S. 447 (1913); Bryant v. United States, 167 U.S. 104 (1897). This construction of the statute was given in the cases cited, although the political offense exception was not at issue.

59. 229 U.S. 447 (1913) (extradition request by Italian government on complaint that fugitive committed murder).

60. *Id.* at 461. The Court stated: "The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the State makes a *prima facie* case of guilt sufficient to make it proper to hold the party for trial." *Id. Accord* Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962). "[T]he extradition proceeding is not a trial of the guilt or innocence [of petitioner] but of the character of a preliminary examination . . . ." *Id.* at 556.

61. 229 U.S. at 460.

62. 229 U.S. at 460-61. There is a distinction between evidence rebutting probable cause, which is properly admitted, and evidence in defense, which may not be admitted. *Id.* The defendant may not present any evidence in the nature of a defense, such as insanity or an alibi. *Id. See* Collins v. Loisel, 259 U.S. 309, 316 (1922); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970). *See also* Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, 198 (1980).

Evidence of the political nature of a crime does not fall into either category. The political character of an offense does not rebut whether a court has probable cause to believe the defendant committed the crime. It also cannot be used as a defense on the merits because a determination of the political nature of a crime does not affect the guilt or innocence of a defendant but merely serves to block his extradition. *Charlton*, therefore, does not explicitly

of the judiciary in the extradition process is uniquely important,[63] "that role is limited to the making of a determination of probable cause."[64]

Focusing on the purpose that review of the evidence is intended to serve gives rise to a fourth interpretation. Section 3184 provides that the magistrate must deem the evidence of criminality "sufficient to sustain the charge under the provisions of the proper treaty."[65] Logically to "sustain the charge," all that would be required is evidence sufficient to establish probable cause that the crime had been committed. The political character of the offense is not relevant to whether the evidence "sustains" the charge, because the political offense provision is an exception to extradition and not a defense on the merits of the charge.[66]

The language of the treaty should also be interpreted in light of the phrase "charge under the provisions of the treaty."[67] The charges available under the treaty are set forth in the Schedule of Offenses[68] referred to in Article III of the Treaty and are not listed in the political offense exception. Contrary to the *Eain* court's interpretation of this phrase,[69] these words were intended only to focus attention on whether the offense charged is enumerated in the Schedule of Offenses. The language of the statute should therefore not be construed to give courts unlimited jurisdiction to decide whether extradition is due, "according to law and the evidence, and pursuant to the treaty," as stated in *Ezeta*.[70]

---

forbid such evidence. The Supreme Court, however, in *Charlton*, appears to place emphasis on only receiving that which falls into the category of evidence rebutting probable cause. *See infra* notes 63-64 and accompanying text. The more evidence that is received on additional issues, the closer the proceeding comes to being a full trial on the merits, which is strictly prohibited. *See supra* note 12.

63. Berenguer v. Vance, 473 F. Supp. 1195, 1199 (D.D.C. 1979) (extradition request by Italian government on charges of homicide and robbery).

64. *Id.* This is of course, in addition to determining whether the offense charged is extraditable under the treaty, and whether the person brought before the court is the one accused of the crime. *See supra* note 8.

65. 18 U.S.C. § 3184 (1976). *See supra* note 21 for text of statute.

66. *See supra* note 62. The court's appraoch in *Charlton* is apparently to examine whether the evidence sustains the extradition, not whether the charge is sustained. Such a reading is not justified by the language of the statute.

67. 18 U.S.C. § 3184 (1976). *See supra* note 21 for text of statute.

68. *See* Treaty, *supra* note 1, at Schedule annexed to Treaty. The schedule of offenses is annexed to the Treaty and lists such offenses as murder, kidnapping, extortion, counterfeiting, fraud and arson. *Id.*

69. *See supra* text accompanying notes 30-31.

70. 62 F. at 996.

In *Mackin*, the magistrate did not address the need for statutory construction, despite the implication in *Eain* and *Ezeta* that such construction is a necessary condition for taking jurisdiction over political offense determinations.[71] She emphasized that Congress had implicitly endorsed the courts' practice of taking jurisdiction to decide the political character of offenses,[72] because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."[73] The court inferred that Congress intended to adopt the judicial interpretation of 18 U.S.C. § 3184, that courts have jurisdiction to decide whether an offense is of a political character, "into the plain words of the statute."[74] Magistrate Buchwald submitted that if there were to be any major change in the extradition process, it would be for Congress to consider, and that in order to interpret the statute differently a major statutory change would be required.[75]

As the government argued in *Mackin*, however, "the vesting of exclusive jurisdiction to decide the 'political offense' question in the Executive Branch does not do violence to the present extradition statutes . . . and is in keeping with the deference the courts have traditionally and wisely paid the Executive Branch in matters of foreign policy."[76] Therefore, the strained construction of section 3184 that gives the courts power to apply the political offense exception should be discarded in favor of the view of authorities explicitly indicating that the judiciary's role in extradition matters is limited to a determination of probable cause.[77]

II. *THE TREATY*

The political offense exception is set forth in Article V(1)(c) of the Treaty on Extradition between the United States and the United Kingdom.[78] It provides:

---

71. *See supra* notes 30-32 & 42-43 and accompanying text.

72. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 38.

73. *Id.* at 38 (quoting Lorillard v. Pons, 434 U.S. 575, 580-81 (1977)). *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951); National Lead Co. v. United States, 252 U.S. 140, 147 (1920).

74. *In re* Mackin, No. 80 Cr. Misc 1, p. 54, slip op. at 39.

75. *Id.* at 42-43.

76. Gov. Brief, *supra* note 14, at 27.

77. *See supra* notes 59-64 and accompanying text.

78. Treaty, *supra* note 1, art. V(1)(c).

> Extradition shall not be granted if . . . (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.[79]

A. *Part One of the Political Offense Exception*

Although the political character of an offense has traditionally been decided by the courts,[80] there is no definition, either in the Treaty itself or in the minutes of the Treaty negotiations, of the "requested Party" that is to make this determination.[81] In *Mackin*, the magistrate held that the term "requested Party" referred to the government in general,[82] although the government argued that the words referred to the executive branch.[83]

The magistrate in *Mackin* focused on the fact that the Treaty was re-negotiated in 1969 and implied that no revision of the

---

79. *Id.*

80. *See supra* note 28.

81. Hannay, *supra* note 35, at 385.

82. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 39-40. This view is reinforced by a reading of articles V, VI, and XI which pertain to the "territory of the requested Party" and of articles IV, VIII and IX which pertain to the "law of the requested Party." For example, article V(1) provides that:

> Extradition shall not be granted if: (a) the person sought would, if proceeded against in the *territory of the requested Party* for the offense for which his extradition is requested, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third state . . . .

Treaty, *supra* note 1, art. V(1) (emphasis added).

Article VI provides: "If the person sought should be under examination or under punishment in the *territory of the requested Party* for any other offense, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him." *Id.* art. VI (emphasis added).

Article XI(2) provides:

> If a warrant or order for the extradition of a person sought has been issued by the competent authority and he is not removed from the *territory of the requested Party* within such time as may be required under the law of that Party, he may be set at Liberty and the requested Party may subsequently refuse to extradite him for the same offense.

Id. art. XI(2) (emphasis added).

Article IV provides:

> If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant *law of the requested Party* does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

political offense exception was made at that time.[84] The magistrate also stated that there was no indication in the minutes of the extradition negotiations between the United States and the United Kingdom that the contracting parties intended to preclude the judiciary from determining the applicability of the political offense exception.[85] Accordingly, she held that the contracting parties to the Treaty would be charged with the knowledge of the way in which the Treaty had been interpreted.[86] She reasoned that the absence of any revision implied an intent not to change the prevailing judicial interpretation regarding jurisdiction over political offense determinations.[87]

Interestingly, the drafters of the Treaty did change the language of the political offense exception when they re-negotiated

---

Id. art. IV (emphasis added).

Article IX(1) sets forth:

> Extradition shall be granted only if the evidence be found sufficient according to the *law of the requested Party* either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.

Id. art. IX(1) (emphasis added).

See also Article VIII, *supra* note 1. The phrase at issue in the above articles could not be construed so narrowly as to refer to one branch of the government.

83. Gov. Brief, *supra* note 14, at 28. The United States is uniformly represented by the President in matters of foreign affairs. The President is the "sole organ of the federal government in the field of international relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). *See* speech of John Marshall, 10 Annals of Cong. 613 (1800), *reprinted in* 18 U.S. (5 Wheat. app.) 26 (1820); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 45-50, 93 (1972). *See also infra* note 102.

84. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 39-40.

85. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 40. Magistrate Buchwald stated: "Absent an indication to the contrary, this Court has no basis upon which to assume that the parties intended to change a practice of more than eighty years." *Id.* (footnote omitted). This statement was based upon a reading of the "Minutes of Extradition Negotiations United States/United Kingdom," London (October 30, 1969 and December 1-4, 1969).

86. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 39-40. Presumably, the magistrate is relying on the supremacy clause of article VI of the Constitution "which expressly makes treaties (along with the Constitution and federal laws) the supreme Law of the Land." B. SCHWARTZ, CONSTITUTIONAL LAW § 3.16 (1979). Therefore, a treaty takes effect as part of our law, just as a federal statute. *Id.*; Head Money Cases, 112 U.S. 580, 599 (1884). Therefore, since Congress is charged with the knowledge of the way in which a statute is being interpreted, *see supra* note 73, the same holds true for a treaty. The court of appeals supplemented the magistrate's opinion on this issue by theorizing that it is more likely that the language was intended to preclude a requesting country from binding the requested country with its definition of political offense or that derived from international law. 668 F.2d at 133.

87. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 40.

it,[88] contrary to statements in the opinions of the magistrate and court of appeals.[89] In the previous treaty between the United States and the United Kingdom,[90] the political offense exception simply stated that a fugitive criminal would not be surrendered

> if the crime or offense in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offense of a political character.[91]

No reference was made as to which branch of the government should determine the applicability of this exception.[92]

Under Article V(1)(c) of the present Treaty,[93] the wording of the exception is essentially the same as in the former treaty except that the re-negotiated Treaty has been amended to say that the "requested Party" is to decide if the offense is political in nature.[94] To follow the magistrate's reasoning,[95] if the re-negotiaters of this Treaty are charged with the knowledge of the way the Treaty had been interpreted, it must be presumed that the drafters of the Treaty intended a new meaning for the provision when a change in the language was effected.[96]

The government argued in *Mackin* that this amendment means the executive branch should determine the applicability of the political offense provision.[97] In light of a trend in the language of the political offense exception in past treaties, particularly in

---

88. Gov. Brief, *supra* note 14, at 28 n.*. *See infra* notes 90-94.

89. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 40; 668 F.2d at 132-33. The magistrate relied on the absence of discussion in the "Minutes of Extradition Negotiations" to demonstrate that there was no dissatisfaction with the way the earlier treaty was interpreted. *See In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 40. *See also supra* notes 85-86 and accompanying text.

90. Treaty on Extradition, Dec. 22, 1931, United States-Great Britain, 47 Stat. 2122, T.S. No. 849.

91. *Id.* at art. 6.

92. *Id.*

93. *See supra* text accompanying note 79.

94. *Id.*

95. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 40. *See supra* note 85.

96. *See generally* Clark v. Allen, 331 U.S. 503, 515-16 (1947); Greci v. Birkens, 527 F.2d 956, 958-59 (1st Cir. 1976) (changes made in standard language previously used in extradition treaties were held to signify that a new interpretation was intended).

97. Gov. Brief, *supra* note 14, at 18. The government interpreted the addition of "requested Party" as calling for the subjective opinion of the executive branch, i.e., that of the Secretary of State. *Id.* n.*.

those treaties entered into force within the last twenty years, the government's view appears correct.[98] The trend has been one moving away from judicial determination of the political offense exception and toward executive resolution of the issue.[99] Over the years, the drafters of treaties have replaced terms such as "judicial author-

---

98. In surveying the 93 extradition treaties between the United States and foreign governments, dating back to 1856, a pattern in the language of the political offense exception can be discerned. See 28 U.S.C. § 3181 for a list of the nations with which the United States has entered into bilateral extradition treaties. For example, in the treaty with Argentina, signed on September 26, 1896, the provision concerning political offenses stated: "In cases of doubt with relation to the present article, the decision of the judicial authorities of the country to which the demand for extradition is directed will be final." Treaty on Extradition, Sept. 26, 1896, United States-Argentina, art. 6, 31 Stat. 1883, 1887, T.S. No. 6. This language clearly confers jurisdiction on the courts to determine whether a political offense has been committed. When the contracting parties to the treaty re-negotiated it in 1972, they deleted the language mandating judicial decision regarding political offenses and gave jurisdiction to "competent authorities of the requested Party." Treaty on Extradition, Jan. 21, 1972, United States-Argentina, art. 7(2), 23 U.S.T. 3501, 3509-10, T.I.A.S. No. 7510.

In the treaties drafted in the first decade of the 1900's, the issue of political offense was to be decided by the "authorities of the government" on which the demand for surrender was made. The drafters of these treaties distinctly omitted any specific reference to the courts. *See, e.g.*, Treaty on Extradition, Jan. 6, 1909, United States-France, art. VI, 37 Stat. 1526, 1530, T.S. No. 561; Treaty on Extradition, May 14, 1900, United States-Switzerland, art. VII, 31 Stat. 1928, 1932, T.S. No. 354; Treaty on Extradition, Apr. 21, 1900, United States-Bolivia, art. VI, 32 Stat. 1857, 1860-61, T.S. No. 399. Furthermore, "authorities of the government" is suggestive of the executive branch, as asserted by Judge Friendly in the opinion of the court of appeals in *Mackin*. *See infra* note 101.

The treaties drafted in the next two decades of this century contain language in the political offense exception which is ambivalent. The provisions declare that "[t]he state applied to, or courts of such State, shall decide whether the crime or offense is of a political character." *See, e.g.*, Treaty on Extradition, Mar. 1, 1933, United States-Albania, art. III, 49 Stat. 3313, 3316-17, T.S. No. 902; Treaty on Extradition, May 6, 1931, United States-Greece, art. III, 47 Stat. 2185, 2189-90, T.S. No. 855; Treaty on Extradition, Jan. 31, 1930, United States-Austria, art. III, 46 Stat. 2779, 2783, T.S. No. 822; Treaty on Extradition, July 2, 1925, United States-Czechoslovakia, art. III, 44 Stat. 2367, 2371, T.S. No. 734. This seems to be a step backward in establishing a trend. However, this ambivalence does not appear in treaties drafted in the recent decades.

Treaties executed in the 1960's and 1970's use language similar to that found in the treaty with Brazil which provides: "The determination of the character of the crime or offense will fall exclusively to the authorities of the requested State." Treaty on Extradition, Jan. 13, 1961, United States-Brazil, art. V(6)(c), 15 U.S.T. 2093, 2100, T.I.A.S. No. 5691. Reference to "authorities of the State" is even more suggestive of the executive branch than the phrase "requested Party," *see infra* note 101 and accompanying text, at issue in the present case. *See* Treaty on Extradition, Jan. 18, 1973, United States-Italy, art. VI(5), 26 U.S.T. 493, 499, T.I.A.S. No. 8052; Treaty on Extradition, June 22, 1972, United States-Denmark, art. 7(4), 25 U.S.T. 1293, 1301, T.I.A.S. No. 7864; Treaty on Extradition, Jan. 21, 1972, United States-Argentina, art. 7(2), 23 U.S.T. 3501, 3509-10, T.I.A.S. No. 7510; Treaty on Extradition, Dec. 3, 1971, United States-Canada, art. 4(1)(iii), 27 U.S.T. 983, 988, T.I.A.S. No. 8237.

99. *See infra* notes 100-04.

ities,"[100] which very clearly gave jurisdiction over the political offense exception to the judiciary, with phrases such as "authorities of the government"[101] and "requested Party," which more clearly denote the executive branch.[102] This trend culminated in the recent extradition treaty entered into by the United States with Mexico.[103] In that treaty, the political offense exception explicitly sets forth that the "executive authority of the requested Party shall decide" the applicability of the exception.[104] In view of the trend, it appears that the change in the language previously used in extradition treaties was intended to signify that a new interpretation of the exception is in order.[105]

The court of appeals in *Mackin* indicated that, although the political offense exception should be handled in a uniform man-

---

100. *See, e.g.*, Treaty on Extradition, Sept. 26, 1896, United States-Argentina, 31 Stat. 1883, T.S. No. 6. *See supra* note 98.

101. *See, e.g.*, Treaty on Extradition, Jan. 13, 1961, United States-Brazil, 15 U.S.T. 2093, T.I.A.S. No. 5691. *See supra* note 98. Support for this view, although qualified, may be found in Judge Friendly's statement in *Mackin* that, "reference to the 'authorities' of the United States Government is more suggestive of the executive branch than is the broader phrase 'requested Party' at issue in this case . . . ." 668 F.2d at 133.

102. When the term "requested Party" is used without words of qualification such as "territory of" [the requested Party], it generally refers to the executive branch. *Cf. supra* note 82. This interpretation is reinforced by a reading of articles IV, V, X, XI, XIII and XIV. For example, article XI provides: "The requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition." Article XIII provides:

> When a request for extradition is granted, the requested Party shall . . . furnish the requesting Party with all sums of money and other articles—(a) which may serve as proof of the offense to which the request relates; or (b) which may have been acquired by the person sought as a result of the offense and are in his possession.

Article XIV provides: "The requested Party shall make all necessary arrangements for and meet the cost of the representation of the requesting Party in any proceedings arising out of a request for extradition."

In each of these articles, in which the term "requested Party" is used alone, the governmental function to be carried out appears to be one more appropriately handled by the executive branch. *See also* articles IV, V, & X. The sole exception to this rule appears in article IX(2) which states: "If the requested Party requires additional evidence or information to enable a decision to be taken on the request for extradition, such evidence or information shall be submitted within such time as that Party shall require." In this case, the term "requested Party," by itself, is ambiguous. Moreover, since the contracting parties to the Treaty are the governments of the United States and the United Kingdom, as set forth in the introductory paragraph of the Treaty, it appears that reference to the "requested Party" or "requesting Party" would indicate the contracting parties.

103. *See* Extradition Treaty, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656 (entered into force Jan. 25, 1980).

104. *Id.* at art. 5(1). The provision states: "If any question arises as to the application of the foregoing paragraph [political and military offenses], the Executive authority of the requested Party shall decide." *Id.*

105. *See supra* note 96 and accompanying text.

ner,[106] it would be impossible to re-negotiate every extradition treaty which is still in force in a short amount of time so as to make the language of the political offense exception identical in each treaty. It is not impossible, however, to apply the exception consistently.[107] It is entirely appropriate for courts to interpret the intent of the negotiators of the Treaty. Ambiguities could be resolved by taking into account the intent evidenced by the trend in the most recent treaties. This analysis would obviate the need for legislation to solve the dilemma posed by the conflicting language of the political offense exception in different treaties. Such legislation is now being contemplated by Congress through Senate Bill S. 1639, entitled "Extradition Act of 1981."[108] The bill provides that the Secretary of State alone shall have jurisdiction to decide the applicability of the political offense exception to extradition.[109]

B. *Part Two of the Political Offense Exception*

In construing Article V(1)(c)(ii) of the Treaty, and similar provisions in treaties with other foreign countries, courts have uniformly held that an inquiry into the motivation of the country requesting extradition can only be made by the Secretary of State.[110] The seminal case on this point is *In re Lincoln*,[111] in

---

106. *See infra* note 107.

107. Such consistency is desirable, for as Judge Friendly stated in *Mackin:*

> [This court is] unable to envision any [reason] . . . the courts should determine political offense questions under some treaties, but not under others. If the State Department had wanted to change the rule reflected in the above treaties . . . it would hardly have done so on a piecemeal basis in treaties with individual foreign states and without disclosing its intention to the Senate.

668 F.2d at 133.

108. S. 1639, 97th Cong., 1st Sess., 127 CONG. REC. § 9952-60 (daily ed. Sept. 18, 1981).

109. *Id.* Section 3194(a) and § 3916(a)(3) of S. 1639 provide the Secretary of State with sole jurisdiction to decide the applicability of the political offense exception. Section 3194(a) provides that the court does not have jurisdiction to determine whether extradition is sought for a political offense or because of the person's political beliefs and § 3196(a)(3) specifies that the Secretary of State has the authority to decline to order the surrender of a person if he is persuaded that the person's extradition is sought for one of these reasons. *Id.*

110. *See* Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Laubenheimer v. Factor, 61 F.2d 626, 628 (7th Cir. 1932); *In re* Locatelli, 468 F. Supp. 568, 574 (S.D.N.Y. 1979); *In re* Sindona, 450 F. Supp. 672, 694 (S.D.N.Y.), *habeas corpus denied sub nom.* Sindona v. Grant, 461 F. Supp. 199, 207 (S.D.N.Y. 1978), *aff'd*, 619 F.2d 167 (2d Cir. 1980); *In re* Gonzalez, 217 F. Supp. 717, 722 (S.D.N.Y. 1963); Gallina v. Fraser, 177 F. Supp. 856, 867 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert denied*, 364 U.S. 851 (1960); *In re* Lincoln, 228 F. 70, 74 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916).

which the petitioner claimed that the British government requested his extradition, not for the crime charged in the complaint, but because it desired to punish him and to prevent him from making further public statements in the United States against the British government.[112] Stated otherwise, the government of Great Britain used the crime of forgery as a subterfuge to punish Lincoln for his political action. The district court held that it was "not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith."[113] The court indicated that "[s]uch matters should be left to the Department of State."[114]

Thus, it is well-settled that the applicability of Article V(1)(c)(ii) is a matter left solely to the discretion of the executive branch.[115] The issue created by this rule is whether the executive branch should decide the applicability of the political offense excep-

---

111. 228 F. 70 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916) (extradition request by the government of the United Kingdom charging the fugitive with forgery and obtaining money on false pretenses).

112. *Id.* at 73-74.

113. *Id.* at 74. The court further stated:

> It is thought by the court that application to the Secretary of State of the United States will furnish full protection against the delivery of the accused to any government which will not live up to its treaty obligations, and that the Secretary of State will be fully satisfied (before delivering the accused to the demanding government) that he is wanted (in the legal sense of that term) upon a criminal charge, that it is not sought to secure him from a country upon which he is depending as an asylum because of political matters, and that the treaty is not actually used as a subterfuge.

Id. Many cases are in accord. *See supra* note 110. For example, in a recent case, an Italian national was ordered extradited to Italy to face charges of fraudulent bankruptcy. He contended that the request for extradition was politically motivated in that he was being sought in order to be punished for his political beliefs. The district court held that the motives of the requesting country are not within the jurisdiction of the court but reserved for the province of the Secretary of State. In habeas corpus proceedings before the district court and court of appeals the same decision was reached. *In re* Sindona, 450 F. Supp. 672 (S.D.N.Y.), *habeas corpus denied sub nom.* Sindona v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978), *aff'd*, 619 F.2d 167, 173-74 (2d Cir. 1980).

In *Garcia-Guillern v. United States*, the petitioner was a former Director General of the Ministry of Education in Peru who was charged with embezzlement. He claimed that he would be charged and tried in Peru for other crimes wholly distinct and unrelated to the crime of embezzlement (which was charged in the original extradition complaint). The court stated that it was not permitted to inquire into the procedure which awaited the petitioner upon his return to Peru. The court held that such matters were left to the State Department, which would ultimately determine whether to surrender the petitioner to the Peruvian government. 450 F.2d 1189 (5th Cir. 1971).

114. 228 F. at 74.

115. *See supra* note 110.

tion in some cases, but not in others. In sustaining Magistrate Buchwald's opinion,[116] the court of appeals in *Mackin* relied on *Eain v. Wilkes*,[117] to hold that the different approaches taken on the political offense and subterfuge issues are not contradictory.[118] The *Eain* court stated that to make the determination that an offense is of a political character, it need only look at past facts relating to whether violent political activity was unfolding at the time to which the facts relate, and to the individual's recognizable connection to that violence.[119] The *Eain* court contrasted this determination of past political fact with the assessment which must be made concerning the motivation of the country requesting extradition. It reasoned that this issue of motivation clearly involves the conduct of our country's foreign relations and, therefore, is a matter best left to the Executive's discretion.[120]

The distinction, however, does not provide an entirely valid basis for dividing jurisdiction on the political offense issue. It is difficult to envision any reason why the executive branch should determine political offense questions in some cases and not in others[121] when the issues raised under both parts of the political offense exception are "usually intertwined."[122] Consequently, having the court decide the political character of the offense and the executive

---

116. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 39.

117. 641 F.2d 504 (7th Cir. 1981).

118. 668 F.2d at 133.

119. 641 F.2d at 516.

120. *Id.*

121. 127 CONG. REC. S9952-60, S9956 (daily ed. Sept. 18, 1981)[hereinafter cited as CONG. REC.].

122. *Id.* at S9956. In a situation where the crime is purely non-political, such as the forgery in *Sindona* or embezzlement in *Garcia-Guillern*, *see supra* note 113, the subterfuge issue seems entirely distinct from determination of the political character of the offense charged. When, however, the crime charged is of the same nature as, or related to, those which the extraditee would claim are the actual targets of the extradition request, the differentiation between the roles of the judiciary and the executive branch is not at all clear. At present, under part one of the political offense exception, courts determine the political character of the offense charged in the extradition request by looking at the presence of a political uprising at the time of the alleged crime, the membership of the extraditee in any political groups, Eain v. Wilkes, 641 F.2d at 516, and whether the alleged crime was committed in furtherance of the uprising. *In re* Castioni, [1891] 1 Q.B. 149, 155. Under part two of the political offense exception, the Secretary of State must make the very same determinations with respect to similar or related charges that the extraditee claims are the true objects behind the subterfuge of the extradition request. In such cases, there is a high probability of overlap between the facts considered and the conclusions drawn by both the court and the Secretary of State. The possibility of inconsistency is therefore undeniable. *See infra* notes 167-72 and accompanying text.

branch decide whether the requesting Party has sought extradition with a view to try or punish the fugitive for an offense of a political character may often lead to "inconsistent results."[123]

III. *POLITICAL QUESTION*

To decide the political offense issue,[124] the magistrate in *Mackin* analyzed the facts regarding the existence of violent political activity and Mackin's connection to that activity.[125] The magistrate's ultimate determination was threefold. Magistrate Buchwald held that: (1) there was a political uprising at the time and site of the commission of the offense;[126] (2) Mackin was a member of the uprising group;[127] and (3) the offense was "incidental to"[128] and "in furtherance of"[129] the political uprising. As the government argued, the magistrate's decision to consider these factors raises serious

---

123. CONG. REC., *supra* note 121, at S9956. *See supra* note 122.

124. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 45. The first judicial attempt to define "political character" of an offense was in the decision of *In re* Castioni, [1891] 1 Q.B. 149. The court created a two-part test to aid in the determination of whether an offense is political in nature; first, there must be a political disturbance at the time of the offense; and second, the offense must constitute an overt act incidental to or part of the political disturbance. *Id.* at 159 (Denman, J.). This approach is still followed in the United States today. *See* Lubet & Czackes, *supra* note 62, at 203; Garcia-Mora, *supra* note 12, at 1244.

125. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 49-91.

126. *Id.* at 83. "[T]he Court conclude[d] that there was a political conflict in Andersonstown, Belfast, Northern Ireland in March of 1978 which was part of an ongoing political uprising, fluctuating in intensity, but nevertheless of sufficient severity to satisfy the first prong of the political offense exception." *Id.*

127. *Id.* at 85. "[The] Court conclude[d] that Desmond Mackin has unquestionably sustained his burden of proof in establishing his long standing commitment to the Republican Movement and his membership in the PIRA on March 16, 1978, the date of the offense charged in the extradition papers." *Id.*

128. *Id.* at 95.

> In so far as the exception requires that the act be "incidental to" a severe political disturbance and to the extent that this has been interpreted to require some degree of contemporaneity between the commission of the act and the political uprising we rely on our discussion above regarding the history and past decade of political violence in Northern Ireland. Based on that discussion this Court has already concluded that there was a political uprising in Andersonstown on March 16, 1978.

Id. at 95-96.

129. *Id.* at 98. "[W]hile this one act could not possibly bring to fruition the goals of the PIRA, it was undoubtedly free from personal motive and substantially linked to the traditional goal and strategy of the IRA and PIRA: an independent Ireland, free from British rule through the use of violence." *Id.*

constitutional issues with respect to the political question doctrine.[130]

The political question doctrine[131] requires the judiciary to refrain from deciding questions deemed political because the Constitution has committed their resolution to another branch of the federal government.[132] Historically, authority over the conduct of foreign affairs has been vested in the executive branch as a result of the judiciary's broad interpretation of the powers granted to the President under Article II of the Constitution.[133] The Supreme Court listed six criteria to assist in identifying a political question, in the landmark case of *Baker v. Carr*.[134] The presence of any one

---

130. Gov. Post Trial Memorandum, *supra* note 7, at 48. *See infra* notes 131-33 and accompanying text.

131. The political question doctrine is not set forth in the Constitution, but is judicially created. L. HENKIN, *supra* note 83, at 215. *See infra* note 132.

132. Elrod v. Burns, 427 U.S. 347, 351 (1976). *See* Baker v. Carr, 369 U.S. 186, 217 (1962); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634 (1818); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803).

> The political-question doctrine has had its greatest scope in the area of external relations. In many ways, the very purpose of the doctrine is to emphasize political autonomy in foreign affairs. The conduct of foreign relations, declared the Supreme Court, at the outset, involves "considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice."

B. SCHWARTZ, CONSTITUTIONAL LAW § 1.19 (1979) (quoting Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260 (1796)).

The Seventh Circuit Court of Appeals in *Eain v. Wilkes* stated that "[t]he government does not direct our attention to a specific constitutional provision that could be invoked to guide a resolution of this issue . . . ." 641 F.2d at 514. This is not necessary, however, since the power of the nation in the field of foreign affairs is not restricted to the specific grants of the constitution. "In that field, federal authority stems from the very existence of the United States as an independent country." B. SCHWARTZ, *supra*, at § 5.13. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317-18 (1936).

133. The President has the power to receive and appoint Ambassadors, to make Treaties, and to declare war as Commander-in-Chief of the Armed Forces. U.S. CONST. art. II. *See* New York Times Co. v. United States, 403 U.S. 713, 741-42 (1971) (Marshall, J., concurring); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948); Hirabayashi v. United States, 320 U.S. 81, 93 (1943); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 309 (1936). *Contra* Kent v. Dulles, 357 U.S. 116 (1958); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See generally* B. SCHWARTZ, *supra* note 132, at § 5.13 (1979); L. HENKIN, *supra* note 83, at 45-54.

134. Baker v. Carr, 369 U.S. 186 (1962). The Court stated:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect

factor is sufficient to constitute an improper exercise of power by the court in violation of the Constitution.[135] The government contended that three of these six applied in the *Mackin* case.[136] The applicable factors are:

1. The issue cannot be resolved without an initial policy determination of a kind clearly for nonjudicial discretion.
2. Multiple pronouncements on the same issue by more than one branch of the government could potentially embarrass our government.
3. The issue does not lend itself to resolution through judicially discoverable and manageable standards.[137]

The government asserted that the magistrate's determination of whether there was a political uprising at the time and site of the commission of the offense directly contravened the principle expressed in each of these factors.[138]

---

due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

Considering the factors in *Baker*, Professor Tribe discussed three theories concerning the relationship between the judiciary and the other branches of government. The first *Baker* factor encompasses the classical view which imposes on the court the requirement of deciding all cases and issues before it unless the court finds that the Constitution itself has vested the determination of the issue in another branch of the government. The second two factors follow the functional approach, under which the court considers such factors as the difficulties in gaining judicial access to relevant information, the need for uniformity of decision, and the responsibilities of the other branches of government, when determining whether or not to decide a certain issue. The last three factors look toward the prudential view, under which the court treats the political question doctrine as a means to avoid passing on the merits of a question, when reaching the merits would force the court to compromise an important principle or would undermine the court's authority. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 71, 72 n.1 (1978). *See generally* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1965-66)(discussing the competing theories of judicial review).

135. 369 U.S. at 217.

136. Gov. Post Trial Memorandum, *supra* note 7, at 50. This determination violates another *Baker v. Carr* factor, namely, that the issue does not lend itself to resolution through judicially discoverable and manageable standards. This is because the "incidental to" and "in furtherance" tests have been applied in a flexible manner, which has led to incongruous results. The reason for this inconsistency is the lack of truly objective criteria to determine political offenses. The courts freely interpret the political offense phrase on a case by case basis, resulting in many possible readings of the present state of the law. Cantrell, *supra* note 12, at 789. *See* Scharpf, *supra* note 134, at 567-73.

137. Gov. Post Trial Memorandum, *supra* note 7, at 50.

138. *Id.*

The magistrate and the court of appeals rejected the political question argument.[139] " 'It is error,' " quoted the court of appeals, " 'to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.' "[140] The court of appeals declared that it was clear the courts have the authority to construe treaties and may find that they provide the answer to issues raised under them.[141]

A. *Issue Requiring Nonjudicial Policy Determination*

The magistrate in *Mackin* rejected the claim that the determination of a political uprising in Northern Ireland involved a policy determination "of a kind clearly for non-judicial discretion."[142] Magistrate Buchwald submitted that the determination relates only to the past political fact of whether a political revolt existed at the time and site of the alleged crime, and not to a consideration of the present political climate of the requesting country.[143] In Magistrate Buchwald's view, only a determination of the isolated issue relating to whether "there occurred violent acts and political tensions that resulted in the charged criminal acts" was required.[144]

The government had submitted that only the executive branch has the authority to determine and recognize the political conditions which exist on foreign soil, including whether a state of war, belligerency or insurrection exists on a certain date.[145] The government relied upon the Supreme Court's opinion in *The Three Friends*,[146] in which the Court noted the distinction between "recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material

---

139. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 40-42; 668 F.2d at 137.

140. 668 F.2d at 137 (quoting Baker v. Carr, 369 U.S. at 211-12).

141. 668 F.2d at 137.

142. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 41 (quoting Baker v. Carr, 369 U.S. at 217).

143. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 41. In Magistrate Buchwald's words: "[T]he Courts are not being called upon to make delicate foreign policy decisions, to debate the political climate in a certain country, or to pass judgment on the merits or demerits of the political affairs of another nation." *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 42.

144. *Id.* (citing Eain v. Wilkes, 641 F.2d at 515).

145. Gov. Brief, *supra* note 14, at 33. *See* Underhill v. Hernandez, 168 U.S. 250, 253 (1897); The Three Friends, 166 U.S. 1, 63-66 (1897); *In re* Cooper, 143 U.S. 472, 499 (1892).

146. 166 U.S. 1 (1897). *The Three Friends* involved a seizure of a vessel that had been armed for the purpose of serving a revolutionary group engaged in armed resistance to the government of the King of Spain, on the island of Cuba. *Id.* at 2.

sense and of war in a legal sense . . . . "[147] In that case, the Supreme Court held that it belonged to the political department to determine when a state of belligerency or insurrectionary warfare existed.[148]

The magistrate also quoted a legal commentary which stated that judicial determination of the issue was appropriate because it "permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations."[149] This rationale, however, of protecting the executive branch from the consequences of its own decisions, not only implies a direct usurpation of the responsibilities of the executive branch, but also indicates recognition of the inherent political nature of the problem.

As the government stressed in *Mackin*, a court is not the appropriate forum[150] for careful analysis of a friendly foreign country's intentions, political system,[151] or complex internal political struggles.[152] Such careful analysis is required, despite the magistrate's questionable contention in *Mackin* that the determination of whether "there occurred violent acts and political tensions that resulted in the charged criminal acts"[153] involved only an "isolated issue."[154] A more informed decision would be made by the execu-

147. *Id.* at 63-64. The existence of a condition of war is to be determined by the political department of the federal government and the courts must take judicial notice of this determination. *In re* Lo Dolce, 106 F. Supp. 455, 460 (W.D.N.Y. 1952); Verana v. De Angelis Coal Co., 41 F. Supp. 954, 954 (M.D. Pa. 1941).

148. 166 U.S. at 63-64.

149. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 42 (citing Lubet & Czackes, *supra* note 62, at 200). Although the magistrate quoted this statement, she stated that she did not necessarily endorse this view. *Id.*

150. Gov. Brief, *supra* note 14, at 34.

151. CONG. REC., *supra* note 121, at S9956.

152. Hannay, *supra* note 35, at 411.

153. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 42 (quoting Eain v. Wilkes, 641 F.2d at 515).

154. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 42. In determining this "isolated issue," *id.*, "Magistrate Buchwald found it necessary to go far beyond the facts supporting the extradition request," Gov. Brief, *supra* note 13, at 31, to determine the political character of the offense. The magistrate received evidence concerning "the history of English-Irish relations, the level of violence in Northern Ireland, the British legal and military response to the efforts of the IRA, the position of the government of the United Kingdom with regard to the European Convention on Human Rights, and a broad range of other matters." *Id.* The hearing took seven days and a transcript of the hearing covered 1621 pages. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 4.

The century-old political struggle in Northern Ireland would provide an objective basis

tive branch since it has expertise in evaluating sensitive international situations.[155] The Supreme Court recognized in *Chicago & Southern Air Lines v. Waterman Corp.*[156] that decisions affecting foreign policy call for a large element of prophecy and that the judiciary does not have the aptitude, facilities or responsibility to make this type of delicate and complex resolution.[157]

There is also danger in vesting this decision-making authority in the judiciary.[158] A court "might lack the expertise to determine the political or nonpolitical nature of an offense arising in an intricate international fact situation. This danger is especially acute with respect to cases involving terrorists because of the complex and ambiguous interplay between their avowed goals and actual conduct."[159] Because the Executive cannot review a judicial determi-

---

for the belief that it was reasonably simple to determine that there was a political uprising at the time of the alleged crime. Yet the magistrate wrote a 101-page opinion covering a

> discussion of the political and historical heritage of Northern Ireland, a treatment of the religious underpinnings of the historical and current disturbances there, passing references to supposed abuses by various authorities, a lengthy discussion of the general level of violence in Northern Ireland, allusions to British legal procedures for the prosecution of suspected terrorists, an assessment of the support for IRA activities within the Catholic community at large, and a host of related topics.

Gov. Brief, *supra* note 14, at 31-32. If the question of whether there were a political uprising in a foreign country were not as clear as it is in Ireland, the factual determination would be unwieldy in light of the broad range of matters which would require consideration.

155. *See* Hannay, *supra* note 35, at 411.

156. 333 U.S. 103 (1948). The President had approved of certain orders of the Civil Aeronautics Board granting and denying certificates authorizing certain American air carriers to engage in overseas and foreign air transportation. Waterman, who was denied a certificate by the Board, sought judicial review of that decision. The Court recognized that since the President's power extends to foreign affairs and foreign commerce, this decision was not subject to judicial review. *Id.* at 111.

157. *Id.* The Court further stated:

> [T]he very nature of ecutive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Ecutive and Legislative . . . . They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id.

158. Lubet & Czackes, *supra* note 62, at 200.

159. *Id.* The magistrate conceded that "modern international political affairs are becoming increasingly complex and correspondingly, that the number of 'hard' cases in which the 'political offense' exception may be raised is likely to increase." *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 42. She also expressed concern that "the political offense exception should not be applied so as to create a safe haven for terrorists in the United States." *Id.* at 99. Yet she adhered to precedent permitting judicial determination of the political offense exception. *Id.* at 42-43.

nation of non-extradition,[160] the courts are bound to take into consideration international and domestic reaction to their decisions.[161] Furthermore, the demonstrated undesirability of judicial determination is complemented by the advantage of granting to the executive branch jurisdiction to decide the issue. For example, if the executive branch does not refuse extradition, but is not completely satisfied with the consequences of the fugitive's return, it may attach certain conditions to his surrender.[162]

---

160. *See supra* note 3 and accompanying text.

161. It has been theorized by legal commentators that the courts are heavily influenced by the political viewpoint of the requesting country, in determining the applicability of the political offense exception. If the requesting country has attitudes similar to that of the United States, the courts will lean toward extradition of the fugitive, whereas if the requesting country has unacceptable political standards, the courts will not extradite the fugitive. Hannay, *supra* note 35, at 394-97; Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61, 68-74 (1979).

For example, in *United States v. Artukovic*, which went up and down the federal courts for a decade, the Yugoslavian government sought the extradition of Artukovic, Minister of the Interior, for the alleged murder of thousands of civilians in concentration camps during World War II. The district court rejected extradition due to the political character of the offenses. The circuit court affirmed this decision. The case went to the Supreme Court which reversed on the procedural point that there had never been a magistrate's hearing as required by statute. Finally, the magistrate denied extradition on the ground that there was insufficient evidence to establish probable cause to believe the accused guilty of the crime charged. Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952), *rev'd sub nom.* Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818, *reh'g denied*, 348 U.S. 889 (1954), *on remand sub nom.* Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958)(mem.), *on remand sub nom.* United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). As one commentator postulates:

> [A] fair reading of the opinions in the case leaves one with a strong suspicion that the federal courts in California were more heavily influenced by the Cold War and the fact that the request for extradition of Artukovic was made by a Communist country, than they were by the merits of the charges against him.

Hannay, *supra* note 35, at 394 (footnote omitted).

Another writer explains the court's decision against extradition in *Artukovic* as an additional illustration of the judiciary's tendency to "exclude from extradition those whose political motivation is deemed worthy but whose acts may not fall within the original definition of the exception." Epps, *supra*, at 71. Her suspicion is that the courts took into consideration the fact that the new regime in Yugoslavia was not within the "Western capitalist tradition" and that, therefore, extradition was not granted. *Id.* at 72.

Hannay believes that the decision to deny the extradition of two Cubans to the Castro government in Ramos v. Diaz, 179 F. Supp 459 (S.D. Fla. 1959), was also influenced by anti-Communism. Hannay, *supra* note 35, at 396. Epps suggests that because the court had little incentive to return the fugitives to the alien government it expanded the political offense exception to prevent the surrender of the fugitives to a politically hostile country. Epps, *supra*, at 72-73.

162. I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 192 (1971). *See, e.g.*, Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962) (the Department of State secured a written

As the government contended in *Mackin*, the magistrate's finding of a political uprising involved an initial policy determination of a kind clearly for non-judicial discretion, thus bringing her finding within the purview of the political question doctrine.[163] This determination should, therefore, be reserved to the discretion of the executive branch, based on the President's primary responsibility for the conduct of United States foreign affairs.[164]

B. *Potential Embarrassment Due to Multiple Pronouncements*

A second constitutional problem is raised by the potential embarrassment of the United States government as a result of multiple pronouncements on the same issue by more than one branch of the government.[165] The court of appeals in *Mackin* dismissed this issue by claiming that if the decision were to be placed solely within the discretion of the executive branch, it might heighten difficulties concerning foreign relations.[166] According to the treatise cited by the court, if the executive branch determines that the fugitive has committed a political offense which is not extraditable, that determination necessarily implies an unfavorable comment on the motivation of the requesting government or on the standards of justice prevailing in that country.[167] The executive branch would, therefore, be put at a diplomatic disadvantage by taking direct responsibility for decisions which may question the good faith of a foreign government.[168] Conversely, if the judiciary makes the decision that the political offense exception applies in a particular case, the treatise indicates that the executive branch is spared much embarrassment in its subsequent dealings with the unsuccessful requesting government.[169]

---

assurance from the government of Venezuela regarding security measures and procedural due process before ordering extradition). *Id.* An additional policy argument that neither court made in *Mackin* is that the rights of an individual are at stake. In order to assure that there is adequate protection of these rights, it would seem reasonable that courts would make an initial finding of extraditability. Eain v. Wilkes, 641 F.2d at 516; Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973). But one commentator states that it is doubtful that courts are actually guided by humanitarian concern for the offender. Cantrell, *supra* note 12, at 783.

163. 369 U.S. at 217.

164. *See supra* notes 132-33 and accompanying text.

165. Baker v. Carr, 369 U.S. at 217.

166. 668 F.2d at 133.

167. *Id.* (citing I. A. SHEARER, *supra* note 162, at 192).

168. I. A. SHEARER, *supra* note 162, at 198.

169. *Id.* at 192. In Ornelas v. Ruiz, 161 U.S. 502 (1896), Mexico had sought the extradition of Ruiz for murder, arson, robbery and kidnapping. *Id.* at 506-07. Allegedly,

Under present case law, however, "the courts generally shun deciding whether the foreign government's extradition request is politically motivated, preferring to leave that decision to the Executive branch."[170] As stated earlier, the issues involved in determining the applicability of the political offense exception under both parts of the political offense provision may often be intertwined.[171] Therefore, the possibility of multiple and conflicting pronouncements on extradition matters casts doubt on the constitutionality, under *Baker v. Carr*, of dividing jurisdiction between the two branches.[172]

C. *Lack of Judicially Discoverable and Manageable Standards*

The magistrate, in determining whether there was a political uprising at the time and site of the commission of the offense, undertook a study on the historical, political, military, religious and sociological aspects of the dispute in Northern Ireland.[173] In response to the government's claim that the issue does not lend itself to resolution through judicially discoverable and manageable standards, the magistrate and court of appeals agreed that the State Department is free to share its up-to-date information on the political situation in a foreign country with the court in the course of extradition proceedings.[174] If the information is especially sensitive in nature, then in camera review is available.[175]

Ruiz and a group of men, whose avowed purpose was to fight the Mexican government, crossed the border from Texas to Mexico and attacked a band of 40 Mexican soldiers. The Ruiz group remained in Mexico for about six hours and then returned to Texas. *Id.* at 510. The commissioner ordered his extradition but the district court reversed, *id.* at 511, holding that the crimes were political offenses. The Supreme Court reversed, *id.* at 512, and granted extradition. It has been suggested that the Supreme Court may have refused to reverse the commissioner's decision to extradite the fugitive partly because of political considerations. Epps, *supra* note 161, at 70. The Secretary of State had already expressed his view, in a letter to the Minister of Mexico, that the offenses were not purely political. 161 U.S. at 511. "Presumably, the Court did not want to embarrass the executive to which friendly relations with Mexico were of more importance at that juncture than giving refuge to a few quasi-revolutionaries." Epps, *supra* note 161, at 70.

170. CONG. REC., *supra* note 121, at S9956 (footnote omitted). *See supra* note 110.

171. *See supra* note 122 and accompanying text.

172. In addition, with the present two-step system, if the courts determine that the fugitive is extraditable and the ecutive reverses that decision, the requesting state is likely to be irate. Epps, *supra* note 161, at 84.

173. Gov. Brief, *supra* note 14, at 35; *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 49-90. *See supra* note 154.

174. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 41; 668 F.2d at 134 (citing Eain v.Wilkes, 641 F.2d at 514-15).

175. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 41; Eain v. Wilkes, 641 F.2d at 514-15, *cited in In re* Mackin, 668 F.2d at 134.

On the other hand, as the government asserted, only the executive branch has the available sources to provide complete, accurate and up-to-date information on the political situation in a foreign country.[176] Although the State Department is free to share that information with the court in the course of extradition proceedings, secrecy and caution are of the utmost importance to national security, and premature disclosure of confidential information could lead to harmful results.[177] The executive branch also has a privilege to withhold certain foreign affairs information from the courts by applying the "state secret doctrine."[178] The scope of this doctrine is limited to nondisclosure of matters relating to international relations, military affairs, and public security.[179] Furthermore, with the decision in the hands of the executive branch, the determination may be made based on "information supplied by the fugitive which could not be received as admissible evidence by the courts because of evidentiary rules or procedures."[180] Given these conditions, the court's ability to gather all data relevant to determination of the issue would seem to be irremediably inferior to that of the executive branch,[181] which indicates that the political offense issue does not lend itself to resolution through judicially discoverable and manageable standards.

---

176. Gov. Brief, *supra* note 14, at 34.

177. United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936).

178. Baldwin, *The Foreign Affairs Advice Privilege*, 1976 WIS. L. REV. 16, 22-23 (1976).

179. *Id.* at 22 n.17. Baldwin asserts:

> The judicially sanctioned withholding of executive information based on a state secret doctrine illustrates three points. First, the courts defer to the opinion of executive departments on the need for confidentiality. Second, courts recognize the executive branch's responsibility for international relations. Third, courts confirm that public interest in confidentiality prevails despite the presumed relevance of the evidence to the court.

Id. at 23.

180. I. A. SHEARER, *supra* note 162, at 192.

181. Scharpf, *supra* note 134, at 567. A further problem is raised merely by the fact that the concept of "political offense" has never been defined by the drafters of treaties or by the legislature, so there is no judicially manageable standard to determine the issue. Gov. Brief, *supra* note 13, at 34-35. As stated in United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959), " 'political character' or political offense has not been too satisfactorily defined." *Id.* at 392. Lord Denman observed in *In re* Castioni, [1891] 1 Q.B. 149, that it was not "necessary or desirable . . . to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offense of a political character." *Id.* at 155. Legal scholars have had the

CONCLUSION

The issue of whether the judicial or the executive branch should decide the applicability of the political offense exception is clouded with uncertainty. It appears that the language of both the applicable statute and the Treaty could be interpreted quite reasonably as requiring determination of the issue by the executive branch. Any lingering doubt as to whether such interpretation is correct should be dispelled when the political question doctrine is included in the consideration. Violation of three of the six factors in *Baker v. Carr* occurs when the judiciary decides the issue, and this unconstitutionality dictates withdrawal from the judiciary of any colorable claim to jurisdiction.

Legislation such as the recently proposed Senate bill that grants to the executive branch jurisdiction over political offense determinations would resolve the dilemma. The proposed bill would codify the interpretations of the exception arguably contemplated by the drafters of the extradition statute and Treaty now in effect, and would preclude future repetitious and time-consuming litigation on the issue. Furthermore, and of paramount importance, such decisive congressional action would eliminate the current conflict with the political question doctrine, thereby fostering long-overdue compliance with the mandates of the United States Constitution.

Maria P. Imbalzano

---

same difficulty in defining this concept. *See, e.g.*, Cantrell, *supra* note 12, at 816; Garcia-Mora, *supra* note 12, at 1226-27. Garcia-Mora states: "[N]o uniform criterion exists in regards to [the concept of political offense] so vitally related to the protection of human rights. There is therefore no fundamental agreement among governments and domestic tribunals as to precisely what constitutes a political offense . . . . " *Id.* (footnote omitted).

Due to the absence of clarity regarding what an offense of a political character encompasses, the courts have been flexible in applying the political offense exception. Epps, *supra* note 161, at 68. In an area that concerns American foreign policy as deeply as does extradition, however, it is imperative that a uniform approach be developed. Lubet & Czackes, *supra* note 62, at 194.