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## The Empire Strikes Back: The Taking of Joe Doherty

James T. Kelly

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## ARTICLE

# THE EMPIRE STRIKES BACK: THE TAKING OF JOE DOHERTY

JAMES T. KELLY\*

*In this Article, Mr. Kelly summarizes the eight year diplomatic and legal effort to return Joe Doherty, a member of the Provisional Irish Republican Army, from the United States to the United Kingdom, where he was wanted for his role in the death of a British soldier and for his escape from prison. The Article begins by considering the British-Irish conflict over the partition of Ireland and the political and diplomatic role the United States has played in mediating that conflict. It then recounts the unsuccessful efforts of the United States and the United Kingdom to extradite Doherty, and the two governments' renegotiation of their existing extradition treaty so as to have adverse retroactive application to Doherty. This Article then examines the successful effort of the United States Justice Department to deport Doherty to the United Kingdom: including a review of Doherty's initial pleas for asylum and withholding of deportation, his subsequent request—in the face of the revised extradition treaty—for deportation to the Republic of Ireland, and the judicially-affirmed decisions of two Attorneys General to refuse such request and then to bar Doherty from presenting his claims for asylum and withholding at a reopened hearing.*

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#### INTRODUCTION

THE United States Supreme Court's recent ruling in *INS v. Doherty*<sup>1</sup> ended the extended litigation of one of the most troubling extradition and deportation cases in the past decade, the "Doherty Case." Over its protracted life, the Doherty Case took a number of surprising twists and turns, and raised a host of nettlesome diplomatic, legal, and policy questions. This Article reviews the history of the Doherty Case and considers whether those questions were answered properly.

The Doherty Case concerned a Provisional Irish Republican Army volunteer, Joe Doherty, who shot and killed a British soldier in Northern Ireland in May 1980. Doherty was captured, tried, and convicted for the killing. He later escaped from custody and eventually fled to the United

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1. 112 S. Ct. 719 (1992).

States, where he was rearrested in June 1983. Strenuous efforts to extradite him failed, but administrative deportation proceedings later accomplished what extradition had not. The United States returned Doherty to the United Kingdom in February 1992.

Like the differing views of ink blots in a Rorschach test, differing perceptions exist as to the culpability of Doherty's acts; the diplomatic, legal and policy implications of the Doherty Case stem from the clash of these differing perceptions. Doherty's supporters believe he was a soldier who killed in combat and a prisoner of war who escaped from enemy captivity while defending his homeland against an occupying army. They point to the federal district judge who denied extradition, stating that the judge understood Doherty's offenses to be part of the ongoing British-Irish conflict in Northern Ireland and, thus, "political" and non-extraditable. Although Doherty was never charged with or convicted of any offenses in the United States, he was held without bail in American prisons for eight years and eight months. He was eventually euchred into withdrawing his request for an asylum hearing because of a supplementary extradition treaty that, his supporters argue, operated as an unconstitutional bill of attainder. Doherty's supporters present his case as one of the more flagrant human rights violations of the decade, and argue that the Supreme Court's ruling sends a dangerous message to the Justice Department—i.e., that it is permissible, without a hearing, to deport an alien to a country where extradition has been denied and persecution is feared.

Doherty's opponents maintain a different view of the facts. To them, Doherty was no soldier. Rather, he was a terrorist gunman, a murderer who escaped from lawful custody, an illegal alien, and a fugitive from justice in a friendly democratic nation. They argue that homicide is not and cannot be regarded as a reasonable political tool. Accordingly, the denial of Doherty's extradition was a grievous mistake which was caused by a federal district judge's misinterpretation of the relevant treaty provision, and which impliedly sanctioned terrorist killings of police and members of the military. Doherty's opponents note that the State Department has long considered the Provisional Irish Republican Army a terrorist organization, and argue that European nations will only cooperate with American anti-terrorist initiatives if the United States shows a willingness to reciprocate with its own anti-terrorist actions. To Doherty's adversaries, two successive Attorneys General were well within their broad discretion to order that Doherty be deported to the United Kingdom and to reject his pleas for asylum.

## I. BACKGROUND

The struggle for Irish independence and unity has involved a long-standing dispute between Great Britain and Ireland, a dispute which pre-dates present concerns about international terrorism. Thus, this Article begins with a review of the events that led to the struggle and the reasons why the conflict has proven intractable.

Ireland was originally settled by Celtic tribes who converted to Christianity in the Fifth Century. From the time of Saint Patrick (c. A.D. 450), the majority of Ireland's citizens have been Catholic. England has exercised an ongoing role in Irish affairs since 1171, when King Henry II successfully invaded Dublin and thereafter controlled the surrounding area. The British presence in the northern province of Ulster dates from 1610, when King James I encouraged Scottish Presbyterians—and to a lesser extent, English Episcopalians—to settle there on confiscated lands, as a means of ensuring the region's loyalty to the crown. These Protestant colonists eventually formed a majority of the population in Ulster, the part of Ireland that lies closest to Scotland.<sup>2</sup>

During the twentieth century, Ireland's two religious cultures have clashed repeatedly over the issue of partition.<sup>3</sup> In sectarian terms, the dilemma is whether the Catholics in the north of the island should be the minority in a partitioned and Protestant-controlled state, or whether the northern Protestants should be the minority in a unified and Catholic-dominated state. In political terms, the dispute has pitted the descendants of the native Irish, who favor an undivided Ireland and are known as "nationalists" and "republicans," against the descendants of the seventeenth century colonists whose cultural roots lie in Scotland or England, and who are known as "loyalists" and "unionists." Each side fears discrimination if labeled the minority. Violence has erupted as the parties have been unable to resolve the impasse through peaceful means.<sup>4</sup>

#### A. *Partition, 1912-1925*

The Kingdoms of England and Ireland were formally joined in 1801 through the Act of Union.<sup>5</sup> Following unsuccessful efforts in 1886 and

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2. [T]he figure of eight hundred years [of Irish oppression by the English]—dating the beginning of suffering from the Norman Conquest of Ireland toward the end of the twelfth century—is a hollow piece of propaganda. The medieval Irish probably suffered no more and no less from the Norman Conquest than the medieval English did. Ireland's real and special troubles began in the late-sixteenth century, when the native Irish began to pay the price of backing the Counter-Reformation—and the deposition of heretic princes—against the Reformation sovereigns of England and Scotland.

Conor C. O'Brien, *The Siege: The Saga of Israel and Zionism* 329 (1986).

3. For our purposes, partition refers to a religious community's demand for a political entity in which it will be dominant. In addition to Northern Ireland, partition was imposed in two other instances where British colonial presence had been withdrawn: India was partitioned to create Pakistan in 1947, and Palestine was partitioned to create Israel in 1948. A high level of political violence has been a common denominator in all three cases.

4. See Thomas P. Foley, *Public Security and Individual Freedom: The Dilemma of Northern Ireland*, 8 *Yale J. World Pub. Ord.* 284, 285-86 (1981-1982).

5. Following the defeat of Wolfe Tone's Rebellion in 1798, Great Britain was forced to tighten its ties with Ireland in the name of strategic security and political efficiency. The Act of Union, which took effect on January 1, 1801, joined Great Britain and Ireland "forever" in one United Kingdom. It also abolished the Irish Parliament and gave Ireland a representation of 100 members in the British Parliament. See 15 *Encyclopedia Americana* 414 (1991) ("[F]ew[] foresaw what a weapon this measure would be in the

1893, Irish nationalists finally persuaded Parliament, in 1912, to enact a limited form of home rule legislation.<sup>6</sup> Protestant unionists from Ireland's northern counties opposed the law and threatened civil war unless the legislation was amended to exclude them. The British Army balked at enforcing the legislation, and Parliament was unable to agree on whether or how to revise it. Parliament found a convenient excuse for postponing the law's implementation in the 1914 outbreak of World War I.<sup>7</sup>

Irish nationalists nevertheless desired full independence from Britain, rather than mere home rule, and thus became impatient with the delay. Their first rebellion, the Easter Rising of 1916, was swiftly crushed. Beginning in 1919, the Irish nationalists fought a fierce guerrilla war against the British security forces. A truce was declared in July 1921.

In December 1920, pursuant to the Government of Ireland Act (the "GIA"), the British Parliament formally partitioned Ireland. The GIA set up a mechanism for home rule through two Irish parliaments (northern and southern), which were to be subordinate to Westminster. The southern parliament, to be located in Dublin, was to govern twenty-six counties, and the northern parliament, to be located in Belfast, was to govern six counties. The GIA allowed for the possibility of Irish reunification upon agreement by the two parliaments. Yet, only the northern parliament became a reality, as the rest of Ireland went its own way towards independence.<sup>8</sup>

Late in 1921, Irish representatives were invited to London to discuss

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hands of Wolfe Tone's heirs. The act of union carried Ireland's political, economic, social, and religious problems into the heart of British political life, and Irish issues [and] . . . Irish members of parliament helped to defeat numerous ministries in the 19th century.").

6. The Irish nationalists were joined by British Liberals but opposed by British Conservatives.

7. See Robert Kee, *Ireland, A History* 145-51 (1980); J. J. Lee, *Ireland, 1912-1985: Politics and Society* 6-24 (1989).

8. See Lee, *supra* note 7, at 43-47. "The border was chosen explicitly to provide unionists with as much territory as they could safely control. Its objective was not to separate unionists and nationalists in order to enable them to live peaceably apart[,] [but] . . . was instead to ensure Protestant supremacy over Catholics even in predominantly Catholic areas." *Id.* at 45-46.

The Irish found it difficult to agree on a name for the gerrymandered territory. ("Gerrymandering" is defined as the act of dividing a state, county, etc., "into voting districts to give unfair advantage to one party in elections." *The American Heritage Dictionary* 553 (1981)). As the territory embraced only six of the nine counties in the ancient province of Ulster, it could not correctly be called Ulster. Nor was "Northern" Ireland a truly accurate name, as County Donegal, the northernmost part of Ireland, remained with the 26 southern counties. Therefore, nationalists referred to the area as "the six counties," "the north," "the north of Ireland," or "occupied Ireland," and continue to do so today.

Note that Scotland and Wales, the other parts of the United Kingdom, have never had their own home rule parliaments, although the demand for such autonomy recently arose during the 1992 British national election campaign. The Labor party favored devolution while the Tories opposed it as Balkanization.

how Irish national aspirations could best be harmonized with British interests. After lengthy negotiations, the Irish were given an ultimatum: sign an agreement or face war with England in three days.<sup>9</sup> This ultimatum resulted in the Anglo-Irish Treaty, signed on December 6, 1921, which recognized the internal sovereignty of the twenty-six southern counties in return for their acceptance of partition for the six northern counties. The twenty-six southern counties became the Irish Free State, a member of the British Commonwealth, which held dominion status then equivalent to Canada and Australia. The six northern counties that opted out of the Irish Free State remained with Britain as Northern Ireland, a part of the United Kingdom with its own home rule government. A strong nationalist minority in the south opposed the Anglo-Irish Treaty and waged an unsuccessful civil war against the Irish Free State from 1922 until 1923.<sup>10</sup>

In December 1925, a boundary agreement (the "Boundary Agreement") among the Irish Free State, Great Britain, and Northern Ireland legitimized partition as an accomplished fact. The Boundary Agreement was subsequently filed with the League of Nations as an international treaty, and the partition issue, which until then had been in dispute, became settled as a matter of law.<sup>11</sup>

On a practical level, however, partition has remained unacceptable to Irish nationalists. Notwithstanding the Boundary Agreement, articles 2 and 3 of the 1937 Constitution of the Irish Free State (the "Irish Constitution") proclaim sovereignty over the whole of Ireland.<sup>12</sup> In addition, the Irish Constitution regards every person born in Ireland, north and south, as an Irish citizen.<sup>13</sup>

In 1949, the Irish Free State declared itself the Republic of Ireland and

9. See Sean Cronin, *Washington's Irish Policy: 1916-1986*, at 39-40 (1987); Lee, *supra* note 7, at 50.

10. See Kee, *supra* note 7, at 191-93; Lee, *supra* note 7, at 47-55.

11. See Cronin, *supra* note 9, at 46; Kee, *supra* note 7, at 202; Lee, *supra* note 7, at 140-50.

Northern Ireland encompasses one-sixth of the island of Ireland. Its population is approximately 60% Protestant and 40% Catholic. In contrast, the Republic of Ireland, which occupies the remaining five-sixths of the island, is currently about 93% Catholic and 7% Protestant.

12. Article 3 of the 1937 Constitution, however, confines the exercise of power to the 26 southern counties of Ireland "[p]ending the reintegration of the national territory." Ir. Const. art. III.

13. See Cronin, *supra* note 9, at 53; Kee, *supra* note 7, at 217; Lee, *supra* note 7, at 202. The Irish Republic's assertion of sovereignty over the entire island would come to play a key role in Doherty's deportation case. Although born a British subject in Northern Ireland, Doherty also had the right to claim citizenship in the Republic of Ireland. See *infra* part IV.A.

According to Irish nationalists, Britain's claim to sovereignty over Ireland has been steadfastly rejected by the Irish for centuries; the British have always been viewed by the Irish as an occupying force; Britain was compelled to relinquish military and political occupation of the greater part of Ireland by force of arms (1916-1921); and partition—which was imposed by Britain, not negotiated—has never been sanctioned or accepted by the Irish. See Sean MacBride, *Remarks to National Press Club, Nov. 2, 1985*, *reprinted*

left the British Commonwealth. Britain recognized its independence through the Republic of Ireland Act of 1949, but cautioned that "in no event [would] Northern Ireland or any part thereof cease to be part . . . of the United Kingdom without the consent of the Parliament of Northern Ireland."<sup>14</sup>

### B. *The Troubles*

In the decades that followed partition, the north's sizeable Catholic minority became second-class citizens in a Protestant enclave run for Protestants.<sup>15</sup> As a result, the minority began a non-violent civil rights movement in the late 1960s. Its principal grievances were that the Protestant majority was gerrymandering,<sup>16</sup> and discriminating in the allocation of housing and job opportunities.

The government of Northern Ireland equated the call for civil rights with "republicanism," asserting that the movement was aimed at undermining its constitutional position within the United Kingdom. Thus, the government refused most of the movement's demands. To make matters worse, the overwhelmingly Protestant security forces did little to shield the Catholic demonstrators from violent attacks by elements of the Protestant majority.

By August 1969, the government of Northern Ireland could no longer control the streets. It asked the British government for military assistance to restore order. British troops were initially welcomed in the Catholic areas of Derry and Belfast. However, this enthusiasm waned over the next two years, as British troops began conducting widespread general house searches, and as "internment without trial" was introduced under the Special Powers Act.<sup>17</sup> On January 30, 1972 ("Bloody Sunday"), British paratroopers killed thirteen unarmed demonstrators during a civil rights march. Bloody Sunday effectively put an end to peaceful protest.

As Catholic reaction to the British troops turned from welcome to sus-

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in 131 Cong. Rec. E4987 (daily ed. Nov. 5, 1985) (extension of remarks by Congressman Biaggi).

14. Lee, *supra* note 7, at 300-01 (quoting from the Republic of Ireland Act of 1949); see Cronin, *supra* note 9, at 218.

15. See Kee, *supra* note 7, at 237, 239; Lee, *supra* note 7, at 433. In 1922, the Special Powers Act was adopted as emergency legislation in order to deal with political violence in Northern Ireland. The Act provided police with broad powers to search and arrest, to intern suspects without trial, to seize property, and to bar publications and demonstrations. It remained in effect until 1973, and, throughout the years it was in effect, it was employed principally against the Catholic minority.

16. See *supra* note 8.

17. As a result of British mistreatment of internees, the Republic of Ireland successfully prosecuted the United Kingdom before the European Court of Human Rights in Strasbourg. In 1978, the Court found the United Kingdom guilty of inflicting "inhuman and degrading treatment" on the internees in violation of the European Convention on Human Rights. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66-67 (1978).

picion, and then to hatred, the Irish Republican Army (the "IRA") was reborn. The IRA had been an active protagonist in the early years of the armed conflict for a unified Ireland,<sup>18</sup> and had reemerged from time to time thereafter.<sup>19</sup> The IRA had been dormant as a military force since 1962, when it shifted its emphasis towards social policy and even considered participation in electoral politics.<sup>20</sup> In January 1970, the IRA split into two factions: the "official" IRA, which advocated a united socialist Ireland but disavowed terrorism, and the "provisional" IRA (the "PIRA"), which went underground and endorsed attacks on the Northern Ireland and British security forces as a necessary step to achieving unification.<sup>21</sup> Before long, the PIRA was engaging in guerrilla warfare against the British security forces and the Protestant paramilitary groups of Northern Ireland.<sup>22</sup> This conflict eventually spread to

18. The "early years" of the conflict spanned from 1919 through 1923.

19. In 1949, the IRA was little more than a bogey to mobilize Unionist voters in the North. . . . In 1954, the raids on British Army barracks began. On 12 December 1956, a military campaign opened in the North. These activities grew out of the [Republic of] Ireland Act [of 1949]. They could not have occurred otherwise. The political climate made them possible. The [Republic of] Ireland Act made them inevitable.

Cronin, *supra* note 9, at 272, 274; see also Jack Holland, *The American Connection: U.S. Guns, Money, and Influence in Northern Ireland* 75-76 (1987):

By 1960 the IRA's border campaign was petering out . . . . A combination of factors contributed to its failure. The Unionist government [in the north] introduced internment . . . [and] the Dublin government [in the south did] likewise, rounding up almost the entire [IRA] leadership. . . . Added to this was the obvious indifference of Northern Ireland's Catholics to the proclaimed struggle for freedom. Though the attacks continued for another two years, they were little more than an irritant to the authorities. . . . Finally, in 1962, the IRA command called a halt.

20. See Lee, *supra* note 7, at 432-33.

21. The PIRA is committed to fighting a long war and aims to sicken Britain into withdrawing from Northern Ireland. In addition to reunification of the north and south of Ireland, the PIRA "advocate[s] the overthrow of the Government of the [Irish] Republic and the establishment of an extreme leftist socialist state for the entire island." Francis W. O'Brien, *Irish Terrorists and Extradition: The Tuite Case*, 18 *Tex. Int'l L.J.* 249, 254 n.22 (1983).

The PIRA's plans strike some observers as nebulous:

[The PIRA] is fighting more for its own ascendancy than for the reunification of Ireland or even for the redress of grievances for the minority of Northern Ireland. It provides no solution and no program for a new republic, only a mishmash of Marxism, romanticized nationalism, a selective reading of history and utter disregard for life.

*Ireland's Outlaw Army*, *America*, Nov. 3, 1984, at 265 (editorial). However, in support of its notion that terrorism against the British will eventually work, the PIRA points to the Jewish extremists of the mid-1940s, who believed that the shortest route to persuading the demoralized British to abandon their mandate over Palestine, to expelling Palestine's Arabs, and to establishing a Jewish state was through violence. See Cronin, *supra* note 9, at 272; O'Brien, *supra* note 2, at 267-68, 275, 281-82.

22. Although the PIRA is the best known paramilitary group in Northern Ireland, with several hundred members and several thousand sympathizers, it is not the only active paramilitary group in Northern Ireland. A second, smaller republican organization, known as the Irish National Liberation Army, is also committed to achieving a united socialist Ireland through violence. The largest and most widely known unionist paramili-

other parts of the United Kingdom and to British targets on the European mainland. As a result, civilians have suffered heavy casualties.

In March 1972, Britain effectively suspended parliamentary government within Northern Ireland. From that time to the present, the British government has administered Northern Ireland from London, as it had done prior to 1921. The British Parliament has also enacted several pieces of emergency legislation that radically altered the criminal justice system in Northern Ireland.<sup>23</sup>

At the Sunningdale Conference, in 1973, the British and Irish governments tried, once again, to resolve their political and diplomatic differences over Northern Ireland. Among other things, the Sunningdale Agreement of December 9, 1973, called for the Protestant and Catholics in the north to begin power-sharing; it also provided for a north-south dialogue through a Council of Ireland.<sup>24</sup> The Irish Republic pledged to accept Northern Ireland's status as part of the United Kingdom until a majority of the north's population desired a change in that status. In return, the British promised support if, in the future, a majority in the

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tary groups are the Ulster Defense Association, the Ulster Volunteer Force, and the Ulster Freedom Fighters.

At its high point in 1972, the British Army had 22,000 soldiers stationed in Northern Ireland. As of January 31, 1991, some 10,600 regular army troops remained in service in Northern Ireland. See *Human Rights in Northern Ireland*, Helsinki Watch Rep., 1991, at 45 [hereinafter *Human Rights in Northern Ireland*].

23. In 1973, the British Parliament replaced the Special Powers Act in Northern Ireland with the Emergency Provisions Act, and in 1974, it adopted the Prevention of Terrorism Act, which is effective throughout the United Kingdom. These emergency acts provide the authorities with extensive powers to deal with the unrest in Northern Ireland, including: (1) the power to stop and search people; (2) the power to arrest, detain, and interrogate suspects for up to seven days without a criminal charge and without an appearance before a judge; (3) the power to search residences without prior judicial authorization; and (4) the power to detain people by executive order—also known as internment—which was utilized from 1971 to 1976. The legislation also declared certain paramilitary organizations illegal and made membership in them a criminal offense, suspended trial by jury for certain scheduled offenses, and set a lower-than-normal standard for the admissibility of confessions. See *Human Rights in Northern Ireland*, *supra* note 22, at 2-4. For Doherty, the most important change involved non-jury trials in so-called "Diplock" courts.

When, in 1985, members of the United States Senate Foreign Relations Committee inquired about the emergency provisions, British apologists defended by pointing to President Lincoln's suspension of the writ of habeas corpus during the American Civil War, see *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and to the internment of Japanese-American citizens during World War II. See *Korematsu v. United States*, 323 U.S. 214 (1944).

24. The notion of a Council of Ireland, permitting representatives of the two Irish parliaments to discuss common problems, first surfaced in the GOI Act of 1920 and carried over to the Anglo-Irish Treaty of 1921. But see Cronin, *supra* note 9, at 47 ("The Unionists did not want it . . . [and] [i]t never met."). The Sunningdale Agreement also provided for a Council of Ireland, but "[i]t was quickly discarded, of course, as a sop to Unionism." *Id.* at 326; see also Lee, *supra* note 7, at 447 (characterizing as "misguided" the Council of Ireland clause in the Sunningdale Agreement).

north wished to become part of a united Ireland.<sup>25</sup> Yet, as was the case from 1912 through 1914, the northern unionists refused to take any steps that might lead to a united Ireland. Election returns in February 1974 emboldened the Protestant community into resisting the Sunningdale Agreement, and a unionist general strike in May 1974 effectively ended the experiment in power-sharing.

### C. *The American Perspective*

The United States has consistently maintained friendly diplomatic relations with both the United Kingdom and the Republic of Ireland. When called upon to "choose sides" in British-Irish conflicts, however, American administrations tend to view Irish issues through British eyes.<sup>26</sup>

The United States' tendency to side with the United Kingdom is rooted in a strong alliance that exists between the two countries on a wide range of issues<sup>27</sup> and in the Irish Republic's reluctance to align itself with the two countries on significant matters.<sup>28</sup> To a lesser degree, the American affinity for the British point of view also stems from an absence of any significant solidarity on "Irish" issues among the thirty to forty million Americans who claim Irish ancestry.<sup>29</sup> At best, Irish-Americans have generated a modest degree of support for particular initiatives in Congress but have ceded the inside track at the White House and the State Department to the British Foreign Office. Further, Irish-Americans are aware that the United States is a nation of Anglophiles, and thus they are divided over whether a moderate posture on "Irish" issues will produce more favorable results than an aggressive stance.<sup>30</sup>

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25. Both governments also pledged to cooperate against terrorism with border security initiatives and the punishment of fugitive offenders.

26. See 138 Cong. Rec. H451 (daily ed. Feb. 19, 1992) (extension of remarks by Congressman Engel) ("When it comes to Ireland, American policy is made in London, not at the State Department."); Cronin, *supra* note 9, at 12.

27. See Holland, *supra* note 19, at 116 ("Two world wars and a host of common global interests have fastened the Anglo-American partnership with stronger bonds than most Irish or Irish Americans care to admit."); Ronald Reagan, *An American Life* 357 (1990) ("Throughout the eight years of my presidency, no alliance we had was stronger than the one between the United States and the United Kingdom.").

28. Ireland's neutrality during World War II and its post-war refusal to join the North Atlantic Treaty Organization are two obvious examples.

29. In fact, on behalf of "Irish" issues, the Irish-American community has never been able to muster the same domestic political clout that African-Americans have brought to bear on issues relating to South African apartheid, or that Jewish-Americans have demonstrated on core issues affecting Israel.

30. On the "aggressive" end of the spectrum are groups like the Irish Northern Aid Committee ("NORAIID"), lobbies like the Irish National Caucus, and legislative caucuses like the Ad Hoc Congressional Committee on Irish Affairs. Their agenda includes a campaign to reverse the State Department policy banning IRA and Sinn Fein representatives from visiting the United States, and to persuade Congress to hold open hearings on British rule in Northern Ireland. More recently, they have advocated the MacBride Fair Employment Principles for American companies doing business in

From the beginning of the troubles in 1969, United States policy has focused on American neutrality, stressing the need for the Irish and British governments to work out a solution on their own. For example, in 1972—following Bloody Sunday—the Foreign Minister of the Irish Republic came to Washington seeking help. Yet, United States Secretary of State William Rogers refused to become involved, even though scattered voices on Capitol Hill called for hearings on the matter.<sup>31</sup>

In 1977, American policy added a new dimension. In an effort to isolate the IRA's American supporters and to stem the flow of money and weapons across the Atlantic, several United States officials spoke out against the violence in Northern Ireland. On March 17, 1977, four United States politicians of Irish descent—House Speaker Thomas A. ("Tip") O'Neill, Senators Edward Kennedy and Daniel Patrick Moynihan, and New York Governor Hugh Carey—issued a statement appealing for an end to the violence in Northern Ireland, condemning funding by Americans for the IRA, and urging American government financial aid for peace.<sup>32</sup>

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Northern Ireland, and they have monitored the expenditure of funds under the Anglo-Irish Agreement Support Act of 1986.

The "moderates" favor the same approach as the government of the Republic of Ireland. Its strategy is: first, to counteract any pro-IRA influence in Washington; and, second, to use the United States government as an intermediary to persuade the British government to adopt a more conciliatory stance in Northern Ireland. See Holland, *supra* note 19, at 131 ("To the Irish authorities it was more important that the IRA be given no opportunity to enhance its credibility than that the British be criticized for their violations of human rights."). From 1977 through 1986, the Speaker of the House of Representatives, Thomas P. ("Tip") O'Neill, was most receptive to this approach. The Speaker's group (see *infra* note 32 and accompanying text, referring to the "Four Horsemen of the Apocalypse") began in 1977 and expanded its membership in 1981 to become the Friends of Ireland in Congress. See Cronin, *supra* note 9, at 318, 320, 322; Holland, *supra* note 19, at 123, 142-43.

More often than not, the moderates have outmaneuvered their more aggressive counterparts, who have proven vulnerable to allegations that the IRA is duping them into supporting the cause of violence.

31. See Cronin, *supra* note 9, at 303-06; Tad Szulc, *U.S. Bars Intervention In Ulster*, N.Y. Times, Feb. 4, 1972, at A2.

32. See Cronin, *supra* note 9, at 313; Bernard Weinraub, *Four Top Democrats Urge Halt in Support for I.R.A.*, N.Y. Times, Mar. 20, 1977, at A22. Opponents who favored a more aggressive strategy promptly dubbed these politicians "the Four Horsemen [of the Apocalypse]."

In the years that followed, it was determined that the Irish Northern Aid Committee (NORAID) was the IRA's "agent" within the meaning of the Foreign Agents Registration Act of 1938, as amended. See 22 U.S.C. § 611 (1988); Attorney Gen. v. Irish N. Aid Comm., 530 F. Supp. 241, 255-60 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 159 (2d Cir. 1982); see also Attorney Gen. v. Irish People, Inc., 796 F.2d 520 (D.C. Cir. 1986) (remanding to District Court for determination of whether Irish-oriented publication was so aligned with Irish Northern Aid Committee as to require registration as a foreign agent); Attorney Gen. v. Irish N. Aid Comm., 346 F. Supp. 1384 (S.D.N.Y.) (enjoining and directing agent of foreign principal to produce books and records for inspection, holding that such inspection did not abridge agent's First Amendment rights), *aff'd mem.*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972).

American donations to the PIRA through NORAID have been estimated at less than \$250,000 a year. See John Brecher, *The IRA's Angels*, Newsweek, May 18, 1981, at 53;

On August 30, 1977, United States President Jimmy Carter followed up with a policy statement, noting America's close ties with "both parts of Ireland and with Great Britain," and emphasizing that "[v]iolence cannot resolve Northern Ireland's problems."<sup>33</sup> President Carter urged Americans "to refrain from supporting with financial or other aid" any organizations that were involved in the violence, and he placed the United States "firmly on the side of those who seek peace and reject violence in Northern Ireland."<sup>34</sup> Ronald Reagan voiced similar themes, both as a presidential candidate in 1980<sup>35</sup> and as President in 1983.<sup>36</sup>

Thus, for Doherty, the political and diplomatic climate in which the Doherty Case arose could hardly have been less favorable. Although Irish nationalists were concerned about partition, their grievances were poorly understood within the United States;<sup>37</sup> American policy concerning British-Irish conflicts often favored the British; and American presidents, regardless of their political affiliations, had unequivocally condemned the violence in Northern Ireland. Notwithstanding his Irish heritage, President Reagan supported Prime Minister Margaret

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*Does U.S. Money Finance IRA Terror?*, U.S. News & World Report, Oct. 26, 1981, at 5; *Passing the Hat for the Provos*, Time, Nov. 26, 1979, at 92; Steven Strasser et al., *The IRA's Money Crisis*, Newsweek, July 31, 1978, at 33. Moreover, three Supreme Court Justices have characterized NORAIID as "a shoestring operation." Irish N. Aid Comm. v. Attorney Gen., 409 U.S. 1080, 1083 (1972) (Marshall, J., dissenting from denial of certiorari). Nevertheless, condemnation of NORAIID has guided America's Northern Ireland policy for 15 years.

33. Northern Ireland: Statement on U.S. Policy, 1977 Pub. Papers 1524 (1978) [hereinafter Statement on U.S. Policy].

34. *Id.*; see Cronin, *supra* note 9, at 312-13. President Carter stated that American policy on Northern Ireland "ha[d] long been one of impartiality" and would not change, adding that "[t]he only permanent solution will come from the people who live [in Northern Ireland]." Statement on U.S. Policy, *supra* note 33, at 1524. The President pledged, however, that "the U.S. Government would be prepared to join with others to see how additional job-creating investment could be encouraged, to the benefit of all the people of Northern Ireland," in the event of a peaceful solution. *Id.*

President Carter's emphasis on job creation aptly recognizes that financial considerations, as opposed to ideological concerns, may now be the key to solving the troubles in Northern Ireland. The Belfast area is no longer economically robust, as it was from 1912 through 1914, and Northern Ireland now represents a net drain on the British economy. Yet, if the British were to withdraw from Northern Ireland, the Irish Republic would be in no position to match the British financial commitment. Thus, the cry for unification in the Irish Republic has been muted, and the prospect of American foreign aid looms large. See *infra* notes 162, 204, and accompanying text.

35. See Cronin, *supra* note 9, at 319-20 (attributing to the presidential campaign of candidate Ronald Reagan the statement that "extradition procedures should not be relaxed on the grounds that these are 'political' prisoners," and quoting Mr. Reagan as having "no views on Irish unity").

36. President Reagan stated: "Those who advocate or engage in violence and terrorism should find no welcome in the United States. We condemn all such acts and oppose the forces of discord in Northern Ireland." Statement on St. Patrick's Day and the Situation in Northern Ireland, 1983 Pub. Papers 405 (1984).

37. The Department of State viewed the partition of Ireland as being settled since 1925.

Thatcher's anti-terrorist initiatives against the PIRA.<sup>38</sup> That Doherty was able to carry on an extradition and deportation struggle in the American courts for close to nine years should be evaluated in this context.

#### D. Underlying Events

Joe Doherty was born in Belfast in 1955, and joined the PIRA at age seventeen. In the mid-1970s, Doherty was convicted for possession of firearms, possession of eighty pounds of explosives, and prison-breaking with intent to escape. He served six years in custody and was released in December 1979.

##### 1. May 2, 1980: Murder or Death in Combat?<sup>39</sup>

In 1980, convoys of military vehicles frequently travelled Antrim Road in North Belfast, a road that connected the sites of two large British Army installations. Their activity made the convoys a target for

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38. On his 1984 "roots" pilgrimage to Ireland, President Reagan spoke out against violence and terrorism on several occasions. See, e.g., *Visit to Ireland, the United Kingdom, and France*, Dep't St. Bull., August 1984, at 8 ("[T]hose who advocate violence or engage in terrorism in North[ern] Ireland will never be welcome in the United States." (quoting President Reagan's June 1, 1984 arrival remarks at Shannon Airport)); *id.* at 16: [T]here is no place for the crude, cowardly violence of terrorism—not in Britain, not in Ireland, not in Northern Ireland. All sides should have one goal before them, and let us state it simply and directly: to end the violence, to end it completely, and to end it now.

(quoting President Reagan's June 4, 1984 Address to the Irish Parliament); see also Holland, *supra* note 19, at 240 (asserting that Reagan's ideological identification with Margaret Thatcher "was a particularly touchy matter for Reagan's Irish-American supporters, especially those who regarded themselves as pro-nationalist. To even suggest to such people that Reagan and Thatcher were ideological partners was tantamount to treason.").

Thatcher's attitude toward 'The Troubles' is rooted in her own strong unionist sentiment and, to a lesser extent, her childhood training as a conservative Methodist. Her attitude has also been shaped by an abhorrence of terrorism and, in particular, the painful murder of Airey Neave [shadow minister who would have been Secretary of State for Northern Ireland in Thatcher's government] in March 1979. His killing instilled an absolute hatred of the IRA in her, which the Brighton bombing [of October 1984] only intensified. . . . For Thatcher, the debate [about Northern Ireland] is mechanistic unless her soldiers are being blown up. She is not affected by the marshalling of historical argument as it is applied to Ireland. She has little feel for history generally and even less for Irish history. . . . The nuances and cultural aspects of the debate have thus never been part of her ken, nor the rights and wrongs of the Reformation period, nor the civil war that resulted in partition.

Chris Ogden, *Maggie, An Intimate Portrait Of a Woman In Power* 217, 219 (1990); see also Hugo Young, *The Iron Lady, A Biography of Margaret Thatcher* 464-75 (1989) (discussing Thatcher's personal influence over Irish foreign policy).

39. This section summarizes facts that were drawn from Doherty's testimony at his extradition hearing. See Transcript of Hearing (Apr. 2, 1984) at 636-46, 783-818, *In re Doherty*, No. 83 Cr. Misc. 1 (S.D.N.Y. 1984) [hereinafter Extradition Transcript]. Except for minor details, Doherty's account was not seriously disputed by the government. See also Martin Dillon, *Killer in Clowntown: Joe Doherty, The IRA, and the Special Relationship* 83-104 (1992) (describing events of May 2, 1980).

the PIRA's snipers, who planned to ambush the convoys at a traffic signal along the way. A three-story apartment building that overlooked the intersection was chosen as the site of the engagement. Although a family resided on the first floor of the building, the upper two stories were vacant.

A PIRA active service unit, comprised of Doherty and three other men, attempted to carry out the planned attack on May 2, 1980. One member of the unit was armed with a pistol and remained in the first-floor apartment with its four occupants.<sup>40</sup> The other three men—armed with a rifle, an American-made M-60 machine gun,<sup>41</sup> and other weapons—prepared for the attack from the top two floors. A hijacked van, intended for use as a getaway vehicle, was parked at the rear of the building.<sup>42</sup>

After several hours had passed and no British convoys had been spotted on Antrim Road, the PIRA unit became concerned. But, as the unit considered abandoning the operation, a car pulled to a sudden stop in front of the building and five men, dressed in civilian clothing, quickly emerged.<sup>43</sup> Several were carrying automatic weapons and one had a sledge hammer. All were wearing fluorescent arm bands. These men were members of the Special Air Service ("SAS"), an elite commando unit of the British Army, and they had been tipped-off to the PIRA's plan. As the British assault team stormed the building, the two sides began firing. British Army Captain Herbert Richard Westmacott was shot and killed in the exchange.<sup>44</sup>

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40. Doherty stated that the members of the family occupying the first floor of the building were in no way involved with the purpose of the operation, were not mistreated, and were not used as shields. See Extradition Transcript, *supra* note 39, at 638, 794. Although these individuals were held against their will and exposed to considerable risk in the gun battle that followed, Doherty was never charged with any offenses relating to them. See *infra* note 86.

41. The machine gun was one of seven that had been smuggled to the PIRA in Northern Ireland after being stolen, in August 1976, from the National Guard Armory in Danvers, Massachusetts. See Andrew Blake, *U.S. Judge Bars Use Of Extradition Pact On Ex-IRA Member*, Boston Globe, July 24, 1991, at 9.

Efforts to stem the flow of weapons to Northern Ireland have long been a cornerstone in America's policy towards Northern Ireland. See Andrew Blake, *The Guns of Ireland and the American Connection*, Boston Globe, Nov. 26, 1978, Magazine, at 10, 60. In fact, participants in the smuggling of arms to Northern Ireland have consistently been prosecuted by the United States. See *United States v. Johnson*, 952 F.2d 565 (1st Cir. 1991); *United States v. Murphy*, 852 F.2d 1 (1st Cir. 1988), *cert. denied*, 489 U.S. 1022 (1989); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Cahalane*, 560 F.2d 601 (3d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978).

42. See Extradition Transcript, *supra* note 39, at 792-93. The van's owner was detained by the PIRA at another location for most of the day. See *id.* at 793.

43. A government attorney at Doherty's extradition hearing expressed some skepticism that experienced British troops would foolishly park their car underneath a window where the PIRA could shoot at them with a machine gun. Doherty explained: "[W]hen [the British troops] got their information that morning about the house, they must have underestimated the fire power." *Id.* at 807. Doherty also testified that the British initially attacked the wrong house. See *id.* at 811.

44. Captain Westmacott, age 28, was from Chichester, Sussex, England. He was a

The British commandos then attempted to enter the building, but the PIRA volunteers fired shots through the front door. As the PIRA unit scrambled upstairs to defend against an expected second assault, the British sought cover behind a stone wall separating the yard from the street and awaited further assistance.

More SAS commandos appeared at the rear of the building. Eventually, the entire block was surrounded by more than 100 soldiers and policemen. After a lengthy standoff, the PIRA hung a white flag out the window and negotiated terms of surrender.<sup>45</sup> The four members of the PIRA unit were arrested as they emerged from the building.<sup>46</sup>

Doherty and the other three members of the PIRA unit were taken to an interrogation center and questioned three times a day for seven days.<sup>47</sup> They were then charged with murdering the British officer, attempted murder, illegal possession of firearms and ammunition, and illegal membership in the PIRA, a proscribed organization. The non-jury trial was held in Belfast Crown Court and lasted for six weeks. Within the United Kingdom, the case was dubbed the "M-60 Machine-Gun Case," because the same weapon that had been used to kill Captain Westmacott had also been involved in PIRA attacks on other members of the security forces in February and April 1980.<sup>48</sup> In early June 1981, the trial was completed

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graduate of the Royal Military Academy at Sandhurst, and his parent regiment was the Grenadier Guards. He left behind a widow and a seven-month old daughter. Captain Westmacott was posthumously awarded the Military Cross for his actions on May 2, 1980.

British newspapers, bound by the strictures of the Official Secrets Act, reported without elaboration that Captain Westmacott had been shot while engaging in "undercover work." *Niedermayer: 3 Charged*, *The Times* (London), May 4, 1980, at 1. The Captain's SAS affiliation was not acknowledged until later. Further, the record did not establish which side fired first or which member of the PIRA unit fired the fatal shot.

45. See Extradition Transcript, *supra* note 39, at 642-44. Doherty testified that, in exchange for their surrender, the PIRA officer in command requested that a priest be brought "round to the house . . . to be a witness in case we were assassinated." *Id.* at 644. According to Doherty, the police and the army agreed to comply with this request, but said "it would take about 15 minutes." *Id.*

46. Doherty's description of the scene outside the building was as follows:

There was [sic] armored personnel carriers, there was [sic] jeeps, and whatnot. Behind that there was a very large crowd which seemed to be a nationalist and republican crowd, with neighbors singing and cheering and sort of trying to get our morale up. . . . I put my fist up and I said "up the IRA."

*Id.* at 645.

47. See *id.* at 646. Under the British emergency laws, authorities have the right to interrogate suspects for up to seven days without filing criminal charges and without an appearance before a judge. See *Human Rights in Northern Ireland, supra* note 22, at 3.

48. There was no evidence that Doherty had personally participated in the February or April 1980 attacks, and he was not charged with those offenses. In fact, there was no evidence that Doherty had violated any laws at all during the period from December 1979 (when he was released from prison) until May 2, 1980.

One of the factors that made Doherty's case a difficult one for the American courts was that he did not fit neatly into the definition of a modern terrorist. See Dillon, *supra* note 39, at 243. "[Doherty] was not known to be guilty of shooting or bombing civilians, attacks on economic targets or the murder of politicians. . . . The soldier he killed was no ordinary soldier, but an officer in a highly efficient counter-terrorist regiment with a dubi-

and the proceedings were adjourned to allow the judge time to review the evidence.

## 2. June 10, 1981: Doherty Escapes

The spring of 1981 was a period of considerable tension inside the northern prison system. This was the time of the hunger strikes, when ten prisoners would starve themselves to death to protest a British decision stripping republican inmates of the "special category" (i.e., prisoner of war) status that had been previously accorded them.<sup>49</sup> On April 10, 1981, Bobby Sands, the first of the hunger strikers, had been elected to the British House of Commons amid considerable international publicity.<sup>50</sup> Moreover, national elections in the Irish Republic had been called for June 11, 1981, and several prisoners in northern jails were on the Irish Republic's ballot.<sup>51</sup> By mid-May 1981, four hunger strikers had died within sixteen days. In the midst of this volatile political climate, British Prime Minister Margaret Thatcher visited Belfast and opined that the PIRA might well be playing its "last card."<sup>52</sup>

The Prime Minister's prediction proved inaccurate. On June 10, 1981, after the M-60 Machine-Gun trial was completed, but before a verdict had been handed down by the court, Doherty and seven other republican prisoners broke out of the Crumlin Road Jail.<sup>53</sup> The escape began at

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ous history." *Id.* According to Dillon, "[t]he SAS frequently ambushed IRA active service units and rarely took prisoners." *Id.* at 81. For more information about the controversial role of the SAS in Northern Ireland, see generally Raymond Murray, *The SAS in Ireland* (1990).

49. See generally David Beresford, *Ten Men Dead, The Story of the 1981 Irish Hunger Strike* (1987) (detailing the hunger strike). The hunger strike began on March 1, 1981, and continued until October 3, 1981. See Lee, *supra* note 7, at 454. One author characterized the British response to the hunger strike as "inept to the point of criminality" and noted that "[the strike] threatened to endanger the political stability not only of Northern Ireland, but [also] of the Republic [of Ireland], where emotions ran high." *Id.*

50. See Beresford, *supra* note 49, at 84-85.

51. John Conroy, *Belfast Diary: War as a Way of Life* 186 (1987).

52. *Id.* at 181.

That spring, Margaret Thatcher replaced Ian Paisley as the greatest recruiter the IRA had ever known. Seemingly oblivious to her role as the great aggravator, she breezed into Belfast on a surprise visit on Thursday, May 28. She strolled around the demilitarized shopping zone, had lunch at Stormont Castle, talked with government ministers, gave interviews to television reporters, and flew back to London in early evening.

In her wake, she left a furious people.

*Id.*

53. The summary of Doherty's escape is drawn from the following books and news reports: Beresford, *supra* note 49, at 191-93; Dillon, *supra* note 39, at 124-47; *Atkins Stresses Gravity Of Ulster Gaol Break-Out And Sets Up Top-Level Inquiry*, *Manchester Guardian*, June 12, 1981, at 19 [hereinafter *Atkins*]; Colin Brown & Paul Keel, *Solicitors Still Held After IRA Escape*, *Manchester Guardian*, June 12, 1981, at 1; Richard Ford, *Guns Blaze As Eight Burst From Belfast Jail*, *The Times* (London), June 11, 1981, at 1; Richard Ford, *Solicitors Held Under Terrorism Act After Belfast Jailbreak*, *The Times* (London), June 12, 1981, at 2 [hereinafter *Solicitors Held*]; Paul Keel, *Top IRA Men Shoot Their Way Out Of High Security Gaol*, *Manchester Guardian*, June 11, 1981, at 1;

approximately 4:15 P.M.—when afternoon visiting hours were ending—in an interview room where the eight prisoners had been meeting with their solicitors. The prisoners had divided themselves into small groups and were occupying three cubicles. Three prisoners, using handguns that had somehow been smuggled into the jail, forced ten unarmed guards and the solicitors into a corner. While one armed prisoner stood vigil, four others forced the guards to turn over their uniforms.

The escapees then split into two groups and began to make their way from the interview room to the main gate. Four wore the guards' uniforms they had appropriated; the others were holding guards as hostages or shields. The first group encountered few problems. They bluffed their way through three interior check points, out the main gate, and into a parking lot where PIRA drivers were waiting. But the second group of four met more resistance. They were challenged in the prison yard by fifteen to twenty unarmed guards, and a skirmish ensued. Some of the guards were beaten, and eventually retreated once the prisoners fired shots at them. Two guards were later hospitalized with head and hand injuries from the beatings.

The commotion in the prison yard alerted members of the Royal Ulster Constabulary (the "RUC") and the British Army, who were located just across Crumlin Road at the courthouse, to the escape. A wild gun battle erupted outside the prison's main gate. No deaths were reported, in part because Doherty duped the RUC and the British soldiers into restricting their fire by shouting that he was a guard.

Some of the escapees piled into waiting cars and sped away in the heavy afternoon traffic. Others fled on foot. PIRA decoy cars also pulled out at the same time, assuring maximum confusion. The getaway cars, riddled with bullet holes, were abandoned nearby, as the prisoners switched to other vehicles and perfected their escape.

The police and the British Army immediately began a large-scale manhunt. They set up roadblocks in the Catholic areas of Belfast and throughout Northern Ireland. They also tightened security at airports, harbors, and border crossings between Northern Ireland and the Republic of Ireland. Finally, they printed 20,000 "wanted" posters and distributed them to motorists as they were stopped at checkpoints.<sup>54</sup>

### 3. The Aftermath

The jailbreak was humiliating to the security forces, for the escape was heavily publicized in the United Kingdom. It prompted debate in Parliament and compelled the Secretary of State for Northern Ireland to order an "immediate and urgent" inquiry into security conditions at the

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and Hugh Noyes, *Urgent Inquiry On Belfast Jail Break*, *The Times* (London), June 12, 1981, at 1.

54. See *supra* note 53.

prison.<sup>55</sup>

On June 11, 1981, two republican prisoners in northern jails were elected to the Irish parliament.<sup>56</sup> On June 12, 1981, Mr. Justice Hutton of the Belfast Crown Court issued his verdict in the M-60 Machine-Gun Case. Doherty was sentenced to life in prison, with a thirty-year recommended minimum stay, for his role in the events of May 2, 1980.<sup>57</sup>

With the help of the PIRA, Doherty successfully eluded the British authorities. He fled to the Republic of Ireland, where he remained in hiding for some time. Following the rearrest in Ireland of several of Doherty's fellow escapees, the PIRA ordered Doherty to go to the United States. In February 1982, Doherty entered the United States under an assumed name and with an altered Irish passport. For the next sixteen months, he lived in Brooklyn, New York, and in Kearney, New Jersey, and was employed as a construction worker and a part-time bartender. He was arrested on June 18, 1983, while working at a bar in New York City.<sup>58</sup>

## II. EXTRADITION

On June 21, 1983, the United Kingdom requested Doherty's provisional arrest for the purpose of extradition to the United Kingdom. On June 27, 1983, a federal district judge issued the provisional arrest warrant, and on August 16, 1983, the United Kingdom made a formal request under the extradition treaty between the United States and the United Kingdom (the "1977 Treaty")<sup>59</sup> to extradite Doherty.<sup>60</sup>

55. Noyes, *supra* note 53, at 1. Ian Paisley expressed the unionist view of the escape when he advised the House of Commons that "[t]his matter has appalled the people of Northern Ireland." *Id.* (quoting Paisley). Other perspectives were offered by writers for the Manchester Guardian, who described the incident as "one of the most audacious Republican operations mounted in Northern Ireland" and "meticulously planned," Keel, *supra* note 53, at 1, and the London Times, which stated that "to many it was clear that the eight men were quickly becoming folk heroes." *Solicitors Held*, *supra* note 53, at 2.

56. See Beresford, *supra* note 49, at 194 ("The euphoria over the breakout carried over to the election, the results of which astonished observers, if not the prisoners themselves. Two of the nine prisoners, Kieran Doherty [(a hunger striker not related to Joe Doherty)] . . . and Paddy Agnew, found they were full-blooded Irish MPs.").

57. See Richard Ford, *Life Sentences Await Four Ulster Escapers*, *The Times* (London), June 13, 1981, at 1. Since Doherty's absence from the proceeding was voluntary, the court maintained jurisdiction to enter a verdict and impose a sentence. *Cf.* Fed. R. Crim. P. 43(b)(1) (United States rule also provides that, where a defendant who was initially present at his trial voluntarily absents himself after the trial has commenced, it shall be implied that the defendant waived his right to be present and a return of verdict shall not be prevented).

58. The Federal Bureau of Investigation (the "FBI") had targeted the New York City bar where Doherty was captured as one frequented by PIRA supporters. Doherty's identity was established from an informer's tip. Doherty's arrest was coordinated by the same FBI agent who had investigated the theft of the M-60 machine guns in Danvers, Massachusetts, several years earlier. See Dillon, *supra* note 39, at 175-76, 236-38.

59. Extradition Treaty, June 8, 1972, U.S.-U.K., art. VII, 28 U.S.T. 227, 231. See *infra* note 75.

60. See *In re Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984). At about the same

From June 1983 through June 1986, Doherty would rarely lose a courtroom battle. In large measure, these courtroom victories would reflect a judicial acceptance of the merits of Doherty's arguments. But Doherty's success during this period would also be aided by a second factor: judicial aversion to government overreaching.

In their zeal to assist the British Government, the Justice Department and, more particularly, the Office of the United States Attorney for the Southern District of New York pursued a highly combative litigation strategy against Doherty; it was a strategy that prompted the courts on three separate occasions to admonish the government for the extreme nature of its arguments. The government's tenacity in opposing Doherty's request for records under the Freedom of Information Act (the "FOIA"),<sup>61</sup> as described below, is illustrative of this strategy.

#### A. *A Preliminary Skirmish: Doherty's FOIA Request*

On July 5, 1983, Doherty requested that the Federal Bureau of Investigation (the "FBI") provide him with copies of the documents in his file. Following the FBI's decision to withhold all such materials, Doherty sought de novo judicial consideration in the United States District Court for the Southern District of New York. In defense, the government argued that an undocumented alien has no right to sue for access to information under the FOIA, and thus moved to dismiss for lack of standing.<sup>62</sup>

On October 30, 1984, Judge Charles L. Brieant denied the government's motion to dismiss. He held that: (1) "[n]othing in the literal language of the [FOIA] statute suggests that disclosure depends upon the . . . citizenship or residency of the person requesting information;"<sup>63</sup> and

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time as the filing of the United Kingdom's request, the Immigration and Naturalization Service (the "INS") issued a deportation warrant. In response, Doherty sought asylum. Pursuant to 8 C.F.R. § 208.3(b) (1992), Doherty's asylum request was deemed to include a petition for withholding of deportation. The administrative deportation hearing was held in abeyance during the extradition proceeding.

61. 5 U.S.C. § 552 (1988 & Supp. II 1990).

62. See *Doherty v. United States Dep't of Justice*, 596 F. Supp. 423, 425 (S.D.N.Y. 1984). Considering that the courts had already rejected the notion that a foreigner is not a "person" within the meaning of the FOIA, see *Stone v. Export-Import Bank of the United States*, 552 F.2d 132, 136 (5th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978), and that the government had an entirely respectable defense to non-disclosure based on the merits of the case, it is odd that the government made this argument.

63. *Doherty*, 596 F. Supp. at 425. In comparing the FOIA clause, which requires disclosure to "any person" who requests it, 5 U.S.C. § 552(a)(3) (1988 & Supp. II 1990), with the Privacy Act clause, which authorizes disclosure to "individuals"—a narrower class defined as United States citizens and lawfully-admitted aliens, 5 U.S.C. § 552a(a)(2) (1988 & Supp. II 1990), Judge Brieant held that Congress had intentionally chosen different terms for the two statutes. See *Doherty*, 596 F. Supp. at 425-26. Furthermore, Judge Brieant dismissed as irrelevant the government's "lurid" characterization of Doherty as "a foreign terrorist [who] seeks to rummage through Government files," *id.* at 424, 428, stating that "the court is perplexed as to how [Doherty's] prior acts become relevant upon the construction of the FOIA." *Id.* at 424.

(2) the FOIA's legislative history did not support "a clear legislative intention to grant a right to sue [under the FOIA] to citizens [only]."<sup>64</sup>

The government next raised a policy objection: if Doherty had standing to sue for the release of FOIA materials, the Soviet Union's KGB could sue for FBI counterintelligence files. Judge Brieant rejected this policy argument, stating: "[T]he KGB . . . presumably has or will obtain the information referred to through normal channels of espionage and leaks. It seems to have no need to rely on the FOIA."<sup>65</sup> Moreover, Judge Brieant admonished that the government not waste any more time:

[I]t is the duty of the bureaucrats holding non-exempt information to comply with [the FOIA's] provisions promptly and cheerfully unless and until the statute is revised by Congress . . . . The legislative goals will not be served by engrafting on the statute's plain meaning[] a judicial exception of the sort urged here; an exception which leads to delay and will require litigation of facts having nothing to do with the merits, such as the citizenship of a complainant or the validity of his green card.<sup>66</sup>

Faced with the prospect of defending the FBI's full denial of access with an argument based only on the merits, the Justice Department then released 168 pages of documents to Doherty—some of which contained substantial redactions.<sup>67</sup>

### B. *United States Extradition Procedures*

The right of a foreign sovereign to obtain the extradition of an individual is created by treaty and the procedures are governed by statute.<sup>68</sup>

64. *Id.* at 426-27. Having determined that the statutory text of the FOIA was clear on its face, Judge Brieant might well have ended the inquiry there. Where resolution of a question of federal law turns on a statute and the intent of Congress, a reviewing court must look first to the statutory language and then to the legislative history only if the statutory language is unclear. *See* *Blum v. Stenson*, 465 U.S. 886, 896 (1984). At the government's insistence, however, the court went on to review the FOIA's legislative history, which the government had also invoked in support of its position. *See Doherty*, 596 F. Supp. at 426-27.

65. *Id.* at 428.

66. *Id.*

67. The government continued to deny Doherty access to 128 more pages pursuant to various FOIA exemptions. The district court sustained this partial denial (in an unreported opinion), and the Second Circuit affirmed on the merits without addressing the government's alternate argument—i.e., that Doherty lacked standing to sue under FOIA. *See Doherty v. United States Dep't of Justice*, 775 F.2d 49, 51 (2d Cir. 1985). Buoyed by the Second Circuit's decision not to reach the standing issue, the government has relitigated the issue against other aliens in other jurisdictions. Those efforts have also been unsuccessful. *See Arevalo-Franco v. United States INS*, 889 F.2d 589, 591 (5th Cir. 1989); *O'Rourke v. United States Dep't of Justice*, 684 F. Supp. 716, 718 (D.D.C. 1988).

68. *See* 18 U.S.C. § 3184 (1988 & Supp. II 1990); *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933). Under the reasoning of *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992), extradition merely provides one optional method for a government that seeks to take an individual back across international borders. Where the applicable treaty (such as the United States/United Kingdom treaty) does not expressly forbid otherwise, another option is the forcible abduction of the individual on the other country's territory

The prevalent practice is for a foreign government first to submit an extradition request through diplomatic channels to the United States Department of State. The request must establish that: (1) an offense was committed within the jurisdiction of the requesting state; (2) the offense also violates American law; (3) the offense is extraditable under the applicable treaty; and (4) the accused is the person sought. This request is then forwarded to the United States Attorney, who files a complaint on behalf of the requesting government and seeks an arrest warrant from a judge or magistrate (the "extradition magistrate") in the district where the accused is found.<sup>69</sup>

Next, the extradition magistrate holds a hearing to determine whether there is sufficient evidence under the treaty to sustain the charge. The hearing is limited in scope. It is not a full trial on the merits, and neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure applies.<sup>70</sup> If the extradition magistrate determines that the alleged offense is within the scope of the applicable treaty and that there is probable cause, the case must be certified to the United States Secretary of State, who has discretion on whether to surrender the individual to the requesting nation.<sup>71</sup>

Judicial review of an extradition magistrate's determination is limited, and the procedures are cumbersome. If a magistrate declines to certify an extradition request, the government may not pursue a direct appeal. Rather, it must refile the request before a second magistrate.<sup>72</sup> The accused individual is likewise barred from pursuing a direct appeal of an adverse ruling. Instead, the individual must either seek a writ of habeas corpus or persuade the Secretary of State to refuse to extradite.<sup>73</sup>

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(assuming the kidnapping country is willing to endure the adverse public relations that will result). Thus, the United Kingdom was presumably free to kidnap Doherty (as Israel did to Adolf Eichmann in Argentina). *But see Alvarez-Machain*, 112 S. Ct. at 2201 n.21 (Stevens, J., dissenting) (quoting Abraham Sofaer, Legal Advisor of the State Department, who resisted the notion that such seizures were acceptable).

69. *See In re United States*, 713 F.2d 105, 108 n.1 (5th Cir. 1983); *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

70. *See In re United States*, 713 F.2d at 108 n.1; *Eain*, 641 F.2d at 508, 511; Steven Lubet, *Taking The Terror Out Of Political Terrorism: The Supplementary Treaty of Extradition Between the United States and the United Kingdom*, 19 Conn. L. Rev. 863, 866-67 (1987); *see also* Fed. R. Evid. 1101(d)(3) (Federal Rules of Evidence do not apply to proceedings for extradition); Fed. R. Crim. P. 54(b)(5) (Federal Rules of Criminal Procedure "are not applicable to extradition"). Accordingly, the accused has the limited right to explain the evidence introduced by the Attorney General, but cannot offer contradicting evidence. Moreover, the accused does not have the rights of confrontation and cross-examination. *See Collins v. Loisel*, 259 U.S. 309, 315-17 (1922).

71. *See* 18 U.S.C. § 3184 (1988 & Supp. II 1990); *Eain*, 641 F.2d at 508.

72. *See In re Mackin*, 668 F.2d 122 (2d Cir. 1981). Traditional double jeopardy standards do not apply to multiple extradition applications. *See Collins v. Loisel*, 262 U.S. 426, 429-30 (1923). The only limitation on the number of successive extradition requests is that each request must be based on a good faith determination that extradition is warranted. *See Hooker v. Klein*, 573 F.2d 1360, 1366 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978).

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

### C. The "Political Offense" Exception

The United States is party to approximately 100 bilateral extradition treaties,<sup>74</sup> each of which contains a "political offense" exception to extradition.<sup>75</sup> The exceptions are designed to allow a signatory to maintain a neutral position in another signatory's internal political disputes.<sup>76</sup> "Political offense" exceptions are based upon a belief that individuals should have a right to resort to political activism in order to foster political change, and a concern that political activists—particularly, unsuccessful rebels—should not be returned to a country which may subject them to unfair trials and punishments based on their political opinions.<sup>77</sup>

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74. The treaties to which the United States is a party are listed in 18 U.S.C. § 3181 (1988 & Supp. II 1990). For a statutory example of a "political offense" exception to extradition, see 18 U.S.C. § 3185 (1988).

75. At the time of Doherty's arrest, the governing treaty between the United States and the United Kingdom was the Extradition Treaty, 28 U.S.T. 227, signed on June 8, 1972, and put into force on January 21, 1977 [hereinafter 1977 Treaty]. Article V(1)(c)(i) of the 1977 Treaty contains the "political offense" exception. It states that extradition "shall not be granted" if the offense "is regarded by the requested party as one of a political character." 1977 Treaty, *supra*, 28 U.S.T. at 227. Where the United States is the requested party, the judiciary, rather than the executive, determines whether this "political offense" exception applies. See *Eain v. Wilkes*, 641 F.2d 504, 517-18 (7th Cir. 1981); *Mackin*, 668 F.2d at 132-33.

76. Neutrality is prudent because today's armed revolutionary may be tomorrow's ruler and today's ruler may be tomorrow's fugitive. See Steven Lubet, *Extradition Unbound: A Reply to Professors Blakesley and Bassiouni*, 24 Tex. Int'l L.J. 47, 51 (1989); see also Duane K. Thompson, *The Evolution of the Political Offense Exception in an Age of Modern Political Violence*, 9 Yale J. World Pub. Ord. 315, 340-41 (1983):

Neutrality in foreign rebellions, to the extent of refusing to deliver belligerents into the hands of their enemies, remains sound policy . . . . The political offense exception does not require a determination of which party in a political controversy is more just; rather, it preserves the integrity of international extradition as a mechanism to bring common criminals to justice.

In practice, however, extradition neutrality is elusive. A country that grants extradition for a political offender is often accused of siding with the requesting government and denying the legitimacy of the revolutionary's claims. In contrast, where a country denies extradition pursuant to a "political offense" exception, the requesting government will often accuse it of siding with the revolutionary—a hostile act.

The recent relationship between the United States and the Republic of the Philippines is illustrative. President Ferdinand Marcos ruled the Philippines under martial law from 1972 to 1981. Nonetheless, on a June 30, 1981 visit to Manila, Vice President George Bush toasted President Marcos for his "adherence to democratic principles and to democratic processes," and on November 27, 1981, the two governments signed an extradition treaty which would ease the return of anti-Marcos Filipino rebels based in the United States. Within six months, however, the political and diplomatic climate had changed sufficiently that the Department of State withheld formal submission of the treaty from the Senate.

77. See *Quinn v. Robinson*, 783 F.2d 776, 793 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); see also *Mackin*, 668 F.2d at 135 ("[T]he perception that extradition without judicial oversight was 'highly dangerous to liberty and ought never to be allowed in this country,' strongly suggests that it was precisely the political offense question that was of the greatest concern to Congress in passing the [Extradition Act of 1848]." (quoting *In re Kaine*, 55 U.S. (14 How.) 103, 113 (1852))).

#### D. *Doherty's Extradition Hearing*

Pursuant to the United Kingdom's request, an eight-day extradition hearing was held before United States District Court Judge John E. Sprizzo in March and April 1984 (the "Extradition Hearing"). On December 12, 1984, Judge Sprizzo found that the United Kingdom had established probable cause for extradition. However, he concluded that the death of Captain Westmacott and Doherty's subsequent escape from prison were "political offenses" within the meaning of the exception in the 1977 Treaty. On that basis, he declined to issue an extradition certificate.<sup>78</sup>

Judge Sprizzo's opinion briefly examined the history of British-Irish relations and observed that "the centuries old hatreds and political divisions which were spawned by England's conquest of Ireland in medieval times continue to resist any permanent resolution."<sup>79</sup> His opinion noted that the PIRA, a violent group that was claiming to be "a contemporary protagonist in that ancient struggle,"<sup>80</sup> had become dormant after losing much public support; yet, the PIRA had ironically resurged, along with violent loyalist groups in Northern Ireland, after the collapse of peaceful efforts to resolve Northern Ireland's political and economic issues. Judge Sprizzo acknowledged that the PIRA's methods and objectives were not supported by a majority of the people in Northern Ireland, or even by a majority of the Catholics in that region. Nevertheless, he refused to conclude that "the absence of a political consensus for armed resistance in itself deprives such resistance of its political character."<sup>81</sup>

#### 1. Judge Sprizzo's Five-Part Test

Judge Sprizzo next reviewed the case law interpreting the "political offense" exception to extradition. He rejected the broad view of the early cases,<sup>82</sup> and observed that the modern cases had adopted a more restrictive view of the exception.<sup>83</sup> Judge Sprizzo then fashioned his own test.

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78. See *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

79. *Id.* at 273.

80. *Id.*

81. *Id.* at 273 n.2.

82. See *id.* at 274. The early cases held that the "political offense" exception should apply so long as the alleged offense was committed during the course of, and in the furtherance of, a political struggle. See *In re Ezeta*, 62 F. 972, 999 (N.D. Cal. 1894); *In re Muenier* [1894] 2 Q.B. 415, 419; *In re Castioni* [1891] 1 Q.B. 149, 156, 159, 166.

83. Among the modern and more restrictive cases cited by Judge Sprizzo were *Eain v. Wilkes*, 641 F.2d 504, 518-21 (7th Cir.) (limiting use of the exception to "acts committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion," without consideration of the motivations underlying the alleged crime), *cert. denied*, 454 U.S. 894 (1981); *Ex parte Cheng* [1973] W.L.R. 746, 753 (limiting the "political offense" exception to "offenses of a political character as between the applicant and the requesting state."); and *Ex parte Schtraks* [1964] A.C. 556, 591-92 (it is not enough that the offense is committed for a political motive or to further a political cause; if the government is only enforcing the criminal law, then the fugitive should be extradited). See *In re Doherty*, 599 F. Supp. 270, 274-76 (S.D.N.Y. 1984).

He held that a court should consider five factors in determining whether the "political offense" exception applies: (1) "the nature of the [alleged] act," (2) "the context in which [the act was] committed," (3) "the status of the party committing the act," (4) "the nature of the organization on whose behalf [the act was] committed," and (5) "the particularized circumstances of the place where the act [took] place."<sup>84</sup> After applying his test to the facts before him, Judge Sprizzo concluded that Doherty had "present[ed] the assertion of the political offense exception in its most classic form."<sup>85</sup>

a. *Nature of the Act*

Judge Sprizzo determined that an act which violates international law and is inconsistent with international standards of civilized conduct should not be considered "political." He refused to hold, however, that the use of violence by itself was dispositive. He observed that Doherty's offenses did not involve the detonation of a bomb in a public place, were not directed against civilian representatives of government, did not result in the death or injury of hostages, and did not clearly violate the principles of the Geneva Convention.<sup>86</sup>

b. *Context in Which the Act Was Committed*

Judge Sprizzo held that the "political offense" exception should not be limited to actual armed insurrections and traditional and overt military hostilities, but should be applied to guerrilla warfare as well.<sup>87</sup> He noted that the death of Captain Westmacott had occurred during an attempted ambush of a British army patrol, and expressed little doubt that such conduct would have fallen within the "political offense" exception had it occurred during the course of "more traditional" military hostilities. He declined to find the exception inapplicable simply because the PIRA was

84. *In re Doherty*, 599 F. Supp. at 275.

85. *Id.* at 276.

86. *See id.* at 274-76; *cf.* *McMullen v. INS*, 788 F.2d 591, 597 (9th Cir. 1986) ("There is a meaningful distinction between terrorist acts directed at the military or official agencies of the state, and random acts of violence against ordinary citizens that are intended only 'to promote social chaos.'" (citation omitted)). Note that Judge Sprizzo never mentioned the family that was held by the PIRA on the first floor of the Antrim Road apartment building, *see supra* text accompanying note 40, except to note that "the court was not presented with [proof] that hostages were killed or injured." *In re Doherty*, 599 F. Supp. at 276.

87. *See id.* at 275. Judge Sprizzo stated the following:

[P]olitical struggles have been commenced and effectively carried out by armed guerrillas long before they were able to mount armies in the field. It is not for the courts, in defining the . . . political offense exception, to regard as dispositive factors such as the likelihood that a politically dissident group will succeed, or the ability of that group to effect changes in the government by means other than violence . . . .

*Id.*; *accord* *Quinn v. Robinson*, 783 F.2d 776, 810 (9th Cir.) ("It is for the revolutionaries, not the courts, to determine what tactics may help further their chances of bringing down or changing the government."), *cert. denied*, 479 U.S. 882 (1986).

engaged "in a more sporadic and informal mode of warfare."<sup>88</sup>

c. *Status of the Party Committing the Offense*

Judge Sprizzo next held that an otherwise political offense might lose its political character if committed for purely personal reasons such as vengeance or vindictiveness. He concluded, however, that Doherty's acts on May 2, 1980 and June 10, 1981, were performed solely at the direction of the PIRA and not for reasons of his own.<sup>89</sup>

d. *Nature of the Organization*

Judge Sprizzo stated that it would be "most unwise as a matter of policy to extend the benefit of the political offense exception to every fanatic group or individual with loosely defined political objectives who commit acts of violence in the name of those so called political objectives."<sup>90</sup> He thus found it appropriate to consider the nature and structure of an organization, "and its mode of internal discipline, in deciding whether the act of its members can constitute political conduct."<sup>91</sup> After such consideration, Judge Sprizzo concluded that the PIRA had "an organization, discipline, and command structure that distinguish[ed] it from more amorphous groups such as the Black Liberation Army or the Red Brigade."<sup>92</sup>

e. *Place Where the Act Occurs*

Judge Sprizzo determined that the "political offense" exception would, in all probability, not apply to acts that occurred outside the territory where political change was to be effected.<sup>93</sup> In the Doherty Case, however, it was undisputed that all of the relevant events took place within Northern Ireland.<sup>94</sup>

88. *In re Doherty*, 599 F. Supp. at 276; cf. *Eain v. Wilkes*, 641 F.2d 504, 520 (7th Cir.) (once circumstances move away from an ongoing, clearly-defined clash of military forces, the judiciary's task becomes much harder), *cert. denied*, 454 U.S. 894 (1981).

89. See *In re Doherty*, 599 F. Supp. at 277 n.7. Judge Sprizzo stated the following: [T]here is no suggestion that Doherty had any personal hostility [towards] Captain Westmacott. There is some suggestion that the physical attack upon one of the guards may have had . . . retaliatory aspects . . . . However, on balance the Court is persuaded that that guard was assaulted because he sought to prevent the escape.

*Id.* (citation omitted); see also *id.* at 272 (discussing the facts surrounding the death of Captain Westmacott and Doherty's subsequent escape).

90. *Id.* at 276.

91. *Id.*

92. *Id.*

93. See *id.* at 275-76; see also *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986) ("political offense" exception inapplicable because conduct occurred in England rather than in Northern Ireland), *cert. denied*, 479 U.S. 882 (1986).

94. See *In re Doherty*, 599 F. Supp. at 272. As a final matter, the court dismissed Doherty's argument that his offenses should be regarded as political because the United Kingdom has enacted special legislation and created special non-jury courts to deal with violence in Northern Ireland. The court specifically rejected Doherty's claim that he did

## 2. Analysis

Judge Sprizzo was not the first American jurist to conclude that the "political offense" exception barred the extradition of a convicted murderer,<sup>95</sup> nor was he the first to refuse to extradite a member of the PIRA under the 1977 Treaty.<sup>96</sup> In fact, at the time, jurists in many nations were refusing British extradition requests.<sup>97</sup> Judge Sprizzo's opinion was well-received by the Second Circuit and by several legal commentators, who praised it for its careful analysis.<sup>98</sup>

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not and could not get a fair trial in Northern Ireland. *See id.* at 276. Judge Sprizzo characterized the government's testimony on the non-jury (Diplock) court issue as "both credible and persuasive." *Id.* He further concluded that both unionists and republicans who commit scheduled offenses in Northern Ireland "can and do receive fair and impartial justice." *Id.*

95. *See Ramos v. Diaz*, 179 F. Supp. 459, 463 (S.D. Fla. 1959); *Artukovic v. Boyle*, 140 F. Supp. 245, 247 (S.D. Cal. 1956), *aff'd sub nom. Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *cert. granted and judgment vacated*, 355 U.S. 393 (1958); *In re Ezeta*, 62 F. 972, 1004-05 (N.D. Cal. 1894).

96. The British government had requested extradition of fugitives on at least 64 occasions over a 20 year period. The United States government granted such requests on all but four occasions (including the Doherty Case). On all four occasions, the "political offense" exception was employed to deny extradition. *See Quinn v. Robinson*, No. C-82-6688 RPA, slip op. (N.D. Cal. Oct. 3, 1983), *vacated and remanded*, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); *In re Mackin*, No. 80 Cr. Misc. 1, slip op. (S.D.N.Y. Aug. 13, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981); *In re McMullen*, Mag. No. 3-78-1099 MG, slip op. (N.D. Cal. May 11, 1979).

A Department of State Memorandum indicates that State and Justice Department officials anticipated that Judge Sprizzo would rule as he did, and informed British officials of that view beforehand. *See* Department of State Memorandum from Martin Wenick to Richard Burt, Assistant Secretary of State for European and Canadian Affairs (Jan. 7, 1985) (copy on file with *Fordham Law Review*). The memorandum specifically states: "With Department of Justice approval, [State Department Deputy Legal Advisor Daniel W.] McGovern *two months ago* pointed out to [Her Majesty's Government] that under current case law the British will continue to lose similar extradition requests [for IRA offenders]." *Id.* (emphasis added). The memorandum was released to the author by the Department of State, pursuant to a Freedom of Information Act request.

97. From 1970 to 1982, the Republic of Ireland rejected 48 British applications for extradition to Northern Ireland of persons accused of terrorist acts in the north. In 1982, the Republic of Ireland granted its first extradition for an accused terrorist since the troubles began in 1969. *See St. Patrick's Fire Crackers*, *Economist*, Mar. 24, 1984, at 42, 45. In December 1986, Holland became the first continental European nation to extradite an IRA member to the United Kingdom. *See Dutch Extradite Two I.R.A. Fugitives*, *N.Y. Times*, Dec. 4, 1986, at A5; *see generally* Colm Campbell, *Extradition to Northern Ireland: Prospects and Problems*, 52 *Mod. L. Rev.* 585 (1989) (examining the "political offense" exception for extradition requests connected with the Northern Ireland conflict); Margaret McGrath, *Extradition: Another Irish Problem*, 34 *N. Ir. Legal Q.* 292 (1983) (discussing the current extradition arrangements between Northern Ireland and the Republic of Ireland); Colm Campbell, Comment, *Irish Extradition Developments*, 39 *N. Ir. Legal Q.* 191 (1988) [hereinafter *Irish Extradition Developments*] (observing that Irish courts' previous interpretation of political offenses had effectively barred the extradition of IRA and INLA suspects); Timothy J. Duffy, Comment, *The Law v. the IRA: The Effect of Extradition Between the United Kingdom, the Republic of Ireland and the United States in Combatting the IRA*, 9 *Dick. J. Int'l L.* 293 (1991) (discussing the evolution of extradition laws between the United States, the United Kingdom, and the Republic of Ireland, and the laws' effectiveness in combatting the IRA's terrorist campaign).

98. *See United States v. Doherty*, 786 F.2d 491, 493-94 (2d Cir. 1986); Abraham

But that judgment was hardly unanimous. Judge Sprizzo's decision to deny extradition also sparked an immediate negative reaction<sup>99</sup> that originated with its timing; it was released only two months after a PIRA bomb exploded at a hotel in Brighton, England, nearly killing Prime Minister Thatcher and her cabinet.<sup>100</sup> In addition, commentators have

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Abramovsky, *The Political Offense Exception and the Extradition Process: The Enhancement of the Role of the U.S. Judiciary*, 13 *Hastings Int'l & Comp. L. Rev.* 1, 18 (1989) ("This balancing test constitutes the most elastic standard yet to be applied in determining whether particular acts fall within the political offense exception. . . . [It offers] a meaningful test . . ."); M. Cherif Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 *Denv. J. Int'l L. & Pol'y* 255, 265-66 (1987) (McMullen, Mackin, and Doherty "were decided . . . in accordance with the longstanding jurisprudence of the [United States] on the 'political offense exception.' None of these cases constitutes a departure from the jurisprudence in existence in the [United States].") (footnotes omitted); Scott C. Barr, Comment, *The Dilemma of the Political Offense Exception: To Which Acts Should It Apply?*, 10 *Hamline J.L. & Pub. Pol'y* 141, 155 (1989):

[T]he *Eain/Doherty* test goes far in narrowing the incidence test in order to protect the interests of both political activists and of innocent civilians, [but] it does not go far enough. The test must be further narrowed by inquiring whether the existing government . . . is representative enough that . . . the citizens . . . could change the government by their vote;

Linda G. Feder, Note, *In Re Doherty: Distinguishing Terrorist Activities From Politically Motivated Acts Under the Political Offense Exception to Extradition*, 1 *Temp. Int'l & Comp. L.J.* 99, 121 (1985) ("[T]he first part of Judge Sprizzo's opinion can only be applauded for its clarity and flexibility . . ."); John P. Groarke, Comment, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under The 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 *U. Pa. L. Rev.* 1515, 1524 (1988) (McMullen, Mackin, and Doherty "were properly decided under the provisions of the treaty").

99. On December 18, 1984, *The Wall Street Journal* stated the following:

[A]nother setback in the war against international terrorism. . . .

. . . .

. . . In what must strike Britons as an especially galling passage, Judge Sprizzo stated that "it was the British army's response" to the attempted ambush on their patrol that "gave rise to" the captain's death.

To blame an army for a death caused by an attempted ambush on its troops is outrageous . . . .

*Moral Confusion*, *Wall St. J.*, Dec. 18, 1984, at 34; see also *British M.P.'s Criticize Ruling on Extradition*, *N.Y. Times*, Dec. 15, 1984, at A5 (Judge Sprizzo's decision was "greeted with fury [in London] by several Conservative Members of Parliament"). But see Holland, *supra* note 19, at 177:

What was conveniently ignored, in the torrents of near-hysterical abuse directed at [Judge Sprizzo], was the careful and conservative nature of his decision. It represented a limiting of the scope of the political-offense exception to actually exclude most of the kinds of crimes that the Reagan government and the popular press were accusing it of glorifying or excusing. The angry reaction had another aspect. In [the] future, any judge or magistrate contemplating finding in favor of the political-exception defense could not help being intimidated by the prospect of the denunciations and controversy that the finding would be bound to produce.

100. For details of the Brighton bombing of October 12, 1984, which killed five and injured 34, see Harry Anderson et al., *The Iron Lady's Brush With Death*, *Newsweek*, Oct. 22, 1984, at 40; *The Target: Thatcher*, *Time*, Oct. 22, 1984, at 50. On October 25, 1984, in the wake of the bombing, Secretary of State George Shultz had publicly con-

criticized Judge Sprizzo's five-part test for being an overly-expansive and confusing interpretation of the "political offense" exception.<sup>101</sup> Other

demned the PIRA. See Secretary Shultz, *Terrorism and the Modern World*, Dep't St. Bull., Dec. 1984, at 12.

The terrorists . . . [of] the Marxist Provisional IRA . . . in Northern Ireland are ideological enemies of the United States. . . .

. . . . Organizations such as the Provisional IRA . . . play on popular grievances, and political and religious emotions, to disguise their deadly purpose. . . . [It is] an organization which has killed—in cold blood and without the slightest remorse—hundreds of innocent men, women, and children in Great Britain and Ireland; an organization which has assassinated senior officials and tried to assassinate the British Prime Minister and her entire cabinet; a professed Marxist organization which also gets support from Libya's Qadhafi and has close links with other international terrorists. The Government of the United States stands firmly with the Government of the United Kingdom and the Government of Ireland in opposing any action that lends aid or support to the Provisional IRA.

*Id.* at 13-15.

101. See e.g., Phyllis J. Baunach, *The U.S.-U.K. Supplementary Extradition Treaty: Justice For Terrorists or Terror For Justice?*, 2 Conn. J. Int'l L. 463, 473-74 (1987) ("This standard . . . is at best confusing . . . [and] the distinctions among the elements are obscure. . . . [T]he court's rationale for its decision appears to rest on two facts: first, that the incident occurred in the context of a military operation, . . . and, second, that the PIRA . . . rather than Doherty himself, directed the actions taken." (footnotes omitted)); Lubet, *supra* note 70, at 865 ("At the same time that the United States vigorously condemns terrorism, it provides an escape hatch for perpetrators that would be derided if applied to domestic crimes." (footnote omitted)); Miriam E. Sapiro, Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. Rev. 654, 678 (1986) ("[T]he court gave little guidance on the application of four of these five rather broad considerations and instead focused its attention on the nature of the organization." (footnote omitted)).

Some commentators have suggested that the duty to extradite PIRA members under the "political offense" exception should be examined by analogy to the international humanitarian law of armed conflict (the "humanitarian law"). See *Supplementary Extradition Treaty Between the United States and the United Kingdom: Hearing on the Impact of the Supplementary Treaty Upon American Domestic Law and Upon the American Constitutional Process in the Fight Against Terrorism Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 122, 137-38 (1985) [hereinafter *Hearing before the Judiciary Subcommittee*] (statement of Professor John F. Murphy); *Supplementary Extradition Treaty Between the United States and the United Kingdom: Hearings on Treaty Doc. 99-8 Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 519-26 (1985) [hereinafter *Hearings before the Committee on Foreign Relations*] (statement of Professor Francis A. Boyle); M. Cherif Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 Akron L. Rev. 495, 551-53 (1984). Under the humanitarian law, members of national liberation movements would fall within the parameters of the "political offense" exception only if their conduct adheres to the Geneva Convention of 1949. See Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; see also *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocols I and II)*, U.N. Doc. A/32/144/Annexes I and II (1977), reprinted in 16 I.L.M. 1391 (1977) (although the United States signed the 1977 Protocols, it has not ratified them; in part, because the 1977 Protocols appear to give legitimacy to certain national resistance movements).

Another commentator has suggested that the "political offense" exception should only be applied to protect "democratic" revolutionaries—i.e., revolutionaries that are fighting for traditional democratic values, rather than to impose a totalitarian ideology on the states within which they operate. See Groarke, *supra* note 98, at 1528-29. Under this

commentators have found fault with Judge Sprizzo's assumption that the goals of the PIRA are those of the Irish republican movement,<sup>102</sup> with his differentiation between the PIRA and other "more amorphous groups,"<sup>103</sup> and with his distinction between military and non-military targets.<sup>104</sup> Moreover, several critics have emphasized that the use of violence against a democratic society should never be countenanced.<sup>105</sup>

Finally, for endorsing the Diplock court system of Northern Ireland as "fair" and "impartial,"<sup>106</sup> Judge Sprizzo has been accused not only of disregarding the "rule of non-inquiry,"<sup>107</sup> but of reaching a highly-debat-

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analysis, the philosophies of many revolutionary organizations (including the Marxist philosophy of the PIRA) could bar its adherents from achieving "political offender" status. See Dillon, *supra* note 39, at 106-07 (attributing to Doherty a Marxist philosophy that he kept well under wraps during his time in the United States). These two alternatives were not addressed by Judge Sprizzo because the parties to the Extradition Hearing did not develop them.

102. See Debra Caffee, Comment, *The United States-United Kingdom Supplementary Extradition Treaty: Limiting Availability of the "Political Crime" Defense*, 9 Hous. J. Int'l L. 303, 324 (1987) ("A change in policies of the British government, or even England's complete withdrawal from the governing of Northern Ireland, would not seem to cause the PIRA to cease its violent tactics under its long-existing set of goals."). Compare *In re Doherty*, 599 F. Supp. 270, 277 (S.D.N.Y. 1984) ("[I]t is the end of British rule in Ireland that has been and continues to be the principal objective of the Irish [r]epublican movement.") with *Hearings before the Committee on Foreign Relations*, *supra* note 101, at 152 (quoting 1981 statement of John Hume, the leader of Northern Ireland's Social Democratic and Labor Party) ("We say to the Provisionals you are not Irish Republicans. You are extremists, who have dishonored and are dishonoring the deepest ideals of the Irish.").

103. See Sapiro, *supra* note 101, at 679 ("The court's assumption that it is possible to draw valid distinctions between groups like the Red Brigade, the PIRA, and the PLO is tenuous."). Compare *In re Doherty*, 599 F. Supp. at 276 (stating Judge Sprizzo's determination about the PIRA's "organization, discipline, and command structure") with *Quinn v. Robinson*, 783 F.2d 776, 785 (9th Cir. 1986) (magistrate held that PIRA Active Service Units "often acted without guidance from superiors, [and] their targets may have been chosen for personal reasons—such as spite or revenge—rather than out of political motivations").

104. In Doherty's subsequent deportation case, Attorney General Meese noted that a homicide victim's identity should not affect a decision on whether to extradite. See *infra* part IV.A. The Ninth Circuit has criticized this aspect of Judge Sprizzo's decision for entirely different reasons, pointing out that "non-military" offenses often fall under the "political offense" exception: "It is clear that various 'non-military' offenses, including acts as disparate as stealing food to sustain the combatants, killing to avoid disclosure of strategies, or killing simply to avoid capture, may be incidental to or in furtherance of an uprising." *Quinn*, 783 F.2d at 810.

105. See, e.g., Caffee, *supra* note 102, at 324 ("If ballots are available to effect change, the line must be drawn so that those preferring to use bullets are not politically and legally protected simply because they find anarchist methods more appealing than democratic ones.").

106. *In re Doherty*, 599 F. Supp. at 276.

107. The "rule of non-inquiry" is actually a custom based in comity, that American courts will refrain from inquiring into the acts of foreign governments. See *Glucksmann v. Henkel*, 221 U.S. 508, 512 (1911) (where an extradition treaty exists between two countries, courts in the requested country must assume that the trial in the requesting country will be fair); *Neely v. Henkel*, 180 U.S. 109, 122-23 (1901) (an individual cannot prevent his extradition by alleging that the criminal processes of the requesting country fall short of the United States' constitutional guarantees); *In re Sindona*, 450 F. Supp. 672, 694

able conclusion after hearing only half the story.<sup>108</sup>

### E. *The Declaratory Judgment Action*

Judge Sprizzo's refusal to certify Doherty's extradition limited the government's options. Barred by a Second Circuit decision from taking a direct appeal,<sup>109</sup> and reluctant to renew the extradition request with another magistrate, the government attempted to do indirectly what it could not accomplish directly: trump Judge Sprizzo's decision. It invoked the Declaratory Judgment Act (the "DJA"),<sup>110</sup> and brought suit against Doherty to obtain an authoritative judicial construction of key provisions in the 1977 Treaty (the "Declaratory Judgment Action"). In effect, the government sought a declaration that would bind any renewed extradition request it might file against Doherty in the future.

This collateral attack strategy was clever, but ultimately unsuccessful. On June 25, 1985, Judge Charles S. Haight of the Southern District of New York granted Doherty's motion to dismiss the Declaratory

(S.D.N.Y. 1978) (claim of prejudice by foreign courts must be reviewed solely by non-judicial branches), *aff'd*, 619 F.2d 167 (2d Cir.), *cert. denied*, 451 U.S. 912 (1980); *In re Ryan*, 360 F. Supp. 270, 274 (E.D.N.Y. 1973) (same), *aff'd*, 478 F.2d 1397 (2d Cir. 1973).

Some courts have purported to depart from the "rule of non-inquiry," although "inquiry" has never been used as a basis for denying extradition. *See, e.g.*, *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928 (2d Cir. 1974) (pursuant to *Gallina*, Canadian criminal procedures were reviewed and approved); *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.) ("We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle" that the criminal processes of a foreign sovereign are presumed fair), *cert. denied*, 364 U.S. 851 (1960); *cf.* *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983) (declining to scrutinize foreign sovereign's criminal process, but noting that such scrutiny might be appropriate elsewhere); *In re Singh*, 123 F.R.D. 127, 133 n.1 (D.N.J. 1987) (accepting affidavit concerning foreign government mistreatment of minority ethnic group for purpose of re-examining non-inquiry doctrine).

One commentator has suggested that Judge Sprizzo's approach—which undertook a perfunctory examination of the Northern Ireland judicial system, solicited the executive branch's advice, gave the advice "appropriate" weight, and then yielded to the executive's determination—"rings with a certain degree of hypocrisy." Michael P. Scharf, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 *Stan. J. Int'l L.* 257, 286 (1988).

108. As noted earlier, Doherty could not cross-examine the government witnesses or present evidence of his own on that issue. *See supra* text accompanying note 70. This aspect of the opinion received especially close attention during the United States Senate's consideration of the Supplementary Extradition Treaty. *See infra* part III.B.

109. *See In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *supra* note 72.

110. In relevant part, the DJA provides:

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201 (1988).

Judgment Action.<sup>111</sup> Judge Haight observed: "If declaratory judgment, a feature of federal practice since 1934, . . . furnishes an appropriate remedy to a foreign nation disappointed in extradition proceedings, it has escaped the attention of the Departments of Justice and State for a considerable time."<sup>112</sup>

Judge Haight took umbrage at the government's warning that a narrow reading of the DJA "would literally compel [it] to continue refile[ing] the [Doherty extradition] request until a favorable decision is obtained, however long that might take."<sup>113</sup> He responded: "If [the government's] statement was intended to intimidate this Court, it does not; and *quaere* whether unlimited repetitions of judicially rejected contentions comport with the dignity of the United States Attorney's office."<sup>114</sup>

Undaunted, the government appealed to the Second Circuit, where Doherty prevailed again.<sup>115</sup> In a forcefully worded opinion, Judge Henry A. Friendly praised Judge Haight's "careful opinion" in the Declaratory Judgment Action, and Judge Sprizzo's "careful analysis of the political offense exception" in the Extradition Hearing.<sup>116</sup> His words for the government, however, were much less charitable. Judge Friendly characterized the Declaratory Judgment Action as an attempt to "escape from [a] long held principle."<sup>117</sup> Moreover, he implied that the government was being hypocritical—noting that, shortly after the government had complained to Congress that its remedies under the extradition statute were

111. See *United States v. Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff'd*, 786 F.2d 491 (2d Cir. 1986). The district court held that the government had failed to state a claim on which relief could be granted. See *id.* at 757 n.3. However, it rejected Doherty's alternate theory for dismissal, holding that the case "arose under" the 1977 Treaty, and that subject matter jurisdiction therefore existed. See *id.*

June 25, 1985 was also the date on which the United States and the United Kingdom signed a supplementary extradition treaty, which retroactively narrowed the "political offense" exception under which Doherty had prevailed before Judge Sprizzo. See *infra* part III.

112. *Doherty*, 615 F. Supp. at 760. Judge Haight characterized the government's Declaratory Judgment Action as a search for "a decision on the merits [of the scope of the 'political offense' exception] rendered by an Article III judge, whose decision is appealable under existing statutes to higher courts." *Id.* at 758.

Judge Haight acknowledged that the issue had not been squarely addressed by the Second Circuit in *Mackin*, but nevertheless found that "Judge Friendly's careful analysis . . . furnish[ed] guidance" and "militat[ed] against" extension of the declaratory judgment remedy to a foreign nation that was requesting extradition. *Id.* at 761.

113. *Id.* at 760 n.5. When United States Attorney Rudolph W. Giuliani ran for Mayor of New York City in 1989, Giuliani's handling of the Doherty Case was used by his opponent to sway New York City's many Irish-American voters against him. See *infra* text accompanying note 350.

114. *Doherty*, 615 F. Supp. at 760 n.5.

115. See *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986).

116. *Id.* at 493-94. Judge Friendly's opinion in *Doherty* was one of his last before his death on March 11, 1986.

117. *Id.* at 492. Judge Friendly, who had also authored *In re Mackin*, 668 F.2d 122 (2d Cir. 1981), referred to the "long held principle" that the government's sole recourse following an extradition magistrate's refusal to certify an extradition case "is to submit a request to another extradition magistrate." *Doherty*, 786 F.2d. at 492-93.

narrow and unsatisfactory, it was urging the court to hold that the DJA provided broad relief.<sup>118</sup> In addition, Judge Friendly accused the government of "[seeking] to veil the true nature of the present action,"<sup>119</sup> explaining: "[W]hat the Government here seeks in reality is not a 'review' of Judge Sprizzo's decision but a declaration that will bind another extradition judge in a proceeding not yet commenced."<sup>120</sup> On March 13, 1986, upon finding that the government's theory "[ran] counter not only to fifty years of history but to the evident purpose of [the extradition statute]<sup>121</sup> and of the [DJA]," the Second Circuit affirmed Judge Haight's order of dismissal.<sup>122</sup>

At this point, three things should be noted. First, no commentator has suggested that the government's pursuit of declaratory relief was meritorious, or that Judge Haight's and Judge Friendly's holdings were erroneous. In fact, just the opposite has been suggested.<sup>123</sup>

Second, several observers have proposed that Congress amend the

118. See *id.* at 497. Judge Friendly called the government's declaratory judgment action "somewhat startling." *Id.* at 494-95. "No one has stated the long standing principle . . . more clearly than the United States itself" when it urged Congress to enact new legislation because the current extradition law left it without a meaningful remedy. *Id.*

119. *Id.* at 499.

120. *Id.* at 502. Judge Friendly further explained:

The Government now tells us that everything that has been said about its remedies if the extradition magistrate refuses to issue a certificate, including what it has told the Congress within the last few years, has been wrong for the half century since the [DJA] . . . was adopted in 1934. . . .

[Yet, nothing suggests that] the DJA was intended to enable the Government . . . to arm itself with a favorable ruling on the law before starting a new proceeding. . . . Having tried and failed to obtain a certificate from Judge Sprizzo, [the Government] fears that it may lose when it tries again before another extradition magistrate and seeks insurance in the form of a declaration of law.

*Id.* at 497, 500.

121. 18 U.S.C. § 3184 (1988 & Supp. II 1990).

122. *Doherty*, 786 F.2d at 503 (footnote added). Because rehearing was denied on June 2, 1986, the government was allowed until September 1, 1986, to petition the Supreme Court for certiorari. See *infra* part IV.A.

123. See, e.g., *Doherty v. Thornburgh*, 943 F.2d 204, 213 (2d Cir. 1991) (Altimari, J., dissenting) ("[T]he government's declaratory judgment motion embodied the general litigation posture that [it has] assumed in this case—once dissatisfied with the result of a decision in *Doherty's* favor, the government attempted to use an extraordinary, but legitimate, tool to obtain the result it was seeking."), *cert. dismissed*, 112 S. Ct. 1254 (1992); *Doherty v. United States Dep't of Justice*, 908 F.2d 1108, 1122 (2d Cir. 1990) ("The government's use of administrative and judicial processes [against *Doherty*] has been exhaustive, to say the least."), *rev'd on other grounds*, 112 S. Ct. 719 (1992); Susan K. Story, Comment, *Scope of Review In Extradition Proceedings: The Government Cannot Appeal A Denial of Extradition Request Based on the Declaratory Judgment Act—United States v. Doherty*, 19 Vand. J. Transnat'l L. 893, 906 (1986):

[T]he Court correctly decided the case. While some of the government's arguments show creativity, only an extreme reading of the [DJA] would suggest that Congress intended that it embrace extradition matters. . . . The government built its entire case . . . on a shaky foundation [and] [t]he Second Circuit arrived at the appropriate result.

(citation omitted).

extradition statute<sup>124</sup> to allow for direct appellate review of all extradition decisions.<sup>125</sup> Although the existing system is unquestionably cumbersome, the wisdom of a prospective change in the law is beyond the scope of this Article. The narrower issue considered here is the equity of stretching the existing law to compel Doherty's extradition.

Third, the declaratory judgment action and its appeal stalled Doherty's deportation proceedings by eighteen months. Yet, in a subsequent opinion denying Doherty's habeas corpus request for release on bail (in which the delay was a collateral issue), the Second Circuit attributed the delay solely to Doherty:

[T]he delay in Doherty's deportation proceedings was solely the result of his own tactical decision. For the almost eighteen months from March 18, 1985 to September 3, 1986, his deportation proceedings were held in abeyance because of a stay entered on his motion and opposed by the INS. Even if a delay of this length might justify [habeas corpus] relief, . . . it is of no aid to Doherty because he was its sole cause.<sup>126</sup>

Given Doherty's understandable desire not to engage in a two-front war of attrition against a government opponent with limitless resources, the Second Circuit's conclusion seems unduly harsh.

### III. THE SUPPLEMENTARY EXTRADITION TREATY

A supplementary extradition treaty (the "Supplementary Treaty") was signed by the United States and the United Kingdom on June 25, 1985. Although it did not mention the PIRA or Northern Ireland, the Supplementary Treaty was meant to narrow the 1977 Treaty's "political offense" exception so as to eliminate its application to violent "relative" political offenses.<sup>127</sup> On July 17, 1986, the United States Senate gave its advice and consent regarding the Supplementary Treaty, and, on November 26, 1986, the British House of Commons gave its approval.

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124. 18 U.S.C. § 3184 (1988 & Supp. II 1990).

125. See, e.g., *Ahmad v. Wigen*, 726 F. Supp. 389, 397 (E.D.N.Y. 1989) ("It would be desirable to allow an appeal by either side from an extradition decision. But this is a matter for the legislature, not the courts."), *aff'd*, 910 F.2d 1063 (2d Cir. 1990); Kevin S. Rosen, Note, *Toward Direct Appellate Review in U.S. Extradition Procedures*, 25 Colum. J. Transnat'l L. 433, 434-35 (1987) (arguing that legislation providing for direct appellate review of extradition proceedings would significantly improve many of the weaknesses and injustices inherent in the current statute).

126. *Doherty v. Meese*, 808 F.2d 938, 941 (2d Cir. 1986). This holding became the law of the case and was given preclusive effect in a second habeas corpus proceeding. See *Doherty v. Thornburgh*, 750 F. Supp. 131, 138 (S.D.N.Y. 1990), *aff'd*, 943 F.2d 204 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

127. "Pure" political offenses are acts directed against the government (such as treason, sedition, and espionage) and contain no elements of common crimes. "Relative" political offenses contain elements of common crimes, but are committed for political purposes or in political contexts. See *In re Mackin*, 668 F.2d 122, 124 (2d Cir. 1981). The Supplementary Treaty did not seek to alter the exception to extradition for "pure" political offenses or for non-violent "relative" political offenses.

A. *Negotiations: December 1984-June 1985*

Judge Sprizzo was the fourth American jurist in five years to refuse to extradite a member of the PIRA to the United Kingdom under the 1977 Treaty.<sup>128</sup> According to the Reagan Administration, those four rulings, coupled with Congress' inability over a three-year period to enact broad extradition reform legislation,<sup>129</sup> created an intolerable situation. In turn, the Administration's frustration with the judiciary and the Congress led to a plan to renegotiate, one-by-one, all of the extradition treaties between the United States and friendly democratic nations. Under this plan, the Supplementary Treaty with the British was intended to be the first of several such bilateral renegotiations.

There is some validity to this explanation; but with regard to Doherty, it overstates key facts and ignores compelling evidence of *ad hominem* motivation.<sup>130</sup> When the timing of the British-American negotiations is considered and the retroactivity clause of the treaty is analyzed, there is a strong suggestion that the Supplementary Treaty may have operated as an unconstitutional bill of attainder.<sup>131</sup>

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128. See *supra* note 96.

129. The last major revision of the federal statutes that govern international extradition procedures occurred in 1848. In 1981, in response to *In re McMullen*, Mag. No. 3-78-1099 MG, slip op. (N.D. Cal. May 11, 1979), and *In re Mackin*, No. 80 Cr. Misc. 1, slip op. (S.D.N.Y. Aug 13, 1981), appeal dismissed, 668 F.2d 122 (2d Cir. 1981), the Reagan Administration proposed legislation to reform the extradition laws, but Congress did not enact it. See Bassiouni, *supra* note 101, at 495-96; Sapiro, *supra* note 101, at 681-83; see also The Extradition Act of 1984, H.R. Doc. No. 3347, 98th Cong., 2d Sess., reprinted in 130 Cong. Rec. 24,641 (1984) (proposed amended extradition bill would have granted either party the right to appeal, required courts to inquire into the motives of the nation seeking extradition, and codified current case law on (1) what constitutes a "political offense" and (2) right to release on bail before an extradition hearing); 130 Cong. Rec. 24,645 (1984) (debate centered around whether the amendments would make it more, or less, difficult to extradite criminals); 130 Cong. Rec. 25,157 (1984) (the vote was 307 against, and 103 for, suspending the rules and passing the bill as amended).

130. The wisdom of prospectively amending the 1977 Treaty is beyond the scope of this Article. The narrower issue considered here is the propriety of amending it retroactively, so as to negate Doherty's victory before Judge Sprizzo.

131. A bill of attainder is a legislative act which inflicts punishment without judicial trial. It includes any legislative act which takes away the life, liberty, or property of a particularly named or easily ascertainable person or group of persons because the legislature thinks them guilty of conduct which deserves punishment. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468-73 (1977); *United States v. Brown*, 381 U.S. 437, 441-42 (1965); *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961). A bill of attainder violates Article I, Section 9, Clause 3 of the Constitution. See also *Reid v. Covert*, 354 U.S. 1, 15 (1957) (treaties must comply with the Constitution).

As this Article goes to press, nearly six years after the Supplementary Treaty took effect, it is still not possible to state with certainty whether the Treaty's retroactivity clause will survive constitutional challenge. Two courts have already found that the clause operates as an unconstitutional bill of attainder. See *In re McMullen*, 769 F. Supp. 1278, 1283-90 (S.D.N.Y. 1991), *aff'd sub nom. McMullen v. United States*, 953 F.2d 761 (2d Cir. 1992). But at the government's request, the Second Circuit granted rehearing en banc on June 5, 1992 (unpublished order), and the case was reargued on September 15, 1992. Regardless of the Second Circuit's ultimate ruling, an appeal to the Supreme Court

By December 1984, at least two and perhaps three of the four extradition rulings that had so provoked the British were well on their way to becoming non-issues; Doherty's case was arguably the only one that could still be fairly described as an open wound.<sup>132</sup> Further, renegotiation of the 1977 Treaty closely followed Assistant Attorney General Stephen S. Trott's negative reaction to Judge Sprizzo's decision in the Extradition Hearing. On December 18, 1984, Mr. Trott, Chief of the Justice Department's Criminal Division, called the decision "outrageous," and stated: "We've got to get rid of this 'political offense' nonsense among free, friendly nations . . . . We're going to have to attack this treaty by treaty and redo the extradition language."<sup>133</sup>

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by the losing side appears likely. Obviously, final resolution of the issue will come too late for this Article, and for the Doherty Case as well.

132. Of the defendants involved in the other three cases, Desmond Mackin had been deported to the Republic of Ireland by consent in December 1981, only a week after the Second Circuit's ruling in *In re Mackin*, 668 F.2d 122, 124 n.3 (2d Cir. 1986). See *I.R.A. Suspect Sent to Ireland*, N.Y. Times, Jan. 1, 1982, at A2. William Quinn was extradited to England in October 1986, under the 1977 Treaty. See *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir.), cert. denied, 479 U.S. 882 (1986); *American is Extradited to Britain in Killing*, N.Y. Times, Oct. 21, 1986, at A5. He was later convicted in a jury trial and sentenced to life in prison. See *American Given Life in I.R.A. Case in London*, N.Y. Times, Feb. 17, 1988, at A7. Peter McMullen was on the verge of being deported to Ireland. See *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986). McMullen was later arrested on a second extradition warrant before deportation was effected. See *In re McMullen*, 769 F. Supp. 1278 (S.D.N.Y. 1991), aff'd sub nom. *McMullen v. United States*, 953 F.2d 761 (2d Cir. 1992), reh'g granted, June 5, 1992 (unpublished order). The British have never considered the deportation of PIRA fugitives to Ireland to be a satisfactory substitute for extradition to the United Kingdom. See *infra* part IV.A.

133. Stuart Taylor Jr., *U.S. Aide Faults Judge's I.R.A. Extradition Ruling*, N.Y. Times, Dec. 19, 1984, at A23. Note that the Doherty Case was not Mr. Trott's first encounter with the PIRA. When he was United States Attorney for the Central District of California (1981-1983), Mr. Trott's office prosecuted John DeLorean for conspiracy to smuggle narcotics. See Judith Cummings, *Jury in Drug Case Indicts De Lorean*, N.Y. Times, Oct. 30, 1982, § I, at 1. The prosecution's theory was that DeLorean had turned to crime in an effort to save his failing automobile plant in Belfast. The prosecution asserted that DeLorean had boasted of an intimate relationship with the IRA and had claimed that it was funding his drug smuggling. See John Kendall, *DeLorean Linked IRA to Drug Deal, Prosecutor Says*, L.A. Times, Dec. 21, 1982, § I, at 1. The IRA strongly denied any link to DeLorean. See John Kendall, *IRA Strongly Denies Link to DeLorean*, L.A. Times, Dec. 22, 1982, § II, at 1. DeLorean was acquitted of all charges in August 1984. See Michael Isikoff & Jay Mathews, *Court Suits Next Hurdle for DeLorean*, Wash. Post, Aug. 18, 1984, at D9.

For a discussion of Mr. Trott's role in negotiating the Supplementary Treaty and his participation in Doherty's deportation case, see *infra* part IV.

The Department of State also reacted swiftly to Judge Sprizzo's decision. See U.S. Dep't of State, Night Note, *IRA Fugitive Extradition Request Denied* (Dec. 14, 1984) (on file with the *Fordham Law Review*):

Our Consulate in Belfast reports that the Doherty decision has prompted a loud outcry in both London and Belfast. Some Westminster MP's [Members of Parliament] are reportedly urging Prime Minister Thatcher to "confront" [President Reagan] with this issue during her visit next week. Senior State and Justice Department officials will be meeting with U.K. officials in London early next week to discuss ideas for avoiding such decisions in the future.

In fact, State Department Deputy Legal Advisor Daniel McGovern and two Deputy

Even those who have viewed the renegotiation movement favorably have been unable to offer a convincing explanation as to why the 1977 Treaty with the United Kingdom was the very first to be renegotiated.<sup>134</sup> Arguably, this resulted from two visits made by British Prime Minister Margaret Thatcher to the United States, visits that came within three months after Judge Sprizzo's decision in the Extradition Hearing. On December 22, 1984, Prime Minister Thatcher met with President Reagan at Camp David, Maryland,<sup>135</sup> and on February 20, 1985, she addressed a joint session of Congress and then met with President Reagan at the White House. On both visits, international terrorism and the situation in Northern Ireland were discussed.<sup>136</sup>

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Assistant Attorneys General arrived in London on December 17, 1984, for "informal" and "exploratory" discussions with the British Foreign and Home Offices on the possibility of amending the 1977 Treaty. See Memorandum from Daniel W. McGovern, State Dep't Deputy Legal Advisor, to Deputy Secretary of State at 4 (Jan. 9, 1985) (on file with the *Fordham Law Review*); see also Memorandum from Charles Hill, State Dep't Executive Secretary, to Robert C. McFarlane, White House (Dec. 21, 1984) (on file with the *Fordham Law Review*) (transmitting a fact sheet on the Doherty Case "for the President's use during his meeting with Prime Minister [Margaret] Thatcher on Saturday, December 22"). The Night Note and the Memoranda were released to the author by the Department of State pursuant to a Freedom of Information Act request.

134. See Lubet, *supra* note 70, at 883.

The decision to reform the political-offense exception through bilateral negotiations with a select group of democratic countries did not inevitably require that the United Kingdom be included on the list. Many reliable observers have strongly criticized British rule in Northern Ireland for failing to meet the test of fairness and democracy.

*Id.* (citations omitted).

Following renegotiations of the 1977 Treaty, the United States signed supplementary extradition treaties with the German Federal Republic (October 1986), Belgium (March 1987), and Canada (Jan. 1988). See Groarke, *supra* note 98, at 1540 n.202. The Canadian supplementary treaty was approved by the Senate in 1991, see S. Treaty Doc. No. 17, 101st Cong., 2d Sess. 6 (1990), and the German supplementary treaty was pending before the Senate at the time of this Article. However, no other supplementary treaties have been transmitted, evidencing that the treaty-by-treaty renegotiations movement has lost its steam.

135. See Bernard Weinraub, *Thatcher Sees No Differences on 'Star Wars,'* N.Y. Times, Dec. 23, 1984, at A1. This first visit came only 10 days after Judge Sprizzo's ruling in the Doherty Case, only four days after Mr. Trott voiced the need "to get rid of this political offense nonsense," see Taylor Jr., *supra* note 133, at A23; text accompanying *supra* note 133, and only one day after an immigration judge ordered Doherty released on bail. See *infra* note 346; see also Cronin, *supra* note 9, at 322 (discussing meetings between Prime Minister Thatcher and President Reagan); Holland, *supra* note 19, at 145 (Northern Ireland was on the agenda of the December 22, 1984 meeting). Two months earlier, in Brighton, a PIRA bomb had nearly killed Prime Minister Thatcher. See *supra* note 100 and accompanying text. The bombing had hardened the Prime Minister's opposition to Irish nationalism, and any flexibility on her part at that time might have been read as a capitulation to terrorism.

136. Prime Minister Thatcher's address to Congress left little doubt about her views on the partition of Ireland and on the PIRA. See 131 Cong. Rec. H484, H486 (daily ed. Feb. 20, 1985). Prime Minister Thatcher stated the following:

So long as a majority of the people of Northern Ireland wish to remain part of the United Kingdom, their wishes will be respected. If ever there were to be a majority in favor of change, then I believe that our Parliament would respond

Bilateral negotiations culminated, on June 25, 1985, in the signing of the Supplementary Treaty at Washington, D.C.<sup>137</sup> Article 1 of the Supplementary Treaty narrowed the "political offense" exception of the 1977 Treaty by identifying particular crimes that would not be regarded as "political."<sup>138</sup> Article 2 lengthened the statute of limitations of the 1977 Treaty,<sup>139</sup> and article 3 extended the time allowed the requesting state to

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accordingly. . . . Be under no illusions about the Provisional IRA. They terrorize their own communities. They are the enemies of democracy, and of freedom, too.

*Id.* For a summary of Prime Minister Thatcher's meeting with President Reagan, see Dep't St. Bull., June 1985, at 46-47.

When the Senate Foreign Relations Committee staff asked the State Department to describe the negotiations that led to the Supplementary Treaty, it was told only that negotiations commenced "last year" (meaning sometime in 1984), at the initiation of the United States, and that the general approach of the treaty had been proposed by the United States delegation. See *Hearings before the Committee on Foreign Relations, supra* note 101, at 711. Moreover, the State Department omitted mentioning Prime Minister Thatcher's two visits to the United States. Cf. Holland, *supra* note 19, at 182 ("[T]he new treaty [was] kept secret until after it was signed."). This omission becomes more significant in light of a later statement by an INS attorney that Doherty's case was "of concern at the highest levels of government." See *infra* part IV.A.1.

The level of secrecy surrounding the negotiations may be gauged by an April 1, 1985 Department of State memorandum from Michael Peay to Deputy Legal Advisor Daniel McGovern, US-UK Supplementary Extradition Treaty: Press Guidance, reacting to a leaked story in the *London Times*:

[The British embassy official] commented that he had no clue as to how the *Times* correspondent had come upon his information which he noted was substantially accurate. . . .

To date, I have not seen or heard of any news reports from US sources concerning the Supplementary Treaty. . . . The UK Embassy is being vigilant about any press reports because of US sensitivities about how this issue is managed publicly.

See also Briefing Memorandum from State Department Legal Advisor Abraham Sofaer to Undersecretary of State Michael Armacost (June 20, 1985) ("No members of the press will be present at the signing ceremony."). Copies of memoranda furnished to the author by the Department of State, pursuant to a Freedom of Information Act request, are on file with the *Fordham Law Review*.

137. See S. Treaty Doc. No. 99-8 [Supplementary Extradition Treaty With The United Kingdom, June 25, 1985], 99th Cong., 1st Sess. (1985) [hereinafter Treaty Doc. No. 99-8]. Sir Oliver Wright, British Ambassador to the United States, signed for the United Kingdom, and Michael H. Armacost, Undersecretary of State for Political Affairs, signed for the United States. For a discussion of Mr. Armacost's subsequent role in Doherty's deportation, see *infra* part IV.A.4.

Prior to assuming the post of Undersecretary, Mr. Armacost had been Ambassador to the Philippines. See *generally supra* note 76 (discussing the swiftly evolving political relations between the United States and the Phillipines).

138. See Treaty Doc. No. 99-8, *supra* note 137, at 1. Article 1 of the Supplementary Treaty identified offenses that were said to be typically committed by terrorists, including aircraft hijacking and sabotage, hostage taking, kidnapping, and (as relevant to Doherty) murder and firearms offenses. See *id.* In effect, article 1 of the treaty adopted Judge Sprizzo's methodology (describing the offenses considered to be not political) but rejected his ultimate conclusion (by implying that only terrorists commit acts of violence and by assuming that all armed rebellion is terrorism).

139. See *id.* at 2. The 1977 Treaty provided that extradition would be barred if an offense was beyond the limitation period of either the requesting state or the requested

submit evidence in support of its extradition request, from forty-five days to sixty days after arrest.<sup>140</sup> Article 4 applied the Supplementary Treaty to any offense committed before its entry into force, as long as the alleged offense violated the laws of both the United States and the United Kingdom at the time of its commission.<sup>141</sup> Articles 5 and 6 involved technical matters, but also pledged that the instruments of ratification would be exchanged "as soon as possible."<sup>142</sup> The key provisions for Doherty were articles 1 and 4.

## B. American Ratification

### 1. The Senate Foreign Relations Committee Delays Action for Nine Months

Secretary of State Shultz submitted the Supplementary Treaty to President Reagan on July 3, 1985, and the President forwarded it to the Senate for advice and consent on July 17, 1985.<sup>143</sup> At the Senate, the Supplementary Treaty met a hostile reception.

The Senate Foreign Relations Committee considered the Supplementary Treaty during three days of remarkably contentious hearings.<sup>144</sup> During these hearings, twenty witnesses testified before vocal galleries of spectators.<sup>145</sup> Opponents of the Supplementary Treaty browbeat Admin-

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state. In contrast, the Supplementary Treaty provided that extradition would be denied only if prosecution would be barred by the statute of limitations of the requesting state.

This seemingly innocuous clause was repeatedly criticized during the Senate Foreign Relations Committee Hearings, see *Hearings before the Committee on Foreign Relations*, *supra* note 101, at 31-32, 49, 312, 630-33, because the United Kingdom has no statute of limitations for most criminal offenses. Thus, under the retroactivity clause of the Supplementary Treaty, even those persons who had participated in the 1916 Easter Rising could be subject to extradition. See *id.*

140. See Treaty Doc. No. 99-8, *supra* note 137, at 2.

141. See *id.*

142. *Id.*

143. See Treaty Doc. No. 99-8, *supra* note 137, at iii and v.

144. The Foreign Relations Committee held hearings on August 1, September 18, and October 22, 1985. See *Hearings before the Committee on Foreign Relations*, *supra* note 101. On November 5, 1985, the Senate Judiciary Committee's Subcommittee on the Constitution also held a hearing. See *Hearing Before the Judiciary Subcommittee*, *supra* note 101.

Treaty analysis properly begins with the language of the treaty. See *United States v. Stuart*, 489 U.S. 353, 365-66 (1989). However, the relative weight to be accorded to non-textual sources remains in dispute. The *Stuart* majority concluded that reliance on the Senate's pre-ratification debates and reports was appropriate, but dismissed a treaty's negotiating history as "a worse indicator of a treaty's meaning." *Id.* at 367-68 n.7. But see *id.* at 370 (Kennedy, J., concurring in part) (declining to reach the question of whether Senate debates on ratification are authoritative or even helpful); *id.* at 374 (Scalia, J., concurring in part) (suggesting that, if treaty's text is ambiguous, negotiating history may be a better indicator of the signatories' intent than legislative materials).

145. Abraham Sofaer, formerly a United States District Judge in the Southern District of New York and a colleague of Judge Sprizzo, became State Department Legal Advisor in the spring of 1985, and served as one of the principal administration spokesmen for the treaty. See Holland, *supra* note 19, at 183, 185. One commentator has described Sofaer as "a pugnacious and vigorous exponent of neoconservatism," and has stated that

istration witnesses<sup>146</sup> and openly expressed plans to stall,<sup>147</sup> while supporters of the Supplementary Treaty hectored witnesses who were

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Sofaer's "love for Great Britain was evident throughout the hearing, . . . [and that] [l]istening to [him] made one wonder at times why it had been necessary for the American separatists to rebel against such a nation [as Great Britain] in the first place." *Id.* at 183, 185; see also Christopher Hitchens, *Minority Report*, *Nation*, Jan. 31, 1987, at 103 (describing Sofaer as manipulating the law to support Reagan Administration policies); Bruce van Voorst, *George Shultz's Feisty Lawyer*, *Time*, Apr. 6, 1987, at 31 (presenting Sofaer as both influential and controversial legal advisor to Secretary of State Shultz).

146. The Foreign Relations Committee Hearings on the Supplementary Treaty marked Judge Sofaer's first appearance as State Department Legal Advisor before the Foreign Relations Committee. As judged from the following excerpt, things did not proceed smoothly:

*Senator Biden* [asking for data]. You can find [that information]. You have weeks to find it, gentlemen. We will be gone for [five] weeks before we get back. There is plenty of time. I am confident you can find them. I am confident the British Government will cooperate with you in that effort.

*Judge Sofaer*. Well, if you'd like your staff people to come over and help, that would be fine.

*Senator Biden*. No, I'm confident that you are able to do it, Judge. And if you are not able to do it, I am confident that we can wait.

. . . .

*Senator Biden*. . . . I would like for the record a comparison of those four different [legal] systems, if I could.

*Judge Sofaer*. Well, I will certainly give you a detailed description of the Diplock courts, which is what we have before us.

*Senator Biden*. That's not what I'm asking, Judge. . . . My job is to ask the questions and yours is to answer them. If you are not going to do it, say no.

*Judge Sofaer*. I don't see why we should be having to justify and engage in an analysis of judicial systems—

*Senator Biden*. Because I asked.

*Judge Sofaer*. Of countries—

*Senator Biden*. Because a Senator asked. . . . Either I'm new to this system, after 13 years, or you're new to the State Department.

*Judge Sofaer*. I blame myself in that regard, sir.

*Hearings before the Committee on Foreign Relations, supra* note 101, at 28, 30.

147. *Senator Biden*. Judge, I want to be up front with you. . . . I think this extradition treaty is an opportunity to do what we have been unable to do so far. There is an incredible reluctance on the part of this Government to criticize one of our closest allies for what I believe to be an absolutely outrageous position . . . with regard to Northern Ireland . . . . So I want to make it clear to you that I am going to do all that I can to hold this up as long as I can to make the case. . . . I am delighted to go forward with this [Supplementary] [T]reaty as long as we are also going forward at the State Department and in this Congress with, at a minimum, verbal sanctions of . . . the British Government with regard to what they are not doing in Northern Ireland. I have many questions and I will be back. I will probably have question for months and months on this treaty.

[applause from the audience]

*Judge Sofaer*. Well, Senator Biden, I can imagine what your concerns are motivated by, and all I can say is that I will try for months and months to answer those questions.

*Id.* at 13-14.

opposed to ratification.<sup>148</sup> In addition, several congressmen urged the Senate not to proceed by treaty at all, but to allow the House of Representatives one more chance to pass extradition reform legislation.<sup>149</sup>

During the Senate Foreign Relations Committee Hearings, two witnesses cautioned that, as to Doherty and others similarly situated, the retroactivity clause in article 4 of the Supplementary Treaty would violate the constitutional prohibition on bills of attainder.<sup>150</sup> However, during a hearing held two weeks later by the Senate Judiciary Committee's Subcommittee on the Constitution, the Administration's spokesmen strongly disagreed.<sup>151</sup> At the close of the hearings, Senator Thomas Eagleton predicted that the Supplementary Treaty, as submitted, was un-

148. *Senator Eagleton*. Mayor [Raymond] Flynn [of Boston], is it your position that as long as the Diplock procedures are in place, no PIRA individual should be extradited to Northern Ireland?

*Mayor Flynn* [a witness opposing the Supplementary Treaty]. I would say, Senator, that it's a bad system to me. . . .

*Senator Eagleton*. Let's stipulate that it's a rotten system. . . . We will stipulate for the record that it stinks. Is it your position that no PIRA fugitive who flees to the United States for whatever crime should be extradited back to Northern Ireland because of the Diplock system being in place?

*Mayor Flynn*. I can't tell you with great authority about an individual case or that particular situation.

. . . . *Senator Eagleton*. Did I hear you say that there could be, for some horribly heinous offenses, extradition back to the north, even though Diplock is in place?

*Mayor Flynn*. Well, again, it's a catch-22 position. . . .

*Senator Eagleton*. Well, let the record note that the mayor does not want to answer the question.

*Mayor Flynn*. Thank you.

*Id.* at 154-55; see also Cong. Q. Inc., *Politics In America* 862 (1986) (Senator Eagleton "has evolved at the close of his career into a sort of premature curmudgeon, free to speak out bluntly and even scold colleagues in a way he could not do if he were seeking re-election in 1986").

149. House members objected to President Reagan's treaty-by-treaty strategy on the ground that it would preempt the legislative process. That it would also enable a Republican administration to negotiate exclusively with a Republican-controlled Senate—thereby, leaving the Democratic-controlled House out of the picture—was not discussed.

The Senate/House dispute has a long history. In 1945, the House passed a constitutional amendment granting itself a role in the treaty ratification process. The Senate allowed the proposal to die without a vote. See Louis Fisher, *Congressional Participation In The Treaty Process*, 137 U. Pa. L. Rev. 1511, 1519-20 (1989).

150. See *Hearings before the Committee on Foreign Relations*, *supra* note 101, at 489, 528-30 (statements of Judge Eugene Maier and Professor Francis Boyle).

151. *Mr. Trott*. [I]t is definitely true that if this protocol were to become the law of the land, it would enable Great Britain and the United States, on her behalf, to go back into court and attempt to effectuate an extradition of these criminals

. . . .

*Senator Hatch*. Do you agree with that? . . .

*Judge Sofaer*. Absolutely. I do not think that there is anything unfair about it.

*Mr. Trott*. No, there just simply is not . . . .

*Hearing before the Judiciary Subcommittee*, *supra* note 101, at 78. But see *In re McMullen*, 769 F. Supp. 1278, 1283-90 (S.D.N.Y. 1991) (holding the retroactivity clause of the treaty to be an unconstitutional bill of attainder), *aff'd sub nom. McMullen v.*

likely to be ratified.<sup>152</sup>

## 2. The American Raid on Libya

Senator Eagleton's analysis proved accurate, and the Supplementary Treaty remained buried in committee for another six months. When it finally began to move, it did so for reasons that no one had anticipated—namely, the American raid on Libya. This Article emphasizes the correlation between the two events because the period from April 14 through July 17, 1986, really marked the turning point in the Doherty Case.<sup>153</sup> Before then, Doherty had rarely lost. Thereafter, he rarely won.

On April 14, 1986, American military aircraft attacked targets in Libya in reprisal for Libya's role in the April 5, 1986, terrorist bombing of a West Berlin nightclub—a bombing which killed an off-duty American serviceman and wounded other American servicemen. Although other European allies had declined to cooperate with the American raid, Prime Minister Margaret Thatcher approved the use of the British bases from which the American aircraft took off.<sup>154</sup>

In a prescient editorial, the London Times suggested that British support for the raid on Libya should be linked to Senate ratification of the Supplementary Treaty.<sup>155</sup> Prime Minister Thatcher adopted that theme

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United States, 953 F.2d 761 (2d Cir. 1992), *reh'g granted*, June 5, 1992 (unpublished order).

152. Specifically, Senator Eagleton stated:

The treaty is in trouble. That is self evident. The treaty, as written, is in trouble.

My preference would be . . . that we go the legislative route. In fact, I think we should inform the legislative committees of both the House and the Senate that we may hold in abeyance for a reasonable period of time this treaty to give them a chance to act.

. . . .

However, if they do not act, then we must do something with this treaty. I think we should . . . 'promulgate' some reservations to it . . . .

. . . .

Finally, I think it is imperative . . . that we have the State Department back as witnesses.

*Hearings before the Committee on Foreign Relations, supra* note 101, at 220-21 (remarks of Senator Eagleton).

153. The legal literature on the Supplementary Treaty is extensive, but only the few articles listed below have made the connection between the Senate's ratification and British support for the American raid on Libya. See Bassiouni, *supra* note 98, at 282 n.127 (citing Kennedy, *Why Were F-111s 'Misused' In The Raid On Libya?*, Chi. Trib., Aug. 19, 1986, § 1, at 15); Scharf, *supra* note 107, at 263 n.28; Kathleen A. Basso, Note, *The 1985 U.S.-U.K. Supplementary Extradition Treaty: A Superfluous Effort?*, 12 B.C. Int'l & Comp. L. Rev. 301, 313 n.100 (1989); Douglas A. Fellman, Note, *Limiting Extradition Law's Political Offense Exception: The United States-United Kingdom Supplementary Extradition Treaty*, 20 Cornell Int'l L.J. 363, 376 n.82 (1987); Guy C. Iversen, Note, *Just Say No! United States Options to Extradition to the North of Ireland's Diplock Court System*, 12 Loy. L.A. Int'l & Comp. L.J. 249, 252 n.27 (1989); Sapiro, *supra* note 101, at 699 n.274.

154. See Neil A. Lewis, *Paris Barred Jets*, N.Y. Times, Apr. 15, 1986, at A1.

155. Specifically, the editorial stated:

in an April 27, 1986, radio interview with the BBC,<sup>156</sup> and the United States Department of State followed suit.<sup>157</sup> Newspaper editorials also drew attention to the issue,<sup>158</sup> prompting a Senate Foreign Relations Committee staff member to marvel at how quickly the Supplementary

The British government took upon itself political opprobrium last week by its approval of the use of American bases in Britain for the Libyan strikes. It offended, the polls said, a wide swathe of British public opinion. Is it not time for the government of the United States to pay a debt? . . .

Before the United States Senate this week is ratification of treaty amendments with the effect of forbidding fugitives from United Kingdom justice to claim in their defence [sic] that their crime was somehow political. . . .

There are in the Senate, and not only among the Democrats, politicians who are devout believers in the twentieth century doctrine that homicide is not murder provided it is carried out in the right spirit. For some legislators with Irish-American constituencies the right spirit is intent to unify Ireland under the flag of revolutionary nationalism. . . .

[But] the greenery of Irish nationalism has been tainted by the green of Islamic crusade against the West. [Qadhafi] has through his money and armaments supply been an actor in Ulster, and Americans should be told the company that [NORAIID] keeps. . . .

The British in Washington have in the past tended to be rather gentlemanly about the issue of Ireland . . . . The time has come[, however] for . . . [a] round of high pressure salesmanship. . . .

Mrs. Thatcher's credit with the people of the United States is at an all time high; the government could do worse than employ some Madison Avenue skills in putting over the British case. . . .

Let it be simply put to the voters in the states who alone can bring the pro-IRA senators to book: you owe us one.

*Reciprocity In Washington*, The Times (London), Apr. 22, 1986, reprinted in *Hearings before the Committee on Foreign Relations*, supra note 101, at 883.

156. See Joseph Lelyveld, *Thatcher Faults U.S. Terror Policy*, N.Y. Times, Apr. 28, 1986, at A6.

Referring pointedly to her Government's readiness to allow the use of British bases in the American raids on Libya, Prime Minister Margaret Thatcher contended today that the United States had an obligation to fight the terrorism of the [IRA] by agreeing to an extradition treaty that has been held up for months in the Senate Foreign Relations Committee.

*Id.*

157. See Linda Greenhouse, *The War On Terrorism, From Tripoli To Belfast*, N.Y. Times, Apr. 30, 1986, at B6. "[A] State Department spokesman, Charles Redman, urged the Senate on [April 28] to reciprocate for Britain's allowing American planes to take off from bases in England by 'demonstrating our willingness to support the British on an issue of terrorism of primary importance to them.'" *Id.*

158. See, e.g., *In Aid of Terrorism*, Wall St. J., April 29, 1986, at 30:

Margaret Thatcher's courageous support for the U.S. raid on Libya proved that the U.S. still has one friend in Europe. It would be unthinkable squalid if the Senate Foreign Relations Committee repaid her courage by refusing to help with her own terrorism problem.

Yet that is what the solons on Foreign Relations may do when they vote on a Supplementary Extradition Treaty . . . which the committee has held up since last July. . . .

The main opposition to the [treaty] comes from senators with strong Irish Catholic constituencies, among them Christopher Dodd of Connecticut, John Kerry of Massachusetts and Claiborne Pell of Rhode Island. One opponent,

Treaty's momentum had revived.<sup>159</sup>

Pressure to ratify the Supplementary Treaty continued to build during May 1986. On May 5, the heads of state of seven democratic nations meeting at the Tokyo Economic Summit Conference issued a forceful statement on international terrorism.<sup>160</sup> Moreover, Senator Richard Lugar, Chairman of the Foreign Relations Committee, warned that a popular foreign aid package to Ireland and Northern Ireland<sup>161</sup> would not be approved until the Supplementary Treaty was approved.<sup>162</sup> In addition, the British government lobbied key Senators,<sup>163</sup> and American

Joe Biden of Delaware, traces his own ancestry to Wolf [sic] Tone, an 18th century Irish revolutionary. . . .

[Mrs. Thatcher] is quite right in demanding that U.S. Senators abandon their pettifoggery politics and get serious about terrorism, wherever it exists;

see also *Partners Against Terrorists*, Wash. Post, Apr. 22, 1986, at A14 (observing that the proposed Extradition Treaty will be considered just after the British aided the American strike against Libya, and that passage of the Treaty would give senators an opportunity to demonstrate solidarity with Britain).

159. "This issue was a sleeper for a long time. . . . It looked easy to kill when no one was looking. . . . All of a sudden, people are starting to pay attention. Suddenly, it's bigger than ethnic politics." Greenhouse, *supra* note 157, at B6 (quoting Mark Helmke, a spokesman for Senate Foreign Relations Committee Chairman Richard G. Lugar).

160. See Statement on International Terrorism, 22 Weekly Comp. Pres. Doc. 583 (May 5, 1986) ("Terrorism has no justification. . . . It must be fought relentlessly and without compromise."). The statement also called for "improved extradition procedures within due process of domestic law for bringing to trial those who have perpetrated . . . acts of terrorism . . ." *Id.*

161. The Anglo-Irish Agreement Support Act, Pub. L. No. 99-415, 100 Stat. 947 (1986).

162. On November 15, 1985, the United Kingdom and the Republic of Ireland signed the Hillsborough Accord, which was designed to facilitate joint consultation on the administration of Northern Ireland. This was the first time that Britain had formally acknowledged the Irish Republic a role to play in governing the North, and its decision to do so at Hillsborough angered most unionists.

In return for a voice in the province's affairs, the Republic of Ireland formally acknowledged British sovereignty over Northern Ireland—an act that provoked most nationalists because it appeared to legitimize partition. In addition, the Irish Republic stated its intention to accede to the 1977 European Convention on the Suppression of Terrorism; by acceding to the Convention, the Irish Republic would reverse its old position and smooth the path for extradition of republican fugitives back to the North. See *infra* part IV.

The Hillsborough Accord effectively ruled out any form of armed political resistance to established governments. It was vague about procedures and details, however, and nationalists have criticized it for co-opting the Irish government into a gradualist, slow-motion position that better suited British interests.

The Anglo-Irish Agreement Support Act of 1986, which was billed as a "mini-Marshall Plan," was designed to demonstrate American financial support for the Hillsborough Accord. The House of Representatives had passed on March 11, 1986. Chairman Lugar linked the Irish aid issue to the issue of Supplementary Treaty ratification, on the ground that the two measures were complementary policy vehicles to curb instability in Northern Ireland. See David Shribman, *Senate Debate On Terrorism In Northern Ireland Entangles U.S.-British Treaty On Extraditions*, Wall St. J., May 12, 1986, at 52.

163. See Francis X. Clines, *Briton Presses U.S. on Irish Extradition*, N.Y. Times, May 14, 1986, at A3 (recounting how British Secretary of State for Northern Ireland, Tom King, travelled to Washington to lobby key United States senators on the pending treaty).

newspaper editorials urged prompt ratification.<sup>164</sup> Finally, on May 31, President Reagan went over the head of the Senate and directly urged the American public to support ratification of the Supplementary Treaty.<sup>165</sup> Thus, the Senate Foreign Relations Committee began compromise negotiations on the Supplementary Treaty, which were spearheaded by Senators Lugar and Eagleton.<sup>166</sup>

164. See, e.g., *The Right Response To Irish Terror*, N.Y. Times, May 23, 1986, at A30:

[F]our Democrats—Senators Dodd, Biden, Pell and Kerry—want to . . . in effect allow asylum for agents of the [IRA] accused of murdering British soldiers. Understandably, the caveat angers the British. . . .

Though the Democratic resisters invoke great principles, their obstruction smacks of tribute to the I.R.A.'s small but vociferous American lobby.

The debate does raise one valid concern about civil liberties [referring to the Diplock court system], . . . [but] Britain can be given the benefit of this doubt. . . .

That still leaves the committee's chairman, Senator Richard Lugar, pursuing his own game. He links a favorable vote on the treaty to his support for a special aid fund for depressed Northern Ireland, a pet project of House Speaker Tip O'Neill. Watching this intricate log-rolling, the British throw up their hands and wonder if this is the same country that berates Europeans for their reluctance to face up to Libya's terrorists. It's time to ratify;

see also *The Ulster Package*, Wash. Post, June 16, 1986, at A10 (opining that the Supplementary Treaty and the foreign aid package were "aimed at promoting peace," and that there "should be little delay in getting the full Senate to consent to ratification [of the Treaty]").

165. Specifically, President Reagan stated:

For nearly a year now a handful of United States Senators have held up approval of a supplementary extradition treaty . . . .

The world is watching. If actions by a few Senators allow terrorists to find safe haven in the United States, then there will be irreparable damage. Refusal to approve the [S]upplementary [T]reaty would undermine our ability to pressure other countries to extradite terrorists who have murdered our citizens. And rejection of this [T]reaty would be an affront to British Prime Minister Margaret Thatcher, one European leader who, at great political risk, stood shoulder to shoulder with us during our operations against Qadhafi's terrorism.

Some members of the Senate Foreign Relations Committee have gone so far as to prepare a substitute treaty permitting those who have murdered British policemen and soldiers, for so-called political reasons, to avoid extradition. Well, this substitute is not a compromise; it's retreat. Its passage would be a victory for terrorism and a defeat for all we've been trying to do to stop this evil. . . .

I therefore urge the Senate to promptly approve the revised treaty and reinforce the momentum building against terrorism.

President's Radio Address to the Nation, 22 Weekly Comp. Pres. Doc. 730-31 (May 31, 1986).

166. One publication has described Senator Lugar's tenure as Foreign Relations Committee Chairman (from 1985 to 1986) in glowing terms, calling him the second or third most influential voice in the United States on foreign affairs, and "something of a shadow Secretary of State" who, by deft compromise, saved several Reagan Administration initiatives from failure. See Cong. Q. Inc., *Politics in America*, 1992, at 486 (1991). Senator Eagleton, the only Democratic and Catholic member of the Foreign Relations Committee favorably disposed to the Supplementary Treaty, see *supra* note 148, had announced his intent to retire at the end of 1986.

### 3. The Substitute Treaty

On June 12, 1986, the Foreign Relations Committee recommended that the Senate approve a substitute treaty (the "Substitute Treaty")—i.e., the Supplementary Treaty with several amendments and a declaration.<sup>167</sup> The Substitute Treaty shortened article 1 of the Supplementary Treaty, which excluded certain crimes from the "political offense" exception. References in the submitted treaty to property damage, possession, intent, and conspiracy offenses were deleted; manslaughter was qualified by "voluntary;" and unlawful detention was qualified by "serious."<sup>168</sup> Further, the Substitute Treaty deleted article 2 of the Supplementary Treaty, which would have made applicable the statute of limitations of the requesting state, and replaced it with a clause that clarified the right of an accused to introduce evidence on the question of probable cause at an extradition hearing.<sup>169</sup>

In addition, the Substitute Treaty inserted a new article 3, which changed the rule of non-inquiry into a rule of partial-inquiry. Article 3(a) authorized a court to deny extradition where (1) the extradition request stems from "trumped up" charges against a dissident, or (2) the accused individual establishes that he would be prejudiced at his trial or punished because of his race, religion, nationality, or political opinions. Article 3(b), which applied only in the United States, limited the scope of an article 3(a) hearing to those offenses listed in article one, and gave either party to an extradition proceeding the right to appeal a decision made under article 3(a).<sup>170</sup> The Committee also recommended that the Senate declare that the Substitute Treaty was not a precedent for other treaties, and that the "political offense" exception would not be narrowed in treaties between the United States and totalitarian or non-democratic regimes.<sup>171</sup>

On July 16 and 17, 1986, the Senate considered the Substitute Treaty. Chairman Lugar opened the debate by focusing on *In re Mackin*,<sup>172</sup> *In re McMullen*,<sup>173</sup> and *In re Doherty*<sup>174</sup>—three judicial decisions that had broadly interpreted the "political offense" exception under the 1977 Treaty. The Chairman acknowledged that the Reagan Administration had negotiated the treaty revisions "because of these cases," and he emphasized that the Substitute Treaty's purpose was to "reverse [the] three cases" and to "put an end to this development in the law."<sup>175</sup>

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167. See Senate Comm. on Foreign Relations, Supplementary Extradition Treaty with the United Kingdom, S. Exec. Rep. No. 17, 99th Cong., 2d Sess. (1986).

168. See *id.* at 4, 6-7.

169. See *id.* at 5-7.

170. See *id.* at 4-5, 7-8.

171. See *id.* at 6.

172. No. 80 Cr. Misc. 1, slip op. (S.D.N.Y. Aug. 13, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981).

173. Mag. No. 3-78-1099 MG, slip op. (N.D. Cal. May 11, 1979).

174. 599 F. Supp. 270 (S.D.N.Y. 1984).

175. 132 Cong. Rec. S9147 (daily ed. July 16, 1986) [hereinafter 132 Cong. Rec.] (re-

Chairman Lugar characterized the treaty as "one of the most difficult and contentious issues the [Foreign Relations] [C]ommittee faced this Congress," and noted that the Committee "[had] spent the better part of a year reviewing [the Supplementary Treaty]."<sup>176</sup> He assured the Senate that the Committee's compromise resolution of ratification, i.e., the Substitute Treaty, was acceptable to both the Reagan Administration and the Thatcher Government.<sup>177</sup> On the issue of retroactivity, Chairman Lugar opined that the Substitute Treaty would pass constitutional muster in the courts.<sup>178</sup> Finally, he promised that the Anglo-Irish Agreement Support Act of 1986 would be considered immediately after a final vote was taken on the Substitute Treaty.<sup>179</sup>

#### 4. Defeat of the D'Amato Amendment

Following Chairman Lugar's opening, Senator Alfonse D'Amato of New York proposed an amendment to narrow, but not delete, the retroactivity clause (the "D'Amato Amendment").<sup>180</sup> In relevant part, the D'Amato Amendment provided that the Substitute Treaty would not apply to any individual whose extradition had been sought prior to the effective date of the Treaty.<sup>181</sup> In support of his proposed amendment,

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marks of Sen. Lugar). The fourth case to interpret the "political offense" exception broadly, *Quinn v. Robinson*, No. C-82-6688 RPA, slip op. (N.D. Cal. Oct. 3, 1983), was not included in Chairman Lugar's discussion, because, on February 18, 1986, the Ninth Circuit reversed the district court and reinstated the extradition magistrate's decision to extradite William Quinn to England. *See Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), cert. denied, 479 U.S. 882 (1986).

176. 132 Cong. Rec., *supra* note 175, at S9120, S9149 (remarks of Sen. Lugar).

177. *See id.* at S9148. Chairman Lugar stated: "These amendments were developed in close consultation with the [A]dministration and the British Government. While both governments would have preferred that the Senate approve the treaty as submitted, both are willing to accept the committee's changes." *Id.*

178. *See id.* Chairman Lugar stated: "The courts have examined the question of the retroactivity of extradition treaties on several occasions. They have found no constitutional problem with retroactivity." *Id.* *But see In re McMullen*, 769 F. Supp. 1278, 1283-90 (S.D.N.Y. 1991) (holding that the Supplementary Treaty is an unconstitutional bill of attainder punishing McMullen for acts previously held by an extradition magistrate to be non-extraditable), *aff'd sub nom. McMullen v. United States*, 953 F.2d 761 (2d Cir. 1992), *reh'g granted*, June 5, 1992 (unpublished order).

179. *See* 132 Cong. Rec., *supra* note 175, at S9149.

180. *See id.* at S9153-54. The retroactivity clause from article 4 of the Supplementary Treaty had been moved, unchanged, to article 5 of the Substitute Treaty.

Senator D'Amato was not a member of the Foreign Relations Committee and would ordinarily not have been expected to play an active role in treaty ratification debates. Doherty was in a New York City jail, however, and his case was well known among New York's large Irish-American community.

One publication has called D'Amato a strong human rights supporter. It has also referred to him as "Senator Pothole," because of his attention to running errands for constituents. *See Cong. Q. Inc.*, *supra* note 166, at 988. Yet, in light of the subsequent rulings in *In re McMullen*, 769 F. Supp. at 1283-90 (holding the retroactivity clause of the treaty to be an unconstitutional bill of attainder) and in *McMullen v. United States*, 953 F.2d 761 (2d Cir. 1992), perhaps "Senator Pothole's" critics owe him an apology.

181. *See* 132 Cong. Rec., *supra* note 175, at S9153. The D'Amato Amendment did not prohibit the retroactive application of the Supplementary Treaty to *all* offenses occurring

Senator D'Amato argued that the American courts "have a distinguished record in extraditing terrorists" and that the Senate "should not sweepingly overrule their carefully considered judgments that [denied] extradition in certain cases."<sup>182</sup> To do so, he cautioned, would violate the constitutional prohibition against bills of attainder, among other things.

In opposition to the D'Amato Amendment, Chairman Lugar asserted that the Substitute Treaty would not operate as an *ex post facto* law and would not constitute double jeopardy.<sup>183</sup> A discussion of the Doherty Case then followed:

*Chairman Lugar:* I would object to the exception that [Senator D'Amato] makes. I appreciate that [he] narrows the scope [of his amendment] very substantially and almost narrows it specifically to the case of Doherty and perhaps to [one other] case. . . . These two cases are celebrated and they have a very important content in the relationship of the United States and Great Britain because of their celebration. They are not unknown situations.

Therefore, I would have to resist the amendment on the basis that it is such an important aspect of the relationship of the countries and of our consideration with them that it would destroy much of the value of this treaty.

*Senator D'Amato:* [W]e are talking about really one case. That would be Doherty. . . . Really what we speak about is a situation where we may be violating an established principle of law so well engrained in this country, in our Constitution, that in order to keep good relationships with an important ally one person is sacrificed.

It seems to me that is a very dear price for us to pay . . . . [T]his is politics. What we are talking about is the political relationship between the United States and England.<sup>184</sup>

In addition, Senator Pell, the ranking minority member of the Foreign Relations Committee, expressed opposition to the amendment.<sup>185</sup>

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prior to the treaty's entry into force. Rather, it only barred retroactive application of the Supplementary Treaty as to persons whose extradition had previously been denied under the 1977 Treaty: i.e., Joe Doherty and Peter McMullen. *See id.* at S9154.

Extradition requests have recently been lodged in two cases involving offenses committed before the effective date of the Supplementary Treaty. *See U.S. v. Smyth*, No. 92-0152 BAC, 1992 U.S. Dist. Lexis 11439 (N.D. Cal. July 24, 1992) (arrested July 15, 1992) (PIRA member convicted of attempted murder in 1978); *In re Artt*, Crim. No. 92-0151-Misc. FMS (N.D. Cal. July 17, 1992) (PIRA member convicted of murder in 1983). The D'Amato Amendment would not have applied to these two cases.

182. 132 Cong. Rec., *supra* note 175, at S9153.

183. *See id.* at S9154-56. Senator Lugar did not address the bill of attainder issue.

184. *Id.* at S9154-55.

185. *See id.* at S9156 (remarks of Sen. Pell). Senator Pell stated:

[T]he arguments of the Senator from New York . . . [are] well-reasoned and [have] merit, but I believe, on balance, we are better off leaving this treaty the way we worked it out in the committee with a great deal of effort. We considered these questions. . . . I intend to support our chairman.

*Id.* Based on the Foreign Relations Committee's hearings, and because of Rhode Island's large Catholic population, one might have expected Senator Pell to favor the D'Amato Amendment; but any such sentiments had been neutralized by President Reagan's radio

Although Chairman Lugar twice tried to end the debate,<sup>186</sup> three other Senators voiced support for the amendment.<sup>187</sup> In the end, Chairman Lugar moved to table the D'Amato Amendment, and that motion carried, sixty-five to thirty-three.<sup>188</sup>

### 5. Defeat of the Helms Amendment

Next, Senator Jesse Helms of North Carolina proposed an amendment to the Substitute Treaty which would permit extradition in cases of criminal violence but forbid it in cases of insurrectional violence (the "Helms Amendment").<sup>189</sup> This amendment, Senator Helms contended, would differentiate "criminal terrorists" from "genuine freedom fighters."<sup>190</sup>

In opposition to the Helms Amendment, Chairman Lugar and Senator Pell maintained that the IRA did not deserve to benefit from such a dis-

address and the newspaper editorials supporting ratification. In addition, Senator Pell's personal friend, Lord Louis Mountbatten, a member of the British royal family, had been killed by an IRA bomb in August 1979.

186. See *id.* at S9156, S9158 (remarks of Sen. Lugar).

187. Senators Dodd, Hatch, and Levin also spoke in support of the D'Amato Amendment. Senator Dodd emphasized that there were no prior cases where a new treaty had been retroactively applied to extradite an individual whose extradition had already been refused under an earlier treaty, see 132 Cong. Rec., *supra* note 175, at S9158 (remarks of Sen. Dodd) (citing June 23, 1986, letter from State Department Deputy Legal Advisor Mary Mochary); Senator Hatch expressed concern that the retroactivity clause in the Substitute Treaty violated due process and fundamental fairness, see *id.* at S9159-60 (remarks of Sen. Hatch); and Senator Levin stated the following: "In the specific case to which [the D'Amato] [A]mendment particularly speaks, the legal process has proceeded so far along that retroactive application of the treaty would go beyond the bounds of our traditional sense of justice." *Id.* at S9160 (extension of remarks by Sen. Levin).

188. See *id.* at S9160 (roll call vote). Viewing the D'Amato Amendment as a test vote on the treaty itself, one notes that the Amendment drew the support of the one-third (plus one) necessary to block ratification. The amendment found broad (if not deep) support at both ends of the political spectrum, but the neocons held the center. A breakdown of the vote defies any simple regional or sectarian analysis. While many who supported the D'Amato Amendment were liberal Democrats, some conservative Republicans (Helms, McClure, and Hatch) did so, too. Senator Helms expressed his view: "This is one time when I think the Democrats are exactly right. . . . It occurs occasionally." Shribman, *supra* note 162, at 52 (quoting Sen. Jesse Helms). Of the nineteen members of the Senate identifying themselves as Catholic, ten voted to table the D'Amato Amendment and nine voted against tabling.

Senator Moynihan of New York and Senator Kennedy of Massachusetts, two of the "Four Horsemen" who had condemned violence in Northern Ireland since 1977, see *supra* note 32 and accompanying text, differed in their opinions on the D'Amato Amendment (Moynihan supported it and Kennedy opposed it). Both had remained silent during the Senate floor debate.

189. See 132 Cong. Rec., *supra* note 175, at S9161. The proposal defined "insurrectional violence" as violence that occurs during an armed rebellion against the military authorities of an individual's home nation, but did not include violence against civilians. See *id.* at S9159 (quoting Sen. Hatch).

190. See *id.* at S9161 (remarks of Sen. Helms). Senator Helms further stated: "Once the legal distinction has been abolished between terrorists and freedom fighters, it will be very difficult to sustain support for the Afghan Mujahideen, Savimbi's UNITA fighters, the Nicaraguan resistance, the Cambodian resistance, or any other group fighting against an established tyranny." *Id.*

inction, because everyone in Northern Ireland has the same right to vote for a member of Parliament as do citizens in the rest of the United Kingdom.<sup>191</sup> Moreover, they described the Helms Amendment as a "re-treat" which would mark "a victory for terrorism,"<sup>192</sup> noted that the Foreign Relations Committee had already considered and rejected the Amendment, and predicted that acceptance of the Amendment would "undo" the "carefully crafted" Substitute Treaty.<sup>193</sup> The debate was not extensive, and the Helms Amendment was tabled, eighty-seven to nine.<sup>194</sup>

## 6. Contested Legislative History

The Senate debate on the Substitute Treaty did not end with the defeat of the Helms Amendment. Just before seven o'clock in the evening, Senator Eagleton delivered a one-half hour soliloquy to a nearly empty chamber.<sup>195</sup> During his speech, Senator Eagleton described himself as the principal author of article 3(a)<sup>196</sup>—the provision restricting extradition in cases of "trumped up" charges or if an individual could show that he would be tried or punished on political or religious grounds. Further, he asserted that Judge Sprizzo's extradition decision in the Doherty Case had provided Northern Ireland's Diplock courts<sup>197</sup> with a clean bill of health on the fairness issue.<sup>198</sup> Finally, the Senator declared that the

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191. *See id.* at 9162-63 (remarks of Senators Lugar and Pell). In an indirect challenge to the assumption that Northern Ireland was a "democracy," Senator Helms had previously stated:

It is not enough to say that there is no right of rebellion against a country with democratic institutions. It is not enough to say that the United Kingdom itself is a democracy. . . . There is no commonly accepted definition of a "democracy." . . . Moreover, a nation that is free in the main part of its territories may not be free in all of the territories that it governs.

*Id.* at 9161 (remarks of Sen. Helms).

192. *Id.* at S9163 (remarks of Sen. Lugar). This characterization had been taken from President Reagan's May 31, 1986, radio address, in which he discussed his view of a precursor to the Helms Amendment.

193. *Id.* at S9163.

194. *See id.* The debate over the Helms Amendment did not begin until six o'clock in the evening, and it lasted only 20 minutes. Members of the Senate have often objected to roll call votes at "late" hours, characterizing them as "bedcheck" votes, *see* Helen Dewar, *Senate to Adopt A New Work Ethic—A Five Day Week*, Wash. Post, Dec. 31, 1987, at A17, and a clear concern as to the time was demonstrated during the debate. *See, e.g.*, 132 Cong. Rec., *supra* note 175, at S9161 (Majority Leader Dole promises "not to have any votes after 6:30 p.m."); *id.* at S9162 (remarks of Sen. Lugar) ("Members . . . are concerned, I know, about the time of departure."). Senator Lugar's earlier efforts to end debate on the D'Amato Amendment can best be understood in this context as well. *See id.* at S9156, S9158.

195. *See* 132 Cong. Rec., *supra* note 175, at S9164-67 (remarks of Sen. Eagleton). Considering Senator Lugar's prior statement about "departure time," and his 7:30 p.m. request for a quorum call, *see id.* at S9168, it is fair to infer that the Senate chamber was empty because of the late hour.

196. *See id.* at S9167. *But see infra* notes 200-02 (disputing claims of Sen. Eagleton).

197. *See supra* note 94.

198. Yet, at the Foreign Relations Committee Hearings, Senator Eagleton had ex-

courts should interpret article 3(a) very narrowly.<sup>199</sup>

Senator Eagleton's narrow interpretation of article 3(a) was challenged the following afternoon. Senators Kerry,<sup>200</sup> Levin,<sup>201</sup> and Biden<sup>202</sup> each professed the Foreign Relations Committee's intent that, during an extradition hearing, the American court should inquire broadly into the administration of justice in Northern Ireland.<sup>203</sup>

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pressed an inconsistent view; he had denounced Judge Sprizzo's three sentence dicta about the Diplock courts as "a gratuitous adventure on [Sprizzo's] part." *Hearings before the Committee on Foreign Relations, supra* note 101, at 176. The Senator had also stipulated that the Diplock court system "stinks." *Id.* at 154; *see supra* note 148.

199. *See* 132 Cong. Rec., *supra* note 175, at S9167 (remarks of Sen. Eagleton). Specifically, Senator Eagleton stated the following:

I consider Judge Sprizzo's opinion, as it relates to the fairness of the Diplock court system, as being conformative to our intent in fashioning article 3(a) . . . . As the author of article 3(a), I wish to assure my colleagues that [article 3(a)] has [a] narrow and focused scope . . . . article 3(a) is not intended to give courts authority generally to critique the abstract fairness of foreign judicial systems. It is directed at the treatment to which this particular person will be subjected.

*Id.*

200. Senator Kerry stated:

Despite the interpretation given article 3(a) of this supplementary treaty by [Senator] Eagleton, this is the view of only one Senator and does not reflect the intent of the Committee. The intent of the Committee is to be found in the colloquy between myself, the chairman of the Committee [(Senator Lugar)], and Senator Biden [in the Committee Report]. . . . [Article 3(a)] is not a narrow provision. It is a very broad, and far-reaching provision that represents a marked departure from past practice in extradition law and should be so interpreted by the court system in this country. . . . [T]he administration of justice system in Northern Ireland has become acceptable to [the Reagan] Administration. It is not acceptable to the [United States] Senate and that is the reason for article 3(a).

132 Cong. Rec. S9253-57 (daily ed. July 17, 1986) (remarks of Sen. Kerry).

201. Senator Levin stated: "I will vote for this treaty . . . . I am particularly relying on the colloquy between the principal sponsor of the committee language, Senator Lugar, and Senators Kerry and Biden, which is printed in the committee report . . . ." *Id.* at S9259 (remarks of Sen. Levin).

202. Senator Biden stated:

I understand that there was some discussion last night on the legislative history of the treaty. . . . No Senators can claim principle [sic] authorship of the treaty or any of its parts, and therefore the right to be the final arbiter of its meaning. The committee report, and not the remarks of any of us, will serve as the principal interpretation of the treaty—should any be needed. If anyone is going to stick to the other view—that the principal author of any particular section is therefore the sole interpreter for all time, all courts, and all occasions—then I would have to claim principle [sic] authorship of the second clause in article 3(a), and insist on my interpretation of it.

*Id.* at S9259-61 (remarks of Sen. Biden).

203. In the intervening years, no American court has yet been called upon to conduct an article 3 hearing; that fact alone may suggest that the United States has never been the haven for PIRA terrorists that treaty supporters made it appear to be. Ironically, in an effort to prove that the treaty is not an unconstitutional bill of attainder, the government has recently argued that the treaty provides significant new judicial safeguards in the form of a broad article 3 hearing. In opposition, the prospective extraditee quoted Senator Eagleton to stress how narrow such a hearing would be. *See McMullen v. United States*, 953 F.2d 761, 768 (2d Cir. 1992), *reh'g granted*, June 5, 1992 (unpublished order).

## 7. The Senate Vote

The final vote on the Substitute Treaty came one year to the day after President Reagan transmitted the Supplementary Treaty to the Senate for advice and consent. The Senate voted, 87-10, to approve the resolution of ratification.<sup>204</sup>

C. *British Ratification*

On November 26, 1986, the British House of Commons considered the Substitute Treaty. In contrast to the spirited deliberations of the United States Senate, the British debate was subdued and anti-climactic. In fact, it lasted only one hour. No real opposition to the Substitute Treaty surfaced, and the only difference of opinion was between those members of Parliament who wanted to praise the Reagan Administration for negotiating the Supplementary Treaty,<sup>205</sup> and those members who were more inclined to chastise the United States Senate for presuming to rewrite it.<sup>206</sup> The Doherty Case was again mentioned, although not in any detail.<sup>207</sup> The tone of the debate makes it clear that Parliament believed that the Substitute Treaty was the best treaty it could get, and that this

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When and if an article 3 hearing becomes necessary, one trusts that Senator Eagleton's remarks will be measured against his own prior statements and the views of his colleagues, and weighed accordingly.

204. As Senator Lugar had promised, the Anglo-Irish Agreement Support Act of 1986 was considered next, and was passed readily on a voice vote. *See generally* Pub. L. No. 99-415, 100 Stat. 947-49 (1986) (providing for United States contributions to a support fund established pursuant to the Act, as well as other assistance in the form of guarantees and credit support to spur economic development and reconciliation in Ireland and Northern Ireland); S. Rep. No. 326, 99th Cong., 2d Sess (1986), *reprinted in* 1986 U.S.C.C.A.N. 2065-73 (report of the Senate Committee on Foreign Relations).

205. *See* 106 Parl. Deb., H.C. (5th Ser.) 373 (1986) (remarks of Sir Eldon Griffiths).

In the end we got the changes [to the 1977 Treaty] for two almost adventitious reasons. The first was the support by the President for the request by our Government. . . . [H]is consistent support for the British position was of enormous help in Congress. . . . I am [also] sure that we would have found it difficult to achieve the [Supplementary Treaty] if Congress had not been impressed by the Prime Minister's support for the United States when it launched the raid against terrorism in Libya.

*Id.*

206. *See id.* at 373-75 ("[It] is limited and overdue. We should be unwise to expect too much from it. It contains far too many let outs. . . . [I]t took far too long to get this arrangement through the United States Congress. . . . It does not go anywhere near as far as I would have liked or, to be fair, as the [Thatcher] Government would have liked." (remarks of Sir Eldon Griffiths)); *id.* at 381 ("Of course, all of us would have preferred it if the treaty that I am commending to the House tonight was the one originally initialed by the two Governments, not the one that came from the Senate. But, that having been said, this supplementary treaty from the Senate is still a worth while [sic] document, although it is not ideal." (remarks of Mr. David Mellor)); *see also id.* at 376 ("I too welcome the order, as far as it goes." (remarks of Mr. Ivor Stanbrook)).

207. *See id.* at 374 ("I do not wish to detain the House by going into detail about the Doherty [C]ase. I am aware of that judgment and the weight that British Ministers have put upon it in their discussions with the United States." (remarks of Sir Eldon Griffiths)).

was a take-it-or-leave-it situation.<sup>208</sup>

Following Parliament's approval of the Substitute Treaty, and then an order in council, the United States and the United Kingdom exchanged instruments of ratification in London. On December 23, 1986, the Substitute Treaty, officially titled the "Supplementary Extradition Treaty," entered into force.

From Doherty's perspective, ratification of the Supplementary Extradition Treaty was a defeat, but not necessarily a mortal blow. To be sure, the retroactive narrowing of the "political offense" exception meant that he might soon face another, more formidable, extradition battle. But the lengthy ratification process had delayed that day, and, once the Senate opponents of the original Supplementary Treaty could stall no longer, they had negotiated substantial concessions from the Reagan Administration and the Thatcher Government. These concessions left Doherty with strong defenses to raise if the British ever decided to renew the extradition request.<sup>209</sup>

At the same time, the Senate debate put Doherty well on his way to winning the public relations war. Specifically, the Foreign Relations Committee Hearings provided a powerful vehicle for focusing public attention on the broader issue: the condition of human rights in Northern Ireland.<sup>210</sup> As a breakdown of the Senate's vote on the D'Amato

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208. See *supra* note 206 (remarks of Mr. David Mellor and Mr. Ivor Stanbrook).

209. Included in these defenses was an opportunity to argue that the retroactivity clause of the Supplementary Treaty was an unconstitutional bill of attainder. See *In re McMullen*, 769 F. Supp. 1278, 1283-90 (S.D.N.Y. 1991), *aff'd sub nom. McMullen v. United States*, 953 F.2d 761 (2d Cir. 1992), *reh'g granted* June 5, 1992 (unpublished order). At the very least, Doherty would also have a chance to argue that, upon extradition, he would be subject to persecution. Possibly, he could use an article 3 hearing to put the Diplock courts and the criminal justice system of Northern Ireland on trial. Indeed, one commentator has stated that article 3 hearings promise to be "the most exciting, if not entertaining, judicial proceedings ever heard in the [United States]," and that "[a] foreign government and a resistance movement will be on trial. . . . It would indeed be quite a day for Irish resisters to vilify the [United Kingdom] and glorify their cause in an [a]rticle 3 hearing." See Bassiouni, *supra* note 98, at 279.

210. A large amount of scholarly commentary on the Supplementary Treaty has been negative. See, e.g., Bassiouni, *supra* note 98, at 264 ("The actual purpose of the Supplementary Treaty is to assist Great Britain in quelling Irish resistance in both its lawful and unlawful forms."); Michelle M. Cain, Note, *Abrogating The Relative Political Offense Exception To Extradition: The United States-United Kingdom Supplementary Extradition Treaty*, 20 J. Marshall L. Rev. 453, 480 (1987) ("[The Supplementary Treaty is] a dangerous precedent . . . . It ignores the philosophy on which the United States was founded, that of the legitimacy of armed insurrection to achieve political change . . . [and is] neither an effective nor a just means of controlling terrorism."); John Lafferty, Note, *The Turning Point Approaches: The Political Offense Exception To Extradition*, 24 San Diego L. Rev. 549, 572 (1987) ("[The Supplementary Treaty was] an unwise attempt to deal with the present problem of terrorism[,] . . . [and] little more than a foreign policy decision to help the British government more effectively suppress the conflict in Northern Ireland, while avoiding the urgent need to bring about a peaceful solution to the problem"). But see Lubet, *supra* note 76, at 53 (arguing that neutrality in extradition matters need not always be a guiding principle of foreign policy, and asserting that the political

Amendment shows, those concerns no longer belonged only to Irish-Americans in the Northeast or to political liberals.

#### IV. DEPORTATION

Unlike extradition, where an accused's appearance before the judiciary for a *de novo* proceeding is the very first step, a deportation proceeding is administrative, and it is subject only to limited judicial review at the end. The United States Supreme Court has explained:

[A]lthough all adjudications by administrative agencies are to some degree judicial and to some degree political[,] . . . [Immigration and Naturalization Service ("INS" or "Service")] officials must exercise especially sensitive political functions that implicate questions of foreign relations and therefore, the reasons for giving deference to agency decisions . . . in other administrative contexts apply with even greater force in the INS context.<sup>211</sup>

The Supreme Court's formula was followed closely in Doherty's deportation proceeding, as executive reliance on foreign policy considerations and judicial deference combined to bring about what the extradition proceeding had not: Doherty's return to Northern Ireland.

##### A. *Doherty Asks to be Deported to the Republic of Ireland*

Doherty's deportation proceeding, which had been stayed since 1983,<sup>212</sup> was reconvened by an immigration judge (the "Immigration Judge") in early September 1986.<sup>213</sup> In response, Doherty invoked section 243(a) of the Immigration and Nationality Act (the "INA"),<sup>214</sup> which in certain circumstances allows a deportable alien to select the country to which he will be deported.<sup>215</sup> Doherty withdrew his application for asylum, conceded his deportability for entering the United States without valid documents,<sup>216</sup> and requested immediate deportation to the Republic of Ireland.<sup>217</sup>

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branches of the United States Government made a perfectly permissible policy decision to favor the British Government over the PIRA).

211. *INS v. Abudu*, 485 U.S. 94, 110 (1988).

212. *See supra* note 60.

213. September 1, 1986, marked the expiration of the government's right to petition the Supreme Court for certiorari in the declaratory judgment action. *See supra* note 122.

214. 8 U.S.C. § 1253(a) (1988).

215. In relevant part, section 243(a) provides:

The deportation of an alien in the United States . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States.

*Id.*

216. Note that Doherty did not concede the other charges against him, dealing with criminal conduct, either actual or potential.

217. Doherty's designation of the Republic of Ireland made sense for several reasons. First, the Republic of Ireland was the country from which Doherty had entered the

Doherty's change in strategy was motivated by the Supplementary Extradition Treaty, which was then pending before the British House of Commons. He was concerned that, once the Treaty took effect, the United Kingdom would renew its extradition request. Thus, Doherty wanted to leave the United States before this could occur.<sup>218</sup>

### 1. The Immigration Judge Finds for Doherty

The INS opposed Doherty's partial concession of the grounds of deportation,<sup>219</sup> and it unsuccessfully sought to present evidence on all of the charges it had lodged against him.<sup>220</sup> In addition, the INS objected to Doherty's designation of the Republic of Ireland, asserting that deportation to that country would harm American efforts to cooperate with other nations in combatting terrorism.<sup>221</sup> The Service stated that

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United States in 1982. Second, it was also the country of his birth, *see supra* note 13, and, third, the Irish government had expressed a willingness to accept Doherty into its territory upon deportation from the United States. Fourth, Doherty believed that his offenses would be punished more leniently in the Republic of Ireland than in Northern Ireland, a judgment shared by the INS.

Based on the Republic of Ireland's reciprocal agreement with the United Kingdom, Doherty would face prosecution in Ireland and a maximum prison sentence of ten years for the charges arising out of his escape from custody on June 10, 1981. However, Doherty asserted that he would be immune from further prosecution in Ireland and would not be extradited to the United Kingdom for murder or the other charges relating to the ambush of the British army patrol on May 2, 1980.

Finally, an alien's designation of the country of deportation under section 243(a) of the INA had never previously been rejected on grounds of prejudice to American national interests.

218. As stated earlier, the British House of Commons ratified the Supplementary Extradition Treaty on November 26, 1986, and the new Treaty took effect on December 23, 1986. *See supra* part III.

Doherty's concerns about the revised treaty were well-founded, as the case of Peter McMullen makes clear. *See In re McMullen*, 769 F. Supp. 1278, 1295 (S.D.N.Y. 1991) (McMullen alleged that the United States government made only perfunctory efforts to deport him to Ireland after it had won a final deportation order, and that the government procrastinated so as to be able to arrest him minutes before his departure for Ireland on a second British extradition warrant, one day after the Supplementary Treaty went into effect), *aff'd*, 953 F.2d 761 (2d Cir. 1992).

219. *See supra* text accompanying note 216.

220. The Immigration Judge ruled that, in view of Doherty's concession of deportability, there was no purpose in allowing the INS to prove the remaining contested allegations and charges. *See In re Doherty*, No. A26-185-231 (Oral Decision of the Immigration Judge, Sept. 19, 1986), *reprinted in* Appendix: Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *INS v. Doherty*, 112 S. Ct. 719 (1992), at 156a [hereinafter Appendix].

221. Doherty's designation of the Republic of Ireland placed the INS in the politically and diplomatically awkward position of proving that British-Irish relationships over Northern Ireland were unfriendly, and that, if Doherty were sent to the Republic of Ireland, the British had little hope of getting him back. *See Dillon, supra* note 39, at 197. At the September 12, 1986 hearing, the Service provided newspaper articles and speeches on the general issue of terrorism, but offered no particularized evidence to support its objection to Doherty's designation of Ireland. *See In re Doherty*, No. A26-185-231 (Transcript of Deportation Hearing, Sept. 12, 1986, Tr. 41-47 [hereinafter Deportation Hearing Sept. 12, 1986, Tr. #]), *reprinted in* Joint Appendix: On Writ of Certiorari to

Doherty's case was of concern "at the highest levels of government" and would receive the Attorney General's personal attention that "coming week."<sup>222</sup> The Immigration Judge granted the INS a one-week continuance to produce specific evidence in support of its objection to Doherty's designation of Ireland.<sup>223</sup>

When the deportation hearing resumed on September 19, 1986, the INS advised that it had nothing further to submit, although the case was still "under review at the highest levels of the Justice Department."<sup>224</sup> The Immigration Judge accordingly found Doherty deportable and ordered him deported to the Republic of Ireland.

## 2. Doherty Seeks Habeas Corpus Relief

The INS appealed the Immigration Judge's decision to the five-member Board of Immigration Appeals (the "BIA" or "Board"), arguing that the Immigration Judge had decided the case on an incomplete record, and that Doherty's designation of the Republic of Ireland was prejudicial to American national interests. Faced with the prospect of a lengthy administrative proceeding, Doherty petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus—an order releasing him from custody to permit his immediate deportation to the Republic of Ireland. In support, Doherty argued that the INS was procrastinating<sup>225</sup> solely to ensure that, once the Supplementary Extradition Treaty took effect, he would be available for extradition to the United Kingdom.

On September 25, 1986, Judge Peter K. Leisure, in an unreported decision, denied Doherty's petition and allowed the administrative appeal process to continue.<sup>226</sup> The Second Circuit affirmed Judge Leisure's ruling on December 23, 1986,<sup>227</sup> the day the Supplementary Extradition Treaty took effect. In an opinion by Judge Ralph Winter, the court held that its power to intervene in the ongoing administrative proceeding was "extremely limited," so long as there was "any reasonable foundation at

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the United States Court of Appeals for the Second Circuit, *INS v. Doherty*, 112 S. Ct. 719 (1992), at 23 [hereinafter Joint Appendix].

222. See Deportation Hearing Sept. 12, 1986, Tr. 47, *supra* note 221, reprinted in Joint Appendix, *supra* note 221, at 23.

223. See *id.* These concerns "at the highest levels of government" are an apparent reference to the Reagan-Thatcher meetings of December 22, 1984, and February 20, 1985. See *supra* notes 135-136 and accompanying text.

224. See *In re Doherty*, No. A26-185-231 (Transcript of Deportation Hearing, Sept. 19, 1986, Tr. 57 [hereinafter Deportation Hearing Sept. 19, 1986, Tr. #]), reprinted in Joint Appendix, *supra* note 221, at 48.

225. Specifically, Doherty argued that the INS was pursuing a frivolous administrative appeal and improperly delaying his deportation to the Republic of Ireland. See *Doherty v. Meese*, 808 F.2d 938, 941 n.3 (2d Cir. 1986).

226. See John Riley, *U.S. Refuses to Deport an IRA Member*, Nat'l L.J., Sept. 29, 1986, at 3.

227. See *Doherty*, 808 F.2d at 944.

all for the Attorney General's actions."<sup>228</sup> The court then went out of its way to express views on an issue not even before it. It interpreted the Attorney General's power to designate a country of deportation under section 243(a) of the INA very broadly, and announced in dicta that the scope of judicial review of an administrative decision rejecting an alien's designation of country would be narrow:

There are no statutory guidelines regarding what quality or quantity of prejudice to United States interests is necessary, or even what constitutes "interests." The requisite judgment requires an essentially political determination. . . . Consequently, apart from claims such as "fraud, absence of jurisdiction, or unconstitutionality," . . . the determination of the Attorney General is essentially unreviewable.<sup>229</sup>

The court also read section 243(a) to provide that, if an alien designated a country of deportation and his choice was rejected, the next choice belonged to the Attorney General.<sup>230</sup>

### 3. The BIA Affirms the Immigration Judge

Once the habeas corpus matter had been resolved, the parties turned their full attention back to the administrative forum. On February 11, 1987, the BIA heard oral argument on the Service's appeal. One month later, it issued a decision unanimously affirming the Immigration Judge and ordering Doherty deported to the Republic of Ireland.<sup>231</sup>

The Board first rejected the assertion that the Immigration Judge had erred in refusing to allow the Service to adduce additional evidence to show that Doherty was deportable on more grounds than he had conceded. It essentially agreed with Doherty that such proof would have unnecessarily prolonged the hearing.<sup>232</sup> Turning to Doherty's designa-

228. *Id.* at 942. The Second Circuit rejected Doherty's claim that the INS appeal to the BIA was frivolous, noting that "the novelty of the issues raised makes this case a particularly inappropriate occasion for judicial intervention in the administrative process." *Id.* at 941 n.3.

229. *Id.* at 943-44. Presumably, the Second Circuit would view the Attorney General's power as broad enough to send a German Jew back to the Third Reich. *See also* Basso, *supra* note 153, at 326, 333 (characterizing the court's decision as one of "virtually absolute deference," and concluding that, if the Attorney General's power to deport a PIRA suspect to the destination of the Attorney General's choice is as broad as the Second Circuit found it to be, the Supplementary Extradition Treaty may have been unnecessary).

230. Specifically, the court stated: "The implied corollary to the Attorney General's power to reject a designated country is the power to name the country to which the alien shall be deported, subject of course to that country's willingness to accept the alien." *Doherty*, 808 F.2d at 941.

231. *In re Doherty*, No. A26-185-231 (BIA, March 11, 1987 [hereinafter BIA March 11, 1987]), *reprinted in* Appendix, *supra* note 220 (all citations will be to Appendix pages).

232. *See id.* at 153a-54a. The BIA specifically stated the following:

An immigration judge . . . is not obligated to allow the Service to waste valuable time and resources proving superfluous charges and allegations. A respondent is no more deportable on seven charges than on two. . . . In this case, the

tion of Ireland, the Board found the INS's appeal "confusing" because "deportability and designation . . . are separate and distinct issues."<sup>233</sup> In addition, it observed that an alien's designation of a country, pursuant to section 243(a) of the INA, had never previously been rejected on the ground that it would be prejudicial to the interests of the United States. The BIA declined to reject Doherty's designation for that reason, noting that "the Service was granted a continuance to allow it to secure evidence of such interest, but it has produced none."<sup>234</sup>

When the Board released its decision on March 11, 1987, it was unaware that six days earlier the INS had filed a motion to supplement the record. That motion presented for inclusion in the file an affidavit from Associate Attorney General Stephen S. Trott (the "Trott Affidavit").<sup>235</sup> The Trott Affidavit, which was dated February 17, 1987, explained why in Mr. Trott's judgment Doherty's deportation to the Republic of Ireland would be prejudicial to the interests of the United States. The Service accordingly petitioned the Board to reopen the case and reconsider its ruling in light of this new evidence.

On May 22, 1987, the BIA granted the INS's request and reopened the case. However, after reviewing both the Service's motion and the Trott Affidavit, the Board affirmed its March 11th order. The BIA held that the affidavit did not constitute "previously unavailable evidence," as required under the BIA regulations,<sup>236</sup> and it again denied the INS's request to remand the case to the Immigration Judge. Moreover, the Board expressed particular concern over the INS's failure to explain the "extraordinary delay" in producing the Trott Affidavit:

[T]he Service's motion is completely silent as to the reasons for [the Trott Affidavit's] submission at this late date. This is an especially telling omission in light of the fact that the Service has repeatedly represented to the immigration judge that Mr. Doherty's case was of great

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respondent . . . conceded deportability on two charges. . . . The immigration judge saw nothing to be gained from proof of additional charges of deportability and, despite the Service's appeal, neither do we.

*Id.*

233. *Id.* at 154a.

234. *Id.* at 155a.

235. Mr. Trott did not execute his affidavit until eight days after the Board had heard oral argument. At that time, the INS may well have reassessed the strength of its position and decided that the evidentiary record needed some additional support.

As Assistant Attorney General in charge of the Justice Department's Criminal Division, Mr. Trott had previously characterized Judge Sprizzo's decision in the Extradition Hearing as "outrageous," and the "political offense" exception as "nonsense." *See supra* note 133 and accompanying text. He had also played a key role in negotiating the Supplementary Extradition Treaty with the British. *See Hearing before the Judiciary Subcommittee, supra* note 101, at 80 (remarks of Judge Sofaer) ("We worked very hard on this treaty, especially Mr. Trott.").

236. In relevant part, 8 C.F.R. § 3.2 (1992) provides that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . ."

interest and under review at high government levels in September 1986. The glacial pace at which any tangible proof of this interest was produced seems to belie any sense of urgency or responsibility on the part of the government to proceed promptly in this case.<sup>237</sup>

The Board also observed that Doherty had claimed Irish citizenship as early as February 1985.<sup>238</sup> It reasoned that the Service therefore should have been prepared well before the September 1986 hearing to contest Doherty's designation of the Republic of Ireland.<sup>239</sup>

The INS's motion did persuade two of the five Board members to switch their votes. The dissenters characterized the Trott Affidavit as "authoritative, material, and dispositive" on the issue of whether Doherty's deportation to Ireland would be prejudicial to the interests of the United States.<sup>240</sup> The dissenters also faulted the majority for becoming "entangled in the requirements of motion practice unnecessarily"<sup>241</sup> and for attempting "to equate the Service with the Associate Attorney General and to punish the former because the latter did not act more expeditiously."<sup>242</sup>

#### 4. Attorney General Meese Reverses the BIA

In most immigration cases, the BIA represents the highest level of administrative review within the Department of Justice.<sup>243</sup> Although the Attorney General retains authority to review personally all BIA decisions, that authority is rarely exercised.<sup>244</sup>

On May 29, 1987, the INS petitioned Attorney General Edwin Meese III to review the BIA's decision to deport Doherty to the Republic of Ireland. On October 28, 1987, following five months of inaction, the Attorney General agreed to accept the case.<sup>245</sup>

237. *In re Doherty*, No. A26-185-231 (BIA, May 22, 1987 [hereinafter BIA May 22, 1987]), reprinted in Appendix, *supra* note 220, at 140a (all citations will be to Appendix pages).

238. Actually, the BIA appears to have been unduly generous to the Service. Other parts of the record make it clear that the INS had actual notice of Doherty's claim to Irish citizenship from his original application for asylum, filed in June 1983. See also Dillon, *supra* note 39, at 183 (British knew as early as mid-1983 that Doherty was likely to seek deportation to the Republic of Ireland, in lieu of returning to the United Kingdom).

239. See BIA May 22, 1987, *supra* note 237, at 141a.

240. *Id.* at 144a (Board Member Morris, dissenting).

241. *Id.* at 145a (Board Member Morris, dissenting).

242. *Id.* at 146a (Board Member Morris, dissenting).

243. Under 8 C.F.R. § 3.1(d)(2) (1992), the Board's affirmance of an Immigration Judge's order of deportation would ordinarily render a case administratively final.

244. See 8 C.F.R. § 3.1(h)(1) (1992) (requiring the BIA to refer for review to the Attorney General all cases which (1) the Attorney General directs the BIA to refer to him; (2) the BIA believes should be so referred; or (3) the Commissioner of the INS requests be referred for review). In the past twenty years, the Attorney General has published fewer than a dozen opinions involving certification review of BIA decisions. Two of those are in the Doherty Case.

245. On December 3, 1987, while the issue of his designation of the Republic of Ireland was still pending before Attorney General Meese, Doherty petitioned the BIA to

On June 9, 1988, Attorney General Meese issued a written opinion (the "Meese Opinion"),<sup>246</sup> in which he held that deportation of Doherty to the Republic of Ireland would be prejudicial to the interests of the United States, and that Doherty should be deported instead to the United Kingdom.<sup>247</sup> The Meese Opinion did not address many of the procedural and evidentiary issues that had vexed the Immigration Judge and the BIA. For example, the Attorney General expressed "no opinion" regarding the BIA's decision to deny the Service's motion to supplement the record,<sup>248</sup> and announced that the procedural regulations that bind the BIA are not even applicable to an Attorney General when reviewing BIA decisions.<sup>249</sup> He also asserted that an Attorney General reviewing an immigration case retains full authority to receive additional evidence and to make de novo factual determinations.<sup>250</sup>

Turning to the merits, the Attorney General identified two reasons for rejecting Doherty's designation of the Republic of Ireland. First, his own de novo review of the factual record in the 1984 Extradition Hearing persuaded him that Doherty had committed serious crimes in the United Kingdom.<sup>251</sup> Second, Mr. Meese articulated that it was the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment in that state.<sup>252</sup>

The Attorney General further determined that deporting Doherty to the Republic of Ireland would injure American relations with the United Kingdom. In so ruling, he cited a letter he had received from Michael H. Armacost, Undersecretary of State for Political Affairs (the "Armacost

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reopen his deportation proceeding. Doherty asked the Board to remand his case to the Immigration Judge for further hearing, so that he might reassert his prior applications for asylum and withholding of deportation, and redesignate the country of deportation. As grounds for this relief, Doherty pointed to "changed circumstances": the December 1, 1987, implementation of a major change in Irish extradition law. For a discussion of the reopening of Doherty's case, see *infra* part IV.B.

246. See *In re Doherty*, No. A26-185-231 (Mem. Att'y Gen., June 9, 1988 [hereinafter Mem. Att'y Gen. June 9, 1988]), reprinted in Appendix, *supra* note 220, at 116a (all citations will be to Appendix pages).

247. See *id.*

248. See *id.* at 128a n.12.

249. See *id.* at 121a n.6.

250. See *id.* This assertion was surprising because it is wholly at odds with the notion of appellate review of a record created below. The regulation, 8 C.F.R. § 3.1(h)(2) (1992), is silent on the scope of review. In addition, prior to the Doherty Case, whenever an Attorney General had accepted certification review of a BIA decision on an immigration matter, the Attorney General had limited his review to legal issues and had not disturbed the BIA's factual findings. In each prior case where further factfinding had been necessary, the Attorney General had remanded the case to the BIA. See Brief for *Amici Curiae* Members of Congress at 2-3 n.3, *INS v. Doherty* (No. 90-925).

251. Judge Sprizzo, of course, had reviewed the same record, yet he had concluded that Doherty had committed unextraditable "political offenses," not common crimes. See *supra* part II.B.3.

252. See Mem. Att'y Gen. June 9, 1988, *supra* note 246, at 124a. The assumption that Northern Ireland is as democratic as the other parts of the United Kingdom was one that Senator Jesse Helms had been unwilling to make during the Senate's treaty ratification debate. See *supra* note 191 and accompanying text.

letter").<sup>253</sup> The Armacost letter stated that Judge Sprizzo's denial of Doherty's extradition had been met with "great disappointment" in the United Kingdom, and opined that the United Kingdom "would not welcome" a decision by the Attorney General to deport Doherty elsewhere. The letter also stated that the United Kingdom is the United States' closest partner in counter-terrorism efforts, and that failure to return Doherty to the United Kingdom could undermine those efforts. Finally, the letter cautioned that, "given the strength of British views on this issue," a determination by the executive branch not to deport Doherty to the United Kingdom "might well prejudice broader aspects of [the] bilateral relationship beyond cooperation in counter-terrorism activities." Mr. Meese agreed with those views.<sup>254</sup>

As a final matter, the Attorney General took note of Doherty's December 3, 1987, request to reopen his deportation proceedings. Mr. Meese remanded that motion to the BIA for its review, and expressed no opinion as to how the Board should decide it.<sup>255</sup>

### 5. The Second Circuit Affirms the Meese Opinion

Doherty appealed the Attorney General's decision, and the Second Circuit affirmed.<sup>256</sup> The court characterized the appeal as "somewhat curious" because Doherty's intervening motion to reopen the deportation proceeding showed that he had lost interest in deportation to the Republic of Ireland.<sup>257</sup> It then reiterated its prior statement that section 243(a) of the INA grants the Attorney General "broad discretion to determine what constitutes prejudice to national interests."<sup>258</sup> The court found that Attorney General Meese's decision was "surely within the scope" of this discretion to determine that deportation of Doherty anywhere other than to the United Kingdom "would harm our relationship with [that country] and would contradict our policy of punishing violence against democratic nations."<sup>259</sup>

The court also rejected Doherty's claim that the Attorney General had

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253. See Mem. Att'y Gen. June 9, 1988, *supra* note 246, at 126a. Mr. Armacost signed the Supplementary Extradition Treaty on behalf of the United States on June 25, 1985. See *supra* note 137. Unlike the Trott Affidavit, to which Doherty was given an opportunity to reply, Doherty had no notice of the Armacost letter.

254. See Mem. Att'y Gen. June 9, 1988, *supra* note 246, at 126a-27a.

255. See *id.* at 129a-30a; *infra* part IV.B.

256. See *Doherty v. United States Dep't of Justice*, 908 F.2d 1108, 1113-14 (2d Cir. 1990), *rev'd on other grounds*, 112 S. Ct. 719 (1992).

257. See *id.* at 1113; *supra* note 245. The Second Circuit held this designation appeal in abeyance pending administrative consideration of Doherty's motion to reopen. After Doherty's motion to reopen was denied by Attorney General Thornburgh, Doherty filed a second appeal, which the court consolidated for briefing and decision purposes with the earlier designation appeal. Although this Article discusses the two appeals separately—in parts IV.A and IV.B, respectively—it should be understood that the appeals were decided simultaneously.

258. *Doherty*, 908 F.2d at 1113; see *supra* notes 229-30 and accompanying text.

259. *Doherty*, 908 F.2d at 1113. The court accepted, but did not analyze, the government's articulation of the policy.

committed reversible procedural error by relying on the Armacost letter, evidence which had not been in the record when the case was before the BIA. The court acknowledged that "it might have been preferable" for the Attorney General to have given Doherty an opportunity to comment on the letter, but it concluded that the Armacost letter "merely confirmed" the Attorney General's own conclusions about the foreign policy implications of the case, and was "of no consequence to the outcome of the decision."<sup>260</sup>

## 6. Analysis

This phase of the Doherty Case warrants several observations. First, and most obvious, is that Doherty took a calculated risk by conceding his deportability and designating the Republic of Ireland. Thereafter, he could never quite overcome the perception that he had rolled the dice and lost. For its part, the INS would never tire of arguing that Doherty's decision to seek immediate deportation to Ireland was based on advice of counsel, and should thus be viewed as a knowing and voluntary waiver of his earlier claim to asylum.<sup>261</sup>

The second is that the Justice Department's handling of the matter gave the appearance of organizational confusion or disarray. When the Immigration Judge asked the Service for evidence that Doherty's deportation to Ireland would prejudice American national interests, the Trott Affidavit was not forthcoming for five months—virtually until the eve of a BIA decision adverse to the government. When the INS later asked the Attorney General to review the BIA's decision, it took Mr. Meese five months just to agree to do so. Mr. Meese's opinion on the merits was released less than a month before he announced his resignation from office. The overall impression is that Doherty's case was lost in the bureaucracy, became important to the Administration only when defeat was imminent, and was resolved only as one of the loose ends that Mr. Meese needed to tie up when he cleaned out his desk. Others have suggested that Mr. Meese's tenure at Justice was marked by disorganization.<sup>262</sup>

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260. *Id.* at 1113-14.

261. *See, e.g., infra* note 293 and accompanying text (Attorney General Thornburgh agrees with INS that Doherty waived his claims to asylum and withholding).

262. *See* Andy Pasztor, *Meese's Avoidance Of Criminal Charges Won't End Justice Department Turmoil*, *Wall St. J.*, Apr. 4, 1988, at 2.

Persistent morale problems afflicting the Justice Department, coupled with a substantial erosion of support for Mr. Meese among both Republicans and Democrats in Congress, are likely to bring months of frustration, policy gridlock and political sparring for the nation's chief law enforcement official and the agency he heads. . . . Faced with such conflicts, the attorney general has clung stubbornly to his job the same way he has run the Justice Department the past three years: trusting only a small group of conservative aides, generally treating critics with disdain and, above all, relying on his ideological and personal ties to Mr. Reagan.

*Id.*; *see also* *Washington Wire*, *Wall St. J.*, Apr. 15, 1988, at 1 (referring to "Meese's Morass" at the "demoralized Justice Department.").

The Department's administrative handling of Doherty's case seems consistent with that perception.

Third, the tenor of the Meese Opinion reads nothing like the review by a cabinet officer of the decision of an inferior tribunal that it purports to be. Rather, in tone and substance, it was really a rebuttal to Judge Sprizzo's extradition decision by the losing litigant in that case. Mr. Meese barely addressed the issues as framed by the Immigration Judge and the BIA. Instead, he focused his attention on refuting the reasoning of Judge Sprizzo.

The Attorney General's reliance on the Trott Affidavit and the Armacost letter is also troubling. Neither document was before the Immigration Judge. The Board received the Trott Affidavit only at the last moment, and the submission of the Armacost letter to Mr. Meese was unknown to Doherty. While immigration proceedings are not governed by the Administrative Procedure Act,<sup>263</sup> they are still subject to constitutional due process concerns.<sup>264</sup> Mr. Trott and Mr. Armacost had been the administration's "point men" in the extradition controversy—i.e., critics of Judge Sprizzo's decision and negotiators with the British on a treaty that sought to undo that decision. By relying so heavily on the untimely evidence they provided, Mr. Meese eliminated any remaining distinction between the conduct of foreign relations and the adjudication of the merits of an alien's deportation case.<sup>265</sup>

Fourth, the Second Circuit's affirmance of Mr. Meese's opinion should not be given the weight of precedent if a national interest challenge to an alien's designation of country should arise in other circuits.<sup>266</sup> Once Doherty had moved to reopen his deportation case in December 1987, his designation of the Republic of Ireland no longer presented a live case or controversy. On that basis alone, Doherty might have abandoned his appeal or the Second Circuit could have simply dismissed it as moot. If the mootness issue was briefed by the parties, the court's opinion never discussed it. Then, too, there was the insurmountable problem posed by Judge Winter's dicta in *Doherty v. Meese*.<sup>267</sup> In that case, the court had

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263. 5 U.S.C. § 551-59 (1988 & Supp. II 1990).

264. See *Marcello v. Bonds*, 349 U.S. 302 (1955).

265. The procedures would have been arguably more objective if Attorney General Meese had given Doherty an opportunity to respond to the Armacost letter, and if the INS had not used evidence supplied by two officials who were directly involved in the treaty negotiations. However, it seems likely that the Justice Department was not overly concerned with its appearance, and that foreign policy was the engine that drove the adjudication.

In some respects, the Doherty Case resembles *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992), *cert. denied*, 61 U.S.L.W. 3059 (U.S. Oct. 13, 1992), another proceeding with sensitive foreign policy overtones, in which a Reagan Administration cabinet officer acted aggressively in the name of national security interests.

266. One commentator has suggested that this aspect of the case was correctly decided. See William Roebuck, Comment, *Recent Development*, 20 Ga. J. Int'l & Comp. L. 665, 675, 680-82 (1990).

267. 808 F.2d 938, 943-44 (2d Cir. 1986).

articulated an extremely narrow and deferential standard of review that would govern the disallowance on national interest grounds of an alien's designation of country of deportation when a proper case came before the Circuit.<sup>268</sup> With that rabbit already in the hat, it seems unlikely that any alien could ever persuade the Second Circuit to overturn an Attorney General's rejection of the country of designation under section 243(a).

Support for that theory may be found in the appellate panel's lack of interest in the procedural issues raised by Doherty: the Service's last-minute production of the Trott Affidavit, which had so angered the BIA, or the almost magical appearance of the *ex parte* Armacost Letter to support the reasoning of the Meese Opinion.<sup>269</sup>

### B. *Doherty Moves to Reopen His Deportation Proceeding*

On December 3, 1987, while the issue of his designation of the Republic of Ireland was still pending before Attorney General Meese, Doherty petitioned the BIA to reopen his deportation proceeding. Doherty desired to reassert his prior applications for asylum and withholding of deportation,<sup>270</sup> and to redesignate his chosen country of deportation. As grounds for this relief, Doherty contended that the Irish Extradition Act (the "IEA"), which had taken effect two days earlier, would operate to ensure that the Republic of Ireland would extradite him to the United Kingdom were he deported to Ireland.<sup>271</sup>

Doherty asserted that the IEA amended and qualified the existing Irish law, so as to remove from the Irish courts the authority to decide whether a given offense was political or connected with a political

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268. See *supra* notes 229-30, 258, and accompanying text.

269. Even assuming that an agency has used extra-record evidence, reversal is not required absent a showing of substantial prejudice. See *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 528-30 (1946). But see *Wiscope S.A. v. Commodity Futures Trading Comm'n*, 604 F.2d 764, 768 (2d Cir. 1979) (reversing a federal agency decision for failure to turn "square corners" ordinarily required in sensitive international issues).

270. See *supra* notes 60, 245. Congress has provided two forms of relief for persons who come to the United States because they fear persecution in their homeland: (1) asylum, see 8 U.S.C. § 1158(a) (1988), and (2) withholding of deportation, see 8 U.S.C. § 1253(h) (1988). The Attorney General can grant asylum upon the determination that an alien is also a refugee—i.e., an alien that is unable to return to his homeland because of persecution or a well-founded fear of persecution. However, not all refugees are entitled to asylum; a grant of asylum remains discretionary with the Attorney General. In contrast, withholding of deportation offers a limited form of mandatory relief; it prohibits the Attorney General from returning an alien to a country where the alien would be subject to persecution, but leaves open the alternative of deporting the alien to a non-threatening third country.

271. By enacting and then implementing the IEA, the Republic of Ireland fulfilled its promise in the Hillsborough Accord of November 1985, and embraced the 1977 European Convention on the Suppression of Terrorism. See *supra* note 162; see also Duffy, *supra* note 97, at 310-17 (explaining that the passage of the Irish Extradition Act by the Irish Parliament gave effect to the European Convention).

offense. He further averred that, had he been deported to the Republic of Ireland prior to December 1, 1987, any subsequent request by the British government for his extradition from Ireland would have been considered pursuant to the Irish statutes and decisional law which preexisted the Extradition Act.<sup>272</sup> Doherty contended that "under those laws, [he] would have been able to resist extradition [from Ireland to the United Kingdom] based upon the same sort of political offense exception which precluded the British government from obtaining his extradition from the United States."<sup>273</sup> Finally, he accused the INS and Attorney General Meese of delaying the resolution of his case in order to ensure that, at such time as he was eventually deported to Ireland, his subsequent extradition to the United Kingdom would be a foregone conclusion under the new Extradition Act.<sup>274</sup>

In the Service's view, Doherty's invocation of the new Irish extradition law was disingenuous. On several occasions in the deportation proceeding, Doherty had attempted to convince the BIA to sustain the Immigration Judge by arguing that, pursuant to pre-1987 decisions of the Irish Supreme Court narrowing the "political offense" exception, he would have been subject to extradition from Ireland to the United Kingdom.<sup>275</sup> The government implied that the real motive behind Doherty's change of strategy was Attorney General Meese's October 28, 1987, announcement that he would review the BIA's decision in Doherty's behalf. At that juncture, the government suggested, Doherty knew that he was unlikely to be deported to Ireland, and needed to try a different tack.

### 1. The BIA Grants Doherty's Motion

On November 14, 1988, following eleven months of consideration,<sup>276</sup>

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272. See *In re Doherty*, No. A26-185-231 (Affidavit of Mary Boresz Pike (Doherty's attorney) Dec. 2, 1987, ¶¶ 24-30 [hereinafter Affidavit Dec. 2, 1987, ¶ #]), reprinted in Joint Appendix, *supra* note 221, at 57; see also *Irish Extradition Developments*, *supra* note 97, at 195:

Although the legislation was enacted in January 1987, its implementation was suspended until 1 December subject to the proviso that resolutions of both Houses of the [Irish Parliament] could either bring it into force at an earlier date or provide for further postponement. This delay was to allow time for reforms in the Diplock Courts in Northern Ireland, for which the Irish Government was pressing, to be introduced by the United Kingdom. By December pressure on these issues appeared fruitless but security developments on both sides of the border between Northern Ireland and the Republic meant that continued non-implementation was seen as politically impossible.

(footnotes omitted).

273. Affidavit Dec. 2, 1987, ¶ 31, *supra* note 272, reprinted in Joint Appendix, *supra* note 221, at 57.

274. See *id.* ¶¶ 24, 32, reprinted in Joint Appendix, *supra* note 221, at 57.

275. See Petitioner's Brief at 47, *INS v. Doherty*, (April 1991) (No. 90-925); Petitioner's Reply Brief at 3, *INS v. Doherty*, (July 1991) (No. 90-925).

276. The BIA initially expressed uncertainty about whether it had jurisdiction to consider Doherty's motion while other aspects of his case were pending before Attorney General Meese. Thus, by order of February 2, 1988, the BIA had forwarded Doherty's motion to the Attorney General for action. On June 9, 1988, the Attorney General re-

the BIA granted Doherty's motion to reopen by a three to two vote.<sup>277</sup> The Board did not address Doherty's claim that a change in Irish extradition law warranted reopening. Instead, as described below, it relied on other grounds that Doherty had not invoked. The BIA concluded that, at the time of his hearing in September 1986, Doherty had a reasonable expectation that he would be deported to the Republic of Ireland, and that deportation to the United Kingdom appeared unlikely. Given the state of the law at that time, the BIA held that Doherty's failure to pursue asylum was excusable because he "could not have been expected to anticipate that he would not be deported to the country of [his] choice."<sup>278</sup> In addition, the Board concluded that Attorney General Meese's opinion of June 9, 1988, which disallowed Doherty's designation of Ireland, constituted "changed circumstances."<sup>279</sup>

After reviewing affidavits from Doherty's mother and his attorney, and other evidence which Doherty had submitted with his motion to reopen, the Board held that Doherty had established a prima facie case that he was likely to be persecuted if returned to Northern Ireland.<sup>280</sup> The BIA dismissed as premature the INS' claim that Doherty had engaged in conduct which would ultimately render him either ineligible for withholding or unworthy of asylum, and stated that "[t]he Service will have the opportunity to prove its allegations upon reopening of the proceedings."<sup>281</sup>

## 2. Attorney General Thornburgh Reverses the BIA

On December 5, 1988, the INS once again took the unusual step of certifying Doherty's case to the Attorney General for review. Attorney General Dick Thornburgh, Mr. Meese's successor, accepted the request

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manded Doherty's motion to the BIA, expressing no views as to how the BIA should resolve the matter except to recommend that it be given priority in view of the case's age. See Mem. Att'y Gen. June 9, 1988, *supra* note 246, at 129a-30a; text accompanying *supra* note 255.

277. See *In re Doherty*, No. A26-185-231 (BIA, Nov. 14, 1988 [hereinafter BIA Nov. 14, 1988]), reprinted in Appendix, *supra* note 220, at 92a (all citations will be to Appendix pages).

278. *Id.* at 99a.

279. *Id.*

280. See *id.*

281. *Id.* at 100a. The BIA did not permit Doherty to redesignate the country of deportation.

The dissenting members of the Board argued that Doherty had failed to make a prima facie showing of persecution if returned to the United Kingdom, and that reopening was unwarranted in the exercise of discretion because Doherty was a terrorist and a member of a terrorist organization. See *id.* at 101a-03a.

This dissent, in turn, prompted a strongly worded special concurrence from Board Member Michael J. Heilman. He stated that "[m]any persons who have engaged in violence, or who have been accused of engaging in violence, have been granted asylum in the United States by the very Department of Justice and the very [INS] which have so strenuously tried to deport Mr. Doherty." *Id.* at 108a. In illustration, Board Member Heilman cited *Blanco-Lopez v. INS*, 858 F.2d 531 (9th Cir. 1988), a recent decision in which the Hon. Stephen S. Trott, by then a judge on the Ninth Circuit, had joined. See BIA Nov. 14, 1988, *supra* note 277, at 109a.

for certification on February 22, 1989, and afforded Doherty and the Service an opportunity for further briefing.

On June 30, 1989, the Attorney General disapproved the BIA's order and denied Doherty's motion to reopen.<sup>282</sup> In effect, his ruling rendered Doherty's concession of deportability administratively final, and gave effect to Mr. Meese's determination that Doherty should be deported to the United Kingdom. Mr. Thornburgh's exhaustive opinion (the "Thornburgh Decision") set out five separate reasons why Doherty should not be permitted to continue immigration proceedings.<sup>283</sup>

The Attorney General first rejected the BIA's *sua sponte* determination that the Meese Opinion of June 9, 1988, constituted changed circumstances warranting reopening of the deportation proceedings. Mr. Thornburgh found it unlikely, as a general matter, that an Attorney General's exercise of statutory authority to reject a deportee's designation of country could ever constitute new evidence.<sup>284</sup> In the instant case, he continued, deportation to the country designated by the alien had been vigorously opposed by the Service, which had also "represented that there [was] interest at the highest levels of the Government that the alien not be deported to the country designated."<sup>285</sup> Under these circumstances, Attorney General Thornburgh found it "inconceivable" that anyone represented by counsel could not know of the risk that the Attorney General would deny deportation to Ireland to protect the interests of the United States.<sup>286</sup> Furthermore, Mr. Thornburgh added, if "[t]he ultimate decision in an administrative process . . . constitut[ed] 'new' evidence to justify reopening . . . there could never be finality in the process."<sup>287</sup>

The Attorney General next turned to Doherty's argument that the IEA warranted reopening, an issue not addressed by the BIA. In essence, Mr. Thornburgh reasoned that Doherty had committed a colossal blunder by misreading the applicable Irish law. Mr. Thornburgh began by noting that the IEA simply gave effect in domestic Irish law to the provisions of the 1977 European Convention on the Suppression of Terrorism. He observed that the Irish government had expressed its intention to sign the European Convention in November 1985 and had signed it in February 1986—more than six months before Doherty with-

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282. See *In re Doherty*, No. A26-185-231 (Mem. Att'y Gen., June 30, 1989 [hereinafter Mem. Att'y Gen. June 30, 1989]), reprinted in Appendix, *supra* note 220, at 46a (all citations will be to Appendix pages).

283. The invocation of so many alternate grounds is a decisional tactic that had been criticized by the D.C. Circuit in another context: "almost as if to ensure a preferred result, the . . . judgment [below] is supported by layer upon layer of alternative holdings on the issues . . ." See *Southern Pac. Communications Co. v. AT&T*, 740 F.2d 980, 983-84 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985).

284. See Mem. Att'y Gen. June 30, 1989, *supra* note 282, at 58a.

285. *Id.* at 58a-59a.

286. See *id.* at 66a.

287. *Id.* at 67a.

drew his applications for asylum and for withholding of deportation. Against this background of well-publicized events, the Attorney General concluded that passage of the IEA in January 1987 and its implementation on December 1, 1987, were "neither sudden nor unforeseeable."<sup>288</sup>

The Attorney General also reviewed the extradition decisions of the Irish courts and concluded that Doherty would have been subject to extradition from Ireland to the United Kingdom even before Ireland became a party to the European Convention. Thus, he reasoned, Ireland's subsequent adoption and implementation of the Extradition Act neither created nor materially increased the risk that Doherty would be extradited to the United Kingdom if deported to Ireland.<sup>289</sup> In any event, Mr. Thornburgh concluded, the issue of Irish law had become irrelevant after June 9, 1988, once Attorney General Meese had ordered Doherty deported to the United Kingdom, not Ireland.<sup>290</sup>

As a third ground for refusing to reopen, Mr. Thornburgh also rejected the new evidence Doherty had offered in support of his renewed claim for asylum and withholding. He reasoned that such evidence was "cumulative of that . . . previously presented, discoverable long ago, or not material in light of the evidence that was presented."<sup>291</sup>

288. *Id.* at 59a-60a, 67a-74a; *see also supra* note 162 (discussing events that led up to the IEA).

289. *See* Mem. Att'y Gen. June 30, 1989, *supra* note 282, at 58a-59a, 66a-74a.

290. *See id.* at 74a.

291. *Id.* at 75a. Mr. Thornburgh refused to consider a 1988 report by a Nobel Peace Prize-winning human rights group concerning political persecution in Northern Ireland. In explanation, he stated the following:

[A]lthough the Amnesty [International] Report itself first appeared in 1988, [Doherty] could, with due diligence, have presented significant amounts of the information contained in it at a much earlier stage of these proceedings. He offers no reasonable explanation for his failure to do so.

Amnesty International's concerns over the causes of the incidents against Irish republic groups do not bear on the treatment of individuals held in prison for criminal activities. Assuming for the purposes of this motion that British security forces have on occasion sought to kill suspected republican opposition members who were outside their custody, it does not follow that an individual actually in the keeping of British forces would also be exposed to such a threat.

*Id.* at 76a, 76a n.31 (referring to Amnesty Int'l, United Kingdom/Northern Ireland: Killings by Security Forces and "Supergrass" Trials (1988)). The Attorney General also rejected an affidavit from Doherty's mother, in which she described her family's history of mistreatment at the hands of the British security forces and unionist elements outside the government. He reasoned as follows:

The affidavit's references to the conduct of nongovernmental "unionist" elements relate generally to the unstable conditions in Northern Ireland, but do not substantiate a claim that [Doherty] would be threatened by persecution at the hands of British *governmental* authorities.

. . . [T]he affiant states that on two unidentifeid [sic] occasions on which her daughter was detained by the police, "the interrogators talked about [Doherty] and what would be done to him upon his return."

. . . [T]he statements attributed to the security personnel are ambiguous. Bearing in mind that [Doherty] has been convicted of a murder, "abusive" statements about him by the police, or statements about "what would be done

Fourth, the Attorney General also denied reopening on the alternate ground that Doherty had explicitly waived his claims to asylum and withholding at the September 1986 deportation hearing. Mr. Thornburgh characterized Doherty's waiver as part of a calculated plan to ensure his immediate deportation to the Republic of Ireland before the United Kingdom ratified the Supplementary Extradition Treaty.<sup>292</sup> In the Attorney General's view, "the integrity of the administrative process" outweighed Doherty's interest in withdrawing an explicit waiver made upon advice of counsel.<sup>293</sup>

Finally, the Attorney General declined to reopen the case on the ground that Doherty would not ultimately be entitled either to asylum or withholding. Mr. Thornburgh did not dispute the BIA's finding that Doherty had established *prima facie* eligibility for the relief sought. Instead, he ruled that it was unnecessary for him to address that issue in light of *INS v. Abudu*.<sup>294</sup>

Noting that a grant of asylum is discretionary, Mr. Thornburgh ruled that he would not grant Doherty asylum. Among other reasons, he determined that it was in the foreign policy interests of the United States to deport Doherty to the United Kingdom.<sup>295</sup>

to him" if he were returned, do not have to be understood as implied threats of persecution on forbidden grounds.

*Id.* at 76a n.32, 78a n.37 (citations omitted). *But cf.* *Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992) (holding that use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the prisoner does not suffer serious injury); *id.* at 1003 (Blackmun, J., concurring) (further proposing that nothing in the Eighth Amendment limits the definition of injury constituting cruel and unusual punishment to "physical injury" and, thus, even fear of beating may be enough).

292. *See* Mem. Att'y Gen. June 30, 1989, *supra* note 282, at 79a-80a.

293. *Id.* at 79a.

294. 485 U.S. 94 (1988); *see* Mem. Att'y Gen. June 30, 1989, *supra* note 282, at 64a n.21. Under *Abudu*, the BIA (or the Attorney General) can deny a motion to reopen by skipping ahead of the threshold concerns (*prima facie* case or reasonable explanation) and by determining that the movant would not ultimately be entitled to discretionary relief (here, asylum). *Abudu* makes clear that the opportunity to "skip ahead" is not available to resolve motions for mandatory relief (here, withholding). *See Abudu*, 485 U.S. at 104-06.

295. *See* Mem. Att'y Gen. June 30, 1989, *supra* note 282, at 65a-67a. In essence, the Attorney General turned the humanitarian remedy of asylum into a political and foreign policy tool that could be used to favor the United States' allies and chastise its enemies. *But see* Brief for *Amicus Curiae* International Human Rights Law Group at 35, *INS v. Doherty*, 112 S. Ct. 719 (1992) (No. 90-925) ("The fatal flaw in this position is that there is no American 'foreign policy' that specifically favors return of criminals for punishment other than that expressed in the extradition treaties of this nation."); Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 Utah L. Rev. 279, 283 (indicating that the Refugee Act of 1980 was intended to end the executive branch's use of asylum as a foreign policy tool).

Eighteen months after Attorney General Thornburgh handed down his decision, the government stipulated that the fact that an individual is from a country the United States supports or with which it has friendly relations is irrelevant to the determination of whether an applicant is eligible for asylum based on a well-founded fear of persecution. *See American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991). Mr. Thornburgh's decision in the Doherty Case was at some odds with this stipulation

The Attorney General also found Doherty ineligible for withholding of deportation under two statutory exceptions stemming from his PIRA membership and rank, and his offenses in Northern Ireland.<sup>296</sup> Mr. Thornburgh took official notice of portions of the record in *McMullen v. INS*,<sup>297</sup> to which Doherty was not a party, and gave it collateral estoppel effect against Doherty. He concluded from the evidence in the *McMullen* record that the PIRA was a terrorist organization and had committed terrorist acts against civilians in a manner that was not protected by the "political offense" exception. He then attributed these PIRA actions to Doherty, under general principles of conspiracy law: "[Doherty's] membership in the PIRA makes him a co-conspirator in the PIRA's effort to overthrow British rule in Northern Ireland by violent means, and hence responsible for any *non-political* crimes his co-conspirators commit in pursuit of that objective."<sup>298</sup> On this basis, Mr. Thornburgh found serious reasons for believing that Doherty had probably committed grave non-political crimes and had assisted in the persecution of others on account of their political opinion.

### 3. The Second Circuit Overturns the Thornburgh Decision

Doherty appealed the Thornburgh Decision to the Second Circuit, where *amicus curiae* briefs were filed on his behalf by numerous members of Congress and by the American Immigration Lawyers Association. On June 29, 1990, a divided panel of the Second Circuit reversed the Thornburgh Decision, and remanded the case to the Justice Department

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because it essentially reintroduced foreign policy considerations through the back door (i.e., using the Attorney General's discretion to deny asylum to an otherwise eligible person).

296. Under 8 U.S.C. § 1253(h)(1) (1988), "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Under subsection (h)(2), however, that provision "shall not apply to any alien if the Attorney General determines that (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" or "(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to [his arrival in the United States]." 8 U.S.C. § 1253(h)(2) (1988).

297. 788 F.2d 591, 599 (9th Cir. 1986).

298. Mem. Att'y Gen. June 30, 1988, *supra* note 282, at 85a n.46; *see also id.* at 83a-91a (discussing *McMullen*). The breadth of this ruling warrants two observations. First, Mr. Thornburgh's invocation of conspiracy law principles to hold Doherty accountable for PIRA acts in which he did not personally participate (including, one assumes, acts that occurred during the period of his imprisonment) stands in sharp contrast to the United Kingdom's handling of the M-60 Machine-Gun Case. When Doherty was tried in Belfast in 1981, he was not charged with conspiracy even for PIRA attacks that had used the same weapon. *See supra* note 48. Second, not even Nazi death camp guards are held to the stringent conspiracy standards Mr. Thornburgh applied against Doherty here. *Cf. Petkiewytch v. INS*, 945 F.2d 871, 877-79 (6th Cir. 1991) (discussing conflicting circuit interpretations of the need for the government to prove a deportee was actively and personally involved in misconduct under the Holtzman Amendment).

with instructions to give Doherty a hearing.<sup>299</sup> Judge George C. Pratt wrote the majority opinion, and Judge J. Edward Lumbard issued a strong dissent.

As a preliminary matter, the majority noted that the Attorney General had not disturbed the BIA's finding that Doherty had established a prima facie case of eligibility for substantive relief from deportation. It thus assumed, for purposes of the appeal, that Doherty had met this burden.<sup>300</sup>

The court concluded that Mr. Thornburgh had abused his discretion in ruling that Doherty had not demonstrated a change in circumstances that would justify reopening his case. It held that the Attorney General had relied on a mistaken view of the law, as neither the regulations nor the applicable decisions require that new evidence offered by an alien in support of reopening must be "unforeseeable."<sup>301</sup> The court also expressed doubt that the intervening circumstances in Doherty's case were as "foreseeable" as the government suggested:

Until this case, . . . an alien's designation of a country of deportation had never been rejected by the attorney general on the basis of prejudice to national interests after the designation had been approved by the [BIA]. His power to make such a decision is expressly conferred by the statute, to be sure, but one could hardly say that its exercise in this case was "foreseeable" when it had never once, in over 30 years, been invoked.<sup>302</sup>

The court also criticized the Attorney General for taking a different view of the facts than had the BIA. In a controversial passage, it then deferred to the BIA's judgment, rather than the Attorney General's, as to when reopening of a deportation proceeding is warranted.<sup>303</sup>

The court then reviewed Mr. Thornburgh's ruling that reopening was unwarranted because Doherty would not ultimately be entitled to withholding of deportation. The mandatory nature of the withholding remedy suggested to the court that a determination of an applicant's ultimate entitlement to relief was improper in the context of a motion to reopen.<sup>304</sup> Focusing on the types of issues raised by Doherty's claim for withholding of deportation, the court stated that "the need for an evidentiary hearing should be obvious" as "[the] issues all raise formidable

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299. See *Doherty v. U.S. Dep't of Justice, INS*, 908 F.2d 1108, 1115 (2d Cir. 1990), *rev'd sub. nom. INS v. Doherty*, 112 S. Ct. 719 (1992).

300. See *id.*

301. *Id.*

302. *Id.* at 1115-16. The Second Circuit did not address those aspects of the Thornburgh Decision rejecting the IEA and Doherty's proffered new evidence as grounds for reopening. Instead, it focused on the issue of "foreseeability" as discussed by Mr. Thornburgh. See *id.* at 1116.

303. See *id.* In the dissent, Judge Lumbard faulted the majority for giving more deference to the decision of an inferior administrative board than to the Attorney General's decision disproving it. See *id.* at 1125.

304. See *id.* at 1116-17.

questions of fact that cannot be adequately resolved in the absence of an evidentiary record."<sup>305</sup> The court concluded that "it was improper for the attorney general to prejudge the merits of Doherty's claim for withholding of deportation without the benefit of a record," and it ordered that claim to proceed to a hearing.<sup>306</sup>

The court found that the need for a hearing on Doherty's asylum claim "presents a more difficult question, because asylum, unlike withholding[,] . . . is a discretionary remedy"<sup>307</sup> and *INS v. Abudu*<sup>308</sup> permits the Attorney General to skip ahead.<sup>309</sup> It then analyzed the 1967 United Nations Protocol Relating to the Status of Refugees,<sup>310</sup> and the legislative history of the Refugee Act of 1980,<sup>311</sup> which revised American standards and procedures governing asylum.<sup>312</sup> It concluded that Congress intended, in 1980, "to insulate the asylum process from the influences of politics and foreign policy,"<sup>313</sup> and that Attorney General Thornburgh "based his decision in large part on the types of geopolitical concerns that [C]ongress intended to eliminate from asylum cases."<sup>314</sup> In so doing, the court concluded Mr. Thornburgh had "seriously exceeded his discretion."<sup>315</sup> Thus, the court found that Doherty was also entitled to an asylum hearing.<sup>316</sup>

The court saved its harshest criticism for Mr. Thornburgh's ruling that Doherty had "waived" his right to apply for relief from deportation:

We find the government's professed concern for the "integrity of the administrative process" unconvincing in light of its own actions in this case. The government's use of administrative and judicial processes has been exhaustive, to say the least. . . . [T]he government itself moved to reopen the case at an earlier stage of the administrative proceedings . . . [and] the certification procedure itself, a rarely used pro-

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305. *Id.* at 1117.

306. *Id.* In the dissent, Judge Lumbard read 8 U.S.C. § 1253(h)(2) as mandating that the Attorney General deny withholding relief if an alien failed any of the tests in § 1253(h)(2)(A) through (D). In his view, the 1984 Extradition Hearing record was replete with Doherty's admissions of § 1253(h)(2) violations. Judge Lumbard found the Attorney General's determination to be "a model of a reasoned decision based on the record," and he would have affirmed the Attorney General's refusal to reopen on the withholding claim. *Id.* at 1128-29.

307. *Id.* at 1117.

308. 485 U.S. 94 (1988).

309. *See Doherty*, 908 F.2d at 1117.

310. Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

311. Pub. L. No. 96-212, 94 Stat. 102 (1980).

312. *See Doherty*, 908 F.2d at 1118-19. Judge Lumbard's dissent focused on the text of the Refugee Act, which in his view placed "no restrictions on [the Attorney General's] discretion." *Id.* at 1126. He faulted the majority for dwelling on what the "historiography" of the legislative history "supposedly indicates." *Id.*

313. *Id.* at 1118.

314. *Id.* at 1121.

315. *Id.*; *see also* Note, *Prisoners of Foreign Policy: An Argument for Ideological Neutrality in Asylum*, 104 Harv. L. Rev. 1878, 1896-97 (1991) (arguing that Mr. Thornburgh's reliance on foreign policy considerations was improper).

316. *See Doherty*, 908 F.2d at 1121.

cedural device that is removed from normal administrative channels, has twice been invoked by the attorney general with respect to Doherty.

In short, it would be unfair to deny a motion to reopen for what amounts to a dubious procedural argument where the alien has otherwise satisfied the standards for reopening and where the government's own conduct in the case has demonstrated less-than-perfect adherence to procedural formalities. The "sporting theory of justice" has no place in deportation proceedings.<sup>317</sup>

#### 4. The Supreme Court Reinstates the Thornburgh Decision

At the government's request, and over Doherty's opposition, the Supreme Court granted certiorari.<sup>318</sup> On January 15, 1992, the Court reversed the Second Circuit, after concluding that the appeals court had "placed a much too narrow limit" on the Attorney General's authority to deny motions to reopen deportation proceedings.<sup>319</sup>

In part I of the Court's opinion, five Justices enunciated certain broad principles.<sup>320</sup> The opinion noted that no statutory provision governs the reopening of deportation proceedings, and asserted that the authority for such motions "derive[s] solely from regulations promulgated by the Attorney General."<sup>321</sup> It then stressed that the Attorney General has broad discretion to grant or deny motions to reopen which, in any event,

317. *Id.* at 1122 (quoting *In re Martinez-Solis*, 14 I. & N. Dec. 93-95 (BIA 1972)).

318. *See INS v. Doherty*, 111 S. Ct. 950 (1991). *Amicus curiae* briefs on Doherty's behalf were then filed with the Supreme Court by the American Civil Liberties Union, the American Immigration Lawyers Association, Amnesty International, the International Human Rights Law Group, the United Nations High Commissioner for Refugees, and 132 members of Congress.

319. *See INS v. Doherty*, 112 S. Ct. 719, 724 (1992).

320. The majority opinion was authored by Chief Justice William Rehnquist. Justices White, Blackmun, O'Connor, and Kennedy joined in part I.

321. *Doherty*, 112 S. Ct. at 724. The majority's statement that the regulations were "promulgated by" the Attorney General is difficult to square with the earlier decisions by Mr. Meese and Mr. Thornburgh, which emphasized that the regulations were the BIA's and not the Attorney General's. *See* Mem. Att'y Gen. June 9, 1988, *supra* note 246, at 121a n.6:

[T]he regulations governing the BIA are not applicable to the Attorney General. Thus, even after having rendered a decision, if the Attorney General was presented with a motion to reconsider, or a motion to remand as the BIA was, he would not be governed by 8 C.F.R. 3.2 and 3.8 in deciding that motion;

Mem. Att'y Gen. June 30, 1989, *supra* note 282, at 55a ("The BIA has promulgated regulations governing its consideration of motions to reopen proceedings. *See* 8 C.F.R. §§ 3.2, 3.8 . . . . These regulations, however, apply only to the BIA, not to the Attorney General, although of course the Attorney General may refer to these regulations when considering a motion to reopen.")

The distinction is significant in light of the Court's recent jurisprudence as to which administrative decisionmakers ought to get judicial deference in the case of conflicting, but reasonable, interpretations of regulations. *See* *Martin v. OSHRC*, 111 S. Ct. 1171, 1176-79 (1991); *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2539-40 (1991) (Scalia, J., dissenting).

are especially disfavored.<sup>322</sup> After determining that "abuse of discretion" is the proper standard of judicial review of motions to reopen, the Court offered a one-sentence conclusion:

[T]he proper application of these principles leads inexorably to the conclusion that the Attorney General did not abuse his discretion in denying reopening either on the basis that [Doherty] failed to adduce new material evidence or on the basis that [he] failed to satisfactorily explain his previous withdrawal of these [asylum and withholding] claims.<sup>323</sup>

In part II, four Justices criticized the Second Circuit's reading of *Abudu*.<sup>324</sup> The plurality then concluded, "for the reasons stated in the opinion of the Attorney General," that Mr. Thornburgh was well within his broad discretion in considering motions to reopen to decide that the material adduced by Doherty "could have been foreseen or anticipated at the time of the [September 1986 hearing]."<sup>325</sup> The plurality also rejected the Second Circuit's suggestion that the Attorney General was in any way limited in his authority to overturn the BIA's decision in Doherty's favor.<sup>326</sup>

In part III, two Justices agreed with the Attorney General that Doherty had waived his claims to relief from deportation to obtain a tactical advantage.<sup>327</sup> These two Justices found the Attorney General's opinion on this point to be the functional equivalent of a conclusion that Doherty had not offered a reasonable explanation for failing to pursue his claims at the September 1986 hearing.<sup>328</sup> They reasoned that Doherty should have pled inconsistently in the alternative: "There was nothing which prevented [Doherty] from bringing evidence in support of his asylum and withholding of deportation claims at his first deportation pro-

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322. See *Doherty*, 112 S. Ct. at 724-25. The Court specifically stated: "Motions for reopening of immigration proceedings are disfavored. . . . [I]n a deportation proceeding[,] . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Id.* (citation omitted).

323. *Id.* at 725. Having sustained Attorney General Thornburgh's exercise of discretion on two grounds, the majority found it unnecessary to review the Attorney General's holding that Doherty's involvement in serious non-political crimes in Northern Ireland made him statutorily ineligible for asylum and withholding. See *id.* at 724.

324. See *id.* at 726 (discussing *INS v. Abudu*, 485 U.S. 94 (1988)). Chief Justice Rehnquist, joined by Justices White, Blackmun, and O'Connor, wrote that "[t]he Court of Appeals seized upon a sentence in our opinion in *Abudu* . . . as negating a requirement of unforeseeability. But this sentence, we think cannot bear that construction . . ." *Id.*

325. *Id.*

326. See *id.* at 726-27. The Court stated: "[the Attorney General] is the final administrative authority in construing the regulations, and in deciding questions under them." *Id.* at 726. As previously noted, however, the plurality never acknowledged the Meese-Thornburgh claim that the regulations were the BIA's, and not the Attorney General's. See *supra* notes 249, 321, and accompanying text.

327. See *Doherty*, 112 S. Ct. at 727. Part III represents only the views of Chief Justice Rehnquist and Justice Kennedy. There were three "dissents" (Justices Scalia, Stevens, and Souter, see *id.* at 731-32), and three abstentions (Justices White, Blackmun, and O'Connor) on the issues discussed therein.

328. See *id.* at 727.

ceeding, in case the Attorney General did contest his designation of Ireland as the country to which he be deported."<sup>329</sup>

Justices Scalia, Stevens, and Souter concurred in part and dissented in part. They agreed with the majority that the Attorney General's broad discretion to deny asylum justified his refusal to reopen the deportation proceeding so that Doherty might apply for that relief.<sup>330</sup> Pointing to the mandatory nature of the withholding-of-deportation remedy, however, the dissent concluded that "the Attorney General's power to deny withholding claims differs significantly from his broader authority to administer discretionary forms of relief such as asylum."<sup>331</sup>

The dissent then examined the procedural bases put forward by the Attorney General and the INS for rejecting Doherty's motion to reopen, and found each one unpersuasive. Justice Scalia first rejected the Attorney General's assertion that Doherty had waived his asylum and withholding claims by withdrawing them at the September 1986 deportation hearing.<sup>332</sup> He concluded that Doherty's waiver was far narrower than portrayed by the government, and that, in any event, no regulation precluded the resubmission of a withdrawn application.<sup>333</sup>

The dissent next took issue with the Attorney General's conclusion that Doherty failed to identify material evidence, not previously available, to be presented at the reopened hearing. Justice Scalia agreed with Attorney General Thornburgh that the change in Irish extradition law did not satisfy the reopening requirements,<sup>334</sup> but viewed Attorney General Meese's rejection of Doherty's designated country of deportation to be "another matter."<sup>335</sup> Justice Scalia acknowledged that a change in the

329. *Id.* That statement represents a serious misreading of the record, and three Justices clearly recognized it as such. *See id.* at 730 (Scalia, J., concurring in part and dissenting in part) ("Doherty's motive, apparently, was to get the deportation hearing over and himself out of the country quickly, before conclusion of a new extradition treaty between the United States and the United Kingdom.")

330. *See id.* (Scalia, J., concurring in part and dissenting in part). The three Justices specifically stated: "Irrespective of foreign policy concerns and regardless of whether Doherty's crimes were 'political,' it was within the Attorney General's discretion to conclude that Doherty is a sufficiently unsavory character not to be granted asylum in this country." *Id.*

331. *Id.* at 729. The dissent specifically stated: "There is no 'merits-deciding' discretion to deny reopening in the context of withholding of deportation. The Attorney General could not deny reopening here . . . simply because he did not wish to provide Doherty the relief of withholding." *Id.* at 730.

332. *Id.* at 730. Justice Scalia stated the following:

[T]he only commitment reasonably expressed by [Doherty's counsel before the Immigration Judge], it seems to me, was a commitment not to seek withholding if the proposed designation [of Ireland] was allowed. . . . But I do not think one can reasonably find in the record any waiver, any commitment as to what Doherty would do, if the proposed designation of country was not accepted—which is what ultimately happened here.

*Id.* at 731.

333. *See id.* at 730-31.

334. *See id.* at 732.

335. *Id.*

outcome of an administrative appeal is not always a proper basis for reopening, but he framed the question before the Court as "whether it may *sometimes* be."<sup>336</sup> He saw "no great practical difficulty in that," noting that the Supreme Court itself in reversing a judgment "frequently remands for further proceedings that our new determination has made necessary."<sup>337</sup>

On that basis, Justice Scalia concluded that the Attorney General's refusal to reopen on the withholding claim was an abuse of discretion:

The denial of reopening here takes on a particularly capricious coloration when one compares it with the considerable indulgence accorded to the INS's procedural defaults in the same proceeding—and when one recognizes that it was precisely that indulgence which placed Doherty in the position of being unable to present his withholding claim. . . . The term "arbitrary" does not have a very precise content, but it is precise enough to cover this.<sup>338</sup>

As a final matter, the dissent addressed the Attorney General's argument that no hearing was necessary because Doherty was statutorily ineligible for withholding of deportation. Justice Scalia found no "*per se* rule that withholding claims cannot be resolved without an evidentiary hearing,"<sup>339</sup> and concluded that the Second Circuit "erred" in holding otherwise.<sup>340</sup> Accordingly, he would have vacated that portion of the appeals court's ruling which ordered the Justice Department to reopen the deportation hearing and directed the Circuit to consider whether the record before the Attorney General was sufficient to support the conclusion that Doherty's offenses were non-political.<sup>341</sup>

The Court's opinion is disappointing, not only for the brevity of its analysis, but also for its approach to the facts and the law.<sup>342</sup> Nevertheless, it is clear that Doherty never came close to sustaining in the Supreme Court the victory he had won in the Second Circuit. On the issue of a reopened asylum hearing, the vote against Doherty was eight to zero. On the issue of the withholding claim, it was five to three against Doherty, and the dissenters would have afforded the government a second chance to persuade the appeals court that a reopened deportation hearing was unnecessary in view of the evidence from the 1984 Extradition Hearing.

## V. DOHERTY'S BAIL REQUESTS

Following his arrest on June 18, 1983, Doherty was imprisoned for eight years at the Metropolitan Correction Center in New York City (the

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336. *Id.* at 733.

337. *Id.*

338. *Id.* at 734-35.

339. *Id.* at 736.

340. *Id.* at 735-36.

341. *See id.* at 736.

342. *See supra* notes 321, 329, and accompanying text.

"MCC").<sup>343</sup> In July 1991, the government transferred him to the federal prison in Lewisburg, Pennsylvania, where he remained in custody until he was deported on February 19, 1992.<sup>344</sup>

Doherty's first application for release on bail was filed in connection with his Extradition Hearing. Judge Sprizzo denied that application on the ground that Doherty presented an unacceptable flight risk.<sup>345</sup>

Doherty renewed his bail request following Judge Sprizzo's rejection of the British extradition request. At that time, formal custody of Doherty had been returned to the INS pursuant to the original deportation warrant and order to show cause. On December 21, 1984, the Immigration Judge set bond at \$200,000,<sup>346</sup> but the INS appealed to the BIA and obtained an emergency stay. On March 4, 1985, the Board reversed the Immigration Judge's order and ruled that Doherty be held without bail. The BIA reasoned that Doherty presented such a poor bail risk that no amount of bond could reasonably assure his presence during future proceedings. The Board also expressed reservations about releasing Doherty pursuant to a bond provided by an unknown source.<sup>347</sup>

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343. The MCC, which is designed for the short-term detention of individuals awaiting trial, lacks the more extensive facilities found in long-term prisons. During his stay, Doherty was confined to a 9'x 9' cell for twenty-three hours a day. In 1986, Doherty was transferred to the federal prison in Otisville, New York, but was returned shortly thereafter to the MCC. Note that detention pending deportation is not supposed to be punitive, and thus it has been suggested that penal facilities should be avoided where possible. See 1 C.F.R. § 305.89-4 (1992) (recommendation of Administrative Conference of United States).

344. See James Barron, *U.S. Extradites [sic] an I.R.A. Killer To Belfast Jail*, N.Y. Times, Feb. 20, 1992, at A1. In an inadvertent slip of the pen, the New York Times headline writers underscored Doherty's argument that the government was using deportation as disguised extradition. In the late edition, the New York Times corrected this mistake and changed the headline to: *I.R.A. Fugitive Sent to Belfast from U.S. Jail*. For Doherty's personal account of his return to Belfast, see 138 Cong. Rec. E1220 (daily ed. May 1, 1992) (extension of remarks of Congressman Manton).

345. At an October 12, 1983, hearing, Judge Sprizzo stated: "I would be greatly surprised, if Mr. Doherty were bailed, if he did not exercise what I would think would be a very rational judgment perhaps to disappear." *Doherty v. Thornburgh*, 943 F.2d 204, 206 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

Because of a compelling national interest in complying with extradition treaties, the courts have generally held that bail should not be granted in extradition cases unless the applicant shows "special circumstances" which warrant his release. See *Wright v. Henckel*, 190 U.S. 40, 63 (1903); *United States v. Leitner*, 784 F.2d 159, 160 (2d Cir. 1986); *United States v. Russell*, 805 F.2d 1215, 1216 (5th Cir. 1986). "Special circumstances" do not include the "discomfiture of jail" or an applicant's status as a "tolerable bail risk." *United States v. Williams*, 611 F.2d 914, 915 (1st Cir. 1979); *United States v. Hills*, 765 F. Supp. 381, 385-86 (E.D. Mich. 1991); see generally Jeffrey A. Hall, Note, *A Recommended Approach to Bail in International Extradition Cases*, 86 Mich. L. Rev. 599 (1987) (proposing an approach that looks to an accused's risk of flight rather than the presence or absence of specific special circumstances).

346. The Immigration Judge issued his order one day before Prime Minister Thatcher and President Reagan met at Camp David, Maryland. See *supra* note 135 and accompanying text.

347. See *In re Doherty*, No. A26-185-231 (BIA, March 29, 1990), at 3-4 [hereinafter BIA March 29, 1990] (citing BIA, March 4, 1985).

Doherty never sought judicial review of the BIA order.

Over the next few years, Doherty proved to have a remarkable flair for public relations. His predicament became a rallying point for opposition in the United States to British rule in Northern Ireland. His support, always strong in the Irish-American neighborhoods of the Northeast, broadened as civil rights and human rights defenders came to his aid as well.

From his jail cell, Doherty wrote a weekly newspaper column.<sup>348</sup> CBS-Television's "Sixty Minutes" twice broadcast a sympathetic program about his case.<sup>349</sup> His visitors at the MCC included several Members of Congress; John Cardinal O'Connor, the Roman Catholic Archbishop of New York; presidential candidate Reverend Jesse Jackson; and Reverend Lawrence Jenco, who had recently been released as a hostage in Lebanon. In addition, in recognition of the unprecedented length of his confinement, the City of New York renamed the street corner outside the jail after him.

Doherty's status even became an issue in the 1989 New York City mayoral election. The Democratic Party candidate and eventual winner, David Dinkins, urged the federal government to grant Doherty asylum, while the Republican Party candidate and former United States Attorney, Rudolph Giuliani, defended the government's handling of the case.<sup>350</sup>

In 1989, for the third and last time, Doherty requested release on bond. He argued that he had been held in custody, pending deportation, longer than any other person, and he contended that his continued detention violated the Due Process Clause of the Fifth Amendment. He also emphasized that he had developed strong community ties in the New York area, and thus was not a poor bail risk.

On September 22, 1989, the Associate Regional Commissioner of the INS denied Doherty's bond application.<sup>351</sup> The BIA affirmed that decision on March 29, 1990,<sup>352</sup> with one member abstaining.<sup>353</sup> In affirming,

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348. Doherty wrote for the weekly newspaper, *The Irish People*.

349. See *60 Minutes* (CBS television broadcast, June 19, 1988), available in *60 Minutes Transcripts*, Vol. XX, No. 40.

350. See William Glaberson, *Threads of Irish Politics Woven Into Mayoral Race*, N.Y. Times, Nov. 3, 1989, at B5; Frank Lynn, *Patronage Inquiry: Big Blast or Whimper?*, N.Y. Times, May 16, 1989, at B1.

351. BIA March 29, 1990, *supra* note 347, at 1.

352. The BIA noted that Doherty had submitted affidavits from several people who regularly visited him in prison. See *id.* at 5. Those affidavits generally expressed confidence that Doherty was a man of honor and integrity, and the belief that Doherty would not dishonor or embarrass his supporters by fleeing to avoid deportation. One individual offered to post a \$100,000 bond, and another offered to post her personal assets. Doherty also named several prominent political figures who visited him in detention, and pointed to various letters and resolutions on his behalf. He noted that he had an offer of employment at \$35,000 per year, and that one of his attorneys had offered to allow Doherty to reside with him in his home. See *id.*

353. As grounds for abstention, BIA Member Heilman wrote:

the Board held that Doherty was partially responsible for the length of his own confinement, and thus rejected Doherty's constitutional argument.<sup>354</sup> Moreover, although it acknowledged that Doherty had demonstrated substantial community ties, the BIA concluded that the risk of flight outweighed all other factors.<sup>355</sup>

Doherty's remaining arguments fared no better. The Board recognized that, prior to his apprehension, Doherty had lived in the United States for approximately sixteen months without incident, and that he had not been charged with or convicted of any crime in the United States. But the BIA found these facts to be "of little consequence," maintaining that any engagement in criminal activities during that time "would have increased [Doherty's] likelihood of being discovered by United States authorities."<sup>356</sup>

Having exhausted his administrative remedies, Doherty petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus. He argued that his detention had become consti-

If a majority of this Board were to order [Doherty] released on bond, the result would be . . . immediate certification by the Service to the Attorney General and reversal of that order. . . . The previous and present Attorney General have made it clear that Mr. Doherty is to be treated as a category apart, and in such vehement terms that there can be no doubt what the ultimate outcome will be in any matter within [the Attorney General's] jurisdiction.

The better disposition of this appeal would be to forward it to the Attorney General and let him apply the special procedures and standards and political considerations to this bond appeal that have enveloped every other aspect of the proceedings relating to Mr. Doherty. It is in those terms that he must defend himself, before the very official who has both the power to define the national interests asserted and to judge Mr. Doherty's pleas. . . . That is the level on which Mr. Doherty will have to do battle.

*Id.* at 9.

354. *See id.* at 7. The BIA stated:

While there may be a limit on the time a respondent may be detained pending completion of deportation proceedings, we do not find it here where both the respondent and the government have demonstrated a predilection for litigation. . . . [A] substantial portion of the period of his detention can fairly be attributed to him.

*Id.*

355. *See id.* at 7-8. Specifically, the BIA stated:

[N]othing presented persuades us that there has been any meaningful reduction since our prior order in the likelihood that [Doherty], if released, will abscond if and when his deportation becomes imminent. [Doherty] went to great lengths to avoid the imprisonment to which he has been sentenced. In escaping from jail, he risked his life in a gun battle. In coming to the United States, he left his family including mother, father, and three sisters and he left his home and his homeland—all the community ties he had developed in his life. [His] ties in this country are meager in comparison to those he abandoned when he fled his homeland. In view of this history, we are unpersuaded that [he] would voluntarily surrender for deportation and return to a British jail out of a sense of obligation to his supporters in this country or to avoid the forfeiture of someone else's money.

*Id.*

356. *Id.* at 6.

tutionally invalid because of its length, and he urged the court to hold that this constitutional violation outweighed any consideration of the risk of flight. In defense, the government argued that Doherty lacked standing to allege a constitutional violation, asserting that illegal aliens have no substantive due process rights to liberty during deportation proceedings.

On November 5, 1990, Judge Miriam Cedarbaum denied Doherty's writ.<sup>357</sup> Rejecting the government's lack-of-standing defense as "an extreme position," she first held that the Fifth Amendment's Due Process Clause does not distinguish between aliens and citizens.<sup>358</sup> Judge Cedarbaum then acknowledged that she had found no cases in which a deportable alien had been held in custody for as long as Doherty. She nevertheless concluded that, while the length of Doherty's detention was "extremely troubling," it was not unconstitutional in light of the surrounding circumstances.<sup>359</sup>

Judge Cedarbaum also rejected Doherty's claim that the length of his detention was attributable to government delays. After reviewing the procedural history of the case, she concluded that "substantial portions of the period of Doherty's detention, including some portions for which Doherty [sought] to blame the Government, [were] attributable to his own litigation strategy,"<sup>360</sup> and other significant periods of time "were devoted to the argument and consideration of the difficult legal issues."<sup>361</sup> Finally, Judge Cedarbaum held that the BIA was correct in giving very heavy weight to the risk of flight, concluding that the evidence on that issue "significantly favor[ed] the Government."<sup>362</sup>

Doherty appealed to the Second Circuit, but, on August 27, 1991, a divided panel affirmed Judge Cedarbaum's decision.<sup>363</sup> The majority agreed with the district court that deportable aliens possess a substantive due process right to liberty during deportation proceedings. It emphasized, however, that this right must be construed narrowly and is "circumscribed by considerations of the national interest."<sup>364</sup> The majority further emphasized that judicial review of alleged government interference with this right is limited,<sup>365</sup> and cautioned that governmental conduct that may be considered "shocking" when directed at a United States citizen "may not be unconstitutional when directed at an alien."<sup>366</sup>

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357. See *Doherty v. Thornburgh*, 750 F. Supp. 131 (S.D.N.Y. 1990), *aff'd*, 943 F.2d 204 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

358. See *id.* at 135.

359. *Id.* at 139.

360. *Id.* at 138.

361. *Id.* at 139.

362. *Id.*

363. See *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

364. *Id.* at 209.

365. See *id.* at 208-09.

366. *Id.* at 209.

In other words, the majority found an alien's due process right to liberty to be "significantly more qualified" than a criminal defendant's due process right to liberty.<sup>367</sup>

In applying these standards to the facts of the Doherty Case, the majority concluded that Doherty's detention had resulted from a proper exercise of the Attorney General's discretion, and thus his Fifth Amendment right to due process had not been violated.<sup>368</sup> Moreover, the majority agreed with the district court that Doherty was principally responsible for the length of his litigation, did not find any invidious purpose or bad faith in denying bail, and concluded that Doherty had only himself to blame for the length of his confinement.<sup>369</sup>

In contrast, the dissent argued that the government had been just as litigious as Doherty in its effort to achieve through deportation what it could not achieve through extradition: Doherty's return to the United Kingdom.<sup>370</sup> The dissent conceded that there was a difference between

367. *Id.* at 210.

368. *See id.* at 211. The court specifically stated the following:

Over the course of the last eight years, Doherty has exercised skillfully his rights under the deportation statute, delaying and perhaps preventing the outcome sought by the government. He has resisted deportation when it would result in his return to Great Britain, agreed to deportation when it would not result in his return, and then resumed his resistance to deportation when circumstances changed. Only in the face of the impending elimination of the political offense exception did Doherty seek to expedite the deportation process and, when it appeared that his destination of choice no longer offered a haven from extradition, he sought relief from deportation, once again slowing down the process. Although this litigation strategy is perfectly permissible, we hold that Doherty may not rely on the extra time resulting therefrom to claim that his prolonged detention violates substantive due process.

*Id.*

369. *See id.* at 211-12. The court specifically stated the following:

[F]rom the outset of his detention, Doherty has possessed, in effect, the key that unlocks his prison cell. That is, if Doherty had agreed to deportation in the first place, he would not have been detained at [the Metropolitan Correction Center] for the past eight years. . . . It cannot be said that, by attributing to Doherty primary responsibility for the delay in resolving his status, he is being "punished" for the exercise of his constitutional rights. Doherty certainly has been afforded the full panoply of procedural due process. He has not demonstrated the invidious purpose, bad faith or arbitrariness necessary to make out a denial of substantive due process.

*Id.* at 212.

370. *See id.* at 212-13 (Altimari, J., dissenting). The dissent specifically stated the following:

In some respect, the government's declaratory judgment motion embodied the general litigation posture that the government assumed in this case—once dissatisfied with the result of a decision in Doherty's favor, the government attempted to use an extraordinary, but legitimate, tool to obtain the result it was seeking. . . .

[T]he government [also] appealed a number of decisions which would have allowed Doherty to be deported to the Republic of Ireland. For example, after the Board of Immigration Appeals issued its final decision . . . the government exercised its right to appeal this decision to the Attorney General—such an appeal is almost never taken. Once again, the government went to extraordi-

the constitutional rights of citizens and non-citizens, but found that the facts of the Doherty Case "clearly transcend[ed]" those differences.<sup>371</sup> Thus, the dissent argued for reversal of the district court's judgment and for a remand with instructions to set appropriate bail.<sup>372</sup>

On December 27, 1991, Doherty petitioned the Supreme Court for certiorari on the bail issue. Three weeks later, however, the Supreme Court reinstated the Thornburgh Opinion, thereby removing the last obstacle to his deportation. One week after Doherty was returned to Northern Ireland, the Supreme Court dismissed his pending certiorari petition.<sup>373</sup> Nonetheless, the British government sought to defuse any concerns about his lengthy confinement in the United States by suggesting that Doherty might eventually receive credit for his time served in the United States.<sup>374</sup>

Two final observations concerning Doherty's possible release on bail should be noted. First, one author has suggested that Doherty would never have become such a symbolic figure in the United States if he had been released on bail at an early stage of his case. In that author's judgment, flight was not a realistic possibility because it would have seriously damaged Doherty's credibility, his cause, and his backers.<sup>375</sup> This speculative theory seems to give too little weight to Doherty's two prison escapes in Northern Ireland. Further, it does not give due regard to Doherty's claim that he feared persecution upon his return to Northern Ireland.

Second, in denying Doherty bail, the Second Circuit stated that his PIRA affiliation "may constitute a more general threat to national secur-

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nary lengths to preclude Doherty from being deported to the country of his choice.

*Id.* at 213.

371. *Id.* at 214 (Altimari, J., dissenting).

372. *See id.* at 213-14 (Altimari, J., dissenting). The dissent specifically stated:

I do find it shocking that we would allow the government to indefinitely pursue a litigation strategy, which was essentially designed to circumvent an extradition decision, at the expense of an individual's right to liberty. At some time, the government's legitimate appeals impinge on the individual's rights to such an extent that the Due Process Clause requires us to say to the State—enough is enough—"Thou shalt not." . . . I believe we have reached that moment. . . .

A point is reached when all pedagogical distinctions give way to common sense and reason and we say: enough—it is just flat out wrong to confine an individual for eight years when he has not been charged with a crime in this country and has been declared by a court of competent jurisdiction to be guilty of a "political offense."

*Id.*

373. *See Doherty v. Thornburgh*, 112 S. Ct. 1254 (1992).

374. *See* Craig R. Whitney, *I.R.A. Guerrilla is Back in a Familiar Belfast Jail*, N.Y. Times, Feb. 21, 1992, at A5. On July 30, 1992, the British Secretary of State for Northern Ireland, Patrick Mayhew, announced that Doherty would not be credited for his time spent in confinement in the United States. Mr. Mayhew indicated that Doherty would have to remain in British custody for another ten years before any parole decision would be made. *See* 138 Cong. Rec. H8027-28 (daily ed. Aug. 12, 1992) (remarks of Congressman Engel); *Stiff Term for IRA Man*, Wash. Post, Aug. 4, 1992, at A6.

375. *See* Dillon, *supra* note 39, at 210-11, 240, 245.

ity," and thus provided "a proper basis for detention."<sup>376</sup> Yet, the Second Circuit never made any attempt to explain this statement. To be sure, the prospect of Doherty, out on bail, delivering lectures, and raising funds, might have proven embarrassing to the administration in the United States and the government in the United Kingdom. Such embarrassment hardly provides a constitutional basis for an eight year and eight month detention of a deportable alien who poses no threat to individual citizens.

### CONCLUSION

The Doherty Case leaves two overall impressions. First, it demonstrates that the American response to terrorism (i.e., politically motivated violence abroad) has been spotty at best. The Carter, Reagan, and Bush Administrations have strongly condemned such violence on many occasions, yet have inexplicably winked at it in other instances.

As an illustration of the United States' inconsistent treatment of "terrorists," one need only look to the April 1990 State Department publication which identifies both the PIRA and the African National Congress (the "ANC") as terrorist organizations.<sup>377</sup> In June 1990, as PIRA "terrorist" Joe Doherty began his seventh year of detention in an American jail, ANC "terrorist" Nelson Mandela was invited to lunch at the White House; Mandela used the occasion to educate President Bush as to why the ANC's use of political violence was acceptable.<sup>378</sup>

For a further illustration, one might recall the Israeli "terrorist" Menachem Begin, whose violent efforts in 1946 and 1947 to expel the British from Palestine and then to push out the region's Arab occupants caused the British to offer a 10,000 pound reward for his capture. If Mr. Begin had been apprehended in the United States under circumstances similar to Doherty's, it is highly implausible that the American government would have turned him over to the British, as it did with Doherty.<sup>379</sup> If there is a principled distinction to be made among these examples, the government has yet to articulate it.

The second impression left by the Doherty Case is that human rights violations abroad are accorded a lower priority by the United States

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376. *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991) (citing *Carlson v. Landon*, 342 U.S. 524, 541-42 (1952)) (alien's membership in Communist Party is a menace to the public interest and warrants denial of bail pending deportation), *cert. dismissed*, 112 S. Ct. 1254 (1992).

377. See U.S. Dep't of State, *Patterns of Global Terrorism: 1989*, at 77, 84-85 (April 1990).

378. See 26 *Weekly Comp. Pres. Doc.* 1002, 1003 (June 25, 1990).

379. For a discussion of Menachem Begin's roles in planning the bombing of the King David Hotel in July 1946, which killed or wounded 150 people, and the Deir Yassin massacre of April 1948, which killed 250 people, see Menachem Begin, *The Revolt* 162-65, 212-30 (1977); Sami Hadawi, *Bitter Harvest* 60, 85, 189 (1989); O'Brien, *supra* note 2, at 268, 281-82. From 1977 until 1983, Menachem Begin served as Prime Minister of Israel, and in 1978, he won the Nobel Peace Prize.

when the maintenance of friendly foreign relations is at issue. In such circumstances, the United States has often turned a blind eye toward human rights violations that would have been vigorously and publicly condemned had they been committed by a weaker or less important nation, or had more Americans been pushing for such condemnation.<sup>380</sup>

Obviously, diplomacy mandates that governments whisper their concerns to allies, even as they shout similar concerns to their enemies. In the case of Northern Ireland, twenty-plus years of American whispering has produced few results. However, the Doherty Case may also have pointed the way to a cure: the spotlight of publicity. Through skillful legal argument, Doherty postponed for over eight years a result that, in retrospect, seemed inevitable. Moreover, aided by his remarkable gift for public relations and his opponents' heavy-handed litigation tactics, Doherty used his time in the United States to maximum advantage. By addressing the facts of his own case, he created a new, non-violent propaganda front for the PIRA's war against British rule in Northern Ireland—an educational campaign that familiarized the American public with conditions in Northern Ireland. In the final analysis, that educational campaign may prove to be his most important legacy.

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380. See Don Shannon, *Bush's Policy on Human Rights Called Shortsighted*, Wash. Post, Dec. 29, 1991, at A18 (discussing the Annual Report of Human Rights Watch). Nor is the phenomenon limited to the current administration. See Holland, *supra* note 19, at 129-30. In 1977, the Irish National Caucus sent accounts of the torture of Irish prisoners in Northern Ireland jails to the [Carter administration's] State Department, "[b]ut the material submitted to the administration was simply ignored. When the State Department published its annual overview of the human-rights situation worldwide, Northern Ireland was not even mentioned." *Id.*

