The 1985 U.S.-U.K. Supplementary Extradition Treaty: A Superfluous Effort?

Kathleen A. Basso
The 1985 U.S.-U.K. Supplementary Extradition Treaty: A Superfluous Effort?

I. INTRODUCTION

On July 17, 1986, the Senate ratified the Supplementary Extradition Treaty (Supplementary Treaty) between the United States and the United Kingdom.¹ The Supplementary Treaty amended the Treaty of Extradition which the two nations adopted in 1972 (1972 Treaty).² The primary impact of the Supplementary Treaty was to effectively repeal the political offense exception (POE) contained in the 1972 Treaty.³ The political offense exception permitted persons who were the subject of extradition requests to avoid extradition by establishing that their alleged offenses were political in nature.⁴ A similar POE is contained in more than ninety extradition treaties which the United States maintains with other countries.⁵ The Supplementary Treaty is the first extradition agreement which seeks to narrow the scope of the POE.⁶ It has, accordingly, come under attack as indicating a partisan approach to foreign policy.⁷

³ Article V(c) of the 1972 Treaty provides that extradition will be denied if the requested party regards the offense for which extradition is sought as one of political character, or if the refugee proves that the motivation behind the extradition request is punishment for a political offense. 1972 Treaty, supra note 2, at art. V(c). For a history of the political offense exception, see infra text accompanying notes 47-68.
⁴ The Supreme Court defines extradition as "the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender," Terlinden v. Ames, 184 U.S. 270, 289 (1902).
⁶ See infra note 51.
⁷ See Supplementary Extradition Treaty with the United Kingdom: Report from the Committee on Foreign Relations to Accompany Doc. 99-8, 99th Cong., 2d Sess. (1986), S384-5, June 26, 1986, at 11 [hereinafter Committee Report] (statement of Sen. Helms) ("[F]or the first time in history, a person fighting against extradition would not be able to present the political offense defense in a U.S. court.").
⁸ See, e.g., United States and United Kingdom Supplementary Extradition Treaty: Hearings on Treaty Doc. 99-8 Before the Senate Committee on Foreign Relations, 99th Cong., 1st Sess. 112 (1985) S381-23, Sept. 18, 1985, at 105 [hereinafter Senate Hearings], (prepared statement of Prof. C. H. Pyle, Mount Holyoke College). Specifically, Prof. Pyle stated, "[a]nd let's be realistic. This Treaty—and future treaties like it—are not directed at assisting 'democratic' governments with 'fair' legal systems, as the State De-
The United States and United Kingdom appear to have adopted the Supplementary Treaty in reaction to four extradition cases which involved members of the Provisional Irish Republican Army (PIRA). In each of these cases, the PIRA activist successfully avoided extradition to the United Kingdom by invoking the political offense exception contained in the 1972 Treaty. Because the PIRA actively engages in terrorist activities directed against one of America's strongest allies, the United Kingdom, the Reagan Administration became concerned about the United States' role in protecting such activities.


10 PIRA is an offshoot of the IRA. The separation officially took place at a Sinn Fin conference in Dublin in December of 1969, due to conflict within the IRA over the extent to which violence should be employed. PIRA is composed of the militant members who are committed to the use of terrorist tactics. See generally 5 THE NEW ENCYCLOPEDIA BRITANNICA, Ready Reference and Index, 427 (15th ed. 1983). See also McMullen v. INS, 658 F.2d 1312, 1314 (9th Cir. 1981) ("The PIRA ... is an offshoot of the para military Irish Republican Army (IRA) ... [and] formed in protest to the perceived ineffectiveness of the IRA.").

11 See infra notes 75-95 and accompanying text.

12 McMullen v. INS, 788 F.2d 591, 597 (9th Cir. 1986) ("PIRA is unquestionably a 'terrorist' organization ... "). While no universally accepted definition of terrorism exists, see R. KUPPERMAN & D. TREN'T, TERRORISM: THREAT, REALITY, RESPONSE 14 (1979) (citing Fromkin, The Strategy of Terrorism, FOREIGN AFFAIRS at 693 (July 1975)) for one interpretation of terrorism to be:

[V]iolence used in order to create fear; but is aimed at creating fear in order that the fear, in turn, will lead somebody else—not the terrorist—to embark on some quite different program of action that will accomplish whatever it is that the terrorist really desires. Unlike the ... revolutionist, the terrorist therefore is always in the paradoxical position of undertaking actions the immediate physical consequences of which are not particularly desired by him.

13 See also 18 U.S.C. § 3077 (Supp. III 1985). The United States has defined an "act of terrorism" in the 1984 Act to Combat International Terrorism to be an act that:

(a) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state; and

(b) appears to be intended

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping.

15 See infra notes 99-100 and accompanying text.
While the Supplementary Treaty is the most direct method of ensuring that future PIRA activists will not escape prosecution in the United Kingdom, it is arguably not the only method by which they could be returned. Where the activist is a national of the United Kingdom, as was the case in three out of the four aforementioned PIRA cases,14 the United States government could deport the activists under current immigration law.15 Most importantly, a recent federal court interpretation of the Attorney General's power indicates that he or she may deport the activist directly to the United Kingdom, regardless of such activist's requested destination.16 While the use of deportation to deliver PIRA refugees back to the United Kingdom may not be as direct a method as the Supplementary Treaty, it is nonetheless a viable and possibly less controversial exercise of power. Moreover, for those PIRA activists who are U.S. citizens, and hence not deportable, the most recent PIRA decision, Quinn v. Robinson, indicates that they were probably already extraditable to the United Kingdom under the 1972 Treaty.17

Given current deportation law and the most recent judicial commentary on acts covered by the POE, the need for the Supplementary Treaty may have been a superfluous effort. This author does not suggest that deportation and extradition are wholly exchangeable procedures. Indeed, their procedures and purposes are very different.18 Given the particular facts surrounding PIRA activists, however, deportation can bring about the same result as extradition, while avoiding the negative ramifications associated with the Supplementary Treaty.19

This Comment begins with the background history of the Supplementary Treaty, including the origins and procedures of extradition, and the basic philosophy behind the political offense exception.20 The Comment will then look at the recent broad judicial interpretations of the political offense exception, which ultimately resulted in the Supplementary Treaty's creation.21 The Comment then examines the U.S.-U.K. Extradition and Supplementary Treaties,22 and briefly discusses the criticisms of the Supplementary Treaty.23

14 See IRA Suspect Sent to Ireland, N.Y. Times, Jan. 1, 1982, at 2, col. 3 (referring to Mackin) [hereinafter IRA Suspect]; McMullen v. INS, 788 F.2d 591 (9th Cir. 1986); Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986).
15 See infra notes 127–31 for grounds of deportation typically related to PIRA refugees.
16 Doherty, 808 F.2d at 941.
17 See 783 F.2d 776, 807–08 (9th Cir. 1986).
18 Compare infra notes 26–45 and accompanying text with notes 125–63 and accompanying text.
19 For some criticisms of the Supplementary Treaty, supra note 1, see infra notes 112–24 and accompanying text.
20 See infra notes 26–68 and accompanying text.
21 See infra notes 75–98 and accompanying text.
22 See infra notes 39–45, 105–11 and accompanying text.
23 See infra notes 112–24 and accompanying text.
The Comment next details how other measures, apart from the Supplementary Treaty, can achieve the goal of delivering PIRA refugees to the United Kingdom.24 Finally, the Comment addresses the propriety of instituting deportation measures when extradition is unavailable, and concludes with observations about the necessity of the Supplementary Treaty.25

II. History of Extradition and the POE in U.S.-U.K. Extradition Treaties

A. Extradition and Its General Procedure

Early instances of extradition26 were sometimes based merely on the premise of goodwill between sovereigns.27 Today the right of a foreign nation to obtain the extradition of an accused criminal is created solely by treaty.28 Such a treaty customarily provides for the reciprocal extradition of individuals who are present within the territory of one of the nations but who have been accused of certain offenses committed within the jurisdiction of the other nation.29

When the United States is the requested state, extradition begins with a formal request made for extradition by the requesting sovereign to the Department of State.30 A U.S. magistrate then conducts preliminary proceedings and a hearing to determine whether the individual is extraditable.31 The magistrate must determine whether (i) the requested individual is the person before the court; (ii) the offense charged is an extraditable offense under the treaty; (iii) the offense charged is a crime within the state where the hearing is being held and (iv) there is probable cause to believe that the individual before the court

24 See infra notes 125–63 and accompanying text.
25 See infra notes 239–53 and accompanying text.
26 See supra note 4 for the Supreme Court's definition of extradition. See also M. Bassiouni, International Extradition: United States Law and Practice, 1, 6 (1987) [hereinafter United States Extradition]. The term "extradition" is derived from the Latin "extradere" which means forceful return of a person to his sovereign. Id.
27 United States Extradition, supra note 26, at 6.
28 Ramos v. Diaz, 179 F. Supp. 459, 460–61 (S.D. Fla. 1959). See also Quinn v. Robinson, 783 F.2d 776, 782 (9th Cir. 1986); United States Extradition, supra note 26, at 32. Note, the Supreme Court in Factor v. Laubenheimer, 290 U.S. 276, 287 (1933), held that according to international legal principles, there is no legal duty to extradite apart from treaty. Id. Hence, under 18 U.S.C. § 3181 (Supp. III 1985), the United States extradites only when pursuant to a treaty with the requesting state. Id.
committed the offense charged. Based on these findings, the magistrate either accepts or rejects the request, and no right of appeal attaches to his or her decision.

If the magistrate finds that the fugitive is extraditable, the charge is certified to the Secretary of State, who may then issue a warrant for the surrender of the fugitive upon request of the requesting state. A petition for a writ of habeas corpus is the mechanism by which the defendant can seek review. The scope of the district court's review of the magistrate's extradition order on such a petition is very limited. The court must determine (1) whether the magistrate had jurisdiction, (2) whether the charged offense is within the treaty, and (3) whether there was evidence supporting the finding that there was reasonable ground to believe the accused guilty.

If, on the other hand, a fugitive is found to be un-extraditable, the requesting State is not bound by res judicata from reinstituting another extradition request.

B. 1972 Treaty Standards for Extradition

On October 21, 1972, the United States and the United Kingdom exchanged the instruments of ratification of the U.S.-U.K. Extradition Treaty in Washington D.C. The 1972 Treaty provides that the United States and the United Kingdom must extradite individuals accused of a wide range of scheduled

---

32 World Public Order, supra note 30, at 515. See also 6 M. Whiteman, Digest of International Law 944-45 (1968); Kircher, The Turning Point Approaches: The Political Offense Exception to Extradition, 24 San Diego L. Rev. 549, 553 (1987). Under 18 U.S.C. § 3184 (1982), the probable cause standard is defined to be: "[i]f, on such a hearing, . . . the evidence is sufficient to sustain the charge under the provisions of the proper treaty and convention . . . ." Id. (emphasis supplied).

33 Fong Yue Ting v. United States, 149 U.S. 698, 714 (1892) (citing Act of August 12, 1848, ch. 167, 9 Stat. 302, Rev. Stat. 5270-74). See also Collins v. Miller, 252 U.S. 364, 369 (1920). The magistrates are granted special authority under various treaties and acts of Congress, and though they act in a judicial fashion, their actions are not a formal exercise of any part of the judicial power of the United States. No appeal from their decisions is given by the law under which they act, and hence no right of appeal exists. Id.


37 Hooker, 573 F.2d at 1368 ("Not only must a judgment be final before it will have res judicata effect, but it also must have been on the merits . . . . The nature of an extradition proceeding is such that the merits of the fugitive's guilt or innocence are not explored."); Quinn, 783 F.2d at 786 n.3.

38 Hooker, 573 F.2d at 1368; see, e.g., Mackin, 668 F.2d at 137.

offenses. The 1972 Treaty also provides for extradition in the case of any offense, attempt, or conspiracy which is punishable in each country by more than one year in prison or death, and is both a felony under United States law and extraditable under any U.K. law. Extradition is also granted for the act of impeding the arrest or prosecution of one who has committed an extraditable offense which is punishable under both United States and United Kingdom laws by imprisonment for a period of at least five years.

The 1972 Treaty also contains a political offense exception. This exception adheres to common international practice by barring the extradition of aliens who are accused of a politically related crime. Accordingly, under the 1972 Treaty, extradition is denied when the offenses are considered "political" by the requested nation, or the requested individuals prove that their extradition is sought with the intent to try or punish them for political acts. It is this provision that was subsequently diminished by the Supplementary Treaty.

C. Origin and Judicial Interpretation of the POE

The political offense exception originated in the philosophical and political revolutions that occurred in Western Europe and America in the late eighteenth and early nineteenth centuries. During this Enlightenment period, the notion was born that individuals have a right to "resort to political activism to foster political change." Accordingly, the idea emerged that protection should be provided for the individual who flees a country after an unsuccessful attempt

---

40 Id. at Schedule. Some offenses included in the schedule are murder, manslaughter, rape, bigamy, kidnapping, theft, blackmail, robbery, burglary, arson, and unlawful seizure of aircraft. Id.
41 Id. at art. III(1)(2).
42 Id. at art. III(3).
43 UNITED STATES EXTRADITION, supra note 26, at 384 ("The political offense exception is now a standard clause in almost all extradition treaties of the world and is also specified in the national laws of many states."); see also Quinn v. Robinson, 783 F.2d 776, 781 (9th Cir. 1986).
45 Id. at art. V(1)(c)(ii).
46 See infra notes 105–11 and accompanying text.
47 See, e.g., Quinn, 783 F.2d at 792 (citing Declaration des droits de l'homme et du Citoyen du 26 aout 1789, art. 2 (Fr.), incorporated as LA PREAMBLE DE LA CONSTITUTION DE 1791 (Fr.), reprinted in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, at 33 (S. Godechot ed. 1970) (declaring as an inalienable right "la resistance a l'oppression"); LA CONSTITUTION DE 1793, art. 120 (Fr.), reprinted in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, supra, at 79, 91 (France "donne asile aux etrangers bannis de leur patrie pour la cause de la liberte."); The Declaration of Independence para. 1 (U.S. 1776) ("W)henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . ."); see J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT ch. XIX (T. Cook ed. 1947); J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (R. McCallum ed. 1948).
to overthrow the country’s tyrannic government.\textsuperscript{49} The Jacobean Constitution of 1793 evidenced the first proclamation of such a right.\textsuperscript{50} This political crimes defense subsequently became a provision of over ninety extradition treaties that the United States entered into with other nations,\textsuperscript{51} and is common to extradition treaties of most western nations.\textsuperscript{52} One commentator\textsuperscript{53} has suggested that the wide acceptance of the POE lies in the decision of the western nations to avoid committing themselves, by treaty, to use of legal means to aid other nations’ suppression of any rebellions.\textsuperscript{54} As a corollary to this rationale, these nations have not wanted to be associated with complicity in “victors’ justice.”\textsuperscript{55} Since the victor in a struggle for power determines the criminality of criminal offenses, it is wise foreign policy not to contribute to the vengeful actions of the victorious group.\textsuperscript{56} Finally, the prevalence of a political crimes defense in the United States fosters an “appropriate public policy” for a country that is comprised of immigrants and identifies itself as “a haven for political refugees of all kinds.”\textsuperscript{57}

1. British Origins

Because a “political offense” is judicially determined through statutory interpretation, case law has become crucial in evaluating the ultimate reach of the POE. Over the years, U.S. courts have adopted the basic parameters of the political offense exception articulated in British decisions.

The seminal case in the United Kingdom defining a political offense is \textit{In re Castioni}.\textsuperscript{58} In that case, the Swiss Government requested the extradition of Angelo Castioni, a Swiss national who had shot and killed a State council

\textsuperscript{49} Kulman, supra note 48, at 757.
\textsuperscript{50} Declaration Des Droits Naturels, Civils et Politiques Des Hommes, 1793, art. 120 (Fr. 1793); reprinted in \textit{LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789}, at 33 (S. Gedechet ed. 1970). Article 120 provides in pertinent part, “donne asile aux etrangers bannis de leurs pays pour la cause de la liberte” ["grants asylum to foreigners banished from their countries for the cause of freedom"]; \textit{Id. See also C. VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION} 9 (1980).
\textsuperscript{51} See Senate Hearings, supra note 8, at 99 (statement of Prof. C.H. Pyle); \textit{see also} \textit{WORLD PUBLIC ORDER}, supra note 30, at 371. For a list of the nations that have entered into bilateral extradition treaties with the United States, see 18 U.S.C. § 3181 (1982) (for example, the list includes Argentina, Australia, Belgium, Burma, Canada, Fiji, Paraguay, India, Mauritius, and Zambia). \textit{Id.}
\textsuperscript{52} Senate Hearings, supra note 8, at 99 (statement of Prof. C.H. Pyle). \textit{See also Committee Report, supra note 7, at 14 (statement of Sen. Helms) (“This doctrine has been carried forward in all Western democracies until the present day.”).}
\textsuperscript{53} Senate Hearings, supra note 8, at 99 (statement of Prof. C.H. Pyle).
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.} For a discussion arguing that there are serious problems with the theoretical purposes and justifications of the POE in the United States, see Shapiro, \textit{Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception}, 61 N.Y.U. L. REV. 654 (1986).
\textsuperscript{58} [1891] 1 Q.B. 149.
member in the course of an armed attack upon a municipal building. The court formulated what is known as the “incidence test.” This test requires that in order for the political offense exception to apply, the offensive act must be carried out “in the course of” and “in furtherance of” a widespread political uprising. The court found that Castioni’s actions were part of political disturbances and held him to be unextraditable.

2. U.S. Case Law Concerning the POE

As stated above, the United States has adopted the basic premise of the original Castioni incidence test in determining whether conduct falls within the POE. The first U.S. case to use the incidence test was In re Ezeta. There, the Salvadoran Government requested the extradition of several refugees accused of murder and robbery. The refugees, however, argued that the offenses were political, since they were committed in an unsuccessful attempt to thwart a revolution. The court denied extradition, finding that the acts were “committed during the progress of actual hostilities between contending forces.” Additionally, the court found that such acts were “closely identified” with the uprising “in an unsuccessful effort to suppress it.”

Over the years, U.S. courts have further defined the incidence test, formulating a two-pronged political offense test through the interpretation of both the Castioni and Ezeta decisions. Each requirement must be satisfied before the offender can invoke the exception. First, there must be “an uprising or other violent political disturbance at the time of the charged offense.” Second, the

---

59 Id. at 150–51. Specifically, the people of the town of Bellizona had been dissatisfied for some time with the then-controlling government. When that government refused to revise the constitution after being presented with the requisite seven thousand signature petition in accordance with that constitution, the townspeople stormed the town palace. During this uprising, Castioni shot and killed a government official. He escaped to England, where he was arrested and committed for extradition on a charge of murder. Castioni admitted to the killing but claimed exemption under the Extradition Act of 1870, which had an extradition exception for acts of “a political character.” Unfortunately, the Act neglected to define the term. Id.

60 Id. at 156.
61 Id. at 166.
62 62 F. 972 (N.D. Cal. 1894).
63 Id. at 995.
64 Id. at 997.
65 Id. at 1002.
66 Id.
67 Quinn v. Robinson, 783 F.2d 776, 797 (9th Cir. 1986). Facilitating a finding of unextraditability, “American courts generally will take judicial notice of a state of uprising.” Id. at n.18 (citing Karadzole v. Artvovic, 247 F.2d 198, 204 (9th Cir. 1957), vacated and remanded, 355 U.S. 393 (1958) (noting that the district court took proper judicial notice of political struggle in Croatia); Ramos v. Diaz, 179 F. Supp. 459, 462 (S.D. Fla. 1959) (extradition court took judicial notice of revolutionary movement in Cuba).
charged offense must be "incidental to, in the course of, or in the furtherance of the uprising."\textsuperscript{68}

III. Events Leading Up to the Supplementary Treaty

A. Criticism of the POE

While the POE followed traditional extradition treaty practice, definitional problems surrounding the exception encouraged its diminishment. First, the United States incidence test, as first applied in In re Ezeta, became the subject of some criticism.\textsuperscript{69} Specifically, the two-pronged test was criticized as being both overinclusive and underinclusive, as it:

\begin{quote}
tends to exempt from extradition all crimes occurring during a political disturbance, but no offenses which were not contemporaneous with an uprising. The strict adherence to the requirement that the act be tied to an uprising disturbance may operate to exclude from protection many individual acts of legitimate political resistance . . . . \(T\)he overinclusive aspect of the approach may operate to protect common criminals simply because their crimes occur during times of political disorder.\textsuperscript{70}
\end{quote}

Thus, the POE was not a consistent method of protection.

Additionally, increased occurrences of terrorist activities fueled concern over the political offense exception. The Reagan Administration feared that the POE would prevent large numbers of terrorists found within the United States from being brought to justice.\textsuperscript{71} The rationale behind this fear was that the political offense test had failed to effectively discern the difference between political rebellion, which is to be protected, and terrorism, which is to be punished.\textsuperscript{72}

\textsuperscript{68} Quinn, 783 F.2d at 797 (citing Eain v. Wilkes, 641 F.2d 504, 518 (7th Cir. 1981) (defendant PLO member failed to establish that a bombing of a market in an Israeli city was incidental to PLO's objectives, and hence was not "incidental to" a political disturbance); Sindona v. Grant, 619 F.2d 167, 173 (2d Cir. 1980) (defendant was charged with crime of fraudulent bankruptcy, which court held was not a crime "incidental to" an uprising); Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971) (defendant was a former Peruvian government official who was charged with embezzlement, which the court held was not a crime "incidental to" an uprising)).

\textsuperscript{69} See, e.g., Lubet & Czaczkes, The Role of the American Judiciary in the Extradition of Political Terrorists, 71 J. CRIM. L. & CRIMINOLOGY 193, 203-04 (1980); Eain, 641 F.2d at 519-20.

\textsuperscript{70} Lubet & Czaczkes, supra note 69, at 203-04.

\textsuperscript{71} See Senate Hearings, supra note 8, at 260-64 (statement of Abraham Sofaer, Legal Advisor to the Department of State). \textit{But see id. at 94.} (statement of Sen. Pell) (Over the forty year period of 1945-1985, the total number of cases seeking extradition was approximately 2000, "but of that 2000, only 4 cases exist where we refused to return the defendant based on political crime.").

\textsuperscript{72} The court in Eain, 641 F.2d at 520-21, commented on this distinction: "The definition of a 'political disturbance,' with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a State, and not the social structure that established the government." \textit{Id.} Thus, according to the court, political acts did not include "cold
Exacerbating the concern surrounding the reach of the POE were the extradition cases of four PIRA activists. It is because of these four initial decisions that the Reagan Administration set the Supplementary Treaty machinery into motion.

B. The PIRA Cases

In the first PIRA case, *In re Extradition of McMullen*, a United States magistrate considered the extradition of a PIRA member, Peter Gabriel John McMullen, who had been involved in a bombing of British Army barracks. In a strict application of the facts to the test requirements, the magistrate denied extradition because (1) the bombing occurred at a time that a political uprising was in existence in Northern Ireland, and (2) the bombing was incidental to the PIRA's political objectives.

The next case also involved a narrow application of the incidence test. In *Matter of Mackin*, the magistrate refused to extradite Desmond Mackin, a PIRA member charged with wounding a British soldier in a gun battle. Applying the two-pronged incidence test, the magistrate determined that Mackin's act was of a political character. The magistrate concluded that: "(1) at the time of the offenses charged against Mackin the Provisional Irish Republican Party (PIRA) was conducting a political uprising in the portion of Belfast where the offenses were committed; (2) that Mackin was an active member of PIRA; and (3) that the offenses committed against the British soldier were incidental to Mackin's role in the PIRA's political uprising in Belfast."

In *Matter of Doherty*, Joseph Patrick Doherty, a member of PIRA, and three other PIRA members, took over a house on May 2, 1980 in order to hide out and then attack a convoy of British soldiers. In the exchange of gunfire that ensued, a British Army captain was killed and Doherty was arrested and charged with murder. While awaiting a court's decision on charges including the murder of the British Army officer, Doherty escaped from prison and entered the United States illegally. Two days after arriving in the United States, the United
Kingdom Government convicted Doherty in absentia for murder and other offenses. The United Kingdom then requested that he be extradited.

In a significant departure from the literal reading of the incidence test, the court determined that the existence of a political conflict and an offense committed “during the course of” and “in furtherance of” that struggle is only the beginning of the analysis required to determine extraditability.80 Indeed, in finding that the facts of this case presented “an assertion of the political offense exception in its most classic form,”81 the court held that the only issue in need of resolution was whether the POE was inappropriate because PIRA engaged in a “sporadic and informal mode of warfare.”82

In analyzing whether the POE did apply to the acts of the PIRA, the court explained that the “nature,” “structure,” and “mode of internal discipline within the organization” are crucial considerations.83 That is, the more structured an organization is, the more likely its acts will be considered political.84 The court ruled that the POE did apply to the acts of the PIRA, noting that the PIRA had an “organization, discipline, and command structure that distinguishes it from more amorphous groups like the Black Liberation Army . . . .”85 The court further delineated a broad scope of the POE, indicating that the fact that the PIRA’s acts were unlikely to achieve its objectives did not “deprive its acts of their political character.”86

The fourth case began on September 29, 1982, when a United States magistrate found William Joseph Quinn, a U.S. citizen, extraditable to the United Kingdom based on six PIRA-related bombing incidents in England.87 The magistrate based his decision on the finding that Quinn had failed to show that he was a member of the PIRA,88 had failed to prove that the alleged acts furthered PIRA goals, and failed to show that the bombings were committed in furtherance of a political uprising.89 Quinn then filed a petition for a writ of habeas

---

80 Id. at 274.
81 Id. at 276.
82 Id.
83 Id.
84 Id. (“[I]t would be most unwise . . . 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.”).
85 Id. The court specifically observed that PIRA’s “discipline and command structure operates even after its members are imprisoned.” Id.
86 Id.
87 Quinn v. Robinson, 783 F.2d 776, 783–85 (9th Cir. 1986).
88 Id. at 785. Specifically, the magistrate held that, “Quinn’s evidence of his membership in IRA was of little weight since he had failed to demonstrate that he was a member of the PIRA or of the Active Service Unit that allegedly conducted the bombings.” Id.
89 Id. The magistrate further held that, “because . . . [Active Service Units] often acted without guidance from superiors, their targets may have been chosen for personal reasons . . . rather than . . . political motivations.” The magistrate went on to find that the bombings were not in “furtherance of"
corpus. In granting this petition, the district court did not address all of Quinn's arguments because it held that the offenses were "non-extraditable political offenses."90

In an extremely liberal interpretation of the political incidence test, the district court found three legal errors in the analysis of the magistrate. First, the court held that Quinn was not required to "show ... membership in an uprising group."91 Second, the court held that the acts are not required to be "politically efficacious or directed by a hierarchy within PIRA" in order to meet the "incidental to" requirement.92 Third, the court disagreed with the magistrate who found that the bombings were not political because they were directed at civilians rather than the government the PIRA was attempting to displace.93 In contrast, the court reasoned that the motive of the acts was to influence the government, and the potential harm to civilians was merely incidental to those acts.94 Hence, the district court held that Quinn's actions were protected activity.95

It is interesting to note that not only did the court deny extradition in these four cases, but with each subsequent case, even though presented with similar fact patterns, the courts seemed to extend the POE's scope by increasing the number of factors that may be considered political. From the straightforward requirements in Mackin and McMullen of an uprising and an act incidental to that uprising, the court later expanded the protection of POE to include acts of dubious circumstances. The most tenuous extension of the POE appeared in the Quinn96 case where the court held that criminal acts need not have been ordered by a hierarchy within the PIRA, thus allowing protection of acts that may be of a personally revengeful nature. Indeed, the court went so far as to hold that membership in an uprising group is not required.97 Equally tenuous was that court's conclusion that acts need not be effective in promoting the political goals of the PIRA in order to remain protected.98

IV. The Repeal of the POE via the Supplementary Treaty

After U.S. courts denied the United Kingdom four extradition requests for PIRA activists, the Reagan Administration became both concerned and embar-
rassed. 99 In light of the cooperative stance British Prime Minister Margaret Thatcher had taken with regard to the U.S. fight against international terrorism, Reagan was eager to reciprocate by eliminating the 1972 Treaty provisions which safeguarded PIRA refugees. 100

In response, the Reagan Administration drew up the Supplementary Treaty 101 which delineated the offenses of political character which would no longer be protected. 102 President Reagan announced the purposes of the Supplementary Treaty in a letter to the Senate. Specifically, he deemed the Supplementary Treaty to be "a significant step in improving law enforcement cooperation and combatting terrorism, by excluding from the scope of the political offense exception serious offenses typically committed by terrorists ..." 103 In addition, Secretary Schultz heralded the Supplementary Treaty as a "significant step to improve law enforcement cooperation and counter the threat of international terrorism and other crimes of violence." 104

The Supplementary Treaty effectively negates the POE by stripping the political character away from an entire schedule of offenses that are normally associated with political revolution. 105 Acts included in the Supplementary

---

99 L.A. Daily J., June 13, 1986, at 22, col. 4 ("State and Justice officials said it was an embarrassment that U.S. courts in recent years have denied extradition for four alleged IRA terrorists.").

100 Id. ("Pressured by Prime Minister Margaret Thatcher to repay her support of the U.S. bombing of Libya, President Reagan had made passage of the [Supplementary] extradition treaty a top priority of his administration this year."); see also President's Letter to the Chairman of the Senate Foreign Relations Committee and the Senate Majority Leader, 22 WEEKLY COMP. PRES. DOC. 524 (Apr. 28, 1986):

As Great Britain demonstrated once again last week, she is our staunchest Ally in the battle against international terrorism. Rejection of the [Supplementary] Treaty would be viewed by the British—and the world at large—as a weakening of U.S. resolve. This must not happen. Indeed, we see Senate ratification of this Supplemental Treaty as a key element of our wider efforts to promote greater international cooperation.

Id.; see also 1986 CONG. Q. ALMANAC 379 ("President Reagan had asked for quick Senate approval of the treaty as a sign of gratitude to Prime Minister Margaret Thatcher for her support of the April 14 U.S. bombing raid against Libya.").

101 Supplementary Treaty, supra note 1.

102 Id. art. I.

103 President's Transmittal Letter to the Senate, 131 CONG. REC. S9696, reprinted in 24 INT'L LEGAL MATERIALS 1104 (1985) [hereinafter President's Transmittal Letter].

104 Id. reprinted in 24 INT'L LEGAL MATERIALS 1104 (1985) (letter from Secretary of State George Schultz accompanying the Treaty).

105 Supplementary Treaty, supra note 1, at art. 1. The Supplementary Treaty provides:

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

(a) an offense for which both Contracting Parties have an obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to a prosecution;
(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person;
(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

Id.
Treaty as exemptions from the POE include murder, voluntary manslaughter, assault causing grievous bodily harm, and offenses involving the use of an explosive or firearm.106 The Supplementary Treaty also provides the framework of an objective test to determine extraditability. Specifically, the evidence of criminality against the defendant must be such that it would be sufficient to justify trial in the requested state, if the act had been committed there.107

Notably, the Supplementary Treaty as ratified in 1986 was not the same treaty that was first submitted to the Senate in 1985. One change was to shorten the list of crimes that would be eliminated from the POE.108 The Senate also provided additional safeguards for the alien via a savings clause. This clause provides that notwithstanding any other provision of the Supplementary Treaty, the extradition request will be refused if the accused can establish before competent judicial authority (by a preponderance of the evidence) that the extradition request was made "with a view to try or punish him on account of his . . . political opinions."109

Also, if the accused can show that he or she will be "prejudiced at his trial or punished, detained, or restricted in his personal liberty by reason of his . . . political opinions," the extradition request will be denied.110 Both parties to the

---

106 Id.
107 Id. at art. 2:
Nothing in this Supplementary Treaty shall be interpreted as imposing an obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party.

Id.

Note that this provision has been interpreted as requiring a showing of probable cause. See Committee Report, supra note 7, at 7:
[...]
The purpose is to determine whether there are sufficient grounds to bind the individual over for trial, or to return him or her to complete an outstanding sentence in the requesting country. [Thus,] a person sought for extradition can introduce evidence on the question of probable cause.

Id.

108 Compare Supplementary Treaty, supra note 1, at art. 1 with Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, reprinted in 24 INT'L LEGAL MATERIALS 1104 (1985) at art. 1 [hereinafter 1985 Treaty]. Items in article 1 of the 1985 Treaty not included under article 1 of the Supplementary Treaty include property damage, possession of firearms with the intent to endanger life, and conspiracy to cause an explosion. See 1985 Treaty, supra, at art. 1. Other offenses were qualified under the 1986 version of the Treaty; manslaughter was changed to "voluntary," and unlawful serious detention was qualified as "serious." See Supplementary Treaty, supra note 1, at art. 1.

109 Supplementary Treaty, supra note 1, at art. 3(a). See also Lubet & Czaczkes, supra note 69, at 203. Traditionally, courts have denied making such foreign policy determinations. This article requires the judicial branch to ignore its longstanding practice of failing to inquire into the motives and processes of the requesting government; at least when that government is the United Kingdom. Lubet & Czaczkes, supra note 69, at 203.

110 Supplementary Treaty, supra note 1, at art. 3(a).
extradition proceeding have the right to appeal this particular determination within thirty days of the decision.\textsuperscript{111}

At first glance, this savings clause seems quite similar in ideology to the POE. The difference, however, lies in the fact that while the POE relates to the political nature of the act itself, this provision relates to the political opinions of the accused or the prejudice of the requesting party’s judicial process.

Overall, on its face, the Supplementary Treaty appears to directly address the Reagan Administration’s concern with PIRA refugees. Since the Supplementary Treaty arguably eliminates from the POE those acts of violence typical of the PIRA, the Treaty significantly improves the chances that no PIRA refugee will escape prosecution in the United Kingdom. Prior to the signing of the Supplementary Treaty, however, the Senate criticized its provisions in ratification hearings.

V. Criticisms Discussed in the Treaty Ratification Hearings

The most universal concern among critics is that the Supplementary Treaty creates an anomalous situation whereby the United States will limit protection of political activists with only one country, the United Kingdom.\textsuperscript{112} The same acts that are not protected by the POE when the requesting State is the United Kingdom, are protected when the requesting State is any of the other States with which the United States has extradition relations. During ratification hearings, critics raised this concern and likened it to the fundamental issue of fairness; i.e., that similarly situated people should have similar rights.\textsuperscript{113}

Critics are also concerned with the United States’ adoption of a treaty-by-treaty approach to altering the POE. By selectively emasculating the POE, the executive branch implies that nations not chosen for such supplementary treaties do not have governments that are sufficiently “democratic” or “fair.”\textsuperscript{114} To do

\textsuperscript{111}Id. at art. 3(b).

\textsuperscript{112}See, e.g., Senate Hearings, supra note 8, at 289. (statement of Prof. M.C. Bassiouni) ("[T]he same acts of violence would not be part of the 'political offense' exception if the requesting state was the U.K., but they would be if it is any of the 100 other states with which the U.S. has extradition relations."); id. at 359, (prepared statement of Rep. Rodino) ("Traditionally, all nations with which we have had extradition treaties have been subject to the same policy.").

\textsuperscript{113}Hearings Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary, 99th Cong., 1st Sess. 159 (1985) [hereinafter Subcommittee Hearings] (prepared statement of Gordon B. Baldwin) ("If fairness alone is the standard . . . the answer is obvious. Similar people in similar situations ought to have similar legal rights."); see also Senate Hearings, supra note 8, at 289 (prepared statement of Prof. M.C. Bassiouni) ("The same exclusions do not apply to other persons who commit the same acts in other states with which the United States has extradition treaties . . . ").

\textsuperscript{114}Conversely, those nations chosen are seemingly given approval by the United States. Senator Joseph Biden commented that the Supplementary Treaty makes the “judgment that the current British system in Northern Ireland is in fact a legitimate and good system. If we pass the Treaty, we are codifying that system.” N.Y. Times, Aug. 2, 1985, at 4, col. 1.
so, it is suggested, involves unwise "favored nation" determinations.\footnote{115} One critic has observed that "[t]his could either lead to the alienation of that government, or worse, to pressures upon our government to enter such agreements with states who truly do not meet the criteria."\footnote{116}

Several constitutional issues also surround the Supplementary Treaty. Since the acts in question have not involved the United States as a requesting State and have exclusively involved persons engaged in the rebellion in Northern Ireland, the exclusions have been referred to as the "IRA exclusions."\footnote{117} Accordingly, the Supplementary Treaty is criticized as being violative of the equal protection clause of the fifth amendment.\footnote{118}

The Supplementary Treaty also arguably violates the Constitution by its retroactivity.\footnote{119} Political refugees previously held un extraditable under the POE would now be extraditable if the United Kingdom were to reinstitute a request.\footnote{120} Critics suggest that this retroactivity violates "both constitutional prohibitions against ex post facto laws and bills of attainder."\footnote{121}

The Supplementary Treaty is also subject to criticism because it takes power from the judiciary and shifts that power to the executive branch. By delineating which offenses are not covered by the POE, the executive branch has predetermined the answers to questions of law and fact related to individual liberty.

\begin{footnotes}
\footnote{115} Senate Hearings, supra note 8, at 105 (statement of Prof. C.H. Pyle); see generally id. at 413–16 (statement of Morton Halperin), 359 (prepared statement of Rep. Rodino) ("Ratification of the proposed Treaty with the United Kingdom could very well lead to requests from other countries to rewrite their extradition treaties, putting us in the difficult position of determining which of our friends and allies have democratic governments and just legal systems.").
\footnote{116} Kircher, supra note 32, at 566.
\footnote{117} Senate Hearings, supra note 8, at 290 (prepared statement of Prof. M.C. Bassiouni). See also id. at 281 (prepared statement of D. Simbulan) ("[I]t is essentially an anti-IRA treaty . . . ."). See supra note 10 for an explanation of the relationship of PIRA to IRA.
\footnote{118} Id. at 289 (prepared statement of Prof. M.C. Bassiouni) ("With respect to the 'equal protection' violation, it is apparent on the face of this category of exclusions, that it is aimed exclusively at those persons who are charged with committing such violations under U.K. law. The same exclusions do not apply to other persons who commit the same acts in other states with which the U.S. has extradition treaties and who would still continue to benefit from the 'political offense exception'."). See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Aliens are protected by those provisions which refer to 'persons' rather than "citizens." Accordingly, they receive the protection of the Bill of Rights, and, specifically, the right to equal protection. Id.
\footnote{119} Article 5 of the Supplementary Treaty provides:
This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both contracting Parties at the time of its commission.
Supplementary Treaty, supra note 1, at art. 5.
\footnote{120} See supra notes 37–38 and accompanying text.
\footnote{121} Kircher, supra note 32, at 563 n.90 (citing 132 Cong. Rec.: S9153-60 (daily ed. July 16, 1986)); see also Senate Hearings, supra note 8, at 528–30 (statement of Francis Boyle, Professor of Law, University of Illinois).
\end{footnotes}
Such questions, the critics argue, are constitutionally reserved for the judiciary.\textsuperscript{122}

Another significant problem relates to the purported conflict of interest between the executive’s authority to rewrite the POE and conduct foreign policy. One commentator has bluntly stated that it is simply inconceivable that, as a political matter, the Department of State would decline to extradite a person to the United Kingdom on the ground that the individual would be persecuted or would not get a fair trial in British courts.\textsuperscript{123} Thus, the proper application of the POE is likely to be inhibited by political pressures typically placed on the executive branch.

Finally, the Supplementary Treaty is criticized as being overbroad, since it eliminates from protection all acts typical of revolutions, as well as terrorism. One critic went so far as to point out that under the Supplementary Treaty, the revolutionaries who led America to its independence would have been extraditable.\textsuperscript{124}

In sum, the negative ramifications of the Supplementary Treaty reach both domestic and international proportions. Such consequences explain why other methods of delivering PIRA refugees to the United Kingdom may be preferable. Indeed, the use of deportation may be one solution to the problem.

VI. DEPORTATION AS AN ALTERNATIVE TO EXTRADITION

A. DEPORTATION PROCEEDINGS IN GENERAL

Deportation is a civil proceeding used to remove foreign nationals present in the United States who are deemed undesirable by statutory definition.\textsuperscript{125} De-

\begin{footnotesize}
\textsuperscript{122} See Subcommittee Hearings, supra note 113, at 91, where Christopher Blakesley states:
\[E\]limination of the political offense exception will undermine the role of the judiciary in an area which the constitution and legal tradition require that the judiciary play a role. When questions of fact and law related to individual liberty are at issue, the judiciary is the constitutionally mandated institution to decide. To undermine this role . . . tends to weaken the principle of the constitutional separation of powers.
\textit{Id.} at 91. \textit{See also Id.} at 159 (prepared statement of Gordon B. Baldwin) (“I do not believe the Department of State is institutionally equipped to make principled decisions about the merits of any particular individual’s claim to be immune from extradition.”); \textit{but see id.} at 157 (“[W]hen to allow the political offense exception is also a foreign policy decision, which should be made by the executive branch.”).
\textsuperscript{123} \textit{Id.} at 123 (statement of John F. Murphy).
\textsuperscript{124} Senate Hearings, supra note 8, at 779–80 (app. A(l) to prepared statement of Prof. Keara O’Dempsey).
\textsuperscript{125} Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (“It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment, it is simply a refusal by the Government to harbor persons whom it does not want.”).
\end{footnotesize}
portable aliens are statutorily defined on numerous grounds. Grounds which could apply to PIRA refugees include membership in any of the following classes:

1. aliens who at the time of application for admission are not in possession of a valid entry document and passport;
2. aliens convicted of, or who admit to, committing a crime of moral turpitude;
3. aliens convicted of two or more offenses (other than purely political offenses) for which the aggregate sentences are greater than or equal to five years;
4. aliens who advocate or are affiliated with an organization that advocates the propriety of assaulting or killing any officer of any organized government because of the officer's official character, or the unlawful damage of property.

Because PIRA activists are frequently unable to obtain legally the required travel documents, both from the United Kingdom and the United States, provision (1) above often applies. Indeed, this was a ground for deportation in both the *Doherty* and *McMullen* cases. After an initial finding of a lack of the proper paperwork, the other aforementioned grounds of deportation may be used to augment the United States' position in the deportation proceeding.

Perhaps the most universally applicable ground for the future deportation of PIRA activists would be (4) mentioned above. Given that the PIRA's goal of

---

127 8 U.S.C. § 1182(a)(20) reads as follows:

"[Aliens] who at the time of application for admission are not in the possession of a valid unexpired immigration visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title."

*Id.*

128 8 U.S.C. § 1182(a)(9) reads in pertinent part: "aliens "convicted of a crime involving moral turpitude . . . or aliens who admit having committed such a crime, or . . . admit committing acts which constitute the essential elements of such a crime . . . ." *Id.*

129 8 U.S.C. § 1182(a)(10) reads in pertinent part: "aliens who have been convicted of two or more offenses (other than purely political offenses), . . . regardless of whether the offenses involved moral turpitude, for which the aggregate sentences were five years or more." *Id.*

130 8 U.S.C. § 1182(28)(F)(ii) reads in pertinent part: "aliens who advocate, teach, or are members of or are affiliated with any organization that advocates or teaches . . . the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the Government of the United States or any other organized government, because of his or their official character." *Id.*

132 *Doherty* v. Meese, 808 F.2d 938, 940 (2d Cir. 1986).
133 *McMullen* v. INS, 788 F.2d 591, 593 (9th Cir. 1986).
135 *See supra* note 130.
ousting British rule in Northern Ireland is largely effectuated through directed actions against law enforcement and other officers of the U.K. government, it is arguable that all PIRA refugees are subject to deportation based on this one ground alone. Curiously, however, only the Doherty case employed this ground of deportation.136

Deportation proceedings begin with the issuance of an "order to show cause" why the alien should not be deported.137 The order informs the alien of the nature of the proceedings, the factual allegations supporting his deportability, the alleged statutory violations, and requires the alien to appear before an Immigration Judge (IJ) for a hearing at a specified time and place.138 Significantly, the Immigration and Naturalization Service (INS) can arrest and take into custody any alien whom it believes is in the country in violation of the law and is likely to escape before a warrant can be obtained.139

The alien is then brought before an immigration officer for examination. If the officer determines that a prima facie case exists that the alien illegally entered the United States, the government begins formal deportation proceedings (unless it grants permission for the alien to depart voluntarily).140 The INS may detain an arrested alien, release the alien under specific conditions, or set bond.141 The alien has the right to file a habeas corpus action in a federal district court, challenging the government's detention or bond decision.142

Typically, appeals are taken from a deportation hearing by the Board of Immigration Appeals (BIA).143 The BIA's decision is based on the record of the deportation hearing, the counsel briefs, and oral argument, if petitioner requests.144 While the BIA's decision is administratively final, the alien may try to appeal it judicially.145

Under the INA, the alien must first exhaust the administrative appeals available.146 The alien is given six months from the final order of deportation to

---

136 Doherty, 808 F.2d at 940 n.1.
138 8 C.F.R. § 242.1(b) (1986).
140 Under the provisions of Immigration and Nationality Act of 1952, Pub. L. 96-212, § 244(e), 94 Stat. 102, 8 U.S.C. § 1254(e) [hereinafter the INA], the Attorney General is authorized, in his discretion, to grant voluntary departure to an alien who is otherwise subject to deportation. Under voluntary deportation, the alien may choose his or her destination. Id.; see, e.g., Jain v. INS, 612 F.2d 683, 685–86 (2d Cir. 1979); Strantzalis v. INS, 465 F.2d 1016, 1017 (3d Cir. 1972). It should be emphasized, however, that voluntary deportation is a privilege, not a right. See Rizzi v. Murff, 171 F. Supp 362, 366 (S.D.N.Y. 1959); Von Kleeckowski v. Watkins, 71 F. Supp 429, 435 (S.D.N.Y. 1947). Mackin eventually departed the United States using this method. See IRA Suspect, supra note 14.
141 INA, supra note 140, at § 242(a), 8 U.S.C. § 1252(a) (1982).
142 Id.
143 8 C.F.R. § 242.22 (1986).
144 8 C.F.R. § 3.5 (1983).
145 8 C.F.R. § 3.1(d)(2) (1983). The INA under 8 U.S.C. § 1105(a) (1982) authorizes the judiciary to have jurisdiction over certain decisions appealed from the BIA.
petition for review in the Court of Appeals. The Court of Appeals' scope of review is limited to (1) determining whether the proceeding was conducted in an arbitrary, capricious, or illegal manner and (2) whether the proceeding complied with notions of due process. The court is able to review only those issues already raised in the deportation hearing and which are part of the administrative record.

Once the refugee is determined to be deportable, the statute provides that the refugee

shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him . . . unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation . . . .

Recent case law extends the Attorney General's power "from the power to reject a designated country to the power to name the country to which the alien shall be deported." The rationale and consequences of this holding will be discussed below.

B. **Defenses to Deportation**

The statute also provides defenses to deportation. Given the definitional limitations of these defenses, however, it seems unlikely that they would be available to PIRA activists. One defense requires a showing that the alien's deportation would result in extreme hardship to a U.S. citizen spouse, parent, or child. The statute narrows the applicability of this defense by requiring that the alien's admission cannot be "contrary to the national welfare, safety, or security of the United States." The statute also provides that the Attorney General has the discretion to accept or deny this particular defense. Given the familial requirements and the discretionary elements surrounding this de-
fense, it is arguable that PIRA members would find it difficult to escape deportation under this defense.

A second defense involves a “withholding of deportation” proceeding, which is valid if the Attorney General determines that “the alien would be subject to persecution on the account of . . . nationality, membership in a particular social group, or political opinion . . . .” The statute provides several exceptions to this rule: if the alien participated in the persecution of any person on account of religion, nationality, or political opinion, then he or she will not be allowed the protections of withholding deportation. Another exception occurs when there is serious reason to believe that the alien committed a “serious nonpolitical crime” outside the United States before arriving in the United States.

Hence, given these exceptions, the Attorney General’s determination as to whether PIRA activities are political may not be determinative. In either case, the refugee is likely to be unable to use the defense of withholding of deportation.

A third defense to deportation is an application for political asylum. To gain asylum, the petitioner must prove that he or she is a “refugee,” which the Immigration and Nationality Act (INA) defines as an alien “who is unable or unwilling to return to . . . [his or her] country because of persecution or a well-founded fear of persecution on account of . . . nationality, membership in a particular social group, or political opinion.” Once a “well-founded fear of persecution” has been established, the Attorney General may, in his or her

---

155 8 U.S.C. § 1253(h) (1982). See INS v. Stevic, 467 U.S. 407, 424 (1984), where the Supreme Court interpreted the standard related to the alien’s burden of proof of “clear probability” to be that it is “more likely than not” that he or she will be persecuted. Id. The court in McMullen v. INS, 658 F.2d 1312, 1315 (1981) held that the following factors must be demonstrated by the alien in order to obtain withholding of deportation:

1. A likelihood of persecution; i.e., a threat to life or freedom.
2. Persecution by the government or by a group which the government is unable to control [of which PIRA is a member].
3. Persecution resulting from petitioner’s political beliefs.
4. The Petitioner is not a danger or security risk to the United States.

Id.

156 8 U.S.C. § 1253(h)(2)(A) (1982). Other exceptions include:

(h)(2)(B): the alien having been convicted of a particular serious crime, constitutes a danger to the community of the United States;
(h)(2)(D): there are reasonable grounds for regarding the alien as a danger to the security of the United States.

Id. Note, one valid ground for refusal to withhold is sufficient. McMullen v. INS, 788 F.2d 591, 599 n.14 (9th Cir. 1986).


161 Id. The Supreme Court has not defined “well founded fear,” but has elusively described it as
discretion, grant asylum.\textsuperscript{162} Again, however, the asylum procedure is not applicable if the alien participated in any persecution of persons based on, among other things, their religion, nationality, or political opinion.\textsuperscript{163}

C. The PIRA Cases in a Deportation Context

Hence, under current law, a PIRA activist who has fled to the United States may be deportable simply because of his or her membership in PIRA.\textsuperscript{164} Further, membership in PIRA disqualifies the refugee from taking advantage of the defenses afforded under the INA, and hence the refugee may be deportable\textsuperscript{165} to a country that must be agreeable with the Attorney General. Thus was the fate of three of the four PIRA refugees originally found to be un-extraditable\textsuperscript{166} (the fourth, Quinn, was a U.S. citizen, and hence not deportable).

1. McMullen

In the McMullen case, the defendant illegally obtained a non-immigrant temporary visa to enter the United States under the name of Kevin O'Shaughnessy.\textsuperscript{167} Without valid paperwork, the defendant was in statutory violation of U.S. immigration law, rendering him deportable.\textsuperscript{168} Upon his arrival in the United States, however, McMullen contacted the Bureau of Alcohol, Tobacco and Firearms with the hope of bartering his knowledge of PIRA activities in exchange for permission to stay in the United States.\textsuperscript{169} After cooperating with the authorities, McMullen raised both the withholding of deportation and asylum defenses at his subsequent deportation hearing.

McMullen testified that the PIRA knew of his cooperation with the authorities. He also testified that he was in danger of being murdered if the United States

\textsuperscript{162} The granting of asylum is discretionary under 8 U.S.C. § 1158(a) (1982). Because of this discretionary nature, the INS must consider any application for asylum as a parallel application for withholding of deportation. 8 C.F.R. § 208.3(b) (1983).

\textsuperscript{163} 8 U.S.C. § 1101(a)(42) (1982). According to Sarvia Quintanilla v. INS, 767 F.2d 1387, 1393 n.3 (1985), decisions denying asylum are reviewed under a two-part standard. To be determined first is whether substantial evidence supports the determination that an alien has failed to prove a well-founded fear or persecution. If the alien does indeed prove this, the court then must review the denial for abuse of discretion. Id.

\textsuperscript{164} See supra notes 127–31.

\textsuperscript{165} Assuming that the refugee's departure will not cause extreme hardship to a U.S. citizen parent, spouse, or child. 8 U.S.C. § 1182(h) (1982).

\textsuperscript{166} See IRA Suspect, supra note 14; McMullen v. INS, 788 F.2d 591 (9th Cir. 1986); Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986).

\textsuperscript{167} McBarron, 788 F.2d at 593.

\textsuperscript{168} Id. This was in violation of 8 U.S.C. § 1182(a)(20) (1982).

\textsuperscript{169} Id. For a discussion on asylum, see supra notes 158–63 and accompanying text.
deported him to Ireland.\textsuperscript{170} The Immigration Judge (IJ) agreed, holding that McMullen was not deportable since he would suffer persecution within the meaning of the INA.\textsuperscript{171} The BIA subsequently reversed the IJ, stating that McMullen had not established a significant "likelihood that he would suffer persecution upon deportation."\textsuperscript{172} The U.S. Court of Appeals for the Ninth Circuit initially reversed the BIA, holding that McMullen \textit{had} demonstrated the requisite "probable persecution" to withhold deportation, and then on review of remand, upheld the BIA's second decision.\textsuperscript{173}

The court first considered the validity of the BIA's denial of McMullen's application for withholding of deportation. The BIA made the denial on the basis of "serious reasons for considering that [McMullen] ... committed a serious nonpolitical crime."\textsuperscript{174} The court defined "nonpolitical crime" as one which "was not committed out of 'genuine political motives,' was not directed toward 'the modification of the political organization or ... structure of the state,' and in which there is no direct 'causal link between the crime committed and its alleged political purpose and object.'\textsuperscript{175} The court went on to hold that even if the crime is determined to be "political" under that definition, a crime is nonetheless considered "serious" and "nonpolitical" if it is "disproportionate to the objective, or if it is 'of an atrocious or barbarous nature.'\textsuperscript{176}

McMullen argued that in determining whether his acts were "political" for purposes of withholding deportation, the BIA should not weigh the nature of the offenses against the political ends sought to be achieved.\textsuperscript{177} To do so, he argued, would be impermissible under the political offense doctrine that has evolved in extradition cases.\textsuperscript{178} Instead, McMullen argued that the Castioni incidence test was appropriate.\textsuperscript{179}

The court refused to treat the standard for the political nature of an offense in the deportation context as that used in the extradition context.\textsuperscript{180} The court emphasized that in deportation, unlike extradition, only the United States and the alien are parties to the action, with no other sovereign directly involved.\textsuperscript{181} Hence, the concern of extradition, i.e. "that we should be careful not to interfere

\textsuperscript{170} McMullen, 788 F.2d at 593.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 594. This was in violation of 8 U.S.C. § 1253(h)(c) (1982).
\textsuperscript{175} Id. at 595 (citing G. Goodwill-Gill, The Refugee in International Law 60–61 (1983)).
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 596.
\textsuperscript{178} Id.
\textsuperscript{179} Id. For a review of the Castioni test, see \textit{supra} text accompanying notes 58–61.
\textsuperscript{180} McMullen v. INS, 788 F.2d 591, 596 (9th Cir. 1986).
\textsuperscript{181} Id.
with political processes in other cultures,” does not apply. Because deportation technically involves only the expulsion of an undesirable alien from the United States, there can be no interference with an “internal struggle” of another nation. Thus, the court indicated that the balancing approach used by the BIA was appropriate.

The court agreed with the BIA in finding that the PIRA’s acts of random violence against civilians and terrorist use of explosives were (1) insufficiently linked to their political objective and (2) qualified as acts of an atrocious nature, out of proportion to the political goal of achieving a unified Ireland. Having determined that the PIRA’s acts were not political, the court then went on to agree with the BIA that there were “serious reasons” to believe that McMullen participated in these crimes. In doing so, the court indicated that McMullen had met the lenient standard of “probable cause” by admitting to active membership in the PIRA.

Finally, the court rejected McMullen’s argument that because a magistrate in a previous extradition hearing found his acts to be political, the court should so find in a deportation hearing. The court based its determination on the fact that extradition determinations have no res judicata effect in subsequent judicial proceedings. Hence, in light of this conclusion, withholding of deportation was properly denied. Because that mandatory relief was unwarranted, the court found that there were sufficient grounds to support the Attorney General’s discretionary denial of asylum. Thus, the court held McMullen to be deportable.

2. Doherty

The most recent PIRA case involved Joseph Patrick Doherty. After U.S. courts found Doherty to be un-extraditable, the U.S. government returned him to the INS pursuant to a deportation warrant. In fact, the INS charged Doherty with five grounds for deportation: (1) lack of proper paperwork, (2) conviction of a crime of moral turpitude, (3) conviction of two crimes within

---

182 Id. (citing Quinn v. Robinson, 783 F.2d 776, 804–05 (9th Cir. 1986)).
183 Id.
184 Id. at 598.
185 Id. at 599.
186 Id.
187 Id. at 597.
188 Id. See supra note 37.
189 Id. at 600.
190 Id.
191 Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986).
192 Id. at 939.
193 Id. at 940. See supra note 127.
194 Id. See supra note 128.
an aggregate sentence of five years or more,\textsuperscript{195} (4) entering the United States for the purpose of engaging in activities which are "prejudicial to the public interest, or would endanger the welfare, safety, or security of the United States,"\textsuperscript{196} and (5) advocating the necessity of the unlawful assaulting or killing of any officer of an organized government because of the officer's official character.\textsuperscript{197}

When the U.S. government filed an action seeking review of the judge's denial of extradition, Doherty moved for a stay of his deportation proceedings pending the outcome of the action. Doherty, however, subsequently moved to withdraw his application for discretionary relief of deportation. He then admitted to being deportable due to a lack of valid immigration documents\textsuperscript{198} and sought immediate deportation, designating Ireland as his desired destination.\textsuperscript{199}

Doherty's reasoning behind this action was likely based upon the existence of the Supplementary Treaty, which was on the verge of being ratified.\textsuperscript{200} Since the Treaty would eradicate the political offense exception retroactively, Doherty would be subject to extradition to the United Kingdom.\textsuperscript{201} Doherty faced a life sentence in the United Kingdom, while in Ireland (based on a dual prosecution agreement between the Republic of Ireland and the United Kingdom), he faced only a ten-year sentence.\textsuperscript{202}

The Attorney General and the INS opposed Doherty's chosen destination on the ground that, "deportation to the Republic of Ireland would be prejudicial to the interests of the United States in its relations with other nations concerning the fight against international terrorism."\textsuperscript{203} The Attorney General then, in a unique move, argued that he had the authority to redesignate the United Kingdom as the country to which Doherty would be deported.\textsuperscript{204} The Attorney General relied on the language of the INA which provides that the Attorney General shall direct the deportation of an alien to a country designated by the alien unless, in the Attorney General's discretion, deportation to that country "would be prejudicial to the interests of the United States."\textsuperscript{205} The court held

\textsuperscript{195} Id. See supra note 129.
\textsuperscript{196} Id. 8 U.S.C. § 1182(a)(27) (1982).
\textsuperscript{197} Id. See supra note 130.
\textsuperscript{198} This is a violation of 8 U.S.C. § 1182(a)(20) (1982).
\textsuperscript{199} Doherty v. Meese, 808 F.2d 938, 940 (2d Cir. 1986). Doherty was able to designate his destination under 8 U.S.C. § 1253(a) (1982). Id.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 940-41. The Attorney General's opposition was based on the INA, supra note 140, at § 243, 8 U.S.C. § 1253(a) (1982). For the statute's language, see supra note 150 and accompanying text.
\textsuperscript{204} Id. at 941.
\textsuperscript{205} Id. INA § 243, 8 U.S.C. § 1253(a).
that such language seemed to suggest that once the alien had made one choice which was rejected, the next choice would belong to the Attorney General.206

Doherty argued that never before had the Attorney General opposed a deportee's chosen destination based on such designation being prejudicial to the interests of the United States and that this lack of precedent rendered the INS's argument "baseless and frivolous."207 The U.S. Court of Appeals flatly disagreed, holding that, to the contrary, "the novelty of the issue raised makes this case a particularly inappropriate occasion for judicial intervention in the administrative process."208

Through novel and expansive language, the court then made the bold statement that 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."209 The court explained that it reviews the Attorney General's decision with enormous deference.210 Specifically, the issue is "whether there is any reasonable foundation at all for the Attorney General's actions."211 The court explained that this deference is rooted in the fact that as a "politically responsible official," the Attorney General analyzes each particular deportation's impact on the United States as a whole, with respect to foreign relations.212 The court held that it has no place to interfere with decisions made by the political branches of government.213 In a final proclamation of its virtually absolute deference, the court stated, "apart from claims such as 'fraud, absence of jurisdiction, or unconstitutionality,' the determination of the Attorney General is essentially unreviewable."214

In analyzing the validity of the court's decision regarding the implied power of the Attorney General, it is important to note that no directly supportive precedent exists. As Doherty argued, the Attorney General has never before disapproved of a deportee's chosen destination.215 Furthermore, never before

206 Doherty v. Meese, 808 F.2d 938, 941 (2d Cir. 1986).
207 Id. at 941 n.3.
208 Id.
209 Id. at 941 (emphasis supplied).
210 Id. at 942.
211 Id. (emphasis supplied).
212 Id. at 943.
213 Id. (citing the Supreme Court in Harisiades v. Shaughnessy, 342 U.S. 580, 586–89 (1952)) ("Any polity toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").
214 Doherty v. Meese, 808 F.2d 938, 944 (2d Cir. 1986) (citing K. Davis, 3 ADMINISTRATIVE LAW TREATISE, 28:2 at 257 (2d ed. 1984)).
215 Id. at 941 n.3.
had any court validated the authority of the Attorney General to determine where, in that case, the deportee would subsequently go.

The court’s decision that the Attorney General should choose the new destination is, however, arguably supported by a plain reading of the statute. The INA provides the Attorney General with the discretion to disallow an alien’s choice if to do so would be “prejudicial to the interests of the United States.”216 Significantly, the INA goes on to say that the deportee can make only one designation.217 Thus, should deportees choose a designation that is unacceptable, they may not choose another, as their rights under the INA have been exhausted. Since the only parties involved in a deportation proceeding are the alien and the Attorney General, it follows that the only other party able to make another designation is the Attorney General.

The legal history of the development of deportation law also lends support to the Doherty court’s conclusion. Deportees’ rights, with respect to determining their destination, originated in the right to challenge the place of deportation already chosen by immigration officials.218 This was accomplished through a writ of habeas corpus. The Internal Security Act of 1950219 (1950 Act) greatly extended the rights of deportees, providing that, “deportation of aliens . . . shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him . . . .”220 However, even this permissive Act went on to provide that if the country was unwilling to accept the alien, then “such deportation shall be directed by the Attorney General within his discretion.”221

The 1952 Immigration and Nationality Act (1952 Act)222 introduced changes which indicated that Congress intended to curtail deportees’ rights with respect to choosing their ultimate destination.223 One court, in analyzing the provisions of the 1952 Act, recognized that it introduced new requirements that (1) the alien’s choice be made promptly; (2) the alien be given only one choice; (3) that choice be restricted if to “foreign territories contiguous to the United States or adjacent islands;” (4) the choice can be disregarded if the designated country

217 Id.
218 See, e.g., U.S. ex rel. Mensevich v. Tod, 264 U.S. 134 (1924) (Alien objected to being sent to Poland when prior to his emigration to the United States, he was a resident of Russia); U.S. ex rel. Karamian v. Curran, 16 F.2d 958, (2d Cir. 1927) (Alien objected to being sent to Persia when he was willing to voluntarily depart for France); U.S. ex rel. Chow Yee Tung v. Harrison, 143 F.2d 128, (2d Cir. 1944) (Alien objected to being sent to Great Britain since he had no connection with that country).
220 Id. at § 23.
221 Id.
223 U.S. ex rel. Scala Di Felice v. Shaughnessy, 114 F. Supp. 791, 794 (S.D.N.Y. 1953) (“Many changes have been introduced by the Act and it is plain on the face of the statute that Congress intended to circumscribe the right of aliens about to be deported in choosing the place of their deportation.”).
does not respond within three months; and (5) the Attorney General be given the discretion to ignore the alien’s choice if “deportation to the country chosen would be prejudicial to the interests of the United States.” Given the 1952 Act’s apparent shifting of power from the alien to the Attorney General, it follows that the Attorney General’s power, post 1952, is at least as broad as the more restrictive 1950 Act that the INA supercedes.

The counter argument, however, can be made that since the 1952 Act does not specifically state the consequences of an inappropriate designation, that in itself is evidence that Congress did not intend the Attorney General to choose another destination. Since the 1950 Act specifically directed that an alien’s inappropriate choice would be followed by the Attorney General’s choice, the absence of such language in the 1952 Act may indicate that Congress intentionally revoked that power of the Attorney General.

If the correct interpretation of the 1952 Act gives the Attorney General the power to name the alien’s destination, then deportation procedures have the ability to effectuate the same results as extradition. For example, if future PIRA activists were to arrive in the United States, it is conceivable that upon finding that a refugee lacks the proper paperwork, the Attorney General could routinely reject that refugee’s designated country for any discretionary reason and designate the United Kingdom as the final destination.

VII. Extradition of U.S. Citizen PIRA Activists Under the 1972 Treaty

Just as recent PIRA deportation cases suggest that the Supplementary Treaty is superfluous to the effort to return Irish PIRA members to the United Kingdom, a PIRA extradition case dealing with a U.S. citizen, who is not deportable, also suggests that the Supplementary Treaty is superfluous.

In Quinn v. Robinson, Quinn was a U.S. citizen charged with the PIRA-related murder of a London police officer and conspiracy to cause six bombing incidents in England. Initially, a magistrate found him to be un-extraditable, and a district court ultimately overruled that decision. The U.S. Court of Appeals reversed, finding Quinn extraditable because his acts failed to satisfy

---

224 Id.
225 783 F.2d 776 (9th Cir. 1986).
226 Id. at 785–86. The procedural history of the case explains the right to appeal. Initially, the U.S. magistrate held Quinn to be extraditable. Quinn then filed a writ of habeas corpus, and upon review, the district court held that Quinn's actions did fall into the POE of the 1972 treaty. Hence, he was held unextraditable. Id. at 785–86. Because this decision was made by a district court rather than a magistrate, a right of appeal exists.
the incidence test.\textsuperscript{227} While the outcome of the case undoubtedly supports the premise that the Supplementary Treaty was unnecessary, it is the \textit{dicta} contained in the majority and concurring decisions that most directly substantiates that premise.

Specifically, the court stated that historically the POE was designed "to protect those seeking to change their own government or to oust an occupying power that is asserting sovereignty over them. We question whether it should apply when the accused is not a citizen of the country or territory in which the uprising is occurring."\textsuperscript{228} Judge Fletcher, in a concurring opinion, agreed with the majority's supposition, stating that "mercenaries or volunteers in a foreign conflict" probably were not covered by the POE absent "tangible and substantial connections" with the uprising country.\textsuperscript{229}

This conclusion may be supported through the consideration of the POE's purpose and origin. As mentioned earlier, the POE was formulated to address the revolutionary who unsuccessfully attempted to overthrow an oppressive regime.\textsuperscript{230} One court has defined a revolutionary as "one who instigates or favors revolution," or one taking part therein.\textsuperscript{231} Another court has defined revolution as "a complete overthrow of the established government in any country or state by those who were previously subject to it,"\textsuperscript{232} and a "fundamental change in political organization, or in a government, or constitution; . . . or renunciation of one government or ruler, and substitution of another by the governed."\textsuperscript{233} From these definitions, it appears as though only nationals may qualify as revolutionaries, since a country's government governs only its nationals.

At least two decisions lend direct support to this conclusion.\textsuperscript{234} In \textit{Kjar v. Doak},\textsuperscript{235} the defendant was a Danish citizen who was a member of the Communist Party. Because that particular party advocated the violent overthrow of
the United States government, the court directly addressed the general "right" of a foreign national to contribute to a domestic revolution. While the defendant argued that the right of revolution is inherent in every individual, regardless of citizenship, the court flatly disagreed, holding, "[t]hat right, if it exists, depends upon where such individual attempts to operate in his effort to effect such right. Revolution presupposes an antagonism between a government and its nationals, not between a government and its aliens."\(^{236}\)

In a similar fact situation, the court in *United States v. Tapolsanyi*\(^ {237}\) commented on an alien's right to bring about governmental change through the promotion of communist propaganda in the United States. In holding that there was no such right, the court stated, "[w]hile no one may be deeply attached to every provision of the Constitution and while all citizens have a right to work for its amendment in an orderly way, that is a right of a citizen. . . . As an alien, he [defendant] had no such right."\(^ {238}\)

If the *Quinn* court's supposition is an accurate reflection of how future courts will interpret the POE when applied to U.S. citizens who are requested for crimes committed abroad, then the Supplementary Treaty may have been an unnecessary effort. That is, under the provisions of the 1972 Treaty and current immigration law, all PIRA activists who flee to the United States are already subject to delivery to the United Kingdom.

**VIII. THE PROPERITY OF USING DEPORTATION WHEN EXTRADITION IS UNAVAILABLE**

Given that deportation may produce the same result as a successful extradition, the question remains as to the extent to which deportation may properly be used when extradition is unavailable. While the *Doherty* court employed deportation measures to send Doherty back to the U.K., the propriety of such a tactic may be questionable. This is because deportation and extradition are rooted in different ideologies.

The Supreme Court, in *Fong Yue Ting v. United States*,\(^ {239}\) has explained that, "strictly speaking . . . 'extradition' and 'deportation,' although each has the effect of removing a person from the country, are different things, and have different purposes."\(^ {240}\) The Court explained that the main purpose of deportation is to remove an alien from a country "simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or

\(^{236}\) *Id.* at 569 (emphasis supplied).

\(^{237}\) 40 F.2d 255 (3d Cir. 1930).

\(^{238}\) *Id.* at 257.

\(^{239}\) 149 U.S. 698 (1893).

\(^{240}\) *Id.* at 709.
contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken.\textsuperscript{241} In comparison, the Court noted that extradition is “the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished.”\textsuperscript{242} It is because of these basic ideological differences that deportation can never be a proper substitute for extradition.

The legality of following up an unsuccessful extradition request with a deportation proceeding can, however, be substantiated in the exclusivity of deportation and extradition law. Because the purpose and function of deportation is distinct from those of extradition, an individual who lawfully avoided extradition may very well qualify for deportation.\textsuperscript{243} The alien’s deportability indicates that for one reason or another, he or she is not a person whom the United States wishes to harbor. Accordingly, it is irrelevant that for extradition purposes, the courts allowed the alien to remain in the United States. Supporting this conclusion is the fact that extradition proceedings have no res judicata effect.\textsuperscript{244}

Nevertheless, at least one critic refers to the deportation of un-extraditable aliens as “disguised extradition.”\textsuperscript{245} This critic challenges that this use of deportation is improper since it circumvents an “internationally recognized process” that assures “the surrender of fugitive offenders between states.”\textsuperscript{246} The weakness in this argument, however, is that according to the respective bodies of law, an alien may simultaneously be protected under extradition law and in violation of immigration law. Thus, this critic concedes that even if such disguised extradition is arguably a less-than-proper use of deportation, it nevertheless “occurs in the exercise of a sovereign right, i.e. the right of the State to expel undesirable aliens. Consequently, disguised extradition, in principle, is not a violation of international law.”\textsuperscript{247} Additionally, this critic recognizes that such a right is “in principle unlimited.”\textsuperscript{248}

Secretary of State Dean Acheson addressed the practice of instituting deportation procedures when extradition is unavailable in a letter to Senator Johnson dated Dec. 20, 1951.\textsuperscript{249} Describing the relationship between the two procedures, he wrote:

\textsuperscript{241}Id.
\textsuperscript{242}Id.
\textsuperscript{243}For example, compare supra notes 26–45 and accompanying text with supra notes 125–63 and accompanying text.
\textsuperscript{244}See supra note 37.
\textsuperscript{245}C. VAN den WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 52 (1980).
\textsuperscript{246}Id. at 56.
\textsuperscript{247}Id.
\textsuperscript{248}Id.
\textsuperscript{249}M. WHITEMAN, supra note 32, at 750.
It is the practice of this Department [of State] to suggest to foreign governments the deportation of American citizens only when other procedures for effecting their return to the United States are not available. Extradition is the proper procedure to be employed in effecting the return from foreign countries of fugitives . . . when there are treaties of extradition in force between the United States and the asylum country . . . .

It follows that in the converse situation (where a foreign State requests that the United States return a fugitive to that foreign nation), the Department's practice would be to deport such fugitives to the requesting State only when there is no extradition treaty in existence. The PIRA cases themselves, however, demonstrate the contrary. Indeed, these cases indicate that deportation may be properly used when extradition efforts under an existing treaty fail. In fact, one commentator observed that this practice is quite common, stating that requests are frequently made by one State to another for the deportation . . . of a person charged in the requesting State with crime. Most frequently, such requests are made where the circumstances are such that the State where he is accused is unable to demand his extradition under treaty and where his deportation . . . might result in his being expelled directly to that State or to a State from which his extradition might be demanded under treaty.

Overall, while it may be argued that on some moral level, deportation should not be used to effectuate the results of extradition when extradition is unavailable, it may also be argued that to do so is perfectly legal. Because deportation and extradition are two discrete and insular bodies of law, the inapplicability of one proceeding does not necessarily invalidate the subsequent institution of the other. Thus, the deportation of an un-extraditable alien appears to be a legally sound practice.

IX. Conclusion

The Supplementary Treaty may have been an unnecessary measure. Given its general purpose of “combatting terrorism,” the Treaty’s immediate goal is to deter terrorism by delivering PIRA refugees found within the United States back to the United Kingdom for prosecution. This delivery is already possible for non-U.S. citizen PIRA refugees, as their PIRA actions are likely to deem them deportable. Further, the INA, along with a recent court decision,

---

250 Id.
251 Id. at 748.
253 Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986).
indicate that the Attorney General has the final say as to the destination of that deportation. For those few PIRA activists who are U.S. citizens, hence not deportable, the POE’s original purpose supports the proposition that the 1972 Treaty was sufficient to guarantee their extradition. Since the POE was designed to protect unsuccessful revolutionaries, who by definition must be nationals, it most likely did not apply to U.S. citizens fighting for an Irish cause.

Accordingly, while the Supplementary Treaty directly ensures that PIRA members could not escape prosecution by fleeing to the United States, it may have been a superfluous effort. Further, given the numerous negative ramifications of the Supplementary Treaty, it was arguably an unwise effort, as well.

_Kathleen A. Basso_