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Procedural Uncertainty Attending the Assertion of the Political Offense Exception in Extradition Hearings

Charles R. Meyer, III*

INTRODUCTION

The American approach to the political offense exception to extradition is under increasing attack. Unfavorable commentary,¹ sparked in part by the recent decision *In re McMullen*,² has noted the confusion present in the operation of the exception. This article will trace some of the difficulties to the uncertain procedural burdens of raising and proving the exception in the judicial hearing. The current practice should be reformed to ameliorate the confusion. To this end, the United States Congress or Supreme Court must intervene to unify the procedural approaches taken by U.S. magistrates with respect to raising and proving the political offense exception.

DEFINITION AND OPERATION OF THE EXCEPTION

A foreign government will request the extradition of an individual it seeks for a violation of its criminal law through diplomatic channels. The U.S. State Department has the discretion to deny such a request.³ However, before the State Department can grant a request for extradition, federal law requires a hearing before a federal magistrate.⁴

This section 3184 hearing is not a criminal proceeding, nor is it strictly governed by American rules of criminal procedure.⁵ Rather, it is a process to ensure that there is sufficient evidence to support a request for extradition, and to exact compliance with the applicable extradition treaty.⁶ Because the hearing is not designed to test guilt, the courts severely restrict the alien fugitive's right to introduce evidence to defeat the request.⁷ In

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general, the individual is permitted to introduce only evidence which tends to show that he or she is not the person sought,⁸ or that the offense is not extraditable. For an offense to be extraditable, it must be contained in the extradition treaty⁹ and not subject to, *inter alia*, the political offense exception.

All American extradition treaties contain a political offense exception.¹⁰ However, the treaty language is vague. For example, the treaty of extradition between the United States and Thailand defines the exception as follows: "The provisions of the present Treaty shall not import a claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses; and no person surrendered . . . shall be tried or punished for a political crime or offense."¹¹

Because the treaties are silent on what constitutes a political offense, the judiciary has adopted the British standard.¹² This test of whether an offense is political has two components. First, the defendant must show a violent political disturbance, civil war, or revolution in the requesting state at the time of the alleged acts. Second, the acts charged against the alien must be incidental to, or in furtherance of, the disturbance, civil war, or revolution.¹³ The U.S. Supreme Court, in its only detailed opinion in this field, declared the issue of whether the offense is political or not to be one "chiefly of fact."¹⁴ This determination has had a significant impact on the case law developing the exception since district and circuit courts have subsequently given magistrates wide discretion owing to the factual nature of the decision.

PROCEDURAL CONFUSION

Section 3184, which authorizes the extradition hearing, is silent as to the procedural requirements for raising the political offense exception. The provision merely states "[i]f, on such hearing, [the magistrate] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty . . . he shall certify . . . that a warrant may issue . . . according to the stipulations of the treaty."¹⁵ It directs the magistrate to the appropriate extradition treaty. However, none of the ninety-seven treaties currently in force contain any rules governing the procedure whereby the political offense exception is raised or proven.¹⁶ The treaty article containing the exception typically does nothing more than refer the decision as to whether an offense is political to the requested state. The treaty does not define how the requested state is to make that determination.¹⁷

Unfortunately, the courts have been unable to clarify the treaties and statutes. There is no direct judicial review once the magistrate makes his findings on the fugitive's extradition.¹⁸ A collateral attack is permitted

through two devices—a petition for a writ of habeas corpus,¹⁹ or an action for a declaratory judgment—but it is limited.²⁰ Only the fugitive may avail himself of these devices; no appeal by the requesting state, or the U.S. Government on its behalf, is permitted to contest the denial of certification.²¹ Moreover, review of the extradition hearing cannot be used to reopen the findings of the magistrate. The only permissible inquiries are: whether the magistrate had jurisdiction; whether the offense was within the treaty; and whether there was any evidence warranting the finding of reasonable ground to believe the accused guilty.²² The severe restrictions placed on district and circuit court review of the Section 3184 hearing explains the dearth of reported decisions in the extradition field. This limited review and the concomitant lack of appellate guidance have contributed directly to the procedural confusion with respect to the burden of raising and proving the political offense exception.²³

The Supreme Court has intervened only twice in cases involving the exception: in 1896 to limit sharply the scope of habeas corpus review of the magistrate's hearing,²⁴ and indirectly in 1958 in a *per curiam* opinion vacating a Ninth Circuit judgment and ordering a magistrate hearing prior to habeas corpus review.²⁵ The survey below of the case law from the four circuits which have dealt with the exception will suggest that the absence of statutory, treaty, or Supreme Court direction has led to the present procedural uncertainty. Each federal magistrate is free to decide on an ad hoc basis who bears the burden of raising, presenting, and proving the exception.

The two most recent decisions at the magistrate's level involving the political offense exception are worth contrasting. They illustrate the substantial procedural confusion. *In re Abu Eain*²⁶ involved a request by Israel for the extradition of a fugitive accused of murdering two civilians killed by a bomb placed in an Israeli market. The magistrate labelled the exception a defense, and required the accused to assert it.²⁷ Eain introduced evidence from expert witnesses bearing upon the interpretation of the treaty exception, and added evidence tying his conduct to that interpretation.²⁸ Deemphasizing the relevance of this evidence the magistrate permitted and relied heavily upon unsolicited evidence from the State Department, which defined the American view of terrorism as being an activity not protected by the political offense exception.²⁹ Based on this record, the magistrate held that Eain's acts were common crimes, and therefore not within the purview of the exception. The memorandum opinion does not indicate which party bore the ultimate burden of persuasion.³⁰

*In re McMullen*³¹ involved a request by the United Kingdom for the extradition of a fugitive accused of murdering British soldiers killed by a bomb placed near some barracks in England. The magistrate labelled the

exception an "exclusion," which the accused must assert.³² McMullen introduced some evidence bearing on the situation in Northern Ireland, and the magistrate took judicial notice of historical events dating back sixty years.³³ In contrast to *Eain*, unsolicited State Department evidence was excluded.³⁴ Based on this record, the magistrate determined that McMullen had established a *prima facie* case that his offense was political. The magistrate ruled that the burden of coming forward with evidence shifted to the requesting state, which subsequently failed to meet this burden. The Court noted that the accused bore the ultimate burden of persuasion.³⁵

The magistrates in *Eain* and *McMullen* differed on the role of the accused's evidence, whether judicial notice by the magistrate was permissible, the use of State Department evidence, and the weight accorded to the various evidentiary sources. These are but two cases. The use of the exception in extradition is bound to rise in the near future.³⁶ With 488 federal magistrates,³⁷ the possibility for continued procedural confusion is clearly present as the magistrates have wide discretion in all matters involving the section 3184 extradition hearing.³⁸

The procedural confusion noted above is especially disturbing because one of the primary purposes of the section 3184 hearing is to provide procedural due process for the accused.³⁹ The fugitive is almost always a stranger to the American legal process. While he may have legal counsel,⁴⁰ the absence of procedural uniformity in raising, presenting, and proving the political offense exception detracts from the due process safeguards which a judicial hearing is supposed to provide. If the procedural requirements are uncertain or unfair, the fugitive is less likely to be able to invoke the protection afforded by the political offense exception. Procedural disarray can cause apparent substantive inconsistency as in *Eain* and *McMullen*.⁴¹ By analyzing the various approaches which have been taken with respect to raising, presenting, and proving the political offense exception in the magistrate's hearing, this article will derive proposals designed to instill the desired uniformity.

RAISING THE POLITICAL OFFENSE EXCEPTION

There are three possibilities in assigning the burden of raising the political offense exception. The accused might raise the issue as an affirmative defense to extradition. The requesting state might negate the existence of the exception as an element of its request for extradition. Finally, the magistrate could decide *sua sponte* whether the exception is an issue based on the documents and evidence before him. There is no uniform approach to be derived from the case law and the policy behind the exception.

A review of the four circuits which have dealt with the issue reveals that even within circuits different approaches have been taken. For example, the early Ninth Circuit case of *Karadzole v. Artukovic* dealt with a request by Yugoslavia for the extradition of a former wartime official accused of ordering the murder of 200,000 concentration camp inmates. The court held that the magistrate should decide whether to raise the political offense exception based on the face of the requesting state's complaint or indictment, or on facts of which the magistrate took notice.⁴² By contrast, in *McMullen*—a case also decided in the Ninth Circuit—the magistrate placed the burden on the accused, much like an affirmative defense.⁴³

The Second Circuit also has a checkered history with respect to raising the exception. In the early case of *Gallina v. Fraser*—involving a request by Italy for the extradition of a fugitive accused of robbery—the burden was placed on the accused.⁴⁴ Subsequently, the Southern District of New York has alternated between requiring the magistrate to raise the issue *sua sponte* during the hearing,⁴⁵ and leaving the issue to the magistrate's discretion,⁴⁶ who presumably could take any of the three approaches outlined above. Currently, the Fifth Circuit follows the rule that the issue is one falling within the magistrate's discretion,⁴⁷ while the Seventh Circuit has consistently characterized the exception a defense, placing the burden on the accused.⁴⁸

This confusion may be traced in part to a terminological misunderstanding. In *Collins v. Loisel* the Supreme Court held, *inter alia*, that "a person arrested for extradition is entitled to introduce evidence rebutting probable cause, but not evidence in defense."⁴⁹ This language has been picked up by other courts,⁵⁰ and has raised uncertainty in labelling the political offense exception.⁵¹

A careful reading of the opinion in *Collins* yields the conclusion that the language was intended only to cover evidence introduced as to ordinary criminal defenses (insanity, duress and the like). Since the extradition hearing is not a criminal proceeding,⁵² criminal defenses should be rejected. However, the political offense exception, as a bar to extradition derived from treaty language, operates much like an affirmative defense. The unwillingness to label it a defense has rested on the belief that, if so characterized, under *Collins* the accused would not be allowed to introduce evidence to establish the existence of the exception—an absurd result. The exception is a defense, but not the ordinary criminal defense to which *Collins* was intended to apply.

Partly because of these terminological problems, a uniform approach cannot be derived from case law. The present confusion prompts inquiry into which approach is consonant with the tenor and purposes of the extradition hearing and the political offense exception. At the outset, recourse to the treaty language is of no help. For example, the Treaty with

Spain provides in Article II that "[p]ersons shall be delivered up . . . for any of the following offenses," and then, in Article V, excepts a political offense.⁵³ While the mandatory language authorizing extradition, subject to enumerated exceptions, implies an affirmative defense, distinguished commentators have contested this conclusion.⁵⁴

Policy considerations argue in favor of classifying the political offense exception as an affirmative defense. There is a presumption in favor of extradition to enhance world order and honor treaty obligations.⁵⁵ Courts could require the requesting state to plead the absence of a political offense in every case, but since many extradition cases do not involve political offenders such a requirement would be an undue burden. Requiring the magistrate himself to consider whether the exception is an issue in each case is similarly unnecessary and cumbersome. The only feasible alternative is to place the burden on the accused. While the pro forma use of the political offense exception in extradition hearings has in practice led to increased pleading of the exception,⁵⁶ this profusion should not be institutionalized by requiring the requesting state or magistrate to raise the issue in each case. The accused in a section 3184 hearing should bear the burden of raising the issue of the political offense exception as an affirmative defense, "which defeats or negates the claims for extradition."⁵⁷

INTRODUCING EVIDENCE; THE BURDEN OF PROVING THE DEFENSE

Once the political offense exception is labelled an affirmative defense which the accused must raise in the section 3184 hearing, there is the additional question of how evidence in favor of or against the assertion of the defense should be introduced. In addressing the issue, it is important to remember that the magistrate's discretion with respect to the introduction of evidence is virtually unlimited.⁵⁸ The magistrate's discretion is reinforced by the line of cases holding that the rules of criminal procedure need not be followed,⁵⁹ and that there is no error if the magistrate excludes evidence.⁶⁰

The magistrate's wide discretion has permitted the development of several different approaches with respect to which party bears the burden of introducing evidence as to the political offense exception. In some cases the magistrate has confined the evidence to historical facts which were judicially noticed.⁶¹ Other cases have required the accused, through expert and documentary evidence, to discharge the burden of introducing sufficient evidence by establishing a *prima facie* case that the acts charged were of a political character.⁶² Once the *prima facie* case is established, magistrates have given the requesting state the opportunity to rebut.⁶³

Finally, in a recent, important development,⁶⁴ one magistrate permitted evidence from the State Department to define the United States' ⁶⁵ view of the political offense exception as applied to the facts at issue.

The normal rule with respect to the introduction of evidence requires placing this burden on the same party which has the burden of raising the issue.⁶⁶ Given the prior conclusion that the political offense exception is an affirmative defense to extradition, the fugitive must bear the burden of introducing evidence on the exception. Otherwise the burden of raising the defense becomes almost meaningless because the accused would raise the defense in every case and immediately cast the burden of rebuttal on the requesting state. This reasoning follows by analogy to the Supreme Court's conclusion in *Leland v. Oregon*,⁶⁷ which held that the accused bears the burden of introducing evidence if he has raised an affirmative defense.

Beyond *Leland*, the policy of promoting international extradition also suggests placing the initial burden of coming forward with the evidence on the accused. On the other hand, for the accused to be treated fairly, he must be able to introduce evidence beyond what the magistrate chooses to judicially notice. Evidence concerning the circumstances of the offense may be necessary for an adequate decision on the political offense issue.

The approach which best accommodates the procedural ⁶⁸ and substantive ⁶⁹ concerns embodied in the exception is a hybrid derived from *McMullen* and *Eain*.⁷⁰ For the reasons noted above, the accused should bear the initial burden and have the opportunity of introducing sufficient evidence to place the defense at issue, a quantum represented by a *prima facie* case.⁷¹ The requesting state may rest, if it feels the quantum of proof needed to successfully assert the defense has not been met. In most cases, however, to increase the chance of obtaining the extradition, the requesting state should introduce its own evidence to rebut the accused's political offense argument.⁷²

There remains one important issue concerning the introduction of evidence during the hearing when the exception is at issue: the role of State Department evidence. Currently, the magistrate has discretion ⁷³ throughout the proceedings to permit State Department evidence on the nature of the offense committed. In *McMullen*, the magistrate did not permit State Department evidence,⁷⁴ and the circuit court in *Eain* voiced a similar discomfort with executive input.⁷⁵ This discomfort is difficult to explain in light of the frequent criticisms of judicial insensitivity to complex international concerns.⁷⁶ The State Department will probably seek to declare its position only in the few controversial terrorist cases—precisely when judicial understanding of the foreign setting needs to be enhanced.

Assuming that there ought to be a political offense exception ⁷⁷ and that the judiciary is the institution to decide upon it,⁷⁸ courts should favor the introduction of State Department evidence to further the process of mak-

ing informed decisions. Significantly, a State Department official has declared his satisfaction with this approach in the only case where State Department evidence was used.⁷⁹ Naturally, great weight should be accorded the State Department evidence.⁸⁰ However, it ought not be dispositive, since the decision is ultimately the magistrate's.⁸¹

THE BURDEN OF PERSUASION

After the accused raises the political offense exception and introduces the *prima facie* case, and the requesting state rebuts, the magistrate must decide the ultimate issue: does the record support the successful assertion of the defense as a bar to extradition? In *Ramos v. Diaz*, the accused was required to show that the act was probably political.⁸² This is the closest any court has come to discussing the burden of persuasion. The ultimate burden of proof in cases where the evidence is in equipoise has rarely been at issue because in most cases the factual situation fits within one of the several recognized categories of the political offense exception.⁸³ Thus, the magistrate may frequently rule as a matter of law.

General rules of evidence require that the party with the burden of pleading a fact will have the burden of persuasion as well.⁸⁴ As discussed above, the burden of introducing the political offense exception should be borne by the fugitive. It follows that the fugitive should bear the ultimate burden of persuasion. This is in keeping with labelling the political offense exception an affirmative defense.⁸⁵ A countervailing consideration in favor of casting the burden of persuasion on the requesting state is the accused's lack of access to evidence.⁸⁶ Who should bear the burden is thus a difficult issue. As with other issues of extradition law, the presumption in favor of extradition should settle this issue in favor of the requesting state. Following *Ramos*, the courts should require the accused to prove that his offense was probably political.⁸⁷

CONCLUSION

There is considerable confusion over the procedural operation of the Section 3184 judicial hearing when the political offense exception is raised as a defense. Procedural uniformity should be the goal. Moreover, the current frustration with the political offense exception may owe much to the absence of State Department input during the judicial process. This note has suggested four proposals for reform: placing the burden of raising the exception on the accused as a defense to extradition; requiring the accused to make a *prima facie* case, which the requesting state may rebut; solicita-

tion by the magistrate of evidence from the State Department as to the United States' view on the political offense exception when terrorist conduct is at issue; and placing the burden of persuasion on the fugitive.

Unifying authority must establish these proposals. The operation of the system has produced confusion, and the magistrates themselves cannot solve the problem. Either Congress should act, by making changes in the statute authorizing the judicial hearing, or the Supreme Court should resolve the current conflict in the approaches taken by magistrates and judges between and even within the circuits. The former avenue is the more promising. Congress drafted the original statutory provisions and is capable of reforming them.⁸⁸ In contrast, it is difficult to imagine either the accused or requesting state reaching the Supreme Court on grounds of procedural irregularities between courts. Absent reform, federal magistrates should not view the frequent assertion that they have wide discretion in an extradition hearing as warranting an ad hoc procedural determination.

NOTES

¹ See, e.g., *Eain v. Wilkes*, 641 F.2d 504, 513, 519 (7th Cir. 1981) (political incidence test too rigid), U.S. appeal pending; Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61, 82-84 (1979) (urges abolition of the exception); Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381, 410 (1979) (U.S. "shocked and embarrassed" by decision in *McMullen*); Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, 206 (1980) (absence of uniform procedure for raising or sustaining political offense exception in American law).

² *In re McMullen*, No. 3-78-1099 MG., slip op. (N.D. Cal. May 11, 1979).

³ See Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313 (1962).

⁴ 18 U.S.C. § 3184 (1976); *Karadzole v. Artukovic*, 355 U.S. 393 (1958) (mandate vacating judgment of the Court of Appeals; remanded to District Court for hearing pursuant to 18 U.S.C. § 3184); *Eain*, 641 F.2d at 508-9.

⁵ *United States ex rel. Oppenheim v. Hecht*, 16 F.2d 955, 956 (2d Cir. 1927) ("Extradition proceedings are not in their nature criminal . . . therefore all talk . . . of the common law on the criminal side, is quite beside the mark"), cert. denied, 273 U.S. 769 (1926); cf. *Grin v. Shine*, 187 U.S. 181, 184 (1902) ("In the construction and carrying out of such [treaties of extradition] the ordinary technicalities of criminal proceedings are applicable only to a limited extent").

⁶ See, e.g., *Eain*, 641 F.2d at 508-9. See also Lubet & Czackes, *supra* note 1, at 198 (states that court determines the existence of supporting evidence, and must find an applicable treaty).

⁷ See, e.g., *Jimenez v. Aristeguieta*, 311 F.2d 547, 556 (5th Cir. 1962) (accused "may offer limited evidence to explain elements in the case against him."), cert. denied, 373 U.S. 914 (1963).

⁸ 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 998-999 (1968).

⁹ 18 U.S.C. § 3184 (1976). If an offense is not listed in the extradition treaty, the United States may grant the request, but need not do so, i.e., it is purely discretionary. See *Greene v. United States*, 154 F. 401 (Ga. 1907), cert. denied, 207 U.S. 596 (1907).

¹⁰ See J. KAVASS & A. SPRUDZ, *EXTRADITION LAW AND TREATIES—UNITED STATES* (1979) for the text of all treaties in force.

¹¹ Treaty for the Extradition of Fugitives from Justice, Dec. 30, 1922, United States–Siam, art. III, U.S.T.S. No. 681, 43 Stat. 1749, 11 Bevans 1008 (entered into force March 24, 1924).

¹² Derived from the leading case *In re Castioni*, 1891 1 Q.B. 148; adopted first by a federal court in *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894). See M. DEFENSOR-SANTIAGO, *POLITICAL OFFENSES IN INTERNATIONAL LAW* 113–25 (1977) for a review of the American case law adopting the *Castioni* standard.

¹³ See, e.g., *Eain*, 641 F.2d at 516; *In re Gonzalez*, 217 F.Supp. 717, 721 (S.D.N.Y. 1963). In evaluating the second component, some courts have permitted evidence concerning the individual's motivation. See, e.g., 217 F.Supp. at 721–22. But see *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980), cert. denied, 449 U.S. 1036 (1980). There are many variants to the basic test used abroad. See generally DEFENSOR-SANTIAGO, *supra* note 12, at 77–166; Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

¹⁴ *Ornelas v. Ruiz*, 161 U.S. 502, 509 (1896).

¹⁵ 18 U.S.C. § 3184.

¹⁶ See 18 U.S.C.A. § 3181 (Supp. 1981) for a list of treaties in force. See also KAVASS & SPRUDZ, *supra* note 10, for texts of treaties.

¹⁷ See, e.g., Treaty of extradition, March 1, 1933, United States–Albania, art. III, 49 Stat. 3313, U.S.T.S. No. 902.

¹⁸ See *United States ex rel. Sakeguchi v. Kanlukukui*, 520 F.2d 726, 729–30 (9th Cir. 1975); *Greci v. Birknes*, 527 F.2d 956, 958 (1st Cir. 1976).

¹⁹ See *Collins v. Miller*, 252 U.S. 364 (1920); *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972); see also 18 U.S.C.A. § 3184 notes 167–73 (1969).

²⁰ See *Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965).

²¹ *In re Lo Dolce*, 106 F.Supp. 455, 457 (W.D.N.Y. 1952).

²² *Fernandez v. Phillips*, 268 U.S. 311, 312 (1924).

²³ This is reinforced by limits placed on review of the magistrate's decision as to the political offense exception. See *supra* note 14 and accompanying text; *Ornelas*, 161 U.S. at 508–9. A final reason for procedural disarray, in extradition law generally, was identified by a Senate Committee, which had occasion to deal with extradition procedure during the hearings on the proposed Criminal Code Reform Bill: "between the time the current extradition laws were enacted, and the present time, the United States has entered into many extradition treaties which have set forth different procedures to be followed in extradition cases." COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1979, S. Rep. No. 553, 96th Cong., 2d Sess. 1050–51 (1980).

²⁴ *Ornelas*, 161 U.S. 502.

²⁵ *Karadzole v. Arkutovic*, 355 U.S. 393.

²⁶ *In re Abu Eain*, No. 79 M 175, slip op. (N.D. Ill., Dec. 18, 1979).

²⁷ Transcript Record for September 27, 1979 at 271, *Eain*.

²⁸ See Fields, *Bringing Terrorists to Justice—The Shifting Sands of the Political Offense Exception*, in INTERNATIONAL ASPECTS OF CRIMINAL LAW 15, 24 (R. Lillich ed. 1981).

²⁹ *Id.* at 22–23.

³⁰ *In re Abu Eain*, slip op. at 20–21.

³¹ *In re McMullen*, No. 3-78-1099 MG., slip op. at 1.

³² *Id.*

³³ *Id.* at 2, 4, 5–6.

³⁴ *Id.* at 3.

³⁵ *Id.* at 6.

³⁶ For example, there is evidence that the exception may be a pro forma device which

every lawyer representing an alien fugitive raises. *See, e.g.,* Gallina v. Fraser, 177 F.Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir. 1960); *In re Sindona*, 450 F.Supp. 672 (S.D.N.Y. 1978) (hearing pursuant to 18 U.S.C. § 3184); *Sindona v. Grant*, 461 F.Supp. 199 (S.D.N.Y. 1978) (habeas corpus review), *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980); *Jhirad v. Ferrandina*, 362 F.Supp. 1057 (S.D.N.Y. 1973), *rev'd*, 486 F.2d 442 (2d Cir. 1973), *cert. denied*, 429 U.S. 833 (1976). *See also* Lubet & Czackes, *supra* note 1, at 193-94, 195 ns.17-20 (the increasing problems associated with terrorism and global violence); Evans, *Reflections Upon the Political Offense in International Practice*, 57 AM. J. INT'L L. 1, 22-23 (1963) ("Given present international conditions and the vulnerability of [many] states, which are afflicted by disturbed political conditions, . . . to espionage, terrorism, fomentation of civil war, or acts of international aggression . . .").

37 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 141 (1981).

38 *See Garcia-Guillern*, 450 F.2d 1189; *Gonzalez*, 217 F.Supp. 717; *Sindona*, 461 F.Supp. 199, 619 F.2d 167.

39 *Sayne v. Shipley*, 418 F.2d 679, 686 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970) ("The Due Process clause guarantees [the extraditee] the right to a hearing prior to extradition."). *See also* Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1949) ("The constitutional requirement of procedural due process of law . . . permeates every valid enactment of [Congress].").

40 It is uncertain whether an extraditee has the right to counsel. In many cases where the exception was at issue, the point was moot, for either accused had his own resources, *see, e.g., Jimenez*, 311 F.2d 547 (former president of Venezuela); *Sindona*, 619 F.2d 167 (financier); or groups with funds were willing to step in on his behalf, *see, e.g., Eain*, 641 F.2d 504 (Palestinian terrorist). If a case were to arise where funding was unavailable, there is strong statutory authority for finding that the accused has a right to counsel, with such expenses as incurred chargeable to the requesting state. *See* 18 U.S.C. § 3195 (1976) ("All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.") in conjunction with 7 Op. Atty. Gen. 612 (1855) (ordinary expenses including fees of counsel to be defrayed by demanding government). *See also* Gallina, 177 F.Supp. at 859 (accused had appointed counsel). Additionally, the proposed Criminal Code Reform Bill has a provision for payment of accused's legal fees. *See* S. 1639, 97th Cong., 1st Sess. § 3193 (1981).

41 Under quite similar factual situations opposite results were obtained—*Eain* was extradited and *McMullen* was not. *See supra* notes 26, 31 and accompanying text.

42 *Karadzole v. Artukovic*, 247 F.2d 198, 202 (9th Cir.), *vacated and remanded per curiam* 355 U.S. 393 (1957). The validity of the Circuit Court opinion may remain intact, since the Supreme Court remanded for a hearing. *See* note 4 *supra*. *But see* Lubet & Czackes, *supra* note 1, at 206-207.

43 *In re McMullen*, No. 3-78-1099 MG., slip op. at 1. *See supra* text accompanying notes 31-35.

44 *Gallina*, 177 F.Supp. at 867.

45 *Jhirad*, 362 F.Supp. at 1062.

46 *Gonzalez*, 217 F.Supp. at 720; *Sindona*, 461 F.Supp. at 201.

47 *Garcia-Guillern*, 450 F.2d at 1191.

48 Transcript Record for September 27, 1979 at 271, *Eain*. *See supra* text accompanying notes 26-30.

49 *Collins v. Loisel*, 259 U.S. 309, 310 (1922).

50 *See, e.g., Jimenez*, 311 F.2d at 556.

51 In *McMullen* the magistrate labelled the exception an "exclusion," though the incidents of this characterization were identical to an affirmative defense in terms of the burden of raising the exception. No. 3-78 1099 MG., slip op. at 1.

52 See *supra* note 5.

53 Treaty on Extradition, May 29, 1970, United States–Spain, 22 U.S.T. 737, T.I.A.S. 7136.

54 1909 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 95-124, 144-65 *in passim*.

55 Glucksman v. Henkel, 221 U.S. 508 (1910); *Grin*, 187 U.S. at 184. Cf. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 7 (1936) (dictum: "The United States has favored . . . extradition. . ."). See also *Sayne*, 418 F.2d at 684; *Peroff v. Hylton*, 563 F.2d 1099, 1102 (extradition tied to foreign affairs).

56 See *supra* note 36 for examples of the pro forma use of the exception.

57 Lubet & Czackes, *supra* note 1, at 206.

58 *Charlton v. Kelly*, 229 U.S. 447 (1912) ("There is not . . . a uniform rule as to admission of evidence for the accused in an extradition proceeding."); *United States ex rel. Petrushansky v. Marasco*, 326 F.2d 562, 567 (2d Cir.), *cert. denied*, 376 U.S. 952 (1963).

59 *United States ex rel. Klein v. Mulligan*, 50 F.2d 687, 688 (2d Cir.), *cert. denied*, 284 U.S. 665 (1931); *United States ex rel. Eatessami v. Marasco*, 275 F.Supp. 492, 494 (S.D.N.Y. 1967).

60 *Desmond v. Eggers*, 18 F.2d 503, 505-506 (9th Cir. 1927).

61 See, e.g., *United States ex rel. Karadzole v. Artukovic*, 170 F.Supp. 383, 392 (S.D. Cal. 1959); *In re Mylonas*, 187 F.Supp. 716 (N.D. Ala. 1960); *In re McMullen*, No. 3-78-1099 MG., slip op. at 2, 4, 5-6 (N.D. Cal. May 11, 1979).

62 See, e.g., *Ramos v. Diaz*, 179 F.Supp. 459, 463 (S.D. Fla. 1959). A limitation placed on the accused's evidentiary burden is that he may not introduce evidence going to the motive of the requesting state. *In re Lincoln*, 228 F. 70, 74 (E.D.N.Y.), *aff'd*, 241 U.S. 651 (1915).

63 See, e.g., *In re McMullen*, No. 3-78-1099 MG., slip op. at 6 (N.D. Cal. May 11, 1979). See also *Ramos*, 179 F.Supp. at 463.

64 See *Fields*, *supra* note 28, at 22-23. The case was *In re Abu Eain*.

65 The bilateral treaties of extradition always refer to the determination of whether an offense is political as falling within the exclusive province of the requested state, without indicating which branch of government should decide. See KAVASS & SPRUDZ, *supra* note 10, for texts of all treaties in force.

66 MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, 784 (E. Cleary 2d ed. 1972).

67 343 U.S. 790 (1952) (defendant raised insanity defense; *held*, accused had to establish the defense beyond a reasonable doubt). See also *James, Burdens of Proof*, 47 VA. L. REV. 51, 59 (1961).

68 For the procedural concern of the extradition hearing resting on due process grounds, see *supra* note 39.

69 The substantive concern has been expressed as follows: "to prevent [the United States'] legal processes from being used by a foreign regime as instrumentalities of reprisal against its domestic political opponents." *Gonzalez*, 217 F.Supp. at 722. Accord *United States ex rel. Giletti v. Comm'r of Immigration*, 35 F.2d 687, 689 (2d Cir. 1929) ("[W]hen the choice is open, we should not make it an incident of the execution of our own laws that the offender should be subjected to the discipline of another country for crimes of [a political] character.").

70 See *supra* notes 26-35 and accompanying text.

71 *In re McMullen*, No. 3-78-1099 MG slip op. at 2, 4, 5-6 (N.D. Cal. May 11, 1979).

72 See *In re McMullen*, slip op. (the accused established a prima facie case, whereupon the burden of proof shifted to the requested state; the United Kingdom offered no evidence to meet this burden).

73 See Transcript Record for September 27, 1979 at 271, *In re Abu Eain*, No. 79 M 175 (N.D. Ill. Dec. 8, 1979). See also *Fields*, *supra* note 28, at 24. See generally *Petrushansky*, 259 U.S. at 567.

74 *In re McMullen*, slip op. at 3.

75 *Eain*, 641 F.2d at 515.

76 See *Epps*, *supra* note 1, at 82-84. But cf. *Eain*, 641 F.2d at 512-515 (after discussion of executive-judicial interaction, and review of reasons in favor of complete State Department

discretion, concludes: (a) judicial review derives from Act of Congress; (b) there are advantages to independent judicial determination).

77 The political offense exception has come under increasing attack. *See* S. 1940, 97th Cong., 1st Sess. § 3194 (1981) (proposed amendment would strip the courts of jurisdiction over the political offense exception); Epps, *supra* note 1 at 88 (abolition of the exception advocated); Fields *supra* note 28 at 16 (if extradition denied, requested state should try the fugitive).

78 *But see, e.g., Note, Terrorist Extradition and the Political Offense Exception*, 21 VA. J. INT'L L. 163 (1980) (arguing that extradition should be an administrative process under State Department control, and subject to the Administrative Procedures Act).

79 The "traditional reticence on the part of the [State Department] to produce official witnesses to testify to the position of the government with respect to the character of an offense has been reassessed in light of contemporary terrorism." Fields, *supra* note 28, at 21.

80 *Charlton*, 229 U.S. at 448; *Sayne*, 418 F.2d at 684; *Gallina*, 177 F.Supp. at 863-64. Extradition practice in the nineteenth century was within the exclusive province of the Executive branch. *Eain*, 641 F.2d at 513 n.13. While the judicial role by now is well-established, it must be remembered that the ultimate decision to extradite is made by the State Department, once the magistrate certifies pursuant to 18 U.S.C. § 3184. *Terlinden v. Ames*, 184 U.S. 270 (1901). *See generally* Note, 62 COLUM. L. REV. 1313, 1314 (1962). Moreover, even though a denial of certification cannot be overturned by the State Department, *Lo Dolce*, 106 F.Supp. 455, the unpopularity of the latter rule is illustrated by the history of the *Artukovic* case. After non-certification in 1959, 170 F.Supp. 383, the Immigration and Naturalization Service instituted deportation proceedings against Artukovic. N.Y. Times, Aug. 17, 1977, at A1, col. 6. *See also Eain*, 641 F.2d at 522 (roundly criticizes result in *Artukovic*).

In general, the history of extradition practice in American law is replete with references to executive discretion as to the interpretation of treaties, *see, e.g., Charlton*, 229 U.S. at 448, as well as deference to the executive generally owing to the foreign policy political constraints. *Peroff*, 563 F.2d at 1102. This is necessary because foreign governments have little comprehension of the separation of powers between branches of American government. Consequently, a magistrate's decision not to extradite has political ramifications in the international setting even if the State Department protests its powerlessness to affect the outcome. *See Eain*, 641 F.2d at 513. *See generally* Note, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities*, 17 VA. J. INT'L L. 495 (1977) (even a state as sophisticated as France does not maintain the same separation of powers; thus, a judicial decision can be influenced by the executive).

In light of the above, it is desirable that the magistrate permit evidence from the State Department, and give it great weight.

81 *See supra* notes 59-61.

82 *Ramos*, 179 F.Supp. at 463.

83 *See, e.g., Eain*, 641 F.2d at 520-22 (anarchist rule governs, issue not in equipoise, burden not addressed).

84 MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, *supra* note 66, at 785. ("In most cases the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well. The pleadings therefore provide the common guide for apportioning the burdens of proof.")

85 *Leland*, 343 U.S. at 799.

86 *See James, supra* note 67, at 60.

87 *Cf. Gallina*, 177 F.Supp. at 868 ("The evidence was conflicting . . . but it did not preponderate . . . in [the accused's] favor. . .").

88 *See Valentine*, 299 U.S. at 8. *See also Hannay, supra* note 1, at 410-911 and ns.111-12.