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JUSTICIABILITY OF THE POLITICAL OFFENSE EXCEPTION IN BILATERAL EXTRADITON AGREEMENTS: TIME FOR JUDICIAL SELF-RESTRAINT

David A. Strauss

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I. INTRODUCTION

For several millennia, nation states have cooperated to bring refugee fugitives to justice.[1] Beginning in medieval times, and up until the nineteenth century, *political* refugees were the most common targets of such cooperative efforts.[2] Modern conceptions of liberty, propagated by liberal democracies like the United States, have fostered a notion among most nation states that politically motivated offenders ought to be protected from those who seek their extradition.[3] To this end, virtually every extradition treaty in existence today contains a provision rendering political offenders nonextraditable;[4] this standard proviso is most commonly called the "political offense exception."

The United States is a party to over one hundred extradition treaties.[5] Congressional legislation prescribes the proper rules and procedure for extraditing an alleged offender to a foreign jurisdiction. According to this statute, a judge or magistrate determines whether there is sufficient evidence to sustain criminal charges, and if so, the Secretary of State is warranted to surrender the accused to the requesting nation.[6]

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1. The earliest recorded agreement to this effect was included as a provision in a peace treaty between a Hittite King and an Egyptian Pharaoh, executed in 1280 B.C. IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971), *cited in* Michael O'Connor, Note, *International Extradition and the Political Offense Exception: The Granting of Political Offender Status to Terrorists by United States Courts*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 613, 613 (1983).

2. Valerie Epps, *The Validity of the Political Offense Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61, 62 (1979), *cited in* O'Connor, *supra* note 1, at 613.

3. Michael R. Littenberg, Comment, *The Political Offense Exception: An Historical Analysis and Mode for the Future*, 64 TUL. L. REV. 1195, 1196 (1990).

4. Antje C. Petersen, Note, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767, 767 (1992).

5. 18 U.S.C. § 3181 (1988).

6. 18 U.S.C. § 3184 (1948), *as amended by* Act of Oct. 17, 1968.

This procedure delegates the responsibility for resolving the issues that arise from an extradition request to different branches of the federal government.[7] This Note discusses how the authority to resolve these issues is currently allocated, and more importantly, how this authority can and should be properly reallocated through judicial self-restraint.[8]

II. THE CURRENT ALLOCATION OF AUTHORITY

Although political offense provisions are often worded differently from treaty to treaty, they are essentially identical in substance,[9] and the federal courts have treated them as such. For example, the extradition treaty between the United States and Canada has a typical, political offense provision:

> A fugitive criminal shall not be surrendered, if the offence in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.[10]

When faced with an extradition request from a foreign jurisdiction, there are four main questions that the federal government must resolve: (1) whether there is sufficient evidence to sustain a charge against the alleged offender;[11] (2) whether the offense sought to be charged is political by

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7. *See generally* SHEARER, *supra* note 1.

8. Specifically, this Note advocates invoking the form of judicial self-restraint known as the "political question" doctrine, most clearly enunciated by the United States Supreme Court in *Baker v. Carr*, in dealing with this issue. 369 U.S. 186 (1962). *See also* Colegrove v. Green, 328 U.S. 549 (1946); United States v. Sisson, 294 F. Supp. 511 (1968).

9. For a full compilation of the extradition treaties to which the United States is a party as of 1979, see IGOR I. KAVASS & ADOLF SPRUDZS, EXTRADITION LAWS AND TREATIES, vols. I-II (1979).

10. Treaty on Extradition, Dec. 3, 1971, U.S.-Can., art. II, 27 U.S.T. 983, *in* KAVASS & SPRUDZ, *supra* note 9, vol. I [hereinafter U.S.-Canada Treaty].

11. *See* Hooker v. Klein, 573 F.2d 1360, 1367 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978). "The function of an extraditing court is not to decide the guilt or innocence of the fugitive at law, but rather to determine whether there is 'competent legal evidence which . . . would justify his apprehension and commitment in [the forum] state.'" *Id.* (quoting Collins v. Loisel [Loisel I], 259 U.S. 309, 315 (1922)). *See also* Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir. 1986) (explaining that extradition treaties require a showing by the requesting nation that probable cause exists to support a charge against

nature;[12] (3) whether the motive of the requesting state is actually to try or to punish the fugitive for a political offense;[13] and (4) whether humanitarian considerations require the request to be refused because of treatment the accused is likely to receive if extradited.[14] The power to decide these issues is currently apportioned between the judicial and executive branches of the United States government.

A. The Current Role of the Judiciary

Congress explicitly conferred on the judicial branch the authority to decide whether there is sufficient evidence to sustain a charge against the accused.[15] This congressional grant of authority has been interpreted by the courts as requiring the requesting nation to show that there is *probable cause* to believe that the alleged offender did in fact commit the crime with which he or she is charged.[16] In practice, however, the federal government, via the United States Attorney General, usually authorizes a United States Marshal to represent and act for the requesting government. The magistrate will not order extradition unless the conduct complained of is punishable criminally in both the requested and the requesting nations; this is the doctrine of "dual criminality."[17]

The question of whether probable cause exists is clearly within the scope of judicial competence and expertise, as are the sub-issues of jurisdiction and dual criminality. This Note does not advocate the removal of this discretion from the judicial branch.

This Note does, however, question the authority of the judiciary to determine whether any particular offense fits within the political offense exception.[18] Neither the treaties nor the relevant federal statute clearly assign this function to either the Executive or the judiciary. Some commentators suggest that the statute assigns this task to the judiciary

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the accused).

12. *See* U.S.-Canada Treaty, *supra* note 10 and accompanying text.

13. *See* U.S.-Canada Treaty, *supra* note 10 and accompanying text.

14. Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980), *cert. denied*, 449 U.S. 1036 (1980); *see also* 18 U.S.C. § 3186 (1988).

15. *See* 18 U.S.C. § 3184.

16. Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

17. *See* Factor v. Laubenheimer, 290 U.S. 276, 293 (1933); *see also* Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir. 1986); Caplan v. Volkes, 649 F.2d 1336, 1343 (9th Cir. 1981). *See, e.g.*, U.S.-Canada Treaty, *supra* note 10, art. I.

18. *See infra* part III.

since it authorizes the judge or magistrate to determine whether a charge can be sustained "under the *provisions of the proper treaty* . . . ."[19] However, this language is ambiguous: it does not expressly give the courts jurisdiction to decide whether the exception applies. An equally plausible argument is that this power is assigned to the Secretary of State since in the same paragraph of the statute Congress stated that the Secretary of State is to arrange for the surrender of the fugitive "according to the *stipulations of the treaty* . . . ."[20] Despite this statutory ambiguity and, more importantly, despite the executive branch having had sole authority over extradition matters prior to the enactment of the extradition statute,[21] the courts have assumed jurisdiction to resolve this question. A century ago in *In re Ezeta*,[22] District Judge Moore explicitly rejected the argument that the courts lack jurisdiction to apply the exception,[23] and the courts presently continue to assert jurisdiction over these matters.[24]

Inherent in the decision determining whether the exception applies, a judge or magistrate must address issues of foreign policy and foreign affairs.[25] These issues include: whether the offense took place during and proximate to a political struggle or uprising between groups for political control;[26] and whether the offense was committed in furtherance of the uprising or struggle.[27] Additionally, an inquiry is often made into the fugitive's motives, although motivation is not dispositive of the issue.[28]

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19. 18 U.S.C. § 3184 (emphasis added).

20. *Id.* (emphasis added).

21. *See* M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 505 (1974).

22. 62 F. 972 (N.D. Cal. 1894).

23. *Id.* at 996-97. On the issue of jurisdiction the court held that "the duty of the judicial authority is to decide whether extradition is due, according to law and the evidence, and pursuant to the treaty . . . . There is no limitation in this respect as to his jurisdiction, and his duty is fully and accurately stated." *Id.*

24. *See, e.g., In re* Mackin, 668 F.2d 122, 135-37 (2d Cir. 1981); Eain v. Wilkes, 641 F.2d 504, 512-18 (7th Cir. 1981).

25. This position was argued by the United States Government on behalf of the United Kingdom in *Quinn v. Robinson.* 783 F.2d 776, 787-88 (9th Cir. 1986).

26. *See* Ornelas v. Ruiz, 161 U.S. 502, 510 (1896); *see also* Artukovic v. Boyle, 140 F. Supp. 245, 246-47 (S.D. Cal. 1956); *see also In re* Castioni, [1891] 1 Q.B. 149, 166 (the landmark British case that gave rise to the current standard applied by the United States courts).

27. *Ornelas*, 161 U.S. at 511.

28. The court in *Eain* stated that "motivation is not itself determinative of the political character of any given act." 641 F.2d at 520.

This Note argues that these issues should be resolved by the executive branch because: (1) they fall explicitly within the Executive's express authority over foreign affairs conferred by the Constitution;[29] (2) they are far more appropriate for the Executive, via the Secretary of State, to resolve;[30] and finally, (3) they do not lend themselves to any manageable standards.[31]

B. The Current Role of the Executive

If the judge or magistrate deciding an extradition matter finds that there is probable cause and that the political exemption does not apply, the Secretary of State nonetheless retains discretion to refuse extradition.[32]

The discretion retained by the Secretary of State, however, is limited. A standard sub-provision found within virtually every political offense provision states that extradition shall be denied if the alleged offender can show that the extradition request was made surreptitiously and with an intention to punish the fugitive for a political offense.[33] Such a provision requires the government to inquire into the motives of the requesting nation. This inquiry must be made delicately and by a political body that has a great deal of information-gathering resources and diplomatic expertise. Quite clearly, this goes beyond the competency of even the most learned judges and magistrates. Accordingly, it has been recognized that the Secretary of State has complete autonomy in determining whether a request is a subterfuge made to punish the alleged offender for a political offense.[34] The Secretary of State is better suited than the judiciary to make this determination because the State Department, as part of the executive branch, is privy to more information crucial to analyzing situations abroad and is, therefore, more likely to perceive the driving force behind an extradition request.[35]

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29. *See infra* part III.

30. *See infra* part III.A.

31. *See infra* part III.A.

32. Quinn v. Robinson, 783 F.2d 776, 789 (9th Cir. 1986); *Eain*, 641 F.2d at 516 (citing *In re* Ezeta, 62 F. 972, 996 (N.D. Cal. 1894)); *see also* 18 U.S.C. § 3186 (1988).

33. *See, e.g.*, U.S.-Canada Treaty, *supra* note 10.

34. *See Quinn*, 783 F.2d at 789 (citing *In re* Lincoln, 228 F. 70 (E.D.N.Y. 1915), *aff'd*, 241 U.S. 651 (1916)).

35. In United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936), the Supreme Court explicitly recognized the executive branch's competency in foreign affairs.

It should be noted that much of the information required to make this determination would be very helpful to the judge who is charged with determining whether the offense itself is of a political nature. However, due to diplomatic concerns, much of this information must remain confidential within the State Department;[36] thus, a judge who seeks the necessary information (if he or she even knows that it exists) will often be unable to obtain it.

In addition to the Secretary of State's discretion to deny extradition due to a requesting state's improper motives, she also retains the power to refuse extradition based on humanitarian concerns.[37] It is often argued before a magistrate hearing an extradition matter, or before a court on habeas corpus review,[38] that a request for extradition ought to be denied because inhumane or unfair treatment awaits the fugitive if she is returned to the requesting nation. Although this is a legitimate basis for refusing a request, the courts have consistently recognized that it is a question better suited to the Secretary of State, and have therefore declined to entertain this argument.[39]

Why have the above two issues been recognized as falling within the purview of the executive branch? Presumably because the Secretary of State has greater competence in this area than the courts. Why then do the courts obstinately retain jurisdiction to decide whether the nature of a crime is political?

III. JUDICIAL SELF-RESTRAINT: THE POLITICAL QUESTION DOCTRINE

The political question doctrine, most clearly enunciated in *Baker v Carr*,[40] is a form of judicial self-restraint. Under this doctrine, a case will be found nonjusticiable if it involves matters that the Constitution has

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36. *See Curtiss-Wright*, 299 U.S. at 320; *see also infra* part III.

37. *Quinn*, 783 F.2d at 790.

38. *Habeas corpus* is the only procedural tool available to one who seeks review of a magistrate's decision to extradite. *See* Gill v. Imundi, 747 F.2d 1028, 1039 (S.D.N.Y. 1990) (quoting *In re* Doherty, 786 F.2d 491, 501-02 (2d Cir. 1986)).

39. "[T]he degree of risk to [the fugitive's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch." Sidona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) (citing Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)). *See also* Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983) ("[S]uch matters are to be determined solely by the executive branch.").

40. 369 U.S. 186 (1962).

relegated to a coordinate branch of government,[41] if the resolution of the issue requires a policy determination not within judicial discretion,[42] or if there is a lack of any manageable standards to guide the court.[43] There are other considerations that may disqualify a case under this doctrine,[44] but those mentioned above are the strongest reasons for declaring the political offense exception nonjusticiable. The first two rest on separation of powers concerns, and the third emphasizes the very nature of the issue involved and the competence of the judiciary to resolve it.[45]

A. Separation of Powers

As previously noted, the political question doctrine requires the judiciary to declare nonjusticiable any matter that has been textually committed to another branch of government by the Constitution.[46] The United States Supreme Court has recognized that the Executive enjoys broad power over foreign affairs[47] pursuant to the President's authority as Commander in Chief, and his authority to make treaties, by and with the consent of the Senate.[48] The Court has acknowledged this general constitutional delegation through a *penumbras* theory that is somewhat analogous to the courts' recognition of a general right to privacy via several more specific guarantees of the Bill of Rights.[49]

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41. *Id.* at 210-11.

42. *Id.*

43. *Id.*

44. For example, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. The "potential for embarrassment" theory was argued by the United States Government on behalf of the United Kingdom in *Quinn v. Robinson*. 783 F.2d 776, 788 (1986). The court rejected this argument and it will not be discussed further in this Note.

45. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 396-98 (11th ed. 1985).

46. *Baker*, 369 U.S. at 217.

47. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *see also* U.S. v. Curtiss-Wright Corp., 299 U.S. 304 (1936).

48. U.S. CONST. art. II., § 2.

49. Justice Douglas, writing for the majority in Griswold v. Connecticut, 381 U.S. 479 (1965), used a *penumbras* theory to invoke for individual persons a general right to privacy stemming from the various Bill of Rights guarantees creating "zones of privacy." 381 U.S. at 484. For a general discussion of penumbras theory, see Paul G. Kauper, *Penumbras, Peripheries, Examinations, Things Fundamental and Things Forgotten: This*

In *United States v. Curtiss-Wright*, the Supreme Court explicitly recognized the Executive's dominant role in the foreign affairs context.[50] The case involved a Congressional Joint Resolution that authorized the Executive to prohibit arms sales to nations involved in the Chaco conflict.[51] The power that this resolution gave the President would most likely have been found an unconstitutional delegation of law-making authority to the *executor* of the laws.[52] The Court did not so conclude, however, because the power given to the Executive related solely to foreign affairs, a domain in which this department has premier authority. Justice Sutherland, writing for the majority, stated:

> Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm . . . *the President alone* has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates.[53]

Similarly, in *Oetjen v. Central Leather Co.*,[54] the Supreme Court, in an opinion by Justice Clarke, made clear that the conducting of foreign affairs is not a topic allowing for judicial intervention, but is committed by the Constitution to the executive and legislative branches of the federal government.[55]

In light of the Supreme Court's repeated recognition and affirmation of the broad executive foreign affairs power mandated by the Constitution, it is difficult to justify the judiciary's retention of jurisdiction over political offense exception issues. To determine whether a crime is by nature political, the judge must: look to and comprehend conditions abroad, decide whether or not there was a political struggle or uprising in the

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Griswold *Case*, 64 MICH. L. REV. 235 (1965).

50. *See Curtiss-Wright*, 299 U.S. 304.

51. *Id.* at 312.

52. *See, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

53. *Curtiss-Wright*, 299 U.S. at 319 (first emphasis added).

54. 246 U.S. 297, 302 (1918).

55. *Id.* at 302; *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (stating that matters pertaining to conduct of foreign relations "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry . . .").

foreign jurisdiction at the time of the alleged offense, and decide whether or not the actor's offense was in furtherance of that uprising.[56] Not only do these inquiries relate to foreign affairs, but their resolution determines whether or not the request will be granted, which is a delicate matter inextricably bound to foreign policy and international relations. Because the President is the "sole organ of the nation in its external relations, . . . "[57] the courts must recognize that the determination of whether the political offense exception applies is accorded to the Executive by the Constitution, and declare it an inherently nonjusticiable issue.

Another basis for finding nonjusticiability is the impossibility of resolving a matter without first making a policy determination that falls outside of judicial discretion.[58] As noted earlier, the "incidence test"[59] requires a determination of whether a political uprising or struggle existed in the requesting nation when the offense was committed,[60] and a determination of whether the act committed was done in furtherance of or incidental to the political disturbance.[61] Although it is true that judges may often fill the role of fact-finder, these facts are often extraordinary, and should, therefore, be left to the scrutiny of the State Department.

These factual findings require consideration of delicate and complicated political matters. This is evidenced by the string of inconsistent holdings reached by the Federal Circuit Courts of Appeals in

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56. This is known as the "incidence test," adopted from the British case, *In re* Castioni, [1891] 1 Q.B. 149, and followed, in an evolved form, to the present day by the American courts. *See In re* Ezeta, 62 F. 972 (N.D. Cal. 1894); Ornelas v. Ruiz, 161 U.S. 502 (1896); Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom.*, Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded per curiam*, 355 U.S. 393 (1958); Escobedo v. United States, 623 F.2d 1098 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980); Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); McMullen v. Immigration and Naturalization Serv., 788 F.2d 591 (9th Cir. 1986).

57. United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936) (quoting U.S. SENATE, REPORTS, COMMITTEE ON FOREIGN RELATIONS, vol. 8, at 24 (Comm. Print 1816)).

58. Baker v. Carr, 369 U.S. 186, 217 (1962).

59. *See supra* text accompanying note 56.

60. *See* Escobedo v. United States, 623 F.2d 1098, 1104 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980). "This circuit defines a political offense under extradition treaties as an offense committed in the course of and incidental to a violent political disturbance . . . ." *Id.* (citing Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Jiminez v. Aristeguieta, 311 F.2d 547, 560 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963)).

61. *Escobedo*, 623 F.2d at 1104.

the twentieth century.[62] As the United States became less isolationist, the courts have reacted by modifying the scope of the incidence test to allow more flexibility in its application.[63] This flexibility allows judges to factor foreign policy considerations into their analyses, rather than apply purely jurisprudential standards.[64] For example, in *In re Gonzales*,[65] Judge Tyler explicitly admitted that the political offense exemption is applied "with greater liberality where the demanding state is a totalitarian regime seeking the extradition of one who has opposed that regime in the cause of freedom."[66]

Because judges are supposed to be objectively detached when resolving legal disputes, they ought not consider foreign policy matters in resolving controversies, nor should they apply a different standard for "disfavored" forms of government. The conduct of foreign policy and relations is within the express Constitutional authority of the executive and legislative branches: they are the "political" departments of government, and their findings in this arena must be exclusive of judicial decision.[67] Parties before a court deserve to be treated equally, without regard for their relations with our country and their chosen forms of government. It is time for Lady Justice to place her blindfold back on, and let the diplomatic branch handle diplomacy.

The judiciary's role ought to be limited to determining whether probable cause exists for sustaining a charge against the alleged offender.[68] The task of determining whether the exception applies should be reallocated to the State Department. In his opinion for the Ninth Circuit Court of Appeals in *Quinn v. Robinson*, Judge Reinhardt wrote that reallocating this task to the State Department is not possible.[69] He stated: "We fail to see how the magistrate could determine whether there is probable cause that the defendant committed an extraditable crime without

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62. *See generally* O'Connor, *supra* note 1 (analyzing Circuit Court opinions that arguably have inconsistent holdings on similar facts); Epps, *supra* note 2.

63. Epps, *supra* note 2, at 68.

64. *Id.* at 74.

65. 217 F. Supp. 717 (S.D.N.Y. 1963).

66. Epps, *supra* note 2, at 73 (quoting *Gonzales*, 217 F. Supp. at 721 n.9).

67. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (citing United States v. Palmer, 3 Wheat. 610 (1818); Foster v. Neilson, 2 Pet. 253, 307, 309 (1829); Garcia v. Lee, 12 Pet. 511, 517, 520 (1838); Williams v. Suffolk Ins. Co., 13 Pet. 415, 420 (1839); *In re* Cooper, 143 U.S. 472, 499 (1892)).

68. *See supra* part II.A.

69. Quinn v. Robinson, 783 F.2d 776, 787 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

determining whether the charged offense is one for which extradition is prohibited [by the political offense exception]."[70] This assertion, however, disregards that the two inquiries involve completely different questions.

A probable cause determination, made by weighing the evidence of guilt on the record, is undoubtedly a judicial function. The question of whether the exception applies, however, involves inquiry into conditions existing in a foreign nation's political structure, not to mention the various foreign policy considerations that are necessarily involved. Not only are a probable cause determination and the political offense exception different issues, but they are easily separated. The judge would decide whether or not there is probable cause and stop there, as if it were an ordinary criminal indictment. The factual overlap may be significant, but in most cases would not be identical, and since the State Department would have access to the trial record, no efficiency would be lost. As Judge Robb recognized in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*:[71] "The conduct of foreign affairs has never been accepted as a general area of judicial competence. [C]ases which would demand close scrutiny of terrorist acts are far beyond [the] limited exceptions to the traditional judicial reticence displayed in the face of foreign affairs cases."[72]

B. Judicial Manageability

The "political question" doctrine also requires judicial forbearance when an issue lacks judicially discoverable and manageable standards to guide its resolution.[73] The "incidence test,"[74] as it has been applied, does not reveal any discrete, manageable standards for the judges and magistrates to apply in extradition cases.[75] Rather, there is confusion and disagreement among the courts as to what the standards are.[76] As Judge

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70. *Id.*

71. 726 F.2d 774 (D.C. Cir. 1984).

72. *Id.* at 825. *See also* Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (warning that a "Serbian Bog" will face courts that inquire into the policies of foreign governments).

73. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

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

75. *See* Quinn v. Robinson, 783 F.2d 776, 801 (9th Cir. 1986) (pointing out the split of authority in the American courts due to the rise of terrorism as a means to effect political change).

76. *Id. See also* Michael R. Littenberg, Comment, *The Political Offense Exception: An Historical Analysis and Model for the Future*, 64 TUL. L. REV. 1195, 1220 (1990).

Robb stated in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*,[77] "there is simply 'no justiciable standard to the political offense,' and . . . 'there has been a tendency for a breakdown in the ability of our courts to process extradition questions . . . .'"[78] The incidence test requires finding whether the act that gave rise to the request was committed in the context of a political uprising, revolution, or struggle, and whether the act was committed in furtherance of that uprising.[79] This "test" has not proven to be as well-defined as it may sound.

The first prong of the political incidence test, requiring that the act be incidental to an uprising, has received varying interpretations from the courts.[80] For example, the Second Circuit Court of Appeals' affirmation of the magistrate's decision in *In re Mackin*[81] cannot be logically reconciled with the Seventh Circuit Court of Appeals' holding in *Eain v. Wilkes*,[82] although both cases were decided in the same year in light of the same precedents. *Mackin* involved a member of the Provisional Irish Republican Army ("PIRA") (a radical sect of the Irish Republican Army) who had been charged with the attempted murder of a British soldier.[83] His membership in the PIRA made him, in the eyes of the court, a participant in a political uprising thereby rendering him nonextraditable,[84] despite the PIRA's commitment to the use of nonselective terrorist violence to achieve its goals.

The Palestinian Liberation Organization ("PLO") has goals similar to those of the PIRA and employs similar tactics toward achievement of their goals; however, in *Eain*, the Seventh Circuit Court of Appeals ruled in favor of extradition when the offender was a member of the PLO. The court redefined the uprising prong to require that the struggle be between nondispersed military forces. The court found the PLO to be too

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77. 726 F.2d 774 (D.C. Cir. 1984).

78. *Id.* at 826 (quoting *Extradition Reform Act of 1981: Hearings on H.R. 5227 Before Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 24-25 (1982) (testimony of Roger Olson, Deputy Asst. Attorney General, Criminal Division, U.S. Dept. of Justice)).

79. *See* O'Connor, *supra* note 1, at 617-18.

80. *See* Quinn v. Robinson, 783 F.2d 776, 801-03 (9th Cir. 1986) (discussing the divergent standards that have emerged in the courts).

81. 668 F.2d 122 (2d Cir. 1981).

82. 641 F.2d 504 (7th Cir. 1981).

83. *Mackin*, 668 F.2d at 124.

84. *See* O'Connor, *supra* note 1, at 628.

dispersed to be recognized as a rebelling group, and therefore held that no uprising was taking place.[85]

Another example of the uprising prong's unmanageability is the case of *Quinn v. Robinson*.[86] In this case, three judges were able to reach the same result, but disagreed as to the standard.[87] Judge Reinhardt sought to limit the uprising requirement by requiring that an alleged offender must have resided in the requesting nation and have committed the offense within its territory.[88] Judges Duniway and Fletcher expressed disagreement with Judge Reinhardt's proposed limits, concurring only in the result.[89] The inability of these judges to agree on a standard further demonstrates the lack of a definable and manageable standard.

As mentioned previously, the incidence test also requires that the act be done *in furtherance* of a political conflict.[90] This requirement has also been inconsistently interpreted by the courts.[91] For example, in *Eain*, the Seventh Circuit Court of Appeals held that violent acts against civilians do not qualify as "in furtherance" of the PLO's political goals.[92] Other courts disagree with this limit on the exception, such as the court in *Quinn*: "To conclude that attacks on the military are protected by the exception, but that attacks on private sector institutions and civilians are not, ignores the nature and purpose of the test we apply . . . ."[93] Thus, there are obvious inconsistencies in the application of this prong of the incidence test that can lead courts to reach drastically different results on similar facts.

Concededly, many legal rules receive differing interpretations from the courts, even though they have existed for decades. However, in the extradition context, this uncertainty provides far too much latitude for judges, allowing them to guide their decisions by subjective value judgments of a political nature rather than by objective, manageable criteria.

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85. Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

86. 783 F.2d 776 (9th Cir. 1986).

87. For a discussion, see James L. Taulbee, *Political Crimes, Human Rights and Contemporary International Practice*, 4 EMORY INT'L L. REV. 43, 54 (1990).

88. *Quinn*, 783 F.2d at 807.

89. *Id.* at 818-21.

90. *See* O'Connor, *supra* note 1, at 617-18.

91. *See Quinn*, 783 F.2d at 809 (Judge Reinhardt discussing different ways to approach this prong of the incidence test, demonstrating that no precise formulation exists).

92. Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

93. *Quinn*, 783 F.2d at 810.

IV. CONCLUSION

The courts should declare the political offense exception nonjusticiable, retaining only the authority to determine whether probable cause can sustain charges against the fugitive. There are three rationales that are relevant for purposes of this Note that justify precluding the courts from deciding cases due to nonjusticiability. These are: (1) courts must refrain from deciding issues that have been constitutionally relegated to other political branches;[94] (2) courts must refrain from deciding issues that involve a preliminary policy decision outside the judicial realm;[95] and (3) courts must refrain from resolving issues when courts lack judicially manageable standards to guide their resolution.[96] Each of these reasons, individually and collectively, render the political offense exemption nonjusticiable.

Commentators often suggest that such a declaration of nonjusticiability is unnecessary because the Secretary of State retains ultimate discretion in extradition matters. This assertion is not completely correct. It is true that the Secretary of State can prevent extradition when a court has ordered it;[97] however, if the extradition request is denied, the Secretary of State has absolutely no authority to order otherwise.[98] This partial discretion is inadequate to insure that the appropriate decision maker has control.

It is also argued that "[a]dministrative decisions . . . are much more likely to be influenced by political elements than the decisions of the courts."[99] This is probably true; but it is also exactly why the State Department *should* have this authority. With the rise of international terrorism, such decisions ought to be governed by political considerations. Deciding whether or not the exception applies often *requires* taking into account political considerations. If foreign policy factors into the equation, then the branch of government assigned by the Constitution to conduct foreign affairs ought to handle it, the branch that also has the

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94. *See* Baker v. Carr, 369 U.S. 186, 210-11 (1962).

95. *See id.*

96. *See id.*

97. *See Quinn*, 783 F.2d at 789 (citing *Eain v. Wilkes*, 641 F.2d 504, 516 (7th Cir. 1981) (citing *In re* Ezeta, 62 F. 972 (N.D. Cal. 1894))); 18 U.S.C. § 3186 (1988).

98. *See* Epps, *supra* note 2, at 75-76.

99. *Quinn*, 783 F.2d at 789 (quoting C. VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 100 (1980)).

informational resourcefulness and diplomatic expertise that is required to make these fragile and crucial decisions.[100]

David A. Strauss

100. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (explaining that the political branches of government have extraordinary power in conducting foreign policy).