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A Sewing Lesson in Political Offense Determinations: Stitching-Up the International Terrorist’s Loophole

By Douglas Kuber
Member of the Class of 1987

The time has come to close the door on violent criminals who rely on out-of-date doctrines to frustrate the rule of law. They have become very adept at exploiting the concept of jurisdiction to thumb their noses at our penal codes. Just by leaving the scene of a crime, they can effectively repeal our laws and make a mockery of justice. The most important tool in their arsenal has become an airplane ticket.¹

I. INTRODUCTION

Terrorism is defined by one commentator as a violent, criminal act, directed toward an impersonal target, committed in order to cause widespread fear within the community.² The international community has not been successful in controlling terrorism through its present legal system. This is evidenced by the ineffectiveness of existing extradition treaties and international conventions, which are designed to insure the effective administration of justice in an international context.

Extradition treaties provide for the surrender of an individual by the country in which he or she is present to another country that has charged that individual with a crime committed within its territorial boundaries.³ These treaties, however, do not require extradition for acts or crimes which constitute “political offenses.”⁴ Courts of various countries often

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¹ Trott, Pare Down the ‘Political Offense’ Doctrine, Nat’l L.J., Jan. 14, 1985, at 12, col.2.
⁴ For example, the extradition treaty between the United States and Great Britain provides that:
Extradition shall not be granted if: . . . (i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or (ii) the
find that terrorist acts constitute political offenses, and thus, terrorists are permitted to take advantage of the political offense exception to escape extradition.⁵

International conventions also have not provided an effective means of dealing with the terrorist dilemma. International conventions are agreements between several nations to achieve a common goal, such as the extradition of hostage-takers. Such conventions are usually drafted with the assistance of an international body, such as the United Nations. Conventions differ from extradition treaties in that International Conventions are multilateral, rather than bilateral, agreements. The ineffectiveness of these Conventions is exemplified by the use of the Geneva Convention⁶ by a Nazi war criminal in an attempt to escape extradition.⁷ The International Convention Against the Taking of Hostages (The Convention)⁸ provides another such example. Although the Convention was designed to remedy a specific aspect of terrorist activity—that of hostage-taking—the Convention includes a variation of the political offense exception which effectively neutralizes its power to require the extradition of the terrorist-political offender.

This Note will discuss the policies which provided the impetus for the original political offense exception and will suggest that these policy arguments are still valid, but must be clarified in the terrorist context. This Note will provide an analysis of the obstacles created by the political offense exception to the extradition of terrorists. Next, a United States proposal for legislation to assist the courts in their analysis of the political offense exception will be explained, and the Convention will be discussed. The inability of each of these attempts adequately to control the terrorist-political offender will be examined. This Note then will trace the history of the political offense exception from its origin in the English courts in 1891, to the present approaches utilized by the courts of four countries—Great Britain, France, Switzerland, and the United States. Through the four country approach, this Note will review cases that have dealt with the political offense exception, emphasizing cases

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⁵ The definition given to a political offense by the courts is discussed infra notes 33-150 and accompanying text.
⁷ Karadzole v. Artukovic, 247 F.2d 198 (9th Cir 1957).
involving terrorist activity. Finally, this Note will set forth two separate proposals for judicial interpretation of the political offense exception, and will provide a thorough analysis of each of the proposals, with regard to the benefits each provides to the extradition of the terrorist-political offender.

II. BACKGROUND TO THE POLITICAL OFFENSE EXCEPTION

The political offense exception was first espoused in a French circulaire in which the Government of France declared it would neither seek nor grant extradition for political offenses. The first extradition treaty incorporating the political offense exception was signed on November 2, 1833, by France and Belgium. In 1843, the United States first included the political offense exception in an extradition treaty with France.

Today, the political offense exception is incorporated into each of the United States’ extradition treaties with other nations. It provides an exception to the otherwise mandatory obligation imposed upon the signatories of an extradition treaty: to extradite an individual presently in the territory of one country to a country which charges him with the commission of a crime within its territorial boundaries. A request for extradition may be denied if the act for which extradition is sought falls within the confines of the political offense exception.

Two policy considerations underlie this exception. First, it is believed that a nation should not be required to involve itself in the domestic, political affairs of another nation. This serves a basic political function by allowing a government to refuse to surrender a fugitive in order to remove itself from any involvement in another nation’s politics. Second, it allows a nation to grant political asylum to political dissidents. This necessarily requires the nation considering the extradition

11. Id. at 13.
14. See supra notes 3-4 and accompanying text.
15. Id.
17. Id.
request to make a value judgment regarding the nature of the fugitive's acts and the motives of the requesting nation. The political offense exception is very important in this regard since it allows for refusal of an extradition request when, in the opinion of the nation contemplating extradition, the requesting nation seeks to prosecute the accused not for the crimes as charged, but for his opposition to that nation's government. This protects the true freedom fighters for whose benefit the exception was originally introduced.\textsuperscript{18}

The exact criteria for distinguishing an offense which is political in nature from any other type of offense have never been identified in any statute or treaty.\textsuperscript{19} Instead, interpretation has generally been undertaken by the judiciary.\textsuperscript{20} The actual decision regarding whether extradition should be granted or refused is left to the discretion of the judiciary, at least at the outset, or to the executive branch.\textsuperscript{21}

III. DIFFICULTIES IN THE TERRORIST CONTEXT

The political offense exception\textsuperscript{22} forbids the granting of an extradition request when the crime for which the accused is sought is "political either in character or in purpose."\textsuperscript{23} Terrorist activity poses a unique problem in the application of the political offense exception. Terrorists can be trained in one country, commit their terrorist activity in another country, and then escape across the border to yet another country. Terrorist activity usually has a political overtone which, as will be discussed below, may be interpreted as within the confines of the political offense exception and, therefore, will preclude extradition.

A. International Hostage-Taking Convention

Several efforts to attack the terrorist problem have been made by isolating specific acts of terrorism and treating them differently from other crimes which come within the ambit of the political offense exception. The International Convention Against the Taking of Hostages,\textsuperscript{24}

\begin{footnotes}
\item[18] See supra notes 16-18 and accompanying text.
\item[21] See supra note 20.
\item[22] See Treaty of Extradition, June 8, 1972, United States-United Kingdom, supra note 4.
\item[23] Carbonneau, supra note 12, at 267.
\item[24] The Convention, supra note 8.
\end{footnotes}
exemplifies such attempts to limit the ability of courts to designate terrorist acts as political offenses. It suggests that hostage-taking for any purpose whatsoever is unjustifiable.\(^\text{25}\) Parties to the Convention agree that captured hostage-takers must be prosecuted by the capturing state or extradited for prosecution to the state in which the offense occurred.\(^\text{26}\) The Convention contains its own modified political offense exception which focuses on prosecution, rather than extradition.\(^\text{27}\) It provides that if the act charged constitutes a political offense, the accused need not be extradited, but if he is not, he must be tried for his crime in the nation from which extradition is sought.\(^\text{28}\) Therefore, between parties to the Convention, the nation in which the accused is captured is obligated to become involved in another nation’s domestic affairs if it refuses the extradition request.\(^\text{29}\) Arguably, the Convention’s modified political offense exception makes the Convention unsuitable for its intended purpose: to eliminate hostage-taking. If the actors know that they will merely be tried in the country in which they are captured, they can shop for a friendly forum and find a country that is sympathetic to their cause. To counter this forum-shopping, terrorists must be prosecuted in the country wherein they perpetrated their crimes to preserve the deterrent effect of that forum’s criminal justice system, and insure that the political offense exception will not provide a loophole.

B. A United States Proposal for Legislative Reform

Domestic statutory reform has sought to create a definitive standard with which to determine a political offense in order to remove judicial discretion in the context of the terrorist. These reform proposals, however, have not adequately defined offenses which should be excluded as a basis for extradition. In fact, crimes of a political nature were defined as not ordinarily including violent crimes in a proposed piece of legislation.\(^\text{30}\) The proposed bill provided that political offense determinations

\(^{25}\) Id. Preamble.

\(^{26}\) Id.

\(^{27}\) Id. arts. 8-9.

\(^{28}\) Id. art. 8 states in part: “The State . . . shall, if it does not extradite him, be obliged, without exception whatsoever . . . to submit the case to its competent authorities for the purpose of prosecution . . . .” This provision is contrary to one of the primary benefits associated with the political offense exception, found in most extradition treaties, that the nation in which the accused is located need not become involved in the internal affairs of the nation which requests the extradition. A trial in the requested nation would inevitably lead to a determination of the legitimacy or nonlegitimacy of the accused’s political goal.

\(^{29}\) Id.

would not normally include:

(A) an offense within the scope of the Convention for the Suppres-
sion of Unlawful Seizure of Aircraft . . . ; (B) an offense within the
scope of the Convention for the Suppression of Unlawful Acts against
the Safety of Civil Aviation . . . ; (C) a serious offense involving an
attack against the life, physical integrity, or liberty of internationally
protected persons . . . including diplomatic agents; (D) an offense with
respect to which a treaty obligates the United States to either extradite
or prosecute a person accused of the offense; (E) an offense that con-
sists of homicide, assault with intent to commit serious bodily injury,
rape, kidnapping, the taking of a hostage, or serious unlawful deten-
tion; (F) an offense involving the use of a firearm . . . if such use endan-
gers a person other than the offender; (G) an offense that consists of
the manufacture, importation, distribution, or sale of narcotics or dan-
gerous drugs; or (H) an attempt or conspiracy to commit an offense
described in clauses (A) through (G) . . . or participation as an
accomplice. . . .

Sections (A) through (D) basically codify already existing interna-
tional agreements.32 Sections (E) and (F) include most crimes of a seri-
ous nature. Section (G) attacks the drug problem and section (H)
includes conspiracy to commit any of the aforementioned acts. Only the
most minor acts, such as trespassing, would be considered of political
color under this legislation, and thus, would be excluded from extra-
dition. This indicates the difficulty involved in establishing a suitable
definition for political offenses which protects the freedom fighters and
yet requires the extradition of terrorists. This legislation does provide
that the definition be applied in normal circumstances, but does not state
when exceptions to this rule should be made or what those exceptions
should entail. This proposal essentially removes the protection of the
political offense exception from those acts for which the exception was
originally created. Because the same act, for instance, murder, can be an
unjustified terrorist act in one situation and a justified act in another, the
political offense determination should be left, not to the legislature, but
to the judiciary which can provide the necessary flexibility.

C. The Four-Country Judicial Approach

Multilateral efforts to provide an effective framework for the extra-

31. Id.
32. Those international obligations are listed by name in (A) & (B). See also Convention
on the Prevention and Punishment of Crimes Against Internationally Protected Persons, In-
15410; The Convention, supra note 8.
dition of terrorists have not been successful. The political offense exception may still be used by terrorists to circumvent the extradition process. Judicial approaches struggle with the unique problem created by applying the traditional analysis of the political offense exception to terrorism. Courts of several nations interpret the political offense exception in various ways. The most influential approaches are those introduced by the British, the French, the Swiss, and the United States.

1. The British Test

The first case in which a court interpreted the political offense exception was *In re Castioni*, decided by a British Queen’s Bench court in 1891. *Castioni* involved a request from the Swiss government for the extradition of an individual charged with the murder of a government official, pursuant to an extradition treaty between Switzerland and Great Britain. The murder occurred during a revolt at the Swiss cantonal palace of Ticino, which occurred in response to the cantonal government’s refusal to revise the constitution. Castioni was a member of a revolutionary group which allegedly stormed the palace and seized the government seat. Thereafter, Castioni fled to England. The British court denied his extradition, finding that the crime was “incidental to and formed a part of political disturbances.” The court articulated a test for determining when an act constituted a political offense:

> [W]hether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political . . . [up]rising in which he was taking part.

This formulation now is referred to as the “incidence test.”

Commentators have attacked the British interpretation of the incidence test as being both underinclusive and overinclusive. It is underinclusive in its blanket failure to protect any actor whose political offense

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33. [1891] 1 Q.B. 149.
34. *Id.*
35. *Id.* at 150-51.
36. *Id.*
37. *Id.* at 149.
38. *Id.* at 166.
39. *Id.* at 159.
did not occur as part of a general uprising.\(^4\) As a result, an actor who is at the incipiency of a revolution will be extradited while, if he had waited until the revolution had matured, he would be entitled to the protection of the political offense exception. It is overinclusive because it protects all criminal acts which occur during a general uprising, without inquiring into the nature of the act nor the political affiliation of the victim.\(^4\) It does not consider that some acts are so heinous that they should not receive the protection of the political offense umbrella, regardless of their political character. Because this interpretation of the test does not make any distinction based upon the nature of the criminal act, it is flawed. Nevertheless, to the extent that the incidence test is interpreted to distinguish between revolutionary activity and terrorist activity, it can be effective. The \textit{In re Castioni} court's origination and exposition of the incidence test remains the source of all political offense interpretation and the seed from which all other approaches germinated.

A British court examined the political offense exception again in \textit{In re Meunier}.\(^4\) France requested the extradition of Meunier, a self-proclaimed anarchist, who was charged with bombing a military barracks and a Paris cafe. These acts had been taken in revenge for the French government's execution of another anarchist.\(^4\) France imposed a death sentence on Meunier in \textit{absentia}.\(^4\) The court granted extradition in this case, refining the test for a political offense:

\begin{quote}
[T]here must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and \ldots if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not.\(^4\)
\end{quote}

The court found that Meunier was identified with an anarchist party, which opposed all forms of government. Thus, even though the acts in this instance were directed against France's national government, the court found that anarchy was primarily directed \textit{not} against a particular government, but rather "against the general body of citizens."\(^4\) In holding that anarchists such as Meunier did not form a party in opposition to a state, the political offense exception was held not to apply, and thus, could not shield Meunier from extradition.

\begin{footnotes}
\item 42. \textit{Id.}
\item 43. \textit{Id.} at 204. \textit{See infra} notes 44-48 and accompanying text.
\item 44. [1894] 2 Q.B. 415.
\item 45. G. \textsc{von} \textsc{Glahn}, \textsc{Law} \textsc{Among} \textsc{Nations} 259 (3d ed. 1976).
\item 46. \textit{Id.}
\item 47. [1894] 2 Q.B. at 419.
\item 48. \textit{Id.}
\end{footnotes}
Accordingly, the traditional British test requires a two-party struggle for the control of the government. Such a struggle must create, by definition, an uprising, and the acts committed must be incidental to that struggle to be considered political. For the British court to find that acts are incidental to the struggle, they must be directed primarily against a particular government and not merely against the general populace.

This traditional interpretation of the incidence test does not prevent the terrorist from escaping extradition by using the political offense exception. Terrorist activity is usually directed against a particular government, for example, where a terrorist bombs a British embassy in Egypt and then flees to Italy. According to the traditional incidence test, such a bombing would be incidental to the uprising, and thus, the terrorist could escape extradition, hiding behind the legality of the political offense exception.

2. The French Test

The French courts have taken an altogether different approach in applying the political offense exception. The French developed an "objective test," which applies only when the contested acts directly injure the rights of the sovereign.49 This test was first set forth in *In re Gatti*,50 in which the San Marino government requested the extradition of Giovanni Gatti, who was charged with the attempted murder of a communist.51 Gatti claimed that his act was committed for political reasons and therefore requested that the French court apply the political offense exception to deny the extradition request.52 France granted extradition, however, finding that Gatti's act did not injure any substantive rights of the San Marino government and thus could not be considered a political offense.53 The court construed the political offense exception to be quite limited in scope. Neither the motive of the accused nor the nature of the act itself was considered when determining the applicability of the exception; instead the only inquiry was whether the rights of the state had been injured by the act.54

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50. 14 Ann. Dig. 145 (Cour d'appel, Grenoble, 1947).
51. Id.
52. Id.
53. Id. at 146.
French courts, however, have begun a trend away from this narrow test. A 1953 case, *In re Rodriguez*, held that extradition may be denied even if the crime committed does not injure any rights of the state requesting extradition. In that case, Spain sought the extradition of Rodriguez for acts of arson and murder. Rodriguez requested protection under the political offense exception, claiming that while Spain ostensibly sought his extradition for his alleged acts of murder and arson, in reality, Spain desired to prosecute him for his general opposition to the Franco government. The French court denied extradition, accepting Rodriguez' assertion that the act was politically motivated, even though the alleged acts did not directly injure the rights of the Spanish government. Another case, *In re Hennin*, involved a request from Switzerland for the return of an individual charged with acts of arson directed against private property. Despite the terrorist nature of Hennin's acts, the court found that the acts occurred in a heated political climate and had a political motivation and purpose, and thus, extradition was precluded by the political offense exception.

The present nature of the French test is uncertain. French courts have wavered between the objective test and other, more subjective approaches. One commentator suggests that some recent French political offense determinations in the terrorist context are indicative of interference by the executive branch with the theoretically independent French judiciary. The trend seems to be toward favoring "the right of asylum and the freedom of political expression over the international interest in the punishment of criminal activity." Thus, the French trend allows terrorists to escape extradition, and gain political asylum, by camouflaging their acts as political expression, and demanding application of the political offense exception.

3. The Swiss Test

Early Swiss cases borrowed the definition of the political offense ex-

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55. 2 G.P. 113 (1953).
56. *Id.* at 115.
57. *Id.*
58. *Id.*
60. *Id.*
62. *See* Cour d'appel, J.C.P II at No. 15274 (1967); Cour d'appel, J.C.P. II at No. 15387 (1968).
64. *Id.* at 279.
ception from the British, applying the incidence test of *In re Castioni*. Later Swiss cases, however, reveal the application of a somewhat different test, concerned more with the character of the offense than the existence of a political uprising. The political offense exception is applied by Swiss courts if the political nature of the crime “predominares” over the commonality of the crime. 

In a case regarding a hostage-taker named Vogt, a Swiss court enunciated three factors to be considered in this determination: (1) the motivation of the actor, (2) the circumstances which existed at the time the crime was committed, and (3) a balancing between the political objective sought and the means used to accomplish that end. Vogt’s extradition was sought for his alleged act of holding civilians hostage, as opposed to holding members of the government hostage. The defendant’s political objective allegedly was to remove the police forces from the location of a food riot. The Swiss court granted extradition, finding that Vogt’s violent methods outweighed his political objective. The court stated, in dicta, that as the means employed become increasingly oppressive, the political objective sought must similarly intensify. Accordingly, this decision suggests that a sliding scale is to be used in these determinations.

In a more recent case, the Swiss court granted extradition, finding that the political nature of the defendant’s act did not predominate over the common character of the crime. The case involved a request by France for the return of Ktir, an Algerian Liberation Movement member, who had been charged with murder. The Swiss court stated that

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65. *In re Ragni*, 49 BGE I 266 (Switz., Fed.Tr. 1923), reprinted in English in 2 Ann. Dig. 286.


68. See *In re Kaphengst*, 56 BGE I 457 (Switz., Fed. Ct. 1930), reprinted in English in 7 Ann. Dig. 292, 293.


72. *Id.*

73. *Id.*


75. *Id.*

76. *Id.*
the heinous nature of the crime of murder necessitated that murder be
the only means of attaining the political end. If so, the political nature of
the crime could be said to predominate, and the actor thereby would be
entitled to the protection of the political offense exception.77

Accordingly, under the Swiss predominance test, an offense will be
found to be political in nature only if its political aspects outweigh its
common elements. While the Vogt decision78 cites three elements for this
determination, in actuality, the Swiss courts use an ad hoc approach.79
Even though this type of approach can be labeled as suspect due to the
immense discretion vested in the court, it may effectively control terrorist
misuse of the political offense exception. Because Switzerland is politi-
cally neutral and has no political motivation unduly influencing its deci-
sions in political offense determinations, it is unlikely that it will abuse
the discretion inherent in its flexible, ad hoc approach.

4. The United States Test

a. Pre-Quinn Cases

Since 1894, United States courts have applied the incidence test of
In re Castioni.80 This standard was first adopted by a District Court in
In re Ezeta,81 a case involving a request by the Salvadoran government
for the extradition of a deposed dictator charged with murder and rob-
bery. The court reviewed and approved the In re Castioni incidence
test82 and denied extradition, finding Ezeta's acts incidental to and in
furtherance of a political uprising.83 The Supreme Court has addressed
the political offense issue only once, in the case of Ornelas v. Ruiz,84
which involved an extradition request from Mexico based on charges of
murder, arson, robbery, and kidnapping. The Supreme Court found that
even though the acts occurred during an uprising, they were basically
unrelated to the uprising, and thus extradition was granted. The deter-
minative factor was that "immediately after this occurrence, though no
superior armed force of the Mexican government was in the vicinity to
hinder their advance into the country, the bandits withdrew with their

77. Id. at 144.
285.
79. See supra notes 65-70 and accompanying text.
80. [1891] 1 Q.B. 149.
81. 62 F. 972 (N.D. Cal. 1894).
82. See supra notes 33-40 and accompanying text.
83. See supra note 52 and accompanying text.
84. 161 U.S. 502 (1896).
booty across the river into Texas.” The bandits’ flight indicated that although an uprising had occurred in Mexico at the time of the alleged acts, the acts were not incidental to that uprising since they were basically unrelated to the revolution. Dicta in the opinion suggested that several factors must be evaluated in determining whether an act constitutes a political offense, including: (1) the character of the act charged, (2) the method used in the perpetration of the act, (3) whether the act resulted in death or the taking of hostages, and (4) whether any property was involved and the extent of damage thereto.

Lower courts, however, have generally applied the incidence test of In re Castioni with extreme rigidity and have ignored the factors enumerated in Ornelas v. Ruiz. Application of the incidence test has led to inconsistent results. For example, in United States ex rel. Karadzole v. Artukovic, the Yugoslavian government requested the extradition of Artukovic, the minister of internal affairs in Croatia during World War II. He was charged with the murder of over 200,000 civilian prisoners in Yugoslavian concentration camps, specifically by the issuance of “orders based on criminal motives [and] hatred . . . to carry out mass slaughters of the peaceful civilian population . . . .” The Ninth Circuit Court of Appeals determined that Artukovic was protected from extradition by the political offense exception by applying a rigid analysis of the incidence test. The court found that because the crimes occurred during the invasion of Yugoslavia, when factions were vying for control of the government, the offenses were political under the incidence test. The Supreme Court vacated the Ninth Circuit’s opinion in this case by issuing a one-paragraph per curiam opinion and remanded for an extradition hearing. The Supreme Court “did not comment on the substantive issues and may well have based its order solely on the fact that the habeas court considered the legal questions involved in Artokovic’s extradition

85. Id. at 511 (quoting Mr. Secretary Gresham, in a memorandum to the Minister of Mexico).
86. Id.
89. 247 F.2d at 204.
90. Id.
91. 355 U.S. 393 (1958). Artukovic was finally extradited to face murder charges in Yugoslavia for his war crimes.
before an extradition court had an opportunity to make the preliminary findings mandated by section 3184."

The nature of the accused’s target is increasingly important under recent cases applying the incidence test. This new emphasis, like the incidence test itself, creates inconsistent and arbitrary results. For example, *In re McMullen* involved a British request for the extradition of an Irish Republican Army (IRA) member charged with the bombing of a military barracks. The court denied extradition, finding that the conflict in Northern Ireland constituted a political uprising and that McMullen’s acts were incidental to and in furtherance of that uprising. Later, however, in *Eain v. Wilkes*, when Israel sought the extradition of a Palestinian Liberation Organization (PLO) member in connection with the Tiberias bombing of a marketplace, which resulted in the deaths of two boys, extradition was permitted. Eain requested the protection of the political offense exception, using an argument strikingly similar to the one used successfully in *In re McMullen* just two years earlier. Eain argued that there was a conflict in Israel that involved violence, and the PLO, a group to which Eain belonged, was a party to that violence. The only difference between the crimes charged in *In re McMullen* and those in *Eain v. Wilkes* was the nature of the target: in the latter a civilian marketplace, and in the former, a military barracks. The *Eain* court, however, added a new requirement that evidence must show a “direct link between the perpetrator, a political organization’s political goals and the specific act.” The court allowed Eain’s extradition, agreeing with the magistrate’s finding that Eain failed to prove “that the bombing was incidental to the PLO’s objectives.” The court did not divulge whether its decision was based on the nature of Eain’s target, which would distinguish this case from *In re McMullen*, or on the lack of nexus between the specific act, the PLO’s objectives and Eain himself. In *United States v. Mackin*, Great Britain requested the extradition of another IRA member charged with the attempted murder of a British soldier. In applying the political offense exception and denying extradition, the United States

92. Quinn v. Robinson, 783 F.2d 776, 799 (9th Cir. 1986).
94. *Id.*
96. *Id.* at 507.
97. *Id.*; see also supra notes 93-94 and accompanying text.
98. 641 F.2d 518.
99. *Id.* at 521. This new requirement is referred to as the nexus requirement.
100. *Id.* at 520.
101. 668 F.2d 122 (2d Cir. 1981).
magistrate found it important that Mackin’s acts were directed against military personnel while the petitioner’s acts in *Eain v. Wilkes* were aimed at the civilian population.  

As demonstrated above, United States courts have not applied a consistent standard for the application of the political offense exception. The recent cases have looked too closely at the nature of the target and have not applied the factors set forth in *Ornelas v. Ruiz*. The courts have a difficult time applying the rigid incidence test, especially in the terrorist context, and arrive at inconsistent results. The *In re McMul- len* court noted that this rigidity of the incidence test creates a problem, stating: “Even though the offense be deplorable and heinous, the criminal actor will be excluded from deportation if the crime is committed under these prerequisites.” These shortcomings of the United States approach to the use of the political offense exception by terrorists were addressed in the recent case of *Quinn v. Robinson*.  

b. *The Quinn Case*

In the most recent United States political offense decision, *Quinn v. Robinson*, the United Kingdom requested the extradition of William Joseph Quinn, a member of the IRA charged with commission of a murder in Northern Ireland and conspiracy to cause explosions in London. The district court determined that Quinn’s extradition was barred by the political offense exception. The Ninth Circuit vacated the writ of habeus corpus and remanded, finding that the charged offenses were not protected by the political offense exception. The court acknowledged, however, that its decision was handed down “with the aid of very little helpful precedent.”

The bombing conspiracy alleged in *Quinn v. Robinson* involved six specific bombing incidents. None involved a military target; each of the bombings was directed towards the civilian population. Quinn was also charged with the murder of Police Constable Stephen Tibble. Because

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102. *Id.*
103. See supra note 84-86 and accompanying text.
104. See supra notes 88-102 and accompanying text.
105. No. 3-78-1899 M.G., slip op. at 3 (N.D. Cal. May 11, 1979).
106. 783 F.2d 776 (9th Cir. 1985).
107. *Id.*
108. *Id.* at 781.
109. *Id.*
110. *Id.* at 818.
111. *Id.* at 782.
112. *Id.* at 781.
Constable Tibble was not in uniform, however, Quinn may not have been aware of Tibble's official status. Thus, neither the murder nor the bombings may have been directed at any military target, a factor which was probably determinative in *Eain v. Wilkes* and other previous cases.\(^{113}\)

The Quinn court criticised courts which, in recent decisions, narrowed the political offense exception by overemphasizing the importance of the nature of the accused's target.\(^{114}\) The Quinn court insisted that the traditional political offense test is "ideologically neutral" and that "qualitative judgments regarding a foreign government or a struggle designed to alter that government" are inappropriate for judicial determination.\(^{115}\) Rather, the court felt such judgments were political questions within the confines of the factors enumerated in *Baker v. Carr*.\(^{116}\) Thus, the Ninth Circuit Court of Appeals decided that United States courts should not judge the political legitimacy of specific revolutionary tactics, including those directed against civilians.\(^{117}\)

In addition, the court in *Quinn v. Robinson* decided against requiring the actor to be a member of a clearly identifiable group seeking to overthrow the government before considering an act to be of political character.\(^{118}\) Accordingly, the court rejected the application of the British test as enunciated in *In re Meunier*.\(^{119}\)

In contrast to the organized, clearly identifiable, armed forces of past revolutions, today's struggles are often carried out by networks of individuals joined only by a common interest in opposing those in power.

\[\text{... [It] is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries. ... It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal.}\(^{120}\)

The *Quinn v. Robinson* court then re-examined the incidence test first espoused in *In re Castioni* and reaffirmed its viability, especially in the context of the terrorist political offender. The court stated that the drafters of the political offense exception never contemplated its use to

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\(^{113}\) See supra notes 94-102 and accompanying text.

\(^{114}\) 783 F.2d at 787.

\(^{115}\) Id. at 804.

\(^{116}\) Id.; see also 369 U.S. 186, 217 (1962).

\(^{117}\) 783 F.2d at 804. See supra note 72 and accompanying text.

\(^{118}\) 783 F.2d at 809.

\(^{119}\) [1894] 2 Q.B. 415.

\(^{120}\) 783 F.2d at 804-05.
protect acts of international violence from prosecution, "regardless of the ultimate objective of the actors." The court noted that the accused is extradited to the country in which the alleged acts occurred, and that the government of that nation may not be the one which the accused sought to influence by his acts. Accordingly, there is less risk of an unfair trial, or punishment for the actor’s political views, and thus, less justification for the invocation of the political offense exception. For example, if a terrorist murdered a United States Army officer in Italy and fled to Argentina, he would be extradited to Italy. Since the terrorist sought to influence the United States government and not that of Italy, Italian courts would not be likely to be influenced by the terrorist’s political views. Accordingly, the risk of an unfair trial is greatly reduced, and therefore, there is less justification for using the political offense exception.

The two requirements of the incidence test are that there be a political uprising and that the act be incidental to that uprising. Most cases have dealt with the latter requirement in detail and have only cursorily examined whether or not an uprising existed. The court in Quinn v. Robinson used the uprising component to remove the protection of the political offense exception from terrorists. The court stated that an uprising occurs only when a “requisite amount of turmoil” is caused by “fundamental efforts to accomplish change.” In addition, the court concluded that an uprising referred only to a “revolt by indigenous people against their own government . . . [and] only within the country or territory in which those rising up reside.”

In applying its interpretation of the incidence test to the facts of that case, the Ninth Circuit Court of Appeals found that an uprising existed only in Northern Ireland at the time of Quinn’s alleged acts. The magistrate, on the other hand, had determined that because Northern Ireland and London are both, at least constitutionally, a part of the United Kingdom and, because the acts in both locations were directed against the same government, an uprising existed “throughout the United Kingdom” at the time of Quinn’s acts. The Ninth Circuit rejected the lower court’s constitutional unit theory and concluded that

121. Id. at 806.
122. Id.
123. [1891] 1 Q.B. 149.
124. Only Ornelas ever dealt thoroughly with this issue. See supra note 84 and accompanying text.
125. Id. at 807.
126. Id. at 813.
127. Id. at 810.
there was no uprising in England at the time of Quinn's acts because the level of violence outside Northern Ireland was insufficient in itself to constitute an uprising, and English citizens or residents were not generating that violence which existed.128

The critical factor is that nationals of Northern Ireland, seeking to alter the government in that territorial entity, exported their struggle for political change . . . to a separate geographical entity—and conducted that struggle in a country in which the nationals and residents were not attempting to alter their own political structure.129

Thus, the Ninth Circuit added a new factor to political offense determinations: The accused must be indigenous to the area where the acts are perpetrated before he will be eligible for protection under the political offense exception.130 Because the court granted Quinn's extradition based on the lack of an uprising in England, it never reached the question regarding what role, if any, Quinn's status as a nonresident of Northern Ireland may have played in the political offense determination.

The Quinn court applied its reasoning to the facts of Eain to show that the application of the traditional incidence test would have achieved the same result as that reached by the Eain court, without resorting to a dramatic change of the test, as did that court in its creation of the nexus requirement.131 The Ninth Circuit court found that because the Israelis had not been engaged in any violent activities to overthrow their government, there was no uprising,132 and therefore Eain's acts could not have been incidental to an uprising, as is required.133 In applying its new residency or nationality requirement134 to the facts of Eain v. Wilkes, the Quinn court questioned whether Eain could have invoked the protection of the political offense exception even if an uprising was in existence, since he was not a resident or national of Israel. "In the absence of a tangible demonstration that he or she has more than a transitory connection with that land, the acts of a foreign national may simply not qualify for protection."135 Given the court's alternative basis for deciding this

128. Id. at 813.
129. Id.
130. The court also noted in dicta that the murder of a police officer is incidental to an uprising if the motivation of the killer was either to restrain the discovery of firearms or to avoid the reduction of his groups' forces, which would occur as a result of his capture. Id. at 811.
131. See supra note 99 and accompanying text.
132. 783 F.2d at 807.
133. The fact that the PLO sought to overthrow the government of Israel does not, in itself, create an uprising under the Quinn v. Robinson court's analysis. Id.
134. Id. at 807-08.
135. Id.
case, this hypothetical discussion is the only hint regarding future interpretation of the new residency requirement.\textsuperscript{136}

The second requirement of the incidence test, that an act be incidental to an uprising, was construed liberally by the \textit{Quinn v. Robinson} court. While the court stated that there must be a “nexus” between the act and the uprising,\textsuperscript{137} the accused’s membership in a group involved in an uprising\textsuperscript{138} should not determine whether the protection of the political offense exception is appropriate.\textsuperscript{139} The court noted that such a requirement: (1) is inconsistent with the rights of the accused; (2) may violate the accused’s Fifth Amendment rights since it may force him to supply circumstantial evidence of his guilt, and membership itself may be illegal; and (3) membership is difficult to prove.\textsuperscript{140}

The court listed some factors that, while not determinative, assisted evaluation of the political nature of the act: (1) proof of membership in a group involved in the uprising, (2) similarity between the charged offense and other acts committed by the uprising group, and (3) the degree of control exerted over the accused’s acts by the uprising group. The court stated that any of these factors could make it more likely that the accused’s act would be considered incidental to the uprising.\textsuperscript{141}

Evidence that the accused’s acts were committed for purely personal reasons, however, could negate any factors suggesting that a nexus exists.\textsuperscript{142} Thus, under a liberal nexus standard, the \textit{Quinn v. Robinson} court found no reason to distinguish the political nature of the act based upon the military or civilian nature of the target.\textsuperscript{143} Rather, the court looked at whether the act itself was likely to have been politically motivated within the context of that particular uprising, without regard to the military or civilian nature of the target.\textsuperscript{144} The \textit{Quinn} court realized that even acts directed against a civilian target may fall within the confines of the political offense exception depending upon the nature of that particular uprising.\textsuperscript{145}

\begin{itemize}
  \item 136. \textit{See supra} notes 130-31 and accompanying text.
  \item 137. \textit{Id.} at 809. Under this standard, “neither proof of the potential nor actual effectiveness of the actions in achieving the group’s political ends . . . nor proof of the motive of the accused . . . or [that of] the requesting nation . . . is required.” \textit{Id.}
  \item 138. This requirement was introduced in Eain v. Wilkes, 641 F.2d 504 (7th Cir.), \textit{cert. denied}, 454 U.S. 894 (1981); \textit{see also supra} note 98 and accompanying text.
  \item 139. 783 F.2d at 809.
  \item 140. \textit{Id.}
  \item 141. \textit{Id.} at 809-10.
  \item 142. \textit{Id.}
  \item 143. \textit{Id.}
  \item 144. \textit{Id.}
  \item 145. \textit{Id.}
\end{itemize}
The Quinn court also reexamined its earlier decision of Karadzole v. Artukovic which held that war crimes may still be considered political offenses despite their barbaric and atrocious nature. The Ninth Circuit Court of Appeals rejected its application of the political offense exception in Karadzole v. Artukovic and stated some sweeping limitations to the exception. The court characterized Artukovic's acts as "crimes against humanity" and concluded that crimes of such magnitude were not protected by, and were entirely beyond the scope of, the exception. The Quinn court also stated that skyjacking, piracy, and acts committed on the high seas were not entitled to the protection of the political offense exception.

The Quinn court also stated that skyjacking has never been a traditional method of revolutionary activity, and thus should not be allowed the protection of the political offense exception. This, however, is in direct conflict with its statement that insurgents themselves decide on the tac-

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146. Id. at 799-800; see also supra notes 88-91 and accompanying text.
147. 783 F.2d at 799-800.
148. Id. Crimes against humanity are defined by the court as crimes in violation of international law and acts carried out "by or with the toleration of authorities of a state." Id.
149. Id. at 799, 817; but see infra notes 156-57 and accompanying text.
150. Id. at 807. This is somewhat akin to the approach of the statutory reform proposal since it isolates certain specific crimes from those within the ambit of the political offense exception.
151. [1891] 1 Q.B. 149.
152. See supra notes 125-30 and accompanying text. Examples of such activities would include skyjacking and piracy.
153. 783 F.2d at 807.
154. Id.
tics for their own revolutions. Judge Duniway noted in his concurring opinion that with the rapid transportation available today, genuine revolutionary activities could occur outside the geographic boundaries of the requesting state. He asked, rhetorically, whether the United States would (or should) have granted a request from Great Britain for the extradition of John Paul Jones for piracy on the high seas. While everyone would agree that the war crimes charged in Karadzole v. Artukovic should never be considered political in nature, the Quinn v. Robinson court's arbitrary characterization of other acts as nonpolitical in nature, such as piracy, would require a court following this standard to grant extradition even for true revolutionary activity, as shown by the John Paul Jones example.

Another difficulty with Quinn v. Robinson is the territorial limitation imposed by the court: namely, the area to which an uprising will be considered to extend. The majority limited the geographical boundary of the uprising to the country in which the requisite amount of violence was present, but refused to extend that boundary to other locations under the control of the same sovereign. Judge Fletcher, who partially concurred in the decision, disagreed with the majority's proposition on geographical boundaries. He did not see any reason why the same exact acts, directed against the same people (the British rulers), should be protected by the political offense exception when committed in Northern Ireland but not when committed in London. The Ninth Circuit could have limited the boundary of an uprising to the particular city or cities in which a sufficient amount of violence was present, a "zone of violence" test, but chose not to do so. Rather, it extended the boundary to the entire geographical unit of Northern Ireland, but refused such extension to the entire political unit of all the territories under the control of Great Britain. The court should have taken this extra step suggested by Judge Fletcher so that revolutionaries can reach the government in power, which may have more effect in England than in Northern Ireland. By restricting the area of the uprising to Northern Ireland, the Quinn court's decision may make it impossible for an IRA revolutionary to reach the government of Great Britain by threatening its existence at its government seat, namely, in England.

155. Id. at 804-05.
156. Id. at 818 (Duniway, J., concurring).
157. See supra note 129 and accompanying text.
158. 783 F.2d at 819 (Fletcher, J., concurring and dissenting).
159. Id. at 820.
160. See supra note 129 and accompanying text.
161. See supra note 159 and accompanying text.
The current United States test, after *Quinn v. Robinson*, is quite different from the approaches used by other countries. The two most distinctive aspects of the United States approach are the geographical limitation of the uprising area, discussed above, and the requirement that the acts must be committed by one who is indigenous to the area of the uprising.\(^6\) The United States test does not balance the objectives of the actor against the means used, a distinctive feature of the Swiss approach.\(^2\) Instead, the United States test includes a warning to the courts that they should not attempt to judge the means used by the revolutionaries.\(^3\)

The *Quinn v. Robinson* court has crafted a standard that may easily be interpreted to deny the invocation of the political offence exception as an exculpatory mechanism while, at the same time, it allows the political offense exception to protect true revolutionary activity. The shortcomings of the Ninth Circuit Court of Appeal's new interpretation of the incidence test should not detract from the monumental effort of a United States court in attempting to deal with the transnational terrorist of the 1980s while still adhering to the basic framework of *In re Castioni*. *Quinn v. Robinson* demonstrates that the judiciary, when given a clear standard with the necessary flexibility, can provide an effective mechanism for dealing with the problem of the transnational terrorist, where both legislative reform and multilateral efforts have failed.

**IV. PROPOSALS FOR A NEW DEFINITIONAL STANDARD**

The political offense exception must be redefined to protect legitimate political actors while preventing terrorists from abusing this defense to extradition. Two possible definitional frameworks are described below to enable the judiciary to make political offense determinations, even in the terrorist context. One approach combines elements of the Swiss and United States tests, and the other is the *Quinn v. Robinson* test, modified to comport more closely to the underlying policy reasons of the political offense exception. The only reason that two different proposals are provided is that the judiciary of certain nations may prefer a combination approach while others may prefer adherence to the basic limitations of the incidence test.

Elements of different approaches that have been utilized by various

\(^{162}\) *See supra* notes 128-30 and accompanying text.

\(^{163}\) *See supra* note 70 and accompanying text.

\(^{164}\) *See supra* note 117 and accompanying text.
nations in defining a political offense can be combined to create a new formulation for this important exception to extradition which will protect the activities of true freedom fighters, while requiring the extradition of terrorists. By combining dicta from *Ornelas v. Ruiz*\textsuperscript{165} together with aspects of the Swiss decisions discussed above,\textsuperscript{166} a basic framework for a new definitional standard of political offenses emerges.\textsuperscript{167} In *Ornelas v. Ruiz*, the Supreme Court stated that the nature and mode of the crime should be considered in any political offense determination.\textsuperscript{168} This approach is more sophisticated than the basic incidence test, since it takes into account the seriousness of the act, the methodology chosen for accomplishing the act, and the act’s reflection on the accused’s culpability. This type of inquiry allows a court to distinguish terrorist acts from other revolutionary activity. The *Quinn v. Robinson* court did not accept this reasoning, stating that this type of inquiry is undesirable because it requires a court to judge the legitimacy of the revolution, by inquiring into the nature of those activities.\textsuperscript{169} This is not necessarily persuasive since an act can only be considered terrorist based upon the norms and mores of society. One cannot help but judge the nature of the acts if he or she ever hopes to separate terrorist acts from general revolutionary activity.

The Swiss court, in the case concerning the hostage-taker Vogt, examined the motivation of the accused and the political and factual circumstances surrounding the commission of the crime. The court then balanced the political objective sought to be achieved by the commission of the crime against the means chosen to accomplish the desired political objective.\textsuperscript{170} Regarding the alleged murderer Ktir, the Swiss court held the crime of murder to be so serious that it must be the only means of achieving the desired political objective to merit the protection of the political offense exception.\textsuperscript{171} For crimes of an extremely serious nature,\textsuperscript{172} courts should similarly require the act to be the only reasonable means of achieving the political objective. Reasonableness must be injected into the test or it will fall prey to the underinclusiveness of the

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\textsuperscript{165} See *supra* notes 84-86 and accompanying text.

\textsuperscript{166} See *supra* notes 65-79 and accompanying text.

\textsuperscript{167} The Swiss approach was criticized by the *Quinn* court as involving inquiries which may be political questions and thus outside the permissible judicial scope. *Ornelas*, however, stated in dicta various factors which are similar to those in the Swiss cases.

\textsuperscript{168} See *supra* note 87 and accompanying text.

\textsuperscript{169} See *supra* note 120 and accompanying text.

\textsuperscript{170} See *supra* notes 67-73 and accompanying text.

\textsuperscript{171} See *supra* notes 74-77 and accompanying text.

\textsuperscript{172} See *supra* note 31 and accompanying text, particularly § (E). This would include homicide, assault with intent to commit serious bodily injury, rape, kidnapping, the taking of a hostage, or serious unlawful detention.
incidence standard173 and of the language of the statutory reform propos-
alas.174 To determine the reasonableness of an act, courts should apply
the balancing approach of the Swiss case Vogt,175 by requiring that as the
means employed become increasingly oppressive, the political objective
sought must similarly intensify in urgency and importance.

To summarize, in determining whether an act constitutes a political
offense, a court should inquire into the nature and mode of the crime, the
motivation of the accused, and the circumstances which surround the
commission of the crime. The court should then balance the political
objective against the means chosen to accomplish that objective. Fur-
thermore, crimes of an extremely serious nature must be the only reason-
able means of achieving the political objective before they will be
considered a political offense. Such a definitional approach would pro-
vide courts with a more workable standard for determining whether
crimes for which extradition is sought are political, and therefore pro-
tected by the political offense exception. This proposed standard would
not produce mathematically precise results, but instead would allow for
flexibility in judicial determinations. The above guidelines would pro-
duce decisions true to the underlying principles of the political offense
exception and would also deny a safe haven to terrorists. For example, in
applying this proposed standard to the facts of the Eain v. Wilkes case,176
the court would, at the outset, have to determine whether murder of a
civilian was the only means of accomplishing Eain’s political objective,
namely, the destruction of the State of Israel. Clearly, his acts could not
satisfy this requirement, and thus extradition would be granted.

Another suitable definition for the political offense exception, which
would deny protection to terrorists and still protect those political of-
fenders for whom the exception was originally formulated, could be
achieved through modifications of the incidence test described by the
Ninth Circuit Court of Appeals in Quinn v. Robinson.177 The difficulties
with this decision178 are twofold. The first difficulty involves both the
disproportionate limitations in the incidence test, which defines the area to
which an uprising will be considered to extend, and the exclusion of cer-
tain tactics from the protection of the political offense exception.179 The
second problem is the contradiction posed by the court’s insistence that it

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173. See supra notes 41-42 and accompanying text.
174. See supra notes 30-31 and accompanying text.
175. See supra note 70 and accompanying text.
176. See supra notes 95-100 and accompanying text.
177. See supra notes 123-50 and accompanying text.
178. See supra notes 152-62 and accompanying text.
179. Id.
is improper for the judiciary to decide which tactics are acceptable. Remediing these two problems would create a clearer standard for judicial application.

A new definition of the geographical area to which the court can ascribe the label of uprising "should be formulated, to allow certain revolutionary activities to be protected if they occur in areas outside the actual "zone of violence." The geographical boundary of an uprising should extend at least to the location of the sovereign's seat of government and possibly to any location under the control of the same sovereign. Thus, in Quinn v. Robinson, the court should have extended the area of the uprising in Northern Ireland to acts perpetrated in London and possibly even to those occurring, for example, in the Falkland Islands. This broader geographical boundary for an uprising would allow the revolutionary activity to reach locations controlled by the same sovereign, and thereby affect the sovereign wherever he may be located.

To meet the uprising requirement, the actor must also be a national or resident of the geographical entity in which the requisite amount of violent activity is present. Under this new standard, while Quinn's acts in London fall within the confines of the geographic limitations of an uprising, the protection of the political offense exception would still be denied because he was not a resident or national of Northern Ireland (the location of the requisite amount of violent activity). Then, Quinn's only hope of protection under the political offense exception would be to make a "tangible demonstration that he... has more than a transitory connection with that land." This could be established by the length of time he lived in that area, whether he has applied for citizenship, and other factors that tend to show a connection with that territory, for example, marriage to a citizen.

The second difficulty with Quinn v. Robinson, the conflict between stating that the court will not tell the revolutionaries which tactics are acceptable and the court's exclusion of certain tactics, can be cured by merely stating outright that certain tactics are not part of accepted revolutionary activities and will not be accorded the protection of the political offense exception. Tactics such as skyjacking, piracy, hostage taking, crimes against humanity, and other tactics which are proscribed by international conventions should be excluded from the exception. This type of blanket exclusion is certainly preferable to the inconsistent language in Quinn v. Robinson. Thus, under this standard, these activities are cer-
tainly not necessary for political change and should never be considered incidental to an uprising.

Both of the proposals suggested above will protect those seeking to change their form of government through political activism, while insuring that terrorists do not escape extradition for their crimes. The first approach is more flexible and will work more efficiently than the second, where the judiciary is completely independent from political coercion from the executive branch. In such countries, the added flexibility will enable courts to keep pace with the new methods of the terrorist. It will ensure that terrorists will not escape extradition by some clever manipulation of a loophole which could appear in a more rigid standard. The second approach is true to the incidence test and provides a solid basis for the viability of the test, at least with respect to current terrorist tactics. This approach is less likely to fall prey to an overzealous executive branch which pressures a politically-controlled judiciary, because the rigid boundaries of the test would force the judiciary to adhere to it instead of political pressures. Thus, each test is valid for a different national structure, and under each test the political offense exception would be revitalized to protect those for whom it was originally developed and would be removed from the terrorist's armory.

V. CONCLUSION

The political offense exception is still necessary to protect political activism. The exception, though, must not be offered to terrorists as a method of escaping extradition and prosecution. The incidence test, when first enunciated in 1891, was a bold proclamation of the international community's desire to protect true revolutionary activity. The proposals stated above are not as bold, but would proclaim loudly that terrorists who merely flee the scene of a crime will not be afforded any protection. The laws will not provide a loophole under which their acts can be considered political, but rather, will require extradition so that their acts will be seen in their true form: as the desperate acts of cowards.