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# THE STATUS OF POLITICAL FUGITIVES AND REFUGEES UNDER UNITED STATES LAW

## I. EXTRADITION

Although the United States Constitution makes no mention of extradition, it has been held to be a prerogative of the federal government.<sup>1</sup> Absent a treaty, it has been the policy of the United States to deny extradition.<sup>2</sup> A treaty is necessary because United States criminal statutes do not recognize offenses committed abroad<sup>3</sup> that do not have an effect within its territory. However, there have been instances in which the absence of a treaty has been ignored.<sup>4</sup> In 1864, a Spanish army officer was surrendered to Spanish authorities in Cuba without a hearing. At that time, the United States and Spain did not have an extradition treaty. Secretary of State Seward, in a report of the incident to the Committee on the Judiciary of the House of Representatives, maintained that "a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race."<sup>5</sup>

More recently, the United States Court of Appeals for the First Circuit stated, in dicta, that "[a]n asylum State might, for

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1. *Valentine v. United States*, 299 U.S. 5, 8 (1936). *See also* *United States v. Rausher*, 199 U.S. 407 (1886).

2. "The modern view and the one maintained in this country, is that a state is under no absolute obligation to surrender fugitives accused of crime unless it has contracted to do so." *Greene v. United States*, 154 F. 401, 410 (5th Cir. 1907). *See also* *Factor v. Laubenheimer*, 290 U.S. 276 (1933). *See generally* 4 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 11-16 (1943).

3. M. GARCIA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* 55 (1956). In this connection, Thomas Jefferson, replying as Secretary of State to a French request for the surrender of French nationals accused of plotting against the Republic, stated that

[t]he laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming within their pale, is received as an innocent man, and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye is sensibly felt here, as in other countries, but, until a reformation of the criminal codes of most nations, to deliver up fugitives from them, would be to become their accomplices. The former is viewed, therefore, as the lesser evil . . .

Kopelman, *Extradition and Rendition History-Law-Recommendations*, 14 B.U.L. REV. 591, 601 n.31 (1936), *quoting* T. Jefferson, 1 *AMERICAN STATE PAPERS* 175 (1832).

4. Although the general rule requires the offense to be covered by the treaty, "congress has the right to provide for the return of a fugitive criminal to a foreign country from which he has fled; and, waiving any requirement of entire reciprocity from the foreign country it may, by statute, without treaty, provide for such return." *In re Neely*, 103 F. 626 (C.C.S.D.N.Y. 1900).

5. 1 J. MOORE, *TREATISE ON EXTRADITION AND INTERSTATE RENDITION* 35 (1881).

reasons of policy, surrender a fugitive political offender . . . [I]n such case we think that the accused would have no immunity from prosecution in the courts of the demanding State, and we know of no authority indicating the contrary."<sup>6</sup> Similarly, in *United States v. Sobell*,<sup>7</sup> Judge Kaufman referred to the opinion of the United States Supreme Court in *Ker v. Illinois*,<sup>8</sup> and stated that in the absence of an applicable treaty, the federal government could use its discretion in extraditing fugitives. Even with a treaty, "informal expulsion procedures are still available to the surrendering state both for enumerated and certainly for non-enumerated crimes. . . ."<sup>9</sup>

The concept of strict double criminality, that the act must be an offense under the laws of both the asylum and requesting States,<sup>10</sup> has been utilized in the past. Some treaties specifically require double criminality as a prerequisite to extradition in all cases,<sup>11</sup> while other treaties specify it only for particular offenses.<sup>12</sup> *Wright v. Henkel*<sup>13</sup> provided that when double criminality is required, the relevant law of the United States jurisdiction in which the fugitive is found may be applied. In *Factor v. Laubenheimer*,<sup>14</sup> the Supreme Court concluded that if an offense is not specifically listed as one requiring double criminality, all that is necessary is a general recognition of the criminality of the offense by the laws of the United States jurisdiction in which the fugitive is found.

Extradition treaties contain exclusive lists of offenses for which a person may be extradited. The offenses are not defined; it is left to the asylum State's courts to determine the applicability of an enumerated offense to the facts of the case.<sup>15</sup> If the

6. *Chandler v. United States*, 171 F.2d 921, 935 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

7. 142 F. Supp. 515 (S.D.N.Y. 1956).

8. 119 U.S. 436 (1886).

9. 142 F. Supp. at 524.

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

11. *See, e.g.*, Treaty of Extradition with the Union of South Africa, Dec. 18, 1947, 2 U.S.T. 884, T.I.A.S. No. 2243 (1951); Treaty with Switzerland for the Extradition of Criminals, May 14, 1900, 31 Stat. 1928, T.S. No. 354.

12. *See, e.g.*, Extradition Treaty with Albania, Mar. 1, 1933, 49 Stat. 3313, T.S. No. 902; Treaty and Exchange of Notes with Austria Concerning Extradition and Commutation of Death Penalty, Jan. 31, 1930, 46 Stat. 2779, T.S. No. 822.

13. 190 U.S. 40 (1931). The Court also indicated that it is not necessary for double criminality to be stated in the treaty, as it is a "general principle of international law." *Id.* at 58.

14. 290 U.S. 276 (1935).

15. *Ex parte Charlton*, 185 F. 880 (C.C.D.N.J. 1911), *aff'd*, 229 U.S. 447 (1913).

accused is sought for multiple offenses, some of which are not listed in the treaty, the "doctrine of speciality" applies. The doctrine provides that the requesting nation cannot punish the fugitive for an offense other than one for which he was surrendered. The Supreme Court has held this to be a principle of international law, apposite even in the absence of an express provision in the extradition treaty.<sup>16</sup> The doctrine is based upon the premise that a State has the absolute right to provide asylum; this right can only be limited by the provisions of a treaty. If an extradited individual were prosecuted for unrelated offenses, the purpose of extradition would be subverted.<sup>17</sup>

Formal extradition procedures are initiated by the requesting State's filing of a verified complaint against the fugitive.<sup>18</sup> The extradition magistrate, who may be a federal or state judge or a federal magistrate, must first decide whether the alleged offense falls within the ambit of the relevant extradition treaty. If the magistrate so finds, a warrant for the fugitive's arrest will be issued. Pursuant to a hearing, the magistrate must determine whether there would have been sufficient evidence to justify the individual's apprehension and commitment for trial had the offense been committed within the forum jurisdiction.<sup>19</sup> The decision of the magistrate is generally not subject to appellate review.<sup>20</sup> However, a habeas corpus proceeding may be brought to ascertain whether the magistrate has jurisdiction, whether the offense was one enumerated by the treaty, and whether there was evidence warranting the magistrate's findings.<sup>21</sup> If reasonable grounds for extradition are found, the magistrate certifies the evidence and forwards it with a transcript of the hearing to the Secretary of State, who, upon the request of the petitioning gov-

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16. *United States v. Rausher*, 119 U.S. 407 (1886). See also *Johnson v. Browne*, 205 U.S. 309 (1907).

17. Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 15 (1968). In *United States v. Mulligan*, 74 F.2d 220 (2d Cir. 1934), a relator was extradited from France to the United States, but was released when the witness died. He was arrested within 30 days for extradition to Canada, on a charge which had arisen prior to his extradition from France. The court held that France gave him up solely to be tried for the offense committed in the United States and not for the offense committed in Canada. Therefore, the United States could not exercise its power in a matter other than that authorized by France.

18. 18 U.S.C. § 3184 (1970).

19. *Id.*

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

21. *Jiminez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963); *Collier v. Vaccaro*, 51 F.2d 17 (4th Cir. 1931).

ernment,<sup>22</sup> issues a warrant for surrender. If the fugitive is not delivered up within two months, he will be released upon application "unless sufficient cause is shown . . . why such discharge ought not to be ordered."<sup>23</sup>

### *The Political Offense Exception*

An act by an individual may be an offense under an extradition treaty, yet the asylum State may refuse to extradite because the act is classified as a political offense.<sup>24</sup> Irrespective of a treaty mandating extradition it would be improper for one State to surrender a fugitive to another State when political passions would affect the opportunity for a fair and impartial trial.<sup>25</sup> The political offense exception arises in two contexts. The first consists of offenses committed exclusively against the State. This category is limited to treason, sedition, and espionage.<sup>26</sup> The second encompasses offenses against individuals which have political overtones. These are referred to as relative political offenses.<sup>27</sup> While it is generally not difficult to determine whether an act is within the first category, much controversy has arisen over the extent of political involvement necessary to transform a common offense into a relative political offense. Courts have been reluctant to define the term relative political offense precisely. The desire of governments to allow themselves the greatest freedom in matters which affect external security and internal peace has caused this lack of precision.

The traditional position of the United States with regard to the interpretation of the term relative political offense is founded upon the English case of *In re Castioni*.<sup>28</sup> There, the court refused extradition of one Castioni to Switzerland for the murder of a Swiss official. Castioni, as a participant in a revolt expressing dissatisfaction with the administration of a Swiss Canton, shot a

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22. 18 U.S.C. § 3184 (1970).

23. 18 U.S.C. § 3188 (1970).

24. The idea of non-extradition of a political offender is relatively recent in origin. Belgium is credited with being the first country to incorporate this concept into domestic law. I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 167 (1971).

25. 2 C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1019-20 (2d ed. 1951).

26. Garcia-Mora, *War Crimes and the Principle of Non-Extradition of Political Offenders*, 9 WAYNE L. REV. 269, 276 (1963).

27. Garcia-Mora, *The Nature of Political Offenses; A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1230-31 (1962).

28. [1891] 1 Q.B. 149 (1890).

member of the government in the municipal palace. The court stated that "fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed part of political disturbances."<sup>29</sup>

*Castioni* soon found support in the United States in *In re Ezeta*.<sup>30</sup> Upon the application for extradition to El Salvador of Ezeta and others, it was held that "[a]pplying by analogy, the action of the English court in that case [*Castioni*] to the four cases now before me, under consideration, the conclusion follows that the crimes charged here, associated as they are with the actual conflict of armed forces, are of a political character."<sup>31</sup> Subsequently, the extradition of one Lynchbaum, who was accused of an act in connection with the "overthrow of landlordism" in Ireland, was denied on the grounds that the act was incidental to attempts to secure reform in legislation and perhaps independence.<sup>32</sup> The magistrate defined political offenses as "crimes 'incidental to and forming a part of political disturbance,' 'riots for political purpose,' . . . these definitions are authoritative."<sup>33</sup>

In 1908, Russia sought the extradition of one Krishean Rudowitz. The federal commissioner approved the extradition request. However, the decision was reversed by Secretary of State Knox after a mass protest was held in Chicago.<sup>34</sup> In explaining his action to the Russian Ambassador, Secretary Knox stated that

the offenses of killing and burning with which the accused is charged are clearly political in their nature, and that the robbery committed on the same occasion was a natural incident to executing the resolutions of the revolutionary group and cannot be treated as a separate offense. . . .<sup>35</sup>

29. *Id.* at 166.

30. 62 F. 972 (N.D. Cal. 1894).

31. *Id.* at 999.

32. 1 HYDE, *supra* note 25, at 574, citing Opinion of Commissioner Moores, Proceedings in Case of James Lynchbaum.

33. Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247, 267 (1933).

34. *Id.* See text accompanying note 63 *infra*.

35. 4 HACKWORTH, *supra* note 2, at 49. Secretary Knox went on to state that: [h]owever much the Government of the United States may deplore or condemn acts of violence done in the commission of acts having political purpose . . . if those acts were in fact done in the execution of such a purpose, there is no right to issue a warrant of extradition therefore.

"[A] person 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

Currently, the United States has extradition treaties in force with some eighty States, and is a signatory of a multilateral convention concluded in Montevideo in 1933.<sup>36</sup> All provide for the political offense exception, but the exact wording varies. Most extradition treaties may be classified into one of several types according to the phrasing of the political offense exception clause.<sup>37</sup> The simplest form of the exception is the clause which merely states that the treaty is inapplicable to political offenses.<sup>38</sup> Some treaties of this type also contain a doctrine of speciality clause.<sup>39</sup> Treaties in this class fail to indicate which State is to raise the exception and which is to determine whether the act

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movement and uprising in which he is taking part" is a political offender and so entitled to an asylum in this country. . . .

*Id.* at 50.

36. Extradition Convention with Other American Republics, Dec. 26, 1933, 49 Stat. 3111, T.S. No. 882. The current parties to the treaty are Argentina, Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, El Salvador, and the United States. The convention does not abrogate any bilateral treaty in force, but provides that upon lapse of a bilateral treaty it will take effect. As the United States has outstanding bilateral extradition treaties with all signatories of the convention, it is wholly inoperative as to the United States.

37. See Bassiouni, *Ideologically Motivated Offenses and the Political Offense Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217, 260-262 (1969).

The United States extradition treaty with Brazil contains what is considered by many to be a carefully worded political offense exception. Bassiouni, *supra* note 17, at 18. The Treaty of Extradition with the United States of Brazil, art. V, Jan. 13, 1961, 15 U.S.T. 2093, T.I.A.S. No. 5691, provides that:

[t]he allegation by the person sought of political purpose or motive for the request for his extradition will not preclude that person's surrender if the crime or offense for which his extradition is requested is primarily an infraction of the ordinary penal law. In such case the delivery of the person being extradited will be dependent on an understanding on the part of the requesting State that the political purpose or motive will not contribute toward making the penalty more severe.

38. Illustrative of such clauses is the wording, "[the treaty] shall not apply to any crime or offense of a political character. . . ." See, e.g., Extradition Treaty with Albania, art. 3, Mar. 1, 1933, 49 Stat. 3313, T.S. No. 902; Treaty with Ecuador Relative to Extradition, art. 3, June 28, 1872, 18 Stat. (3) 1756, T.S. No. 79; Convention for the Mutual Delivery of Criminals and Fugitives from Justice with Austria, art. 3, July 3, 1856, 11 Stat. 691, T.S. No. 9.

39. See text accompanying note 16 *supra*. "A person who has been surrendered . . . shall consequently in no case be prosecuted . . . on account of a political crime or offense committed by him previously to his extradition or on account of an act connected with such a political crime or offense." See, e.g., Supplementary Convention to the Extradition Convention of October 26, 1901 and of June 20, 1935 with Belgium, art. 4, Nov. 14, 1963, 15 U.S.T. 2252, T.I.A.S. No. 5715; Extradition Treaty with Poland, art. 3, Nov. 22, 1927, 46 Stat. 2282, T.S. No. 789; Extradition Treaty with Turkey, art. 3, Aug. 6, 1923, 49 Stat. 2692, T.S. No. 872.

comes within the exception. Another form of the exception provides that a person shall not be surrendered if he can prove that he will be punished for an offense of a political character.<sup>40</sup> This clause implies that the fugitive has the responsibility to raise the political exception defense in the asylum State's courts. Some treaties state that the courts of the asylum State shall determine whether or not the offense is of a political nature.<sup>41</sup>

The Department of State favors a restrictive reading of the political offense exception because, were a liberal view to be accepted, "[n]ot only would such interpretation and application of the treaties seriously inhibit the ability of the United States to fulfill what this Department, and undoubtedly the other parties to the treaties, construe as the obligation under the treaties, but it can fairly be assumed that such restrictive interpretation and application of the treaty will redound to our detriment when we attempted to invoke our rights under such treaties."<sup>42</sup>

Many of the older treaties contain the *attentat* clause, which has its basis in Belgian law.<sup>43</sup> That law provided that "[t]here shall not be considered as a political crime or as an act connected with such a crime an attack upon the person of the head of a foreign government or of members of his family, when the attack takes the form of either murder, assassination, or poisoning."<sup>44</sup> This provision made its first appearance in United States treaties in the 1882 extradition treaty with Belgium.<sup>45</sup> With one exception,<sup>46</sup> treaties entered into by the United States from 1909 through the early 1930s contained this clause.<sup>47</sup> Although much

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40. See, e.g., Treaty for Extradition of Fugitives from Justice with Bolivia, art. 6, Apr. 21, 1900, 32 Stat. 1857, T.S. No. 339; Extradition Treaty with Great Britain, art. 6, Dec. 22, 1931, 47 Stat. 2122, T.S. No. 849; Treaty of Extradition with the Union of South Africa, art. 6, Dec. 18, 1947, 2 U.S.T. 884, T.I.A.S. No. 2243.

41. See, e.g., Supplementary Extradition Treaty with Austria, art. 3, May 19, 1934, 49 Stat. 2710, T.S. No. 873.

42. Letter from Acting Legal Advisor Meeker to Assistant Attorney General Miller, June 6, 1961, Department of State MS. File No. 211.3115 Perez Jiménez Marcos, *quoted in* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 766 (1968).

43. Annales Parlementaires, Chambre des Représentants, Dec. 18, 1855. Law of March 22, 1856.

44. For an English translation of this provision, see Draft Convention on Extradition, 29 AM. J. INT'L L. 363 (Supp. 1935).

45. Convention with Belgium for the Extradition of Criminals, art. 4, para. 2, July 13, 1882, 22 Stat. 972, T.S. No. 30.

46. The exception was the Extradition Treaty with Germany, July 12, 1930, 47 Stat. 1862, T.S. No. 836.

47. Deere, *supra* note 33, at 253.



of United States law has come from principles of common law, it should be noted that Britain does not utilize the *attentat* clause as it conflicts with British law providing that attacks against the Sovereign are treason and therefore political.<sup>48</sup>

The *attentat* exception to the political offense exception has been the target of much criticism. It has been suggested that it is too narrow, as there is no valid reason for confining the exception to attempts to kill a head of State or his family.<sup>49</sup> It has also been criticized for being too broad, since it removes from the exception all assassination attempts against a head of State, even those based upon a valid political objective. It has been said that "the Belgian clause goes too far, since exceptional cases of murder of heads of State from political motives or for political purposes might occur which do not deserve extradition."<sup>51</sup> More recent treaties no longer have this provision.

### *Non-inquiry*

While the courts of the United States are apparently willing to go to great lengths to find an offense to be within the ambit of the political offense exception, the courts do not readily examine the motives of the requesting State in seeking extradition, even if it is claimed that the fugitive is sought on purely political grounds.<sup>52</sup> The courts have assumed a modest view of their competence in this area, and have preferred to let the executive branch decide these questions.<sup>53</sup>

This position is illustrated by the case of one Lincoln,<sup>54</sup> who was to be extradited to England to face trial on forgery charges.

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48. *Id.*

49. Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371, 383 (1953), citing F. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 265 (6th ed. 1915). This criticism has itself been called into question for refusing to recognize that the line must be drawn somewhere, and that extending it would effectively destroy the concept of political offense. *Id.* at 383-84.

50. The Convention of May 14, 1897 between the United States and Brazil attempted to overcome the restrictiveness of the *attentat* clause and included the president, vice president, governors, and lieutenant-governors of the states within the exception. Treaty and Protocol with Brazil for the Extradition of Criminals, May 14, 1897, 33 Stat. 2091, T.S. No. 423.

51. Oppenheim, cited in Clark, Coudert & Mack, *The Nature and Definition of Political Offense in International Extradition*, AM. SOC. INT'L L. PROC. 95, 158 (1909).

52. Jacob, *International Extradition: Implications of the Eisler Case*, 59 YALE L.J. 622, 633 (1950). But see text accompanying notes 61-66 *infra*.

53. *Id.*

54. *In re Lincoln*, 228 F. 70 (E.D.N.Y. 1915).

Lincoln claimed that he was being sought solely on political grounds because extradition had not been requested until after he had published politically inflammatory writings against the English government. The court refused to dispose of the question.

[I]t is not a part of the court proceedings . . . nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. . . . The government of the United States, through the Secretary of State should determine whether the foreign government is in fact able to exercise its civil powers, and whether diplomatic and treaty relations are being carried out and respected in such a way that it is safe to surrender an alleged criminal under a treaty.<sup>55</sup>

This "rule of non-inquiry" was applied in 1934 in the case of *In re Normano*.<sup>56</sup> Normano was a Jewish professor residing in the United States after arriving from Germany. Germany sought his extradition, which he opposed on the ground that the anti-Semitic policy of the government in power would prevent his receiving a fair trial. Although in the interim he was released because he had been held for more than two months,<sup>57</sup> the court stated in dicta that "[w]hatever may be the situation in Germany, the extradition treaty between that government and the United States is still in full force, and it is the duty of the court to uphold and respect it just as it is bound to uphold the laws and Constitution of the United States."<sup>58</sup> *Normano* must be contrasted with *Gallina v. Fraser*,<sup>59</sup> in which the United States Court of Appeals for the Second Circuit expressed the opinion that "[w]e can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above."<sup>60</sup>

In addition to the courts, the executive branch has authority to inquire into extradition. By statute, the Secretary of State may

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55. *Id.* at 74.

56. 7 F. Supp. 329 (D. Mass. 1934).

57. 18 U.S.C. § 3188 (1970) provides that whenever any person is not delivered up and conveyed out of the United States within two calendar months after commitment to jail, he may be discharged from custody upon application.

58. 7 F. Supp. at 330-31.

59. 278 F.2d 77 (2d Cir. 1960).

60. *Id.* at 79. The principle referred to was non-inquiry into procedures awaiting the fugitive upon extradition.

order a fugitive committed and delivered "to be tried for the offense of which charged."<sup>61</sup> This duty was originally held to be ministerial in nature.<sup>62</sup> It was soon established, however, that the executive department has discretion in the matter.<sup>63</sup> The Department of State may refuse to permit extradition even though the examining commissioner has found grounds to exist.<sup>64</sup> Thus, both the judicial and the executive branches must be in agreement as to the propriety of the request.

This power of review has been subject to a self-imposed restraint. The Secretary has continuously refused, as has the judiciary, to consider allegations that the fugitive would not receive a fair trial in the requesting State. Thus, after the court in *Normano* declined to rule on possible prejudice in the requesting State, the Legal Advisor's Office of the Department of State issued an opinion stating that the failure to receive a fair trial would not be justification for an executive refusal of surrender.<sup>65</sup> Some treaties, however, provide that a fugitive shall not be surrendered "if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character."<sup>66</sup>

#### *Recent definitions of the political offense*

The United States has continued its liberal policy of denying extradition for political offenses. Perhaps the most vivid example of this liberality is *Artukovic v. Boyle*.<sup>67</sup> Ardrija Artukovic was an official in the Croatian Government. Yugoslavia sought his return on the grounds that, as Minister of the Interior in the government of Ante Pavelic, he issued orders for the murder of over 1200 persons during a power struggle for control of Croatia. The district court held that the offenses were political<sup>68</sup> and therefore non-extraditable under the applicable treaty.<sup>69</sup> "The plain read-

61. 18 U.S.C. § 3186 (1970).

62. *In re Sheazle*, 21 F. Cas. 1214 (No. 12,734) (C.C.D. Mass. 1845).

63. *In re Stupp*, 23 F. Cas. 281 (No. 13,562) (C.C.S.D.N.Y. 1875).

64. *See, e.g., Nicosia v. Wall*, 442 F.2d 1005 (5th Cir. 1971).

65. 4 HACKWORTH, *supra* note 2, at 202 & 215-16. *But see Nicosia v. Wall*, 442 F.2d 1005 (5th Cir. 1971).

66. Extradition Treaty with Great Britain, Dec. 22, 1931, 47 Stat. 2122, T.S. No. 849.

67. 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*, 355 U.S. 393 (1958), *rehearing sub nom. United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959) (surrender denied).

68. 140 F. Supp. at 247.

69. *Id.* The District Court was referring to the Treaty with Servia for the Mutual

ing of the indictment here makes it immediately apparent that the offenses for which the surrender of the petitioner is sought, were offenses of a political character.”<sup>70</sup>

On appeal, the Court of Appeals for the Ninth Circuit affirmed the lower court and discussed the contention that Artukovic's acts were of the character of war crimes, and that such crimes are subject to extradition. The court stated:

We now consider the question whether because the offenses are also called “war crimes” they have lost their character as “political offenses” within the meaning of the treaty. Appellant argues that “war crimes” are crimes for which extradition is to be granted within the meaning of international acts to which the United States is a party. It is argued by recent legal writers that the “barbarity and atrocity of the crimes [crimes against the law of war and crimes against humanity] committed weigh so heavily upon the common crime element that the political act has practically ceased to exist and, therefore, that the extradition of the offender is the only justifiable course of action.”

Appellant in essence argues that by virtue of resolutions taken in 1946 and 1947 by the United Nations General Assembly as to the surrender of alleged war criminals, it is incumbent on this Court to hold that Artukovic is charged with an offense which is extraditable.

We have examined the various United Nations Resolutions and their background and have concluded that they have not sufficient force of law to modify long standing judicial interpretations of similar treaty provisions. Perhaps changes should be made as to such treaties.<sup>71</sup>

The court cited *Castioni* with approval, but went too far in finding a relationship between this offense and a political view. It may well be true that the connection between the offense and the political act has become so tenuous as to be in truth nonexistent.

The court, in dicta, also appeared to accept Artukovic's contention that there was immunity from prosecution on the basis of the act of state doctrine. In this regard, the court stated that “[t]he District Court properly took judicial notice of the fact that Ante Pavelic was the Premier of Croatia during World War II . . . . We conclude that the finding . . . that the offenses . . .

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Extradition of Fugitives from Justice, Oct. 25, 1901, 32 Stat. 1890, T.S. No. 406.

70. 140 F. Supp. at 247.

71. 247 F.2d at 204-05.

were offenses of a political character was correct."<sup>72</sup> Implicit in this statement is at least tacit approval of an application of the act of state doctrine. But the doctrine does not apply to war crimes. In a similar situation, the act of state doctrine was rejected by the Nuremburg court and the war crimes tribunals.<sup>73</sup>

Operation of the act of state doctrine to possible political offenses was clarified in *Jimenez v. Aristeguieta*.<sup>74</sup> Venezuela sought the extradition of Jimenez for murder and financial offenses while he was chief executive of that country. He contended that, as the acts charged were done in exercise of his powers as chief of State, he was entitled to be discharged from custody.<sup>75</sup> The court held that an individual must act in his official capacity for the doctrine to be applied.<sup>76</sup> The offenses for which Jimenez was sought did not fit into this category. Furthermore, the court indicated that even if the act of state doctrine were applicable to the facts, its actual invocation should be left to the executive department.<sup>77</sup>

The *Artukovic* court indicated that "the *Castioni* case was recently reconsidered by the English courts . . .,"<sup>78</sup> but that "American cases have more or less adopted language in *Castioni*."<sup>79</sup> This has been seen by some to indicate a failure of the United States courts to accept a more liberal view of the political offense exception.<sup>80</sup> But this is not accurate.

The case in which *Castioni* was reconsidered was *Regina v. Governor of Brixton Prison ex rel Kolczynski*,<sup>81</sup> in which seven members of a crew of a Polish fishing vessel overpowered the other members of the crew in order to seek political asylum in

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72. *Id.* at 204.

73. Garcia-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders*, 62 MICH. L. REV. 927, 943 (1964). In this regard the author states "[r]eliance upon inherited principles in order to characterize crimes against humanity as political, merely because they are committed by agents of the State, amounts to asserting an extravagant claim for which there is no support in law or in fact, and certainly affords no comfort to those who have been the victims of aggression upon all law and humanity." *Id.* at 943-44 (footnote omitted).

74. 311 F.2d 547 (5th Cir. 1962).

75. *Id.* at 557-58.

76. *Id.* at 558.

77. *Id.*

78. 247 F.2d at 203.

79. *Id.*

80. Green, *Political Offenses, War Crimes and Extradition*, 11 INT'L & COMP. L.Q. 329, 333 (1962).

81. [1955] 1 Q.B. 540.

England. The court held the mutiny to be a political offense, and not subject to extradition.

[T]he words "offense of a political character" must always be considered according to the circumstances existing at the time when they have to be considered . . . . In this case the members of the crew . . . were under political supervision and they revolted by the only means open to them. They committed an offense of a political character, and if they were surrendered there could be no doubt that, while they would be tried for the particular offense mentioned, they would be punished as for a political crime.<sup>82</sup>

But the facts of *Kolczynski* are not relevant to the facts in *Artukovic*. Under the *Castioni* doctrine, *Kolczynski* would have been decided differently since there was no political uprising in the traditional sense. In *Artukovic*, such a set of circumstances was found to exist. Therefore, the *Artukovic* court properly did not broaden an accepted doctrine, contrary to Professor Green's opinion. The cases and facts were clearly distinguishable. Given the proclivity of commentators to cite dicta as hallowed rules of law, it may be a blessing in disguise that the court did not provide additional enlightenment of an area not relevant to the case at bar.

United States courts have not ignored *Kolczynski* totally, however. In *In re Gonzalez*,<sup>83</sup> the Dominican Republic sought the extradition of Clodeveo Ortiz Gonzalez, who participated in the torture and killing of two prisoners while acting in "a military or quasi-military capacity under the regime of Generalissimo Rafael Trujillo."<sup>84</sup> The court held that, under the traditional *Castioni* test, Gonzalez's actions were not incidental to a political disturbance.<sup>85</sup> The court then went on to indicate that in the proper circumstances the traditional view could be modified along the lines of *Kolczynski*.<sup>86</sup> The *Kolczynski* doctrine, therefore, would

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82. *Id.* at 549. Evidence was submitted that tape recordings were being made of the fugitives' conversations while at sea, and that the recordings were to be used in preparing a case against them based on their political beliefs. *Id.* at 550.

83. 217 F. Supp. 717 (S.D.N.Y. 1963).

84. *Id.* at 719 (footnote omitted).

85. *Id.* at 721.

86. "*Kolczynski*, as well as the history of the political offense exception in Anglo-American law, arguably indicate that the political offense exception legitimately can be 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." *Id.* at 721

seem not to be disfavored by the courts of the United States, but it remains dormant. While it is sometimes felt that the use of the political offense exception has been so limited in scope as to become almost illusory,<sup>87</sup> the principle is still applied in United States courts.

## II. DEPORTATION AND EXTRADITION

The immigration laws of the United States<sup>88</sup> have been used as an alternative to extradition. As Hackworth explains:

The immigration laws of the United States provide for the exclusion or deportation of aliens who have been convicted of or who admit the commission of certain classes of crimes in foreign countries. These laws are separate and distinct from the laws and treaties relating to extradition. They are not enacted for the benefit of foreign governments or for the purpose of bringing fugitives to justice; rather, they are for the protection of the United States. However, requests are sometimes made by governments for the deportation by other governments of fugitives from justice, and occasionally steps are taken—especially in the absence of an extradition treaty—to deport such persons.<sup>89</sup>

Exclusion—the denial of entry into the United States—has been requested in many instances when there was no extradition treaty, when a treaty did not cover the alleged offense, and in other circumstances.<sup>90</sup> Deportation is not available if the fugitive entered the United States legally and has not violated the immigration laws, is a national of the United States, or is not actually implicated in the manner alleged by the requesting State.<sup>91</sup>

The reasons for using deportation and exclusion as alternatives to extradition are pragmatic ones. Much time is involved in an extradition proceeding. Deportation is a practical method of disposing of the matter.<sup>92</sup> In the opinion of one authority,<sup>93</sup> this

n.9. This was not a case in which the acts in question were blows struck against a repressive totalitarian regime in the cause of freedom.

87. Garcia-Mora, *supra* note 49, at 371.

88. Act of Oct. 3, 1965, Pub. L. No. 89-236, ch. 6, 79 Stat. 918.

89. 4 HACKWORTH, *supra* note 2, at 30.

90. See Evans, *Acquisition of Custody Over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 BRIT. Y.B. INT'L L. 77, 83-4 (1964).

91. *Id.*

92. *Id.* at 94 n.4, citing Department of State MS. File No. 211.44Sm 6 (Jamaica, 1917).

93. *Id.* at 103.

situation is partly the fault of the cumbersome extradition process, and partly the fault of officials whose judgments are blurred by the exigencies of the situation. Additionally, the fugitive who is being deported rather than extradited carries the burden of claiming misuse of the deportation statutes, and must challenge the good faith of three executive agencies: the Immigration Service, the Department of Justice, and the Department of State. But both the asylum and requesting States have a responsibility to insure that their concern with the ends of their procedures does not overshadow their obligation to be just in the means they employ.<sup>94</sup>

Occasionally there are clashes between extradition and immigration proceedings. Venezuelan Ex-President Jimenez attempted to use section 243(h)<sup>95</sup> as a bar to extradition.<sup>96</sup> He urged that a duty of deportation under that section should take precedence over an extradition order approved by the Secretary of State. The Board of Immigration Appeals rejected this claim and commented:

there is no inherent inconsistency between, on the one hand, our Treaty of Extradition with Venezuela and the statutory provisions of deportation, including withholding of deportation on the basis of impending physical persecution. Any inconsistency which might result would arise only from divergent applications of these provisions by different government officials. Statutes should be interpreted and applied, however, so as to render them harmonious and to give maximum effect to the provisions of each.

A decision by the Secretary of State granting extradition will terminate any deportation proceedings in whatever posture they might be in at the time.<sup>97</sup>

### III. IMMIGRATION

When an alien comes to the United States seeking refuge from repression, the fact that he has not committed an extraditable offense does not assure him asylum. The Supreme Court, in *Nishimura Ekiu v. United States*,<sup>98</sup> held that "[i]t is an accepted

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94. *Id.* at 104.

95. 8 U.S.C. § 1255 (1970).

96. *In re Perez-Jimenez*, 10 I. & N. Dec. 309 (1963).

97. *Id.*

98. 142 U.S. 651 (1892).



maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."<sup>99</sup> In the United States, this power is regulated by treaty or acts of Congress and enforced by the executive.

Prior to 1952, little relief was given to the political refugee.<sup>100</sup> In 1875, Congress first established the current "political" exception to the rule that those convicted of enumerated offenses would not be allowed to immigrate to the United States.<sup>101</sup> In 1917, Congress exempted those who left their homelands because of religious persecution from taking a required literacy test for entry.<sup>102</sup>

Early deportation statutes did not provide any special relief for the political refugee. However, the executive branch was allowed discretion to either permit the alien to leave voluntarily or to temporarily stay deportation. The judiciary was loathe to tamper with this discretion.<sup>103</sup>

The Immigration and Naturalization Act of 1952<sup>104</sup> grants a

99. *Id.* at 659. The Supreme Court has also held that suspension of deportation is a matter of grace "rather than a right." *Jay v. Boyd*, 351 U.S. 345, 354 (1956).

100. For a more detailed history, see Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204 (1969).

101. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.

102. Act of Feb. 3, 1917, ch. 28, § 3, 39 Stat. 874.

103. Judge Hand remarked, with regard to the deportation of one Giletti, that: [h]is offenses are apparently political, for which he could not be extradited. True, this does not prevent us from ridding ourselves of his presence for crimes committed here, but it has been our traditional policy . . . not to assist in the prosecution of political offenses, and it would seem to be a corollary that, when the choice is open, we should not make it an incident of the execution of our own laws that the offender should be subjected to the discipline of another country for crimes of that character. The occasion would therefore seem to be one in which the utmost latitude might properly be given him, consonant with law to escape these consequences.

*United States ex rel. Giletti v. Commissioner of Immigration*, 35 F.2d 687, 689 (2d Cir. 1929). See also *United States ex rel. Fortmueller v. Commissioner of Immigration*, 14 F. Supp. 484 (S.D.N.Y. 1936). But see *United States ex rel. Weinberg v. Schlotfeldt*, 26 F. Supp. 283 (N.D. Ill. 1938), which was held to be "clearly erroneous" in *Soewapadji v. Wixon*, 157 F. 289, 290 (9th Cir. 1946) *cert. denied*, 329 U.S.792 (1946).

104. 66 Stat. 162. In addition, the United States has bound itself to the substantive parts of the Convention Relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 150, through its adoption of the Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577. By approving the Protocol, the United States has become bound to Article 33 of the Convention, which provides:

very low priority to those seeking entry into the United States due to fear of persecution.<sup>105</sup> The provisions of the law limit such refugees to persons who have fled from any Communist or Communist-dominated country or area, or from any country within the Middle East, for fear of persecution on account of race,

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1. No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The Convention Relating to the Status of Refugees extended protection only to those persons who became refugees "as a result of events occurring before January, 1951." *Id.* at art. 1, para. A(2). This limiting clause was extended by the Protocol, which provided that the substantive provisions of the Convention were to be applied as if the restrictive date clause were omitted.

There is little case law on the effects of the Protocol. In 1971, the Court of Appeals for the Fifth Circuit upheld a State Department decision to refuse extradition to Panama when the accused would be subject to punishment for his political opinions. *Nicosia v. Wall*, 442 F.2d 1005 (5th Cir. 1971). Agreements between the United States and Panama did not have a political offense exception but, using the Protocol as a basis, the State Department refused extradition. The court thus allowed the State Department to enforce the Protocol against Panama, a non-signatory State.

Other decisions on both the administrative and the judicial levels have unanimously affirmed the proposition that the Protocol has not modified the existing laws of the United States. *Chim Ming v. Marks*, 367 F. Supp. 673 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 1170 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *Kan Kam Lin v. Rinaldi*, 361 F. Supp. 177 (D.N.J. 1973), *aff'd per curiam*, 493 F.2d 1229 (3d Cir. 1974); *In re Dunar*, Interim Dec. No. 2192 (I. & N., Apr. 17, 1973). Indeed, the courts have indicated that the reason for United States accession to the Protocol was not to benefit refugees within the United States, but rather was a method of indicating approval of its contents. In *Chim Ming v. Marks*, 367 F. Supp. 673 (S.D.N.Y. 1973), the court cited the approval message of President Johnson to the Senate as follows:

It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecution. Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere.

*Id.* at 677-78, citing S. Exec. K, 90th Cong., 2d Sess., at III.

105. 8 U.S.C. § 1153(a)(1)-(6) (1970). Political refugees are of class seven priority, preceded by (in order): unmarried children of United States citizens, spouses and children of a lawfully admitted alien, members of the professions and those with "exceptional ability in the sciences or the arts" which will substantially benefit the United States, married children of United States citizens, brothers and sisters of United States citizens, and laborers possessing skills of which there is a shortage in the United States.

religion, or political opinion, and are unable or unwilling to return to such country.<sup>106</sup>

The political refugee is also subject to the exclusion provision of the statute,<sup>107</sup> which provides that all aliens "convicted of a crime involving moral turpitude (other than a purely political offense). . . [or] who have been convicted of two or more offenses (other than purely political offenses) shall be excluded from admission to the United States."<sup>108</sup> Thus, the political offense exception appears in the immigration laws. The political offense exception in the statute, however, is not interpreted restrictively as is the case in extradition treaties. The Immigration and Naturalization Service [hereinafter referred to as Immigration Service], in a 1950 decision,<sup>109</sup> held that the test to be applied is the *Castioni* test of offenses incidental to or part of a political disturbance. Thus, as used in the statute, the term embraces not only a purely political offense but also the relative political offense as well.

The political refugee may enter as a quota immigrant,<sup>110</sup> a special immigrant from a country of the Western Hemisphere,<sup>111</sup> or a non-quota immigrant.<sup>112</sup> The alien may enter conditionally, either on the basis of his refugee status<sup>113</sup> or at the discretion of the Attorney General.<sup>114</sup> A refugee is an excludable alien subject to deportation, but the refugee's status may be adjusted to that of a permanent resident at the discretion of the Attorney General.<sup>115</sup> If the refugee has previously entered the United States and is ordered deported, deportation may be withheld if, in the opinion of the Attorney General, the person would be subject to persecution in the receiving country.<sup>116</sup>

The two important elements of refugee classification are the circumstances surrounding the applicant's departure from his homeland and the circumstances militating against his return.<sup>117</sup>

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106. 8 U.S.C. § 1153(a)(7) (1970).

107. 8 U.S.C. § 1182 (1970).

108. 8 U.S.C. § 1182(a)(9)-(10) (1970).

109. *In re K*, 4 I. & N. Dec. 108 (1950).

110. 8 U.S.C. §§ 1115, 1153 (1970).

111. 8 U.S.C. § 1101(a)(27) (1970).

112. 8 U.S.C. §§ 1101(a)(15), 1184 (1970).

113. 8 U.S.C. § 1153(a)(7) (1970).

114. 8 U.S.C. § 1182(d)(5) (1970).

115. 8 U.S.C. § 1255 (1970).

116. 8 U.S.C. § 1253(h) (1970).

117. See Evans, *Political Refugees and the United States Immigration Laws*, A Case Note, 62 AM. J. INT'L L. 921, 923-24 (1968).

Although the refugee must establish that inability and unwillingness to return are predicated upon fear of persecution, the refugee need not prove that he, in fact, will be subject to persecution.<sup>118</sup> Imprisonment for violating a civil law does not, in itself, indicate persecution.<sup>119</sup>

An applicant seeking refugee status must, therefore, be genuinely fleeing to escape persecution.<sup>120</sup> The Immigration Service has denied refugee status to an alien who left her homeland to visit her daughter,<sup>121</sup> and to another person who left to obtain further education.<sup>122</sup> Yet, the Immigration Service has defined the term "fled" to encompass departing from a homeland prior to the circumstance which caused the applicants to become refugees. In *In re Zedkova*,<sup>123</sup> Zedkova left her native Czechoslovakia prior to the Russian intervention of August, 1968. Based upon her claim that she would be subject to persecution upon return, the Immigration Service granted her refugee status. The Regional Commissioner decided that "it would be extremely narrow and inequitable to view those nationals who physically fled . . . because of political opinion as refugees and to withhold such status from those who remain out of the country for the very same reason. . . . It is immaterial whether the circumstance . . . occurred before or after departure from the country or area."<sup>124</sup>

### *The political refugee and deportation*

An alien who attempts to delay deportation on the grounds of persecution "has the burden of satisfying the special inquiry officer that he would be subject [*sic*] to persecution on account of race, religion, or political opinion as claimed."<sup>125</sup> On appeal, the alien must prove that the finding was so arbitrary or capricious as to constitute a denial of due process.<sup>126</sup>

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118. *In re Shirinian*, 12 I. & N. Dec. 392 (1967).

119. *In re Moy*, 12 I. & N. Dec. 117 (1967).

120. *In re Tom*, 11 I. & N. Dec. 798 (1966).

121. *In re Lalian*, 12 I. & N. Dec. 124 (1967).

122. *In re Frisch*, 12 I. & N. Dec. 40 (1967).

123. *In re Zedkova*, 13 I. & N. Dec. 626 (1970).

124. *Id.* at 628.

125. 8 C.F.R. § 242.17(c) (1976).

126. *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir. 1961), *cert. denied*, 366 U.S. 950 (1961). See generally *United States ex rel. Kordic v. Esperdy*, 276 F. Supp. 1 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 232 (2d Cir. 1967), *cert. denied*, 392 U.S. 935 (1968). Judge Frank, in *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715 (2d Cir. 1954), questioned the constitutionality of allowing the Attorney General discretion in such proceedings.

Prior to 1965, the law required that the refugee must be in fear of physical persecution.<sup>127</sup> In 1958, the Immigration Service defined physical persecution, which is usually based upon race, religion, or political opinions, as including incarceration, subjection to corporal punishment, torture, or death.<sup>128</sup> Applying that standard, the United States Court of Appeals for the Second Circuit refused to withhold deportation of a Yugoslav who petitioned that he would be denied employment upon his return because of his Church membership.<sup>129</sup> The same year, however, the Third Circuit allowed a stay of deportation after it had been denied by the Attorney General.<sup>130</sup> Here, too, a Yugoslav petitioner contended that he would be unable to earn a livelihood because of his practice of Roman Catholicism. The court reasoned that the Attorney General had defined the term persecution incorrectly, placing too much emphasis on the means rather than the ends of persecution. The court stated that

[t]he statute does not concern itself with the manner in which physical persecution is inflicted, so long as that is the net effect of the forces or the circumstances that the Yugoslavian government will impose . . . . However, there is no basis for thinking that "physical persecution" requires or even connotes the use of intensive physical force applied to the body with all the dramatics of the rack and wheel. The denial of an opportunity to earn a livelihood in a country such as the one involved here is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual. The result of both is the same, and it is one Congress, motivated by the humanitarian instincts that have always characterized our conduct and that of our civilization, certainly hoped to avoid when subsection 243(h) was enacted.<sup>131</sup>

In 1965, "physical persecution" in section 243(h) was modified to read "persecution."<sup>132</sup> The Board of Immigration Appeals, in *In re Janus and Janek*,<sup>133</sup> responded to criticism levelled at the difficulty of success in a section 243(h) proceeding by explaining that

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127. 8 U.S.C. § 1253(h) (1964), as amended, 8 U.S.C. § 1253(h) (1970).

128. *Diminich v. Esperdy*, 299 F.2d 244, 246 (2d Cir. 1961), cert. denied, 369 U.S. 844 (1962), citing *In re Kale*, Imm. Adm. Dec. A9 555 532 (1958).

129. 299 F.2d at 244.

130. *Dunat v. Hurney*, 297 F.2d 744 (3d Cir. 1961).

131. *Id.* at 746. On reargument the court split equally on the decision but all eight members agreed that economic sanctions may amount to physical persecution. *Id.* at 753.

132. 8 U.S.C. § 1255 (Supp. I, 1965), amending 8 U.S.C. § 1255 (1964).

133. 12 I. & N. Dec. 866 (1968).

flight motivated by fear of persecution for political considerations is sufficient for the purposes of a section 243(h) stay of deportation.<sup>134</sup>

In *Kovac v. Immigration and Naturalization Service*,<sup>135</sup> the modification of the statute was held to have eliminated a requirement that all means of obtaining a livelihood must be removed before a claimant could fall within the ambit of the statute. The court indicated approval for the "enlightened interpretation of the statute"<sup>136</sup> in *Janus*. It reasoned that deletion of the word "physical" from section 243(h) shifted the emphasis from the act of oppression to the results, and that this removed any requirement for the denial of all employment opportunities as grounds for a stay. In the instant case, the petitioner showed that he had suffered economic deprivation by the secret police in their efforts to induce him to spy on Hungarian refugees. The Board denied his stay because he was still employed when he left for the United States.<sup>137</sup>

In *Berto v. Immigration and Naturalization Service*,<sup>138</sup> the

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134. *Id.* at 876-77.

Section 243(h) cases must be decided individually, on all of their facts; the performance of a particular act or the following of a specified course of conduct are no more than guidelines for arriving at a result on the basis of an entire record. We are not convinced that every travel restriction imposed by an Iron Curtain country and punished, in the breach, by imprisonment, is political persecution; or that every person who leaves such a country and subjects himself to the penalties provided under those laws by remaining outside of his country for longer than permitted is a bona fide refugee, or a person who will be subject to persecution on his return because of his political opinion. A person whose departure from an Iron Curtain country is devoid of political motivation, or whose decision not to return is unrelated to the politics of that country (*e.g.*, the person who finds better economic opportunity here, or enters into a marital relationship with a resident alien or United States citizen) is not entitled to a section 243(h) stay solely on the basis that he may face criminal prosecution for overstay. Nor is a person who has not expressed opposition to the political regime before departure automatically excluded from relief, if he can show that his departure was politically motivated and that any consequences he faces on return are political in nature. Each case, as we have said before, must be considered on all of its facts, each factor given its proper weight. We are aware of the inherent nature and intended function of the 243(h) stay provisions, and have shaped our decisions accordingly.

*Id.*

135. 407 F.2d 102 (9th Cir. 1969).

136. *Id.* at 106.

137. *Id.* The court held that the Board was "arbitrary and capricious" in its finding that petitioner's work on board a ship was inconsistent with his claim of economic persecution.

138. 432 F.2d 824 (6th Cir. 1970).

Sixth Circuit relied upon *Janus*. Petitioner Berto entered the United States on a visitor's visa. Upon expiration of his visa and initiation of deportation proceedings, he requested asylum by means of a stay in the expulsion action. He produced uncontroverted evidence that he would be subject to persecution upon his return to Hungary. The court found that the factors disclaimed by the Board in *Janus* as grounds for deportation were supportive grounds for deportation in the instant case.<sup>139</sup> Thus, it is safe to assume that the Immigration Service, with prodding from the courts, will be more liberal in applying the "enlightened interpretation" of the statute that the recent political refugee cases have engendered.

#### IV. CONCLUSION

The United States has traditionally been liberal in protecting the political fugitive. The courts attempt to categorize an offense as within the political offense exception to extradition treaties and the immigration laws in order to provide beneficial treatment for the political refugee. However, there is much room for improvement.

In the case of the political offense exception found in extradition treaties, some courts, in their zeal to protect a person who claims to be a political fugitive, have extended protection to those in power who may be guilty of war crimes. This goes beyond the original purpose of the political exception, which was to protect the individual seeking changes in a political system from the extreme punishment that the requesting State was certain to invoke upon his return. Using this standard, the political offense exception should not be available to one in power at the time of the commission of an offense, since clearly the act charged was not to obtain a change in a political system, but to preserve the status quo. Subsequent changes in government should not alter the result, since the facts as of the time of the commission of the act are controlling. Such a limitation in application would preserve the political offense exception for those who truly need it, while denying it to those who seek to use it as a shield for the commission of abhorrent crimes.

The immigration laws, though usually applied reasonably, are sometimes used to deport or prevent entrance of a person who

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139. *Id.* at 844.

is nonextraditable, either because there is no extradition treaty or because the alleged crime is not covered by the treaty. This surreptitious use of the immigration laws makes a mockery of traditional United States practice. It is hoped that the judiciary will begin to see through this diaphanous attempt to circumvent the protections accorded a political offender by the extradition laws through the use of deportation.

*Jay A. Bondell*