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DEPORTATION AS DE FACTO EXTRADITION: THE MATTER OF JOSEPH DOHERTY

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NOTES

DEPORTATION AS DE FACTO EXTRADITION: THE MATTER OF JOSEPH DOHERTY

The British Government wants me back, to punish me for defending my country against those very troops that terrorize my neighborhood and my neighbors. Michael Hayes was one of the many that were mysteriously murdered. Within three months of Mickey's death, six more of my neighbors were gunned down in the same manner. The same coverup, the same injustice, and the same troops. This is dedicated to the innocent and the forgotten.

—Joseph Doherty[1]

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1. Doherty, *Death in the Rain*, in Ir. Echo (New York City), Jan. 25, 1986, at 36, col. 1. People unfamiliar with Joseph Doherty's case consider him to be a terrorist. Mr. Doherty, however, sees himself as a soldier defending his country from the political oppression and foreign military occupation he describes in this poem. This oppression is well documented but often ignored in the United States because of our strong ties with the United Kingdom. *See, e.g.*, AMNESTY INT'L, APPEAL HEARING OF SIX MEN CONVICTED OF BOMBINGS IN BIRMINGHAM (1988); AMNESTY INT'L, INVESTIGATING LETHAL SHOOTINGS: THE GIBRALTAR INQUEST (1989); AMNESTY INT'L, NORTHERN IRELAND: ALLLEGED TORTURE AND ILL-TREATMENT OF PAUL CARUANA (1985); AMNESTY INT'L, NORTHERN IRELAND: KILLINGS BY SECURITY FORCES AND "SUPERGRASS" TRIALS (1988); AMNESTY INT'L, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND (1978).

Northern Ireland is in a state of war, *see* Finucane v. The Governor of Portlaoise Prison, No. 164/89, slip op. at 15 (Ir. S.C. Mar. 13, 1990), and is recognized and treated as such by the United Kingdom. The long history of Irish resistance to English occupation, which has smoldered and erupted periodically through the centuries, surfaced again in the 1970s after the failure of the Irish civil rights movement. *In re* Doherty, 599 F. Supp. 270, 273 (S.D.N.Y. 1984). The Provisional Irish Republican Army (PIRA) has led this resistance, with significant support from the local community. *Finucane*, No. 164/89, at 14. The United Kingdom has responded with sophisticated counterinsurgency tactics, as well as special tribunals (Diplock courts) to deal with politically motivated "crimes" and important changes in the procedural and substantive law for politically motivated "crimes." *Id. See* generally R. HARVEY, DIPLOCK AND THE ASSAULT ON CIVIL LIBERTIES (Haldane Soc'y of Socialist Lawyers Report No. 1, 1981). The English judiciary also recognizes and characterizes the occupation of Northern Ireland as a war. In *Attorney-General for Northern Ireland's Reference*, a British soldier was acquitted of murder because of the, as Lord Diplock stated, "state of armed and clandestinely organized insurrection against the lawful government of Her Majesty by persons seeking to gain political ends . . . ." [1977] A.C. 105; [1976] N. Ir. 169, 206 (C.A.). The state of war in Northern Ireland

I. INTRODUCTION

This Note will examine the relationship between international extradition and deportation, and the application of these mechanisms in the matter of Joseph Patrick Thomas Doherty. For the past seven years[2] the United States government has attempted, unsuccessfully, to return Doherty to the United Kingdom by way of extradition and deportation. Although never charged with a crime in the United States, Doherty has been incarcerated throughout this period in the Metropolitan Correctional Center in New York City.[3] His prolonged incarceration is the result of the United States government's attempt to use deportation to accomplish what it could not by extradition. This Note will demonstrate that utilizing deportation to return a criminal to a foreign country is without basis in law and is inconsistent with the function and rationales underlying extradition and deportation.[4]

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distinguishes Joseph Doherty from terrorists who rely on violence against civilians to cause chaos in otherwise peaceful countries.

Furthermore, Doherty's acts do not satisfy the United States government's own definition of terrorism. *See* U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1988 (1989) (terrorism defined and widely accepted by the United States government for the last twenty years as "premeditated, politically motivated violence perpetrated against noncombatant targets"). Doherty's acts were a direct assault on a British military convoy and were not directed at civilian targets. *Doherty*, 599 F. Supp. at 272. Therefore, the issue is not whether the government's attempted deportation of Doherty is justified as a response to terrorism, but whether it is justified as a legitimate exercise of the executive branch's inherent diplomatic power.

This case also has important ramifications for the thousands of refugees who arrive in this country every year because it concerns the process governing deportation and asylum. The fairness of this process is a recurring issue in the large number of cases heard by immigration officials. Amicus Curiae Brief of American Immigration Lawyers Association at 1, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term).

2. Mr. Doherty was arrested in New York City on June 18, 1983 on an immigration warrant and has been held without bail since. Somerstein & Pike, Information Statement on Joseph Doherty (1989) (on file at the office of the N.Y.L. SCH. J. INT'L & COMP. L.).

3. The Metropolitan Correctional Center (MCC) is a short-term pre-trial detention facility, exempt from normal federal regulations applicable to long-term facilities. Mr. Doherty is allowed one hour a day to exercise on the roof, and there are no vocational programs. Mr. Doherty is the longest held prisoner in the MCC's history. *Id.* at 4-5.

4. Mr. Doherty is currently awaiting a hearing on asylum mandated by the Second Circuit Court of Appeals. *See* Sqiers, *Plea for Release on Bail by IRA Member Rebuffed*, N.Y.L.J., Nov. 6, 1990, at 1, col. 3. He was recently denied bail by the District Court, Southern District of New York. *Id.*

II. BACKGROUND

In 1981, Joseph Doherty escaped from a British prison where he was awaiting trial for the murder of a British soldier.[5] He subsequently fled to the United States where he was captured two years later.[6] On December 12, 1984, the United States government's extradition request was denied by the United States District Court, Southern District of New York, because Doherty's acts fell under the political offense exception of the United States-United Kingdom extradition treaty.[7] In blocking Doherty's return to the United Kingdom, the court characterized his actions as "the political offense exception in its most classic form."[8] Despite affirmation in collateral and appellate review,[9] the executive branch of the government refused to abide by the word or spirit of the district court's decision, instead resorting to the immigration process in its attempt to return Joseph Doherty to the United Kingdom.

The uncertainty concerning when a new Irish extradition law, that essentially eliminated the political offense exception to extradition between the United Kingdom and the Republic of Ireland, would become operative caused Joseph Doherty to waive his right to an asylum hearing and agree to immediate deportation to the Republic of Ireland.[10] Doherty hoped to

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5. *Doherty*, 599 F. Supp. at 272. Doherty and three members of the PIRA occupied a residence in Northern Ireland to prepare an ambush of a British army convoy. *Id.* British intelligence learned of the plan and dispatched a car of plainclothes British commandos. *Id.* During the assault, initiated by the British, a British soldier was killed. *Id.* Joseph Doherty was convicted *in absentia* of murder. *Id.*

6. *Id.*

7. Treaty of Extradition Between the United States and the United Kingdom of Great Britain and Northern Ireland, Jan. 21, 1977, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter U.S.-U.K. Extradition Treaty].

8. *Doherty*, 599 F. Supp. at 276.

9. United States v. Doherty, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff'd*, 786 F.2d 491 (2d Cir. 1986). Although no appellate review exists for a denial of extradition, the government has an absolute right to refile the request. *Doherty*, 786 F.2d at 495. The government chose not to refile, instead attempting to circumvent the non-appealability of an extradition decision by seeking collateral review in the form of a declaratory judgement. *Id.* at 493. This attempt was rejected by the district and appellate courts. *Id.*

10. Brief for Petitioner at 20-21, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term). Doherty withdrew his asylum request based on assurances that the Republic of Ireland would accept him into its territory. *Id.* at 15. If Doherty remained in the United States and lost his asylum bid, subsequent deportation would subject him to the new Extradition (European Convention of the Suppression of Terrorism) Act of 1987. *Id.* at 21; *see* Extradition (European Convention of the Suppression of Terrorism) Act (Ir. 1987) [hereinafter Irish Extradition

return to Ireland before the new law took effect and thereby preserve his political offense defense to extradition.[11] Doherty was faced, or so he thought, with a choice between immediate deportation (in which case he would enjoy the possible protection of the Ireland's Extradition Act of 1965)[12] or a request for asylum, a process that could have taken years and subjected him to the new Irish extradition law if unsuccessful. Doherty chose immediate deportation to the Republic of Ireland.[13]

Under 8 U.S.C. section 1253, aliens have a substantive right to choose their country of deportation.[14] The government, however, invoked a seldom used provision[15] in section 1253[16] claiming that

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Act of 1987].

11. Implementation of the act was suspended until December 1, 1987. The Irish Parliament retained power to postpone or accelerate its implementation. The law was enacted on Dec. 1, 1987. Matter of Doherty, Mem. Att'y Gen. (June 30, 1989) at 17-18.

12. *See* Extradition Act (Ir. 1965).

13. Doherty had every reason to believe that he would be sent to Ireland because the government had not presented any evidence that his deportation there would prejudice United States interest. Amicus Curiae Brief of American Immigration Lawyers Association at 3, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term).

14. *See infra* note 55.

15. *U.S. Refuses to Deport I.R.A. Member, Rarely Used Provision Invoked*, NAT'L L. J., Sept. 29, 1986, at 3, col. 1 [hereinafter *U.S. Refuses to Deport I.R.A. Member*]. According to government officials and Doherty's attorneys, this is the first time that the government has attempted to use section 1253 to prevent an alien from designating his country of deportation. *Id.*; *see also* Brief for Petitioner at 17, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term).

16. 8 U.S.C. sections 1253(a) and 1253(h)(1), (2)(A) and (2)(C) provide:

(a) Acceptance by designated country; deportation upon nonacceptance by country

The deportation of an alien in the United States provided for in this chapter, or any other act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation. . . . If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be discharged.

. . . .

(h) Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien to a

deportation to any country other than the United Kingdom, "would prejudice the interests of the United States."[17] This not only accorded the government a second chance at returning Doherty to the United Kingdom, it also substantially limited the judiciary's role in the final disposition of the case.[18] Even with the judicial branch effectively eliminated, the government's effort was nevertheless thwarted by its own administrative judge and the Board of Immigration Appeals (BIA), which held that Doherty should be deported to the Republic of Ireland.[19]

The government responded by utilizing 8 C.F.R. section 3.1 (h)(1)(iii)[20] which allows the attorney general to review and overturn

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country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that:

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social; group, or political opinion;

. . . .

(C) there are serious reason for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States. . . .

8 U.S.C. §§ 1253(a), 1253(h)(1),-(2)(A),-(2)(C) (emphasis added).

17. *U.S. Refuses to Deport I.R.A. Member*, *supra* note 15, at 3, col. 1.

18. The court is generally limited to review of discretion and procedural due process in deportation procedures. *See infra* note 58 and accompanying text.

19. Matter of Doherty, A26-185-231, slip op. (BIA Dec. 3, 1987). The government did not produce any evidence that Doherty's return to the United Kingdom would prejudice the interests of the United States despite being granted three adjournments for that express purpose. Reply Brief for Petitioner at 4, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term).

20. 8 C.F.R. 3.1 (h)(1) provides:

The Board shall refer to the Attorney General for review of its decision all cases which:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes it should be referred to the Attorney General for review.

(iii) The Commissioner requests be referred to the Attorney General for review.

(iv) In any case in which the Attorney General reviews the decision of the Board, the decision of the Attorney General shall be stated in writing and shall be transmitted to the Board for transmittal and service provided in paragraph (f) of this section.

decisions of the BIA.[21] The attorney general, the losing party throughout, overturned the BIA decision[22] and thereby circumvented the applicable treaty and statute addressed by the district court in the extradition proceeding,[23] as well as Doherty's administrative victories in the deportation proceedings.

Even if ultimately unsuccessful, the government's delay has subjected Doherty to the new Irish extradition law[24] as well as the supplemental Anglo-American extradition treaty.[25] For this reason, Doherty moved to reopen his asylum hearing,[26] a motion opposed by the government but nevertheless granted by the BIA.[27] The government invoked the attorney general's review power for an unprecedented second time, denying a hearing and issuing a final order of deportation.[28]

The United States Court of Appeals for the Second Circuit recently affirmed the government's designation of the United Kingdom as the country of deportation but reversed the government's refusal to grant Doherty a hearing on asylum.[29] By affirming the government's designa

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21. In the last twenty years the attorney general has only certified eight cases for review. All these cases dealt with questions of law and not the extraordinary factual determination which the attorney general conducted with regard to Doherty. Amicus Curiae Brief of Members of the United States Congress at 21, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term).

22. Matter of Doherty, Mem. Att'y Gen. (June 9, 1988).

23. U.S.-U.K. Extradition Treaty, *supra* note 7.

24. Irish Extradition Act of 1987, *supra* note 10. If Doherty had been deported immediately it was uncertain whether he would have been extradited by the Republic of Ireland. *See* Brief for Petitioner, *supra* note 10, at 53-56. Regardless, because Irish law provides for extraterritorial prosecution, Doherty would have been subject to prosecution and a ten-year sentence in the Republic of Ireland for his crimes committed in the United Kingdom. *Id.* It is likely he will spend a longer period of time incarcerated in the United States.

25. Supplemental Extradition Treaty with the United Kingdom, Dec. 23, 1986, United States-United Kingdom [hereinafter U.S.-U.K. Supplemental Treaty], *reprinted in* S. EXEC. REP. NO. 17, 99th Cong., 2d Sess. 14 app. 1, at 15 (1986). Although not in effect at the time of Doherty's arrest or deportation, the treaty purports to be retroactive. *See infra* note 129.

26. 8 C.F.R. section 3.2 requires material evidence not available at prior asylum hearings to reopen a case. The BIA found that implementation of the Irish Extradition Act of 1987, *supra* note 10, the occurrence of which was not certain, fulfilled these criteria. Matter of Doherty, A26-185-231, slip op. (BIA Nov. 14, 1988).

27. Matter of Doherty, A26-185-231, slip op. (BIA Nov. 14, 1988).

28. Matter of Doherty, Mem. Att'y Gen. (June 9, 1988).

29. Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990). The Supreme Court recently has agreed to decide whether the government must reconsider Doherty's asylum request. *U.S.*

tion, the Court of Appeals suggests that the extradition and deportation are interchangeable tools of foreign policy. While these mechanisms reflect certain political and diplomatic interests, they do not allow the government to subject an individual to political persecution in the name of United States foreign policy.

III. DEPORTATION AND EXTRADITION: DEFINITIONAL DISTINCTIONS

International extradition returns an individual present in the United States to a country where the individual is wanted for criminal acts committed in that country or against its citizens.[30] Deportation, on the other hand, removes an alien from the United States because the alien is undesirable or detrimental to the public welfare.[31] Both mechanisms contain political-humanitarian exceptions to expulsion, if expulsion would subject the individual to political persecution.[32] The implementation of either deportation or extradition should correspond to its proper purpose and should not frustrate the applicable political-humanitarian exceptions to expulsion. This Note will demonstrate that the government's use of deportation to return Joseph Doherty to the United Kingdom is contrary to the purpose of deportation and the parallel political-humanitarian exceptions to expulsion contained in deportation and extradition.

First, extradition, not deportation, is the mechanism designated by Congress to return criminals to foreign countries. Also, extradition, because of its criminal nature, contains procedural and substantive safeguards that protect individual liberty. Deportation, on the other hand, is not designed to return criminals to foreign countries but to protect the internal welfare of the United States. Therefore, its utilization to return an alleged criminal to a foreign country circumvents the safeguards contained in extradition. Second, the motivation and result of the government's actions render meaningless the judiciary's determination that Joseph Doherty's acts fell within the political-humanitarian exception to extradition. These actions attempt to capitalize on the somewhat ambiguous and often misunderstood functions of deportation and extradition[33] which the following analysis will clarify.

Supreme Court to Review 'Son of Sam' Law, N.Y.L.J., Feb. 29, 1990, at 1, col 5.

30. Helton, *Harmonizing Political Asylum and International Extradition*, 1 GEO. IMM. & INT'L L.J. 457, 457 (1986).

31. Fong Yue Ting v. United States, 149 U.S. 698, 709 (1892).

32. Helton, *supra* note 30, at 475; *see also* Pirie, *The Need for a Codified Definition of Persecution in United States Refugee Law*, 39 STAN. L. REV. 187, 188-89 (1986).

33. Helton, *supra* note 30, at 458.

A. Extradition

The United States Supreme Court has defined extradition to foreign governments as "the surrender of a criminal by a foreign state to which he has fled from persecution to the state in which the crime was committed, upon demand of the other state, in order that he may be dealt with according to its laws."[34]

Domestic extradition to foreign governments is not constitutionally mandated.[35] As a result, it is completely subject to a legislative and executive determination on what procedural and substantive criteria are required to extradite an individual. The government's treatment of Doherty violates both the procedural and substantive criteria enacted by Congress and approved by the executive branch for the extradition of an alleged criminal to a foreign country.

Congress has elected not to enact a comprehensive statute dealing with foreign extradition.[36] Instead, the substantive criteria for extradition are found in individual extradition treaties between the United States and various countries.[37] Commentators have grouped the interests Congress weighs in its ratification of a treaty into four categories,[38] any of which if important enough may limit or broaden the definition of an extraditable offense.[39] Therefore, in negotiating and ratifying an extradition treaty, Congress and the executive branch necessarily consider the treaty's risks and benefits to the United States. Furthermore, these diplomatic interests are intended to be fully enunciated in the particular treaty and, like the parole evidence rule, should not thereafter be manipulated by outside interests not enumerated in, or explicitly excepted from, the treaty.

Congress, however, has established certain minimal standards in the U.S.C. which are applied consistently regardless of the foreign country involved.[40] These procedures provide executive and judicial checks and

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34. *Fong Yue Ting*, 149 U.S. at 709.

35. U.S. CONST. art. IV, § 2, cl. 2; *see* California v. Superior Ct. of Cal., 482 U.S. 400 (1987) (the Extradition Act, which implements the extradition clause of article IV, requires an asylum state to give up to a demanding state a fugitive against whom a properly certified indictment has been lodged).

36. 18 U.S.C. § 3184 (1982) is basically procedural in nature.

37. Banoff & Pyle, *'To Surrender Political Offenders': The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT'L L. & POL. 169, 175 (1984).

38. *Id.* at 173-74. The classifications include: 1) to obtain reciprocal return of fugitives; 2) to facilitate punishment of wrongful conduct; 3) to avoid harboring those who may commit similar crimes again; and 4) to avoid international tension caused by the refusal to return a sought after offender. *Id.*

39. *See* Helton, *supra* note 30, at 459 nn.100 & 113 (examples of variations in the political offense exception).

40. 18 U.S.C. § 3184 (1982) (procedure requires judicial and executive approval of

balances that protect individual rights as well as the diplomatic interests of the United States. The United States will not extradite someone unless the criminal activity is enumerated in a valid treaty[41] and is generically criminal under the laws of the United States.[42] The United States government has discretionary power to act on a foreign government's request to apprehend and deliver an alleged offender to the requesting country.[43] The government must then bring the individual before a federal magistrate or judge who determines whether a valid treaty exists and whether the crime is extraditable under that treaty.[44] If the court finds the individual extraditable, the decision is certified and sent to the secretary of state who has final discretion on whether the extradition will be enforced.[45] The secretary's discretion is limited to approval of an extradition order and does not allow reversal of a judicial finding of ineligibility.[46] This two-tier approach provides checks and balances between the legal and diplomatic considerations involved in an extradition request.

By requiring judicial certification based on the terms of a particular extradition treaty, Congress rejected a general grant of discretion to the State Department which would have enabled the executive branch to determine requests based solely on the comity interests of United States foreign policy.[47] Although other nations will extradite based solely on their political interests,[48] the United States has rejected such a practice because of the due process rights of individuals, a mistrust of foreign criminal procedure and a fear of overreaching executive power.[49]

Attempting to deport Joseph Doherty to the United Kingdom based on his "crime" committed in Northern Ireland after an extradition attempt

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extradition).

41. 18 U.S.C. § 3181 (1982); *see also* Factor v. Laubenmer, 290 U.S. 276, 287 (1933) (extradition requires a valid treaty with the requesting country); United States v. Rauscher, 119 U.S. 407, 430 (1886) (crime must be enumerated in the extradition treaty).

42. *See, e.g.*, Collins v. Loisel, 259 U.S. 309 (1922) (crime is extraditable only if it is criminal in both countries); Kelly v. Griffin, 241 U.S. 6 (1916); Wright v. Henkel, 190 U.S. 40 (1903) (it is enough if a particular variety of crime is extraditable in both jurisdictions).

43. Banoff & Pyle, *supra* note 37, at 176.

44. *Id.* at 175-76.

45. *Id.* at 176.

46. *Id.*; *see also* Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980).

47. Banoff & Pyle, *supra* note 37, at 175-77.

48. *Id.* at 176.

49. *Id.*

based on the same incident has been rejected by the judicial branch[50] is an obvious attempt to circumvent these minimal procedural safeguards established by Congress. It also avoids the judicial enforcement of the substantive criteria contained in the extradition treaty with the United Kingdom.[51] Although conflicting and potentially detrimental diplomatic interests exist, there is no legal basis for returning Doherty to the United Kingdom. Justifying his expulsion on the diplomatic interests of the United States ignores the fact that these interests were already considered by the legislative and executive branches when they entered into the extradition treaty with the United Kingdom.[52]

B. Deportation

Unlike extradition, deportation depends solely on an alien's effect on the internal welfare of the United States and not on any diplomatic agreement between the United States and a foreign country. The Supreme Court has defined deportation as

> the removal of an alien out of this country, *simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or those of the country he is sent to.*[53]

Deportation's prophylactic function is further evidenced by the criteria for its implementation:

(1) Entry without inspection or through the improper channels;
(2) Institutionalization because of mental illness;
(3) Failure to comply with alien registration;
(4) Membership in groups which pose a danger to the government or public safety;
(5) Becoming a public charge;
(6) Conviction for crimes of moral turpitude;
(7) Drug addiction or drug related conviction; and

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50. *See supra* note 5.

51. *See* U.S.-U.K. Extradition Treaty, *supra* note 7. The treaty between the United States and Great Britain contains a traditional political offense exception. *Id.* art. V(1)(C)(i).

52. The provisions of 8 U.S.C. § 3184 and the applicable treaty are rendered meaningless if the government can obtain the same result at will through deportation.

53. Fong Yue Ting v. United States, 149 U.S. 698, 725 (1982) (emphasis added).

(8) Failure to comply with applicable immigration requirements for aliens.[54]

As these criteria demonstrate, the political interests of the United States are not grounds for deportation without some correlation to national security or welfare. The same is true for the removal of an alien found to be deportable.

As the primary purpose of the deportation statute is to protect the internal welfare of the United States, an alien found to be deportable generally is free to designate the country of deportation.[55] The attorney general may designate the country if the alien refuses to do so or if the designated country refuses to accept the alien.[56] The attorney general's discretion is limited by the asylum and withholding provisions which prohibit deportation to a country where the alien faces a well-founded fear of persecution.[57] As deportation focuses on domestic welfare (as

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54. 8 U.S.C. § 1251 (1982).

55. 8 U.S.C. § 1182 (1982); 8 U.S.C. § 1253 (1982); *see* Landon v. Plasencia, 459 U.S. 21, 26 (1982) ("alien in a deportation hearing has substantive rights . . . he can (within certain limits) designate the country of deportation, depart voluntarily and avoid the stigma of deportation"); Rodriguez-Agustin v. INS, 765 F.2d 782, 784 (9th Cir. 1985) (alien's right to designate country of deportation is a substantive right); Maldonado-Sandoval v. INS, 518 F.2d 278, 280 n.3 (9th Cir. 1975) (deportable alien is entitled to various statutory rights including right to designate country of deportation); *see also*, Brief for Respondents, INS at 45-46, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term); Linnas v. INS, 790 F.2d 1024 (2d Cir. 1986) ("deportation and extradition are two entirely different processes having separate statutory bases. Unlike the subject of an extradition proceeding, a deportee . . . has the right to choose initially the country to which he will be deported. By preserving this statutory right for Nazi persecutors, Congress made it clear that . . . such persons were to be treated as deportees not extradites") (citations omitted). The government's position in *Linnas* appears inapposite to its use of deportation of Joseph Doherty.

56. 8 U.S.C. § 1253 (1982).

57. 8 U.S.C. section 1158(a) provides that eligibility for a discretionary grant of asylum if the alien meets the definition of "refugee" contained in 8 U.S.C. section 1101(a)(42)(A). 8 U.S.C. § 1158(a) (1982).

> The term refugee means (A) any person who is outside any country of such person's nationality or, in a case of a person having no nationality, is outside any country in which such a person last habitually resided, and who is unable or unwilling to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. . . . The term refugee does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, to political opinion.

opposed to the criminal focus of extradition), judicial review is limited to procedural due process and abuse of discretion.[58]

The above criteria demonstrate that deportation's purpose is to protect the internal integrity of the United States. Thus, its focus is on the alien's effect on the domestic welfare. Moreover, the alien's right to choose his or her country of deportation is explicit, thereby providing individual protection that justifies the limited judicial review. This right, combined with the asylum and withholding exceptions, demonstrates that deportation was intended to be a diplomatically neutral process that would not be accomplished at the cost of individual freedom.

IV. POLITICAL AND HUMANITARIAN EXCEPTIONS TO EXTRADITION AND DEPORTATION

Both extradition and deportation contain political-humanitarian exceptions to exclusion.[59] The political offense exception applies to extradition, while its counterpart in the immigration process is found in the asylum and withholding provisions of 8 U.S.C. sections 1185 and 1253.[60] Their separate development and application[61] might explain their different criteria, but a number of scholars have argued that the failure to adequately recognize their relationship has resulted in various

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8 U.S.C. § 1101(a)(42)(A) (1982). 8 U.S.C. section 1253(h)(1) provides that the attorney general shall not deport or return any alien "to an area where the aliens life or freedom would be threatened by persecution." 8 U.S.C. § 1253(h)(1) (1982); *see* INS v. Stevic, 467 U.S. 1407 (1984) (attorney general has no discretion once the alien has met these criteria); *see also* Cooper, *Promised Land or Land of Broken Promises? Political Asylum in the United States*, 76 KY. L.J. 931 (1987-88) (discussing standards for asylum and withholding).

58. Carlson v. Landon, 342 U.S. 524, 540 (1951) ("[T]he power to expel aliens, being essentially a power of the political branches . . . may be exercised entirely through executory offices with such opportunities for judicial review as Congress may see fit subject to judicial intervention under the Constitution." The Court based this holding on the fact that deportation was not a criminal proceeding and has never been held to be punishment). Harisiades v. Shaugnessy, 342 U.S. 580, 589 (1951) (deportation is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or inference").

59. Helton, *supra* note 30, at 458, 475.

60. *Id.* at 475.

61. The political offense exception operates on citizens and aliens wanted in connection with alleged crimes committed abroad. *Id.* at 457. Its emergence as a formal legal process came relatively early in the 19th century. Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 454 (1985). The exception derived from political asylum, a slightly older and different principle which provides sanctuary for those who are faced with political persecution. Helton, *supra* note 30, at 459.

anomalies and inconsistencies in American policy.[62] Such criticism is magnified when the anomaly results not from particular circumstances, but from the United States government's deliberate attempt to avoid an exception to expulsion.

A. The Political Offense Exception

The government's initial attempt to return Joseph Doherty to the United Kingdom was blocked by the political offense exception.[63] Although not explicitly defined in the treaty, the exception has been developed through substantial case law.[64] The exception is fundamental to the United States' extradition treaties.[65] The exception is also deeply rooted in the history of western democracy.[66] The overwhelming majority of political offense cases[67] and their corresponding commentaries[68] have dealt with the "complex" or "relative" political offense.[69]

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62. *See, e.g.*, Helton, *supra* note 30, at 458.

63. *In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984).

64. *See* Banoff & Pyle, *supra* note 37, at 177-87 (discussing the case development of the political offense exception in international and United States law).

65. The United States currently has over one hundred bilateral extradition treaties with foreign countries. *See* 18 U.S.C. § 3181 (1982 & Supp. III 1985) (listing current treaties). Every treaty provides that extradition will not be granted where the offense is of a political nature. Helton, *supra* note 30, at 457; *see also*, Note, *supra* note 61, at 450. *But see* U.S.-U.K. Supplemental Treaty, *supra* note 25 (limiting the acts to which the political offense exception applies). For explanation of the supplemental treaty's effect, see Helton, *supra* note 30, at 471-75.

66. Article 120 of the French Jacobin Constitution of 1793 reflected the libertarian spirit in its asylum provision applicable to those "exiled for the cause of freedom." The political offense exception itself was formulated in Belgium in 1833. The Belgium provision stated that no person "shall be punished for any political act connected to such a crime." It has been adopted by most western democracies. Goldie, *The Political Offense Exception and Extradition Between Democratic States*, 13 OHIO U. L. REV. 53, 59 (1986).

67. *See, e.g.*, Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981) (member of PLO extradited for the bombing of an Israeli village square that killed a number of civilians); Escobede v. United States, 623 F.2d 1098, 1104 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980) (attempted kidnapping of Cuban counsel and the murder of the assistant counsel); *In re* Mackin, 668 F.2d 122 (2d Cir. 1981) (shooting of an undercover British soldier found to be "incident" to his role in the PIRA); Ramos v. Diaz, 179 F. Supp. 459, 462 (S.D. Fla. 1959) (Cuban soldier sought for the murder of an escaping communist prisoner).

68. *See, e.g.*, Epps, *The Validity of the Political Offense Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61 (1979); Hannay, *International Terrorism and the Political Offense Exception*, 18 COLUM. J. TRANSNAT'L L. 381 (1980); Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political*

These offenses are troublesome because they involve elements of both political and common crimes.[70] Although western democracies have developed different methods of evaluating an act's political legitimacy,[71] they uniformly acknowledge the exception's validity.[72]

The political offense exception has undergone various alterations in response to criticism and changes in the international political environment. The modern development of the exception in the United States consists of a three-prong test enunciated in the case *In re Mackin*:[73]

(1) whether a political uprising, revolution, rebellion, or war was in existence at the time of the alleged offense;

(2) whether the accused was a participant in the group responsible for the uprising; and

(3) whether the alleged offense satisfied the *Castioni* "incidental to" or "in furtherance" of the political beliefs test.[74]

Even this modern variation of the political offense exception, however, has been criticized as an inadequate response to "complex" political crimes.[75]

Offense Exception, 61 N.Y.U. L. REV. 654 (1986) (all proposing the abandonment of the political offense exception).

69. Helton, *supra* note 30, at 460-61. The pure political offense acts directly against the government and contains no elements of the common crime, *e.g.*, treason, sedition and espionage. The complex political offense contains elements of both, *e.g.*, bank robbery to finance anti-government activities. *Id.*

70. Banoff & Pyle, *supra* note 37, at 178.

71. French case law has responded with an objective test where the only question is whether the act directly injures the target state. The Swiss have adopted a proportionality test which evaluates the target and the proportional nature of the crime to its political motives. The British test, enumerated in *In re* Castioni, [1841] 1 Q.B. 149, questions whether the act was "incident" to and part of a political disturbance. Goldie, *supra* note 66, at 62-67.

72. *See generally* Banoff & Pyle, *supra* note 37 (discussing the history and current status of political offense exception in international law).

73. 668 F.2d 122 (1981) (Mackin was charged with the attempted murder of an undercover British soldier.).

74. *Id.* at 125; *see Castioni*, 1 Q.B. 149.

75. *See* Helton, *supra* note 30, at 464 (exception cited as inadequate in response to

The *Doherty* court abandoned the mechanical "incidence" test applied in *Mackin* in favor of a balancing test it deemed more appropriate to the modern threat of terrorism.[76] In doing so, the court evaluated the nature of the act,[77] its objective,[78] the nature of the group the individual was aligned with,[79] the individual's personal history,[80] the history of the revolt[81] and whether the act violated international law.[82] Despite its stricter standard, the court found that Doherty's acts represented "the political offense exception in the classic form."[83]

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terrorist acts); *see also* sources cited *supra* note 68.

76. *In re* Doherty, 599 F. Supp. 270, 274 (S.D.N.Y. 1984). The court stated:

> [w]ere the Court persuaded that all that need be shown to sustain the political offense exception is that there be a political conflict and that the offense be committed during the course of and in the furtherance of that struggle, the respondent would clearly be entitled to the benefits of that exception . . . [but] such an approach is hardly consistent with either the realities of the modern world, or the need to interpret the political offense exception in the light of the lessons of recent history.

Id.

77. Id. at 275. The court noted that the act was not an indiscriminate bombing of civilians or addressed at civilian or an act government representatives. *Id.* Rather, the acts were targeted at the British military and, furthermore, it was the British military's response to the situation which led to the battle and subsequent death. *Id.*

78. *Id.* Doherty and his other PIRA members were dispatched by PIRA leadership "'to engage and attack' a convoy of British soldiers." *Id.* at 272.

79. *Id.* at 275. The court noted that the PIRA, although an offshoot of the traditional IRA, had a discipline and command structure that parallels conventional military organizations and distinguished it from amorphous terrorist groups such as the Black Liberation Army or the Red Brigade. *Id.* at 276.

80. *Id.* at 275. Doherty's early exposure to oppression and adoption of republican beliefs is related in his poem, text accompanying *supra* note 1.

81. *Id.* at 273-74. The court first discussed the centuries old hatred and political divisions which resulted from the British conquest of Ireland and noted that these animosities were present in modern Ireland as well. *Id.* The court went on to note the modern political climate in Ireland, the resurgence of the PIRA after the January 1972 incidents in Londonderry where thirteen civilians were killed by British paratroopers, the escalation of violence between the PIRA and loyalist terrorist factions and the imposition of martial law type conditions by the British including the creation of Diplock courts to try political offenders and the military occupation of Londonderry and Belfast. *Id.* For a detailed background on the history of the Northern Ireland conflict, see Myers, *A New Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention in an Internal Conflict*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 1, 9-31 (1990).

82. *Doherty*, 599 F. Supp. at 275.

83. *Id.* at 276.

B. Asylum and Withholding

Withholding and asylum are the political-humanitarian counterparts in deportation to the political offense exception in extradition.[84] An alien is eligible for asylum if he or she can demonstrate a well-founded fear of persecution.[85] Moreover, the attorney general must withhold deportation when an alien's life or liberty is threatened by persecution.[86] The recent evolution of the asylum and withholding provisions demonstrates a congressional intent to eliminate political considerations from the deportation process.

Prior to the Refugee Act of 1980,[87] asylum was granted on an ad hoc basis, founded not on humanitarian concerns but on an ideological aversion to communism.[88] During this period, asylum was explicitly tied to ideology and limited to proof of actual or probable physical persecution.[89]

The act was specifically intended to remove ideology from the deportation process and thereby comply with the Refugee Convention and Protocol.[90] The act's broader language, which prohibits exclusion of "any person" who can demonstrate fear of persecution, demonstrates a congressional intent to prohibit discrimination based on policy or convenience.[91] The act makes withholding mandatory once the statute's threshold criteria are met and, therefore, removes the attorney general's

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84. Helton, *supra* note 30, at 475.

85. *See supra* note 57 and accompanying text; *see also* Piric, *supra* note 32, at 188-89 (discussing requirements for asylum and withholding).

86. *See supra* note 57 and accompanying text.

87. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. (1986)).

88. From 1965 to 1980, refugee law quota systems resulted in 95% of the asylum grants going to refugees from communist countries. *See* Note, *supra* note 61, at 458.

89. The purpose of the Displaced Persons Act, ch. 647, 62 Stat. 1009 (1948), *as amended by* Act of June 16, 1950, ch. 262, 64 Stat. 219 (1950); Act of June 28, (1951), ch. 167, 65 Stat. 96 (1951) (repealed 1957), was to aid persons fleeing fascist or Soviet persecution. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 868 n.22 (1980) (quoting 8 U.S.C. § 1153(a)(7) (1980)); The Refugee Act of 1953, ch. 336, 67 Stat. 400 (1953), *as amended by* Act of Aug. 31, 1954, ch. 1169, 68 Stat. 1044 (1954), served to expedite the admission of refugees from communist countries. *Id.* at 868. In 1952, "refugee" was defined to explicitly include people fleeing from communist countries. *Id.* at 869; *see also* Cooper, *supra* note 57, at 924-27 (discussing bias in United States refugee policy).

90. Cooper, *supra* note 57, at 930.

91. *See, e.g.*, Kurzban, *supra* note 89.

discretion with regard to withholding applications.[92]

In a brief of Amici Curiae,[93] members of the United States Congress explain the purpose of the Refugee Act of 1980 and its abuse in the treatment of Joseph Doherty. The brief explains that the act eliminated the dependence of asylum applicants on executive discretion by reestablishing congressional influence in the deportation process.[94] Specifically, it reaffirmed "the historic policy of the United States to respond to the urgentness of persons subject to persecution . . . ."[95] The legislative history of this act, which had broad bipartisan support,[96] makes clear that Congress adopted specific standards and procedures to prevent unfettered executive discretion in the deportation process and bring the United States into accord with international law.[97]

The act limited "the executive branch's abuse of discretion"[98] in four ways. First, it adopted a non-political definition of refugee.[99] Second, it created uniform procedures for asylum applications.[100] Third, it removed the executive's discretion in applications for withholding.[101] Finally, Congress limited the executive's unfettered discretion in its use of parole power.[102]

These members of Congress assert that the government's treatment of Joseph Doherty violates the act's clear mandate by denying Doherty a hearing on asylum.[103] In twenty years the attorney general has only certified eight decisions of the BIA for review.[104] In each instance the review consisted of questions of law.[105] In *Doherty*, the attorney general certified two decisions of the BIA, both times to overturn that tribunal's

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92. *See* INS v. Stevic, 467 U.S. 1407 (1984).

93. Amicus Curiae Brief of Members of the United States Congress, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term).

94. *Id.* at 10.

95. *Id.* (citing S. REP. NO. 590, 96th Cong., 2d Sess. 19 (1980)).

96. *Id.* at 4.

97. *Id.* at 12.

98. *Id.*

99. *Id.*

100. *Id.* at 13.

101. *Id.* at 14.

102. *Id.* at 16.

103. *Id.* at 17-22.

104. *Id.* at 21.

105. *Id.*

factual findings.[106] These extraordinary actions reveal the government's political motivation, the same political motivation Congress eliminated from the immigration process by the Refugee Act of 1980.[107]

C. Modern Development of Asylum and Its Relationship to the Political Offense Exception

The modern development of the asylum doctrine not only reflects its new humanitarian focus, but it also highlights its relationship to the political offense exception. An alien may not be deported to a country where that alien's life or freedom would be jeopardized by persecution unless the alien has committed a serious non-political crime outside the United States.[108] The definition of a non-political crime was addressed by the BIA in *In re Rodriguez-Palma*,[109] and by the United States Court of Appeals for the Ninth Circuit in *McMullen v. INS*.[110]

In *Rodriguez*,[111] the BIA looked to the Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees[112] (the "Convention and Protocol") to define political offenses. The handbook states that the offense should be political in nature and purpose, that is, committed because of political motives and not for personal gain.[113] Moreover, there should be a close causal link between the crime and the individual's political goals,[114] with the crime's political element outweighing its common law character.[115] Lastly, the act should not be

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106. *Id.*

107. *Id.* ("Whatever foreign policy concerns the executive may have in Mr. Doherty's case, Congress has explicitly made it clear that such concerns have no place in the asylum determination.").

108. 8 U.S.C. § 1253 (1982); *see* 8 C.F.R. § 208.8(F)(1)(v) (1988).

109. 17 I&N Dec. 465 (BIA 1980).

110. 788 F.2d 591 (9th Cir. 1986).

111. Rodriguez arrived as part of the Mariel freedom flotilla. He applied for asylum and withholding and admitted being convicted of drug trafficking in 1962 and robbery in 1968 and 1978. The immigration judge and BIA both ruled the acts were serious non-political acts. 17 I&N Dec. 465 (BIA 1980).

112. OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES (1979).

113. *Id.* ¶ 152, at 36.

114. *Id.*

115. *Id.*

of an atrocious nature or disproportionate to its goals.[116]

In *McMullen v. INS*,[117] the Ninth Circuit held that the Refugee Act of 1980 was meant to be construed consistent with the Convention and Protocol.[118] Although the court noted the similarities between the Protocol's criteria for asylum and the political offense exception, it declined to apply extradition's mechanistic analysis in the asylum context, choosing instead a balancing test based on the nature of the act vis-a-vis its political objective.[119] While the court rejected the "incidence" test and adopted a more flexible standard similar to that used in the Doherty extradition for determining the political nature of an act,[120] it justified its decision not on the inadequacy of traditional extradition analysis,[121] but on the difference between deportation and extradition.[122]

These cases demonstrate the similar purpose and standards shared by asylum and the political offense exception. In both contexts, an individual can not be returned to a foreign country where the individual faces punishment for a political crime. The standards developed to determine whether a crime was a political act are similar, if not the same, and any distinction results from the different situations addressed in the respective proceedings.

D. The Illegitimacy of De Facto Extradition

The government's treatment of Joseph Doherty amounts to a de facto extradition because the purpose, justification and result of the extradition and deportation are identical. The deportation's conflict with the

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116. *Id.*

117. 788 F.2d 591 (9th Cir. 1986).

118. *Id.* at 595.

119. *Id.* at 596 ("[T]he definition of the political offense exception although it may serve as a guide, does not control our analysis of political offenses under section 243(h)(2)(c)."); *see* Helton, *supra* note 30, at 479 (analyzing the court's holding).

120. *See supra* notes 73-83 and accompanying text.

121. *See generally* sources cited *supra* note 68.

122. *McMullen*, 788 F.2d at 596.

> Thus, the analysis in an extradition case turns on the language of the particular treaty, while the political offense analysis in withholding of deportation cases turns on a single standard—the Convention and Protocol. In addition, in contrast to extradition, deportation is a matter solely between the United States government and the individual seeking withholding of deportation. No other sovereign is involved . . . [a]ll the United States seeks is to expel him from its *own* borders. Thus, we find ourselves unencumbered by [concerns of extradition].

Id. (emphasis in original).

procedure, substance and humanitarian exceptions designed by Congress for the expulsion of aliens and accused criminals highlights its illegitimacy.

Extradition is the proper mechanism for returning an individual to a foreign country for crimes committed there.[123] Due to its criminal nature and adverse effect on individual liberty, Congress has provided procedural safeguards which ensure that the individual's rights are not violated in the name of the United States government's diplomatic interests.[124]

Deportation, on the other hand, is ideologically neutral and is based on humanitarian rather than political interests.[125] Its purpose is to protect domestic welfare and, therefore, does not permit the government to justify deportation or specify the country of deportation based on interests unrelated to domestic welfare.[126] The alien has a substantive right to designate the country of deportation unless the alien refuses to do so or it is not possible to remove the alien to that country.[127]

Furthermore, both deportation and extradition contain parallel political-humanitarian exceptions to expulsion designed to ensure that the individual is not subject to persecution. These exceptions prohibit returning an individual to a country where he will suffer political persecution.

The proper avenue for the United States to return Joseph Doherty *the PIRA fugitive* to the United Kingdom is through extradition. In doing so, however, the government must adhere to the criteria established by the executive and legislative branches based on their evaluation of the best interests of the United States. Attempting to deport Joseph Doherty *the illegal alien* to the same country and for the same reason and rationale rejected in the extradition of Doherty *the fugitive*, is an abuse and misapplication of the immigration process.[128]

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123. *See supra* notes 34-52 and accompanying text.

124. *See supra* notes 36-49 and accompanying text.

125. *See supra* notes 53-58 and accompanying text.

126. The legitimacy of the political branches' plenary power is seriously undermined when interests unrelated to its constitutional foundation are interjected.

127. 8 U.S.C. §1253(h) (1982); *see supra* note 55 and accompanying text.

128. Statements of government officials demonstrate that the crime addressed in the extradition is the same basis for the deportation. Jay Scott Blackmun, assistant district director of the INS, stated: "It's quite clear that in the extradition proceeding, the objective was to get Doherty to the United Kingdom. And in the deportation proceeding, our objective is to get him to the United Kingdom. This is just an alternative means to accomplish that." *60 Minutes: Joe Doherty of the IRA* (CBS television broadcast, Oct. 11, 1987) (transcript on file at the office of the N.Y.L. SCH. J. INT'L & COMP. L.). Furthermore, Mr. Blackmun stated that "the United States has taken a strong stance on

The government's actions also violate the substantive criteria contained in the Anglo-American extradition treaty which was in effect at the time of Doherty's extradition proceeding.[129] In negotiating and ratifying the extradition treaty with the United Kingdom, the legislative and executive branches necessarily considered the interests of the United States in determining what crimes would be extraditable. The treaty in question contained the political offense exception,[130] which although not explicitly defined in that treaty has been developed through a substantial body of case law.[131]

At the time of Joseph Doherty's extradition proceeding, the political offense exception was intensely criticized as an inadequate and antiquated doctrine.[132] Twice Congress considered, but failed to enact, a statute to address these concerns.[133] The executive branch began negotiating a controversial supplemental treaty with the United Kingdom[134] designed to limit the political offense exception, but it had not been implemented at the time of Doherty's extradition proceeding.[135] The district court did,

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terrorism. It would be prejudicial to the interests of the United States to permit a member of a terrorist organization to leave the U.S. and travel to a country where he might escape punishment for his crimes." *U.S. Refuses to Deport I.R.A. Member*, *supra* note 15, at 3, col. 1. This reference is an attempt to deprive Mr. Doherty of his legal rights as an Irish citizen. *See infra* notes 208-09 and accompanying text.

129. U.S.-U.K. Extradition Treaty, *supra* note 7. *But see* U.S.-U.K. Supplemental Treaty, *supra* note 25 (limiting the political offense exception). At this time Joseph Doherty may be subject to the supplemental treaty. Although not in effect at the time of Doherty's extradition, this treaty purports to be retroactive. *See* Helton, *supra* note 30, at 433 n.114 (describing the legality of retroactive application of treaty provisions).

130. Article V of the treaty provides:

> (1) Extradition shall not be granted if:
>
> (c)(i)the offense for which extradition is requested is regarded as one of a political nature.

U.S.-U.K. Extradition Treaty, *supra* note 7, art. V.

131. *See* sources cited *supra* note 67.

132. *See* sources cited *supra* note 66.

133. *See* S. 1940, 97th Cong., 2d Sess. 3 (1982) (proposed new section 3194(e)(1) of title 18 of the U.S.C.), *reprinted in* S. REP. NO. 475, 97th Cong., 2d Sess. 3, 130 CONG. REC. H9242 (daily ed. Sept. 10, 1984) (proposed new section 3194(e)(92) of title 18 of the U.S.C.). For explanation of the proposal's effect on exception, see Helton, *supra* note 30, at 469-71.

134. The United States government began redefining the political offense exception on a treaty-by-treaty basis in 1985. Helton, *supra* note 30, at 459. The first treaty approved by Congress was the supplemental treaty. *Id.*

135. Although the timing of the ratification may be irrelevant because of the treaty's retroactive nature, Helton, *supra* note 30, at 471-75, it takes on added significance in light of the government's actions which this Note demonstrates are illegitimate. Furthermore,

however, adopt a stricter test in the Doherty extradition designed to address the inadequacy of the exception which Doherty's acts fulfilled "in the classic form."[136]

The government is attempting to accomplish what Congress specifically chose not to do, the executive failed to do and the *Doherty* court did do but with a different result. This substitution for congressional judgment and defiance of a judicial holding,[137] even if ultimately unsuccessful, has effectively stripped Joseph Doherty of the constitutional rights accorded aliens present in the United States[138] and of his substantive and procedural rights under the applicable treaties and statutes.

Lastly, the government ignores the purpose of, and relationship between, the political offense exception and asylum. An alien may not be deported to a country where the individual faces persecution[139] unless the individual has committed a serious non-political crime outside the United States.[140] Even though the *McMullen* court refused to grant res judicata effect to the political offense exception in an asylum hearing,[141] Joseph Doherty's acts independently satisfy the *McMullen* test. This is not

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there is evidence that the government's actions amount to delay tactics designed to ensure that Doherty will be returned to the United Kingdom. For instance, the "prejudicial" standard has never been used, even with regard to Nazi war criminals. *See* Brief for Petitioner at 93, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term).

136. *In re* Doherty, 599 F. Supp. 270, 276 (S.D.N.Y. 1984).

137. The only method to "appeal" a ruling blocking extradition is to file another extradition. *See supra* note 9. The government's requested declaratory judgement was rejected by the Second Circuit Court of Appeals which commented that the administration "fear[s] it may lose when it tries again." United States v. Doherty, 786 F.2d 491, 500 (S.D.N.Y. 1986). The government chose not to file a writ of certiorari or another extradition request, instead resorting to the immigration process where it would retain control.

138. For an analysis of the constitutional rights of aliens see, United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Bridges v. Wixon, 362 U.S. 135 (1945); Japanese Immigrant Case, 189 U.S. 86 (1903) (aliens who have "entered" the United States are entitled to constitutional protection of due process); Linnas v. INS, 790 F.2d 1024, 1030 (2d Cir. 1986), *cert. denied*, 479 U.S. 995 (1986) (aliens who have effected entry into country, whether lawfully or not, are accorded full panoply of traditional due process rights); Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983); *see also* Martin, *Due Process and the Treatment of Aliens. Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983). *But see* Aleinkoff, *Aliens, Due Process and 'Community Ties': A Response to Martin*, 44 U. PITT L. REV. 237 (1983).

139. *See supra* notes 84-107 and accompanying text.

140. *See supra* notes 108-22 and accompanying text.

141. *McMullen*, 788 F.2d at 596.

a surprise given the similarities between the *McMullen* test and the test applied by the district court in the Doherty extradition.[142] There are numerous distinctions between *McMullen* and *Doherty* which demonstrate that Doherty's acts, unlike McMullen's, are political and therefore should bar his deportation to the United Kingdom.

In *McMullen*, the acts that were the basis of the extradition attempt were unrelated to McMullen's subsequent claim of persecution in the deportation proceeding.[143] While McMullen's extradition was blocked because the court found his acts against the United Kingdom political in nature,[144] his subsequent claim of persecution in the deportation proceeding derived not from the government of the United Kingdom, but from the PIRA because of McMullen's informant activities for the United States and British governments.[145] The court, therefore, distinguished extradition from deportation because the deportation proceeding did not interfere with the internal political affairs of the host country.[146]

In contrast, the government claims in the Doherty matter that the diplomatic interests of the United States will be endangered if the United States does not help the United Kingdom combat its internal political insurrection by returning Doherty to the United Kingdom.[147] Direct consideration of the internal interests of the United Kingdom, as well as the diplomatic interests of the United States, is inconsistent with the *McMullen* court's view that deportation involves the exclusion of an undesirable alien and not interference with the internal affairs of a foreign country.

The second major distinction between the *Doherty* and *McMullen* cases is apparent from the *McMullen* court's definition and application of its asylum standard. The court held that the Refugee Act of 1980 adopted the Convention and Protocol and, therefore, asylum need not be granted for serious non-political offenses.[148] The court noted the difficulties in

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142. *See supra* notes 76-83 and accompanying text.

143. McMullen was convicted and served three years for participation in PIRA activities. Upon his release, he initially refused, but eventually was coerced, to aid in training and smuggling for PIRA activities. He then fled to the United States where he cooperated with United States and United Kingdom officials in hopes of gaining asylum. After gaining the benefit of McMullen's information, the United Kingdom sought extradition but was unsuccessful. The United States then sought to deport McMullen to his home in the United Kingdom. McMullen claimed that returning to the United Kingdom would result in retaliation from the PIRA. *McMullen*, 788 F.2d at 593.

144. *Id.*

145. *Id.*

146. *Id.* at 596.

147. *See* sources cited *supra* note 128.

148. *McMullen*, 788 F.2d at 594-95; *see also supra* notes 109-22 and accompanying

defining terrorist acts as political or nonpolitical,[149] but then concentrated on one criteria that justified its characterization of McMullen's acts as non-political.

In finding McMullen's acts non-political, the court concentrated on his indirect participation in the murder of civilians who opposed the PIRA. According to the court, McMullen's acts were non-political because "the random acts of violence against the ordinary civilians of Northern Ireland and elsewhere are not sufficiently linked to their political objectives and, by virtue of their primary targets, so barbarous, atrocious and disproportional to their objective that they constitute, 'serious nonpolitical crimes.'"[150]

As the district court noted in *Doherty*, Joseph Doherty's acts were aimed directly at the British military and did not involve civilian targets.[151] Moreover, the acts were carried out in a conventional military manner[152] and did not constitute "random acts against the ordinary citizens intended to promote social chaos."[153]

Doherty's acts, unlike McMullen's, demonstrate the convergence rather than the divergence of the political offense exception and asylum. In the final analysis, the government's de facto extradition ignores the distinctive functions of deportation and extradition, as well as the similarities between the political offense exception and asylum.

Even if the technical distinction between section 1253 and the Refugee Act of 1980 prevail over the substance and overall purpose of deportation, the language of section 1253 does not justify deporting Joseph Doherty to the United Kingdom for his alleged crime.

V. SECTION 1253 AS A DEPARTURE CONTROL

The "prejudicial" provision in 8 U.S.C. section 1253 is a form of departure control. The term "departure control" describes specific statutory provisions that allow the government to restrict an individual's departure from the United States.[154] The government contends that the "prejudicial" provision of section 1253 gives the attorney general power (based on United States interests) to override Doherty's substantive right

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text; Helton, *supra* note 30, at 479 (discussing effect of *McMullen* court's ruling).

149. *McMullen*, 788 F.2d at 595.

150. *Id.* at 598.

151. *In re* Doherty, 599 F. Supp. 270, 272 (S.D.N.Y. 1984).

152. *See supra* note 5.

153. *Doherty*, 599 F. Supp. at 272.

154. Note, *Alien Departure Control—A Safeguard for Both the Exercise of Fundamental Human Rights and National Security*, 28 VA. J. INT'L L. 159 (1987).

to choose his country of deportation.[155] In this respect, it constitutes a form of departure control and conceivably may provide a legal basis for returning Joseph Doherty to the United Kingdom. An analysis of the constitutional limits and statutory purpose of departure controls demonstrates, however, that section 1253 does not justify returning Doherty to the United Kingdom.

As the history and case law addressing departure controls is sparse,[156] their purpose and constitutional limits are unclear. Nevertheless, the Supreme Court has developed basic rules of construction and constitutional limits pertaining to the control of individuals departing from the United States. In *Kent v. Dulles*,[157] the Court held that the Passport Act,[158] which prohibited the use of a passport by a communist in furtherance of the communist movement,[159] did not permit the secretary of state to deny a passport to a communist travelling to a communist convention. The Court stated that the secretary's broad power over passport authorization was not a grant of unbridled discretion and must be narrowly construed absent clear congressional intent to the contrary, congressional acquiescence or a national emergency, such as a war.[160] Moreover, in *Aptheker v. Secretary of State*,[161] the Court narrowly construed the Subversive Activities Act[162] so as to ensure that the act served a "legitimate end and did not unduly infringe on individual freedoms."[163] While avoiding constitutional issues, these cases demonstrate the need to limit executive discretion and protect individual rights by narrowly construing departure controls.

In *Zemel v. Rusk*,[164] the Court addressed the constitutional limits of departure controls when it upheld the denial of a Cuban passport application. The Court reasoned that the restriction was constitutionally valid because of the strained cold war relations between the two countries

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155. Brief for Respondent at 28-49, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1989) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term).

156. *See generally* Note, *supra* note 154.

157. 357 U.S. 116 (1958).

158. Passport Act of 1926, ch. 772, 44 Stat. 887 (codified at 22 U.S.C. § 211(a) (1982)).

159. 22 C.F.R. 51.135 (1957).

160. *Kent*, 357 U.S. at 127-29.

161. 378 U.S. 500 (1964).

162. Subversive Activities Control Act of 1950, Pub. L. No. 81-831, 6, 64 Stat. 987, 993 (codified as amended at 50 U.S.C. 787 (1982)).

163. *Aptheker*, 378 U.S. at 509 (citing Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)).

164. 381 U.S. 1 (1965).

which gave rise to the "weightiest concerns of national security."[165] In *Haig v. Agee*,[166] the standard was further refined as a "likelihood of serious damage to the national security or foreign policy."[167] There, the Court upheld the revocation of the passport of a former CIA agent who had declared "war" on the CIA and promised to reveal the identities of foreign operatives.[168] Finally, in *Regan v. Wald*,[169] the court permitted restriction of business-related travel to Cuba, pursuant to the Cuban Assets Control Regulations,[170] because United States relations with Cuba were in a state of emergency and the money involved would be used to support communist expansion in the Western Hemisphere.[171]

The standards of narrowly construing departure controls, and requiring a likelihood of serious damage to the national security to justify their implementation, are also fundamental principles of international law.[172] International law principles dictate, and scholars point out, that departure controls must be implemented only when necessary to address pressing, immediate and serious public needs, subject to more than administrative or executive action and accompanied by procedures which limit governmental discretion.[173] In the 1972 Uppsala Conference,[174] a declaration was adopted[175] stating that a restriction must be "necessary to prevent a clear and present danger to national security or public order . . . and only if such limitations are provided for by law, are clear and specific, are not subject to arbitrary application and do not destroy [ ] substan[tive] [ ] rights."[176] These standards apply to both aliens and citizens under international law.[177]

The scope of the United States government's alien departure controls

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165. *Id.* at 16.

166. 453 U.S. 280 (1981).

167. *Haig*, 453 U.S. at 306.

168. *Id.*

169. 468 U.S. 222 (1984).

170. 40 Stat. 411, *as amended* 50 U.S.C. app. § 1 *et seq.*

171. *Regan*, 468 U.S. at 243 (quoting United States v. Curtis-Wright Export Corp., 299 U.S. 304, 319 (1936)).

172. H. HANNIUN, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 122 (1987).

173. Note, *supra* note 154, at 167.

174. This report, compiled in Uppsala, Sweden, describes the historical and philosophical right to leave and the right to leave in various countries. *Id.* at 170-72.

175. Uppsala Colloquium, The Right to Leave and Return, *reprinted in* K. VASAK & L. SKOFSKY, THE RIGHT TO LEAVE AND RETURN 164 (1976).

176. *Id.* at 170.

177. *Id.* at 164.

is less clear.[178] While there are few cases on point,[179] history demonstrates that serious threats to national security have normally accounted for the imposition of such restrictions. In response to World Wars I and II, various controls were implemented to restrict alien departure.[180] During the Korean conflict, President Truman issued two presidential proclamations which limited the freedom of aliens.[181] These restrictions were primarily intended to prevent the transfer of technical information received by aliens through education and training received in the United States.[182] In 1987, United States authorities prevented former Philippine president Ferdinand Marcos from leaving the United States because he had allegedly purchased weapons and chartered a flight to the Philippines for the purpose of overthrowing the Aquino government.[183]

Marcos was detained based on 8 C.F.R. section 215,[184] which has language similar to section 1253 and allows the government to prevent an alien from *leaving* the United States if his departure is deemed *"prejudicial to the interests of the United States."*[185] Departures which are considered "prejudicial" are set forth in five categories[186] which contain substantial procedural protection designed to restrict executive discretion

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178. *Id.* at 183.

179. The Supreme Court has yet to address the issue of alien departure control, although an alien's right to depart was recognized in Han-Lee Mao v. Brownwell, 207 F.2d 142 (D.C. Cir. 1953).

180. Act of June 21, 1941, ch. 210, 55 Stat. 252 (1941) (repealed 1952); Act of May 22, 1918, ch. 81, 40 Stat. 559 (1918) (amended 1941) (repealed 1952). Controls placed on all persons of Japanese ancestry during World War II were upheld in Korematsu v. United States, 323 U.S. 214 (1944); *see* Firabayashi v. United States, 320 U.S. 81 (1943); *see also* Note, *supra* note 154, at 184 n.161.

181. Proclamation No. 3004, 18 Fed. Reg. 489 (1953); Proclamation No. 2914, 15 Fed. Reg. 9029 (1950); *see* Note, *supra* note 154, at 185 n.162.

182. Note, *supra* note 154, at 185. Arthur Helton, director of the Lawyers Committee for Human Rights, believes section 1253(h) was intended to serve the same purpose. *See U.S. Refuses to Deport I.R.A. Member*, *supra* note 15, at 3, col. 1.

183. Note, *supra* note 154, at 159-60.

184. 8 U.S.C. § 1185(a)(1) (1982) authorizes the president to control an individuals entry or departure. The corresponding regulations are Controls of Aliens Deporting from the United States, 8 C.F.R. § 215 (1987) (Justice Department), and 22 C.F.R. § 46 (1987) (State Department).

185. Note, *supra* note 154, at 184-86 (emphasis added).

186. *Id.* at 184. Departure is prejudicial when: 1) departure would adversely effect national security; 2) the alien is subject to registration in the armed forces of the United States; 3) the alien is implicated in legal proceedings; 4) the alien is leaving the country involuntarily (this humanitarian provision protects aliens who are being forced by their own country to return); and (5) similar cases not explicitly covered in the preceding provisions. *Id.*

and protect the individual. The most important of these categories addresses the adverse effect the individual will have on national security.[187] Restriction is authorized where an alien is likely to either: 1) disclose information concerning the national defense;[188] 2) engage in activities against the defense of the United States,[189] United Nations[190] or an ally;[191] 3) participate in any insurrection in the United States or in the territory of an ally;[192] or, 4) have technical training that an enemy could use to undermine military operations of the United States or an ally.[193]

It is unclear whether the restriction of an alien must also be justified by a likelihood of serious damage to national security or foreign policy. Although under international law the standard is the same for citizens and aliens,[194] United States law has generally limited the rights of aliens.[195] The Supreme Court, however, has recognized that upon entrance into the United States aliens are entitled to constitutional protection and the substantive rights granted them by Congress under statute.[196] In the context of deportation, aliens have a substantive right to designate their country of deportation and apply for asylum.[197] For these reasons, the same standard should be applied to aliens departing pursuant to deportation and citizens departing of their own free will.

Joseph Doherty's acts do not satisfy the criteria for instituting a departure control.[198] Doherty does not pose a threat to the national defense of an ally because he has renounced his membership to the PIRA[199] and faces incarceration and possible extradition to the United

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187. 8 C.F.R. § 215.3(a) (1987); 22 C.F.R. § 46.3(a) (1987).

188. 8 C.F.R. § 215.3(a); 22 C.F.R. § 46.3(a).

189. 8 C.F.R. § 215.3(b); 22 C.F.R. § 46.3(b).

190. 8 C.F.R. § 215.3(b); 8 C.F.R. § 46.3(b).

191. 8 C.F.R. § 215.3(c); 8 C.F.C. § 46.3(c).

192. 8 C.F.R. § 215.3(d); 8 C.F.R. § 46.3(d).

193. 8 C.F.R. § 215.3(i); 22 C.F.R. § 46.3(i).

194. Note, *supra* note 154, at 165.

195. *See* Martin, *supra* note 138. Different standards of constitutional protection are accorded depending on an alien's status within the United States. *Id.*

196. Aliens who have "entered" the United States are entitled to constitutional protection. Landon v. Plasencia, 454 U.S. 21 (1982).

197. *See supra* note 16; *see also* Yiu Sung Chun v. Sava, 708 F.2d 877 (2d Cir. 1983) (the right to apply for political asylum also implicates substantive rights, as well as rights under the United States Constitution).

198. *See supra* notes 154-93 and accompanying text.

199. Blake, *Judge Eyes Bail for Ex-IRA Member; Fugitive from Ulster Has Been Held for Seven Years in New York Jail*, Boston Globe, Sept. 5, 1990, at 3, col. 1.

Kingdom even if he is deported to the Republic of Ireland.[200] Nor is there evidence that Doherty or any member of the PIRA constitute a threat to the welfare or security of the United States. The government's justification, therefore, is not based on the national security of an ally, but on a desire to protect United States diplomatic relations with the United Kingdom and its reputation in the international community.[201] These motivations do not justify the imposition of restrictions under 8 U.S.C. section 1185. In addition, and it is doubtful that 8 U.S.C. section 1253 provides a broader basis for control.

The use of identical language in sections 1253 and 1185 indicates their similar purposes. Nothing in section 1253 indicates that a lower standard is to be applied to the control of an alien's deportation. The inclusion of the same provision in sections 1185 and 1253 simply reflects the distinctive situations addressed by each provision. Section 1185 allows the government to restrict travel of those who are attempting to leave the United States of their own volition.[202] Section 1253, on the other hand, deals with individuals being deported. The inclusion of the "prejudicial" standard was a way of insuring that an alien's choice under section 1253 would not pose any of the dangers protected against under section 1185.[203]

The government is attempting to expand the scope of the "prejudicial" language in section 1253, an ambiguous and never before used provision, beyond that of section 1185.[204] The ambiguity of the statute's language as well as a lack of congressional intent[205] or acquiescence[206] on the

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200. Under article two of the Irish Constitution, the Republic consists of the whole of Ireland, North and South. Finucane v. The Governor of Portlaoise Prison, No. 164/89, slip op. at 13 (Ir. S.C. Mar. 13, 1990). Article three provides that until reunification, the Irish legislature (Oireachtas) may allow for extrajudicial prosecution of certain offences. *Id.* at 14. Those offenses that may be prosecuted are the ones most commonly occurring under the political offense exception. *Id.* Under this scheme, the Republic will provide extrajudicial prosecution for crimes committed in the North if the United Kingdom requests such prosecution. *Id.* Therefore, the United Kingdom can request Doherty's extradition from the Republic of Ireland and if unsuccessful can request prosecution within the Republic. Extrajudicial prosecution has been conspicuously more successful in securing conviction of fugitive offenders of politically motivated crimes. Campbell, *Extradition to Northern Ireland: Prospects and Problems*, 52 MOD. L. REV. 585 (1989).

201. *See supra* note 128.

202. *See supra* notes 173-82 and accompanying text.

203. *See supra* notes 189-94 and accompanying text.

204. *Supra* note 15.

205. *See generally* 1978 U.S. CODE CONG. & ADMIN. NEWS, 4700; *see also* Pub. L. 96-212, 1980, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS, 141; Pub. L. 97-116, 1981, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS, 2577.

206. Rather than congressional acquiescence, the government's actions have resulted in

subject demands a narrow construction of this clause equivalent to that given section 1185. The extraordinary power and potential for abuse inherent in the attorney general's interpretation of section 1253 is precisely what the Supreme Court tried to prevent in its rulings on departure controls.[207] This use is also contrary to the international standard which mandates "more than simple administrative or executive action . . . accompanied by procedures to limit executive discretion."[208]

Joseph Doherty does not pose a serious threat to the security of the United States or the United Kingdom. Doherty is a citizen of the Republic of Ireland and the Republic has agreed to accept him if deported there.[209] If Doherty is deported to the Republic of Ireland he still faces trial and incarceration for his "crime" because the Irish Constitution allows extrajudicial prosecution for crimes committed in Northern Ireland.[210] Furthermore, the broadness of the government's position demonstrates its inconsistency. The government contends that deportation to *any* country other than the United Kingdom would prejudice the interests of the United States.[211] If this position were truly based on the criteria for departure control, then Joseph Doherty would necessarily pose a threat to the United Kingdom even if deported to Siberia. The government's actions leave no doubt that section 1253 is not being used as a security device but as an affirmative tool of foreign policy.

There are also two independent reasons why the use of departure control in the Doherty context is inappropriate. First, it is not being used to prevent an individual from leaving the United States; it is being used to return an individual to a country where he faces persecution. Second, the control overrides numerous administrative and judicial decisions which have unanimously held that it is improper to return Doherty to the United Kingdom. In reality, the government is not protecting the United Kingdom from a security risk, it is protecting the United Kingdom from the laws of the Republic of Ireland. Attorney General Meese bluntly stated, "it is in our interest that [the petitioner] be sent directly to the United Kingdom" because "deporting him to Ireland would require the United Kingdom to invoke Irish law to secure [his return] to the United Kingdom."[212] In exercising his substantive right to designate the

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a proposed congressional resolution and an Amicus Curiae brief opposing the government's treatment of Joseph Doherty.

207. *See supra* notes 156-71 and accompanying text.

208. *See supra* notes 172-77 and accompanying text.

209. *See supra* note 10.

210. *See supra* note 200.

211. Matter of Doherty, Mem. Att'y Gen. (June 9, 1988).

212. *Id.*

country of deportation, Doherty is not attempting to escape punishment or carry on his fight against the English occupation; he simply wants his case heard and his sentence served in his own country. Doherty fears

> the treatment he would receive as a known republican whose devotion to the republican cause has made him a subject of special antipathy to security forces . . . . Once entombed within the famous Long Kesh [Maze] prison and at the total disposal of the government he has opposed . . . since his teenage years Mr. Doherty fears not the punishment of life imprisonment but rather inhuman and degrading treatment, beatings, torture, and perhaps even death.[213]

The government has attempted to ensure throughout this proceeding that Doherty will not be able to use these fears in his defense either in the United States or in the Republic of Ireland.

If Doherty had been deported when he first waived his asylum hearing and agreed to deportation, he may have been able to invoke the political offense exception to the Irish Extradition Act of 1965.[214] By invoking the prejudicial provision of section 1253 and refusing to abide by judicial and administrative decisions, however, the government kept Doherty in the United States until the new Irish extradition law, which effectively eliminated the exception as it applied to Doherty, became operative.[215] This delay has also subjected Doherty to the supplemental Anglo-American extradition treaty which also eliminated the political offense exception from the treaty.[216] These facts demonstrate the true de facto nature of the government's actions. Even if Doherty eventually prevails in the United States and is sent to the Republic of Ireland, he faces extradition under the new Irish extradition law. Recent decisions by the Supreme Court of the Republic of Ireland, however, indicate not only that Doherty's fears accurately depict treatment of Republican prisoners in the prisons of the United Kingdom, but also that despite the new Irish extradition law, deporting Doherty to the Republic of Ireland probably will allow Doherty to avoid that abuse.

In its March 13, 1990 decisions, *Finucane v. Governor of Portlaoise*

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213. Brief for Petitioner at 64-65, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term).

214. *See* notes 10-13 and accompanying text.

215. Irish Extradition Act of 1987, *supra* note 10.

216. Article 4 of the Supplemental Treaty eliminated, for all practical purposes, the political offense exception to extradition with retroactive effect. *See supra* note 25; *see also* Helton, *supra* note 30, at 471-75 (listing and analyzing the provisions of the supplemental treaty).

Prison[217] and *Clarke v. Governor of Portlaoise Prison*,[218] the Irish Supreme Court denied extradition of two members of the IRA who had escaped from Long Kesh [Maze] prison. Although the cases concerned extradition under the Irish Extradition Act of 1965,[219] the court based its decision on article 40 of the Irish Constitution.[220] The court held that returning the petitioners to English custody would violate their constitutional rights because it would subject them to the "probable risk, that [they] would be assaulted or injured by the illegal acts of the prison staff."[221] The court based this holding on its finding of systemic abuse of republican prisoners in English custody and a refusal by the prison system to discipline prison officials or reform its treatment of republican prisoners.[222] The court affirmed its position on April 6, 1990, when it refused to extradite Owen Carron, an alleged member of the IRA, based again on the Irish Constitution. Thus, even if the United Kingdom requests extradition under the new Irish extradition law, his extradition may very well be blocked by the Irish Constitution.[223]

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217. No. 164-89, slip op. (Ir. S.C. Mar. 13, 1990).

218. No. 304-89, slip op. (Ir. S.C. Mar. 13, 1990).

219. *Supra* note 12; *cf.* the case of Desmond Ellis, the first person extradited to Britain from Ireland under the Irish Extradition Act of 1987. Ryder, *Dublin Judges Hand Over IRA Bombs Suspect*, Daily Telegraph (London), Nov. 15, 1990, at 11, col. 1; *IRA Suspect Is Extradited to London for Bombing Trial*, N.Y. Times, Nov. 15, 1990, at A10, col. 6.

220. *Finucane*, No. 164-89, at 3 (Walsh, J.).

221. *Id.* at 9.

222. The Court based its decision on events surrounding a 1983 mass escape from the Long Kesh [Maze] prison. During this escape, which involved close to two hundred prisoner's a British guard died of a heart attack. After the grounds were secured, prison officials transferred the remaining republican prisoners to a different block in order to conduct a search of the grounds. The guards were ordered to remove police dogs from the prisoner's path and initially did so. After the minister, however, left the prisoners were attacked by the guards and dogs. Despite serious injuries to prisoners, prison officials refused medical treatment for a number of days in memory of the deceased guard. The guard had died of a heart attack. When the Bureau of Prisons attempted an investigation it was met with a wall of silence and written documentation denying any abuse or denial of medical treatment. Prison officials testified at numerous cases brought by prisoners that no such actions took place and that there was no conspiracy. The prisoners lost most of theses cases. Documents which were uncovered, however, revealed a systemic cover-up. Despite written and testimonial evidence that no abuses of prisoners occurred, these documents proved that prisoners were in fact attacked by dogs and guards and were denied medical treatment for up to ten days. Although the government has offered monetary settlements for some prisoners, it has not instituted an investigation, disciplinary proceedings or reform although most of the guards remain in service at the Long Kesh prison. *Id.*

223. Prokesch, *Court Counters Irish Policy on Extraditions to Britain*, N.Y. Times, Apr. 7, 1990, at A3, col. 1.

Clearly, Joseph Doherty's acts do not satisfy the criteria for departure control. Therefore, there is no basis for returning him to the United Kingdom other than the fact that he is wanted by an ally for a crime committed in that country. This amounts to an illegitimate de facto extradition. The government's actions render meaningless three separate statutory mechanisms (extradition, deportation and departure controls), strip Joseph Doherty of his procedural and substantive rights and circumvent the legal system of the Republic of Ireland,[224] which Joseph Doherty is a citizen.[225]

VI. CONCLUSION

The government's use of deportation to accomplish what was properly addressed and prohibited in extradition ignores the distinct purposes of these two mechanisms. It also ignores both mechanism's political-humanitarian exceptions to expulsion. The government has attempted to serve the very political interests Congress explicitly excluded from deportation and the judiciary prohibited in extradition.

The diplomatic interests of the United States, while arguably important, do not rise to the level of national emergency. Therefore, Doherty's return to the United Kingdom cannot be justified as a valid exercise of departure control. Most departure controls limit an individual's freedom by forcing him to remain in the United States. In contrast, the government is using section 1253 to remove Doherty from the United States to a country where he faces physical persecution. While the United Kingdom is possibly our staunchest ally, the United States cannot ignore the abuse of republican prisoners by the United Kingdom as documented by the Irish Supreme Court and various international agencies, and experienced by Doherty personally.

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224. Whether Doherty would be imprisoned or extradited once in the Republic of Ireland has been uncertain throughout this proceeding. What was certain was that Doherty faced a 10-year sentence in the Republic if he did block extradition to the United Kingdom. *See supra* note 24 and accompanying text. Prior to the implementation of the Irish Extradition Act of 1987, *supra* note 10, Doherty possibly could have blocked extradition based on the Irish political exception which was a question of law to be decided by Irish courts. Brief for Petitioner at 69 n.37, Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990) (No. 88-4084, 1988 Term; renumbered No. 89-4092, 1989 Term) (citing McGlinchey v. Wren, [1982] I.R. 154; [1983] I.L.R.M. 169). The implementation of the new extradition law removed the issue from the courts and specifically prohibited acts which included automatic weapons. *Id.*

225. Doherty is a citizen of both the United Kingdom and the Republic of Ireland. He is recognized by the Republic as its citizen and was assured that the Republic would accept his deportation.

To return Joseph Doherty to the United Kingdom based on diplomatic expedience would compromise this country's traditional role as a refuge from persecution and as guarantor of fundamental rights.

Michael J. Bowe