

5-1-2000

Removing Blinders from the Judiciary: In Re Artt Brennan, Kirby as an Evolutionary Step in the United States-United Kingdom Extradition Scheme

Matthew S. Podell

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Civil Rights and Discrimination Commons](#), [Criminal Procedure Commons](#), and the [International Law Commons](#)

Recommended Citation

Matthew S. Podell, *Removing Blinders from the Judiciary: In Re Artt Brennan, Kirby as an Evolutionary Step in the United States-United Kingdom Extradition Scheme*, 23 B.C. Int'l & Comp. L. Rev. 263 (2000), <http://lawdigitalcommons.bc.edu/iclr/vol23/iss2/5>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

REMOVING BLINDERS FROM THE JUDICIARY: *IN RE ARTT, BRENNAN, KIRBY* AS AN EVOLUTIONARY STEP IN THE UNITED STATES–UNITED KINGDOM EXTRADITION SCHEME

Abstract: *Within the extradition treaty between the United States and the United Kingdom, there exists an exemption for fugitives who have allegedly committed crimes that are political in nature. The political offense exemption has resulted in complications when dealing with the thorny issue of alleged terrorists from Northern Ireland who flee to the United States. This Note traces the history of the political offense exemption and scrutinizes the results of a recent Ninth Circuit decision, In re Artt, Brennan, Kirby, in which the court concluded that federal courts may inquire into systemic bias when considering whether or not a defendant's conviction in the Northern Ireland judicial system was tainted by prejudice.*

INTRODUCTION

In the field of extradition law, there is perhaps no issue more complex or controversial than terrorism.¹ The treatment of suspected or convicted terrorists by the United States in extradition proceedings entails a delicate balance between two competing motivations: on the one hand lies a desire to ensure that perpetrators of violence are duly punished for their unlawful acts; on the other is the historical notion that the United States should protect those who are unjustly persecuted in their native lands.² Under most extradition treaties, this balance is achieved by an exemption for fugitives who have allegedly committed crimes that are political in nature.³

¹ See GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 132 (1991).

² See generally Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 25, 1985, T.I.A.S. No. 12050 [hereinafter Supplementary Treaty], reprinted in S. REP. NO. 99-17 at 15-17 (1986) [hereinafter Senate Report]; Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Oct. 21, 1976, U.S.-U.K., 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter 1977 Treaty].

³ See 1977 Treaty, *supra* note 2, art. V(1)(c)(i); Senate Report, *supra* note 2, at 1.

The political offense exemption has proven to be inadequate, however, when dealing with the thorny issue of alleged terrorists from Northern Ireland who flee to the United States.⁴ Northern Ireland is a region beset by political violence where the legal system operates in a secretive and often draconian manner.⁵ In recent years, the U.S. legislature and judiciary have attempted to grapple with the difficulties inherent in determining whether fugitives from Northern Ireland should be returned to the United Kingdom once apprehended, or allowed to remain in the United States, sheltered from persecution.⁶ In 1986, the Senate ratified a treaty that provides a defense to extradition for those fugitives who can demonstrate that their convictions were unlawfully tainted by prejudice, or that they will suffer unjust, prejudicial punishment if returned to the United Kingdom.⁷

Judicial interpretation of this treaty has centered largely on whether federal courts are empowered to hear a defendant's evidence of generalized, systemic bias within the Northern Ireland system of justice.⁸ The most recent case to consider this issue was the 1998 Ninth Circuit decision *In re Artt, Brennan, Kirby*.⁹ In that case, the court concluded that federal courts may inquire into systemic bias when considering whether or not a defendant's conviction was tainted by prejudice.¹⁰

Part I of this Note provides a brief historical overview of the political and religious strife in Northern Ireland and then looks more extensively at the system of justice that has been established there over the past thirty years. Part II examines the United States-United Kingdom extradition scheme and considers the proper scope of judicial inquiry into foreign legal systems. Part III discusses the three cases in which federal courts have considered whether to hear a fugitive's claims of general, inherent bias in the English and Northern Irish systems of justice. Part IV analyzes the Ninth Circuit's reasoning

⁴ See, e.g., Supplementary Treaty, *supra* note 2; *In re Requested Extradition of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

⁵ See generally Northern Ireland Emergency Provisions Act, ch. 5 (1978) [hereinafter EPA].

⁶ See, e.g., Supplementary Treaty, *supra* note 2; *In re Requested Extradition of Artt, Brennan, Kirby*, 158 F.3d 462 (9th Cir. 1998), *reh'g granted*, 183 F.3d 944 (9th Cir. 1999); *In re Requested Extradition of Smyth*, 61 F.3d 711 (9th Cir. 1995), *rev'g*, 863 F. Supp. 1137 (N.D. Cal. 1994).

⁷ See Supplementary Treaty, *supra* note 2, art. 3(a).

⁸ See generally *In re Artt, Brennan, Kirby*, 158 F.3d 462; *In re Smyth*, 61 F.3d 711.

⁹ 158 F.3d 462.

¹⁰ See *id.* at 475.

in the most recent of these decisions, *In re Artt, Brennan, Kirby*. Finally, this Note concludes that for moral, prudential, and legal reasons, other federal circuits should follow the Ninth Circuit's example and permit broad judicial inquiry into systemic bias when a fugitive's conviction may have been tainted by prejudice. To prevent fugitives from abusing this defense and bogging down extradition proceedings, judges should utilize an individually tailored *prima facie* threshold for presentation of evidence of systemic bias.

I. HISTORICAL BACKGROUND OF THE CURRENT LEGAL SYSTEM IN NORTHERN IRELAND

A. *Overview of Political and Religious Turmoil*

Northern Ireland's history of internal strife and political and religious polarization extends as far back as the first English invasion of Ireland in 1170.¹¹ Almost every generation since that time has seen incidents of armed insurrection against British rule by those who would preserve the sovereignty and integrity of a united Ireland.¹² Ireland's current geopolitical landscape originated under the United Kingdom's 1920 Government of Ireland Act, which established a parliament in Belfast to govern the six northeastern counties of Ireland (Northern Ireland) and a separate parliament in Dublin to govern the other twenty-six.¹³ In 1921, these lower twenty-six counties became the Irish Free State, while Northern Ireland remained part of the British empire.¹⁴

This partition of the island did little to placate either nationalists—a largely Catholic group which seeks a unified Ireland—or unionists, a predominantly Protestant group which insists upon Northern Ireland's allegiance with the rest of the United Kingdom.¹⁵ The nationalist and unionist groups both have subsets—republicans and loyalists, respectively—which advocate the use of violence as a legitimate means of pursuing their political goals.¹⁶ The Irish Republican Army (IRA) and the Provisional Irish Republican Army (PIRA) are

¹¹ See BRIAN BARTON, *A POCKET HISTORY OF ULSTER* 11 (1996).

¹² See *id.*

¹³ See *id.* at 27.

¹⁴ See *id.* at 36.

¹⁵ See *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1139–40 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995).

¹⁶ See *id.*

two of the most prominent republican paramilitary groups.¹⁷ The counterpart loyalist organizations are the Ulster Freedom Fighters and the Ulster Volunteer Force.¹⁸ Since 1969, over 3,000 people have been killed in the political violence, and over 35,000 have been injured.¹⁹

The upsurge of violence over the past thirty years was sparked by the growth of the Catholic civil rights movement in the late 1960s.²⁰ Catholics took to the streets at this time to protest what they perceived as discrimination by the mostly Protestant government in Northern Ireland.²¹ Their marches evoked a violent response, both from the Royal Ulster Constabulary—the Northern Ireland police force—and from Protestants whose counter-marches devolved into riots against Catholics.²² In an attempt to restore order, the British deployed troops into Northern Ireland in 1969.²³

Guerilla violence has persisted since that time, marked most recently by the horrific 1998 bombing in Omagh, Northern Ireland, that killed 28 innocent civilians and injured 220.²⁴ The bombing was committed by the “Real IRA,” a radical splinter group of the IRA.²⁵ The attack was a tragic counterpoint to the landmark “Good Friday Peace Accord,” formed on April 10, 1998.²⁶ The peace accord maintains Northern Ireland’s status as a British province for as long as the majority of the province wants it to remain so.²⁷ The accord further stipulated that Britain eventually turn over control of the area to a new provincial government, the Northern Ireland Assembly, in which Catholics and Protestants will participate side-by-side.²⁸ The peace ac-

¹⁷ See *id.* at 1140; see also PAUL ARTHUR & KEITH JEFFERY, NORTHERN IRELAND SINCE 1968, 37 (1988) (describing how the militant PIRA emerged in the late 1960s after disillusionment with the stagnant Official IRA).

¹⁸ See *In re Smyth*, 863 F. Supp. at 1140.

¹⁹ See *id.*

²⁰ See CAROLINE KENNEDY-PIPE, THE ORIGINS OF THE PRESENT TROUBLES IN NORTHERN IRELAND 41–42 (1997).

²¹ See *id.*

²² See *id.* at 46.

²³ See *id.* at 48.

²⁴ See ‘Real IRA’ Accepts Blame for Bombing, ORLANDO SENTINEL, Aug. 19, 1998, at A3.

²⁵ See *id.*

²⁶ See Bill Glauber, *Peace Comes to N. Ireland*, BALTIMORE SUN, Apr. 11, 1998, at 1A.

²⁷ See Marjorie Miller, *Victory Ushers in Era of Hope for Northern Ireland Vote*, L.A. TIMES, May 24, 1998, at A1.

²⁸ See *id.* This transition occurred at midnight on December 1, 1999, thus fulfilling one of the most important provisions of the Good Friday agreement. See Ray Moseley, *New Era for Northern Ireland*, CHI. TRIB., Dec. 3, 1999, at A1; Fawn Vrazo, *Northern Ireland Gains Self-Rule*, HOUS. CHRONICLE, Dec. 2, 1999, at 29.

cord was endorsed by 71% of Northern Irish voters in a May 1998 referendum.²⁹

B. *The Diplock Report*

The recent history of anti-terrorist legislation in Northern Ireland took shape in the wake of civil rights protests in the late 1960s.³⁰ In response to the violence that persisted despite the presence of British army troops, the British government instituted direct rule over Northern Ireland's affairs in 1972.³¹ One of the government's first tasks was to re-evaluate procedures for dealing with terrorists and suspected perpetrators of violence.³² Before 1972, the government of Northern Ireland had relied on internment—the detention of terrorist suspects without trial—to stem the tide of violence.³³ This method proved ineffective, as internment merely hardened the resolve of many terrorists and fueled the fires of political violence.³⁴ In October of 1972, the British government established a commission to recommend more effective and perhaps humane ways of dealing with terrorism.³⁵ Two months later, the commission issued the "Diplock Report," which outlined legal procedures to deal with the emergency situation in Northern Ireland.³⁶

The most notable provision of the Diplock Report calls for the creation of specialized criminal courts (Diplock Courts) in which suspected terrorists are tried *without right to a jury*.³⁷ Traditionally, citizens of Northern Ireland had been accorded the right of trial before a jury of twelve peers, selected at random from the community.³⁸ The Diplock Commission felt that this system was unworkable in the context of political violence in Northern Ireland, where there existed a real

²⁹ See Ray Moseley, *New Era for Northern Ireland*, CHI. TRIB., Dec. 3, 1999, at A1; Fawn Vrazo, *Northern Ireland Gains Self-Rule*, HOUS. CHRONICLE, Dec. 2, 1999, at 29.

³⁰ See *supra* notes 19–22 and accompanying text.

³¹ See JOHN JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM 8 (1995).

³² See *id.*

³³ See REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185, at 1 (Lord Diplock, Chairman) [hereinafter Diplock Report]; JACKSON & DORAN, *supra* note 31, at 8.

³⁴ See JACKSON & DORAN, *supra* note 31, at 8.

³⁵ See Diplock Report, *supra* note 33, at 1; JACKSON & DORAN, *supra* note 31, at 8.

³⁶ See Diplock Report, *supra* note 33, at 3. The commission, report, and certain elements therein have taken on the name of the commission's chairman, Lord Diplock.

³⁷ See Diplock Report, *supra* note 33, at 18.

³⁸ See *id.* at 17.

threat of witness and juror intimidation by terrorist groups.³⁹ Furthermore, the Commission emphasized the difficulty of obtaining jurors anywhere in Northern Ireland who were not biased by political sympathies.⁴⁰ This problem was particularly grave, considering the geographic concentrations of republicans and loyalists in specific areas of the country, and the consequent problem of obtaining a diverse jury pool in those areas.⁴¹ The Diplock Report concluded that:

matters have now reached a stage in Northern Ireland at which it would not be safe to continue to rely upon methods hitherto used for securing impartial trial by a jury of terrorist crimes [T]rial by judge alone should take the place of trial by jury for the duration of the emergency.⁴²

Criticism of the Diplock Report emerged during parliamentary debates over the 1973 Northern Ireland (Emergency Provisions) Act.⁴³ Critics expressed reservations regarding the evidence Lord Diplock used to derive his conclusions about jury bias and intimidation.⁴⁴ Furthermore, many felt that the Diplock Report did nothing to improve upon the former system of internment, a practice that “struck at the very root of public conceptions of justice according to law.”⁴⁵

C. *The Northern Ireland (Emergency Provisions) Act*

The recommendations of the Diplock Commission were “incorporated wholesale” into the Northern Ireland (Emergency Provisions) Act (EPA), passed in 1973 and renewed and expanded in 1978.⁴⁶ The EPA is still in force in Northern Ireland.⁴⁷ The EPA severely curtails civil liberties of persons living in Northern Ireland, and makes particular provision for those suspected of terrorist activities (as defined in the list of “scheduled offenses”).⁴⁸ The EPA contains provisions for

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² Diplock Report, *supra* note 33, at 18.

⁴³ See JACKSON & DORAN, *supra* note 31, at 17.

⁴⁴ See *id.*

⁴⁵ *Id.* at 18 (citations omitted).

⁴⁶ See *In re Requested Extradition of Smyth*, 61 F.3d 711, 713–14 (citations omitted).

⁴⁷ See *In re Requested Extradition of Artt, Brennan, Kirby*, 158 F.3d 462, 464 (9th Cir. 1998), *reh'g granted*, 183 F.3d 944 (9th Cir. 1999); *In re Smyth*, 61 F.3d at 714.

⁴⁸ See EPA, *supra* note 5, at app. sched. 4; Kelly D. Talcott, *Questions of Justice: U.S. Courts' Powers of Inquiry Under Article 3(a) of the United States-United Kingdom Supplementary Extradition Treaty*, 62 NOTRE DAME L. REV. 474, 478–84 (1987). The EPA's scheduled of-

pre-trial arrest and detention and for procedures during trial.⁴⁹ Prior to trial, the EPA grants police enormous power to investigate terrorist crimes and pursue suspects.⁵⁰ Notable provisions include:

- Any constable may arrest without warrant any person he suspects of being a terrorist, and may enter and search that person's premises or any other premises without warrant.⁵¹ The suspected terrorist may be detained for up to seventy-two hours,⁵² during which time he is usually interrogated.⁵³ Abuses by police during this interrogation period have been documented.⁵⁴
- Any constable or British soldier may stop and question *any* person to ascertain that person's identity, or to determine what he knows concerning terrorist activity, and if that person refuses to answer he may be imprisoned or fined.⁵⁵
- "Young persons" (ages 14–17) accused of scheduled offenses may be imprisoned while awaiting trial.⁵⁶
- Any person belonging to a "proscribed organisation" (including the IRA), and any person *dressing or behaving* like a member of such an organization, is subject to prison, a fine, or both.⁵⁷
- Any person who wears a hood, mask, or other item designed to conceal identity while out of doors is subject to prison, a fine, or both.⁵⁸

After arrest, the EPA authorizes other notable reductions of civil liberties:

fenses include a wide variety of crimes against persons or property, not all of which are necessarily politically motivated. See Talcott, *supra* at 481–82. However, the Attorney General for Northern Ireland may certify a crime as "nonscheduled" (and thus not subject to the provisions of the EPA) if the government believes it has no connection with terrorism. See *id.* at 482. Thus, those accused of politically motivated crimes are subject to an entirely different criminal justice system from the rest of the populace. See *id.*

⁴⁹ See generally EPA, *supra* note 5.

⁵⁰ See *id.*

⁵¹ See *id.* §§ 11, 13.

⁵² See *id.* § 11 (3).

⁵³ See Talcott, *supra* note 48, at 479 n.29.

⁵⁴ See *id.* at 481.

⁵⁵ See EPA, *supra* note 5, § 18.

⁵⁶ See *id.* § 4.

⁵⁷ See *id.* §§ 21, 25 (emphasis added).

⁵⁸ See *id.* § 26.

- In cases of scheduled offenses, the EPA significantly limits the power of judges to grant bail prior to the adjournment of trial.⁵⁹ That power is left solely in the hands of the Supreme Court.⁶⁰
- Evidentiary standards are significantly reduced, allowing *any* confession to be entered into evidence, whether voluntary or not, provided it was not induced by torture or inhumane treatment.⁶¹ This standard is a loose one and tacitly condones the use of some degree of physical violence to obtain confessions.⁶²
- A trial on indictment of a scheduled offense shall be conducted by a court without a jury.⁶³

With its strict and forceful measures to combat terrorism, the EPA has enabled courts in Northern Ireland to drastically impinge upon the procedural safeguards that traditionally guarantee a “fair trial” in most common law jurisdictions.⁶⁴ While the EPA technically applies to all citizens, some have asserted that in practice, the EPA has been used chiefly to curtail the personal liberties of Catholics only.⁶⁵

II. THE UNITED STATES—UNITED KINGDOM EXTRADITION SCHEME

A. *The 1977 Extradition Treaty*

The 1977 Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Britain and Northern Ireland (1977 Treaty) primarily governs the United States-United Kingdom extradition scheme.⁶⁶ As a general rule, the 1977 Treaty provides that “[e]xtradition shall be granted for . . . an offense within any of the descriptions listed in the Schedule annexed to this Treaty . . . or any other offense”⁶⁷ However, the 1977 Treaty also contains exceptions under which extradition will not occur.⁶⁸ For example, the “double criminality” requirement (a stan-

⁵⁹ See *id.* § 2.

⁶⁰ See EPA, *supra* note 5, § 2.

⁶¹ See *id.* § 8.

⁶² See Talcott, *supra* note 48, at 483.

⁶³ See EPA, *supra* note 5, § 7; see also discussion of “Diplock Courts,” *supra* notes 37–42 and accompanying text.

⁶⁴ See *In re Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995).

⁶⁵ See Daniel T. Kiely, Jr., Note, *The Compromise Between Outrage and Compassion: Article 3(a) and In re Requested Extradition of Smyth*, 30 CORNELL INT’L L.J. 587, 599 (1997).

⁶⁶ See 1977 Treaty, *supra* note 2.

⁶⁷ *Id.* art. III(1).

⁶⁸ See *infra* notes 69–71 and accompanying text.

dard provision in the law of extradition)⁶⁹ prevents extradition for crimes that are not “punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty”⁷⁰

Furthermore, Article V of the 1977 Treaty provides that “[e]xtradition shall not be granted if . . . the offense for which extradition is requested is regarded by the requested Party as one of a political character”⁷¹ Most extradition treaties contain similar political offense exceptions,⁷² and the Article V provision is a “typical formulation.”⁷³ The political offense exception derives from the notion that political dissent is an important mechanism for social change, and dissidents should be shielded from retaliation by a hostile home government.⁷⁴ However, there is no universally agreed-upon definition of what constitutes a political offense.⁷⁵

B. *Emerging Consternation with Article V of the 1977 Treaty*

The political offense exception to the 1977 Treaty soon became entangled in the issue of terrorism in Northern Ireland.⁷⁶ One of the greatest controversies in extradition law revolves around whether terrorist acts are political in nature—and thus protectable under the political offense exception—or whether they are simply inexcusable criminal behavior.⁷⁷ As one scholar has noted,

One person’s terrorist is another person’s freedom fighter in fear of persecution Terrorism is not a legal concept that can be examined in such a way that it is possible to define those instances when it is within and those when it is outside the political offense exemption. It is truly a “hot issue.”⁷⁸

Beginning in 1979, a series of United States decisions denied extradition of IRA members because their acts, while criminal, were

⁶⁹ See GILBERT, *supra* note 1, at 52.

⁷⁰ 1977 Treaty, *supra* note 2, art. III(1)(a).

⁷¹ *Id.* art. V(1)(c)(i).

⁷² See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 476(2) (1986).

⁷³ *In re Requested Extradition of Artt, Brennan, Kirby*, 158 F.3d 462, 465 (9th Cir. 1998), *reh’g granted*, 183 F.3d 944 (9th Cir. 1999).

⁷⁴ See Kiely, *supra* note 65, at 605.

⁷⁵ See “Extradition—Political Offences,” *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 331 (1992).

⁷⁶ See *In re Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995).

⁷⁷ See GILBERT, *supra* note 1, at 132–33.

⁷⁸ *Id.* at 133.

considered political in nature.⁷⁹ In *In re McMullen*, a case that involved an IRA terrorist who had bombed British army barracks and fled to the United States, the district court ruled that the Article V political offense exception prohibits extradition when the criminal act occurs as part of a political uprising and when the accused is a person engaged in acts of political violence with a political end.⁸⁰ Notably, the court stated that “[e]ven though the offense be deplorable and heinous, the criminal actor will be excluded from deportation if the crime is committed under these pre-requisites.”⁸¹ After reviewing evidence which established that the defendant was a member of the IRA and that the IRA was a group seeking a political objective, the court concluded that the bombing was of a political nature, and thus the defendant could not be extradited.⁸²

In the 1981 case *In re Mackin*, the United Kingdom sought the defendant’s extradition to face charges of attempted murder of a British soldier in Belfast.⁸³ The Second Circuit refused to issue a writ of mandamus to reverse a magistrate who had held that “the offenses committed against the British soldier were incidental to Mackin’s role in the PIRA’s political uprising in Belfast,” and that therefore the defendant could not be extradited for those offenses.⁸⁴ In *In re Doherty* in 1984, the Southern District of New York denied the request for extradition of a PIRA member who was convicted of murdering a British army captain.⁸⁵ The court determined that because the murder had occurred during a pre-meditated ambush of the captain’s patrol unit, the crime typified “the political offense exception in its most classic form.”⁸⁶

The outcomes of these cases infuriated the British Government and led to calls for reformation of the 1977 Treaty.⁸⁷ Fearing that continued decisions such as these would turn the United States into a haven for terrorists, the Reagan Administration proposed a new treaty that would have eliminated judicial application of the political offense

⁷⁹ See *In re Smyth*, 61 F.3d at 714.

⁸⁰ See *In re Extradition of McMullen*, Mag. No. 3–70–1099 M.G. (N.D. Cal. May 11, 1979), reprinted in 132 CONG. REC. 16,585–86 (1986).

⁸¹ *Id.*

⁸² See *id.* at 16,586.

⁸³ See *In re Requested Extradition of Mackin*, 668 F.2d 122, 124–25 (2d Cir. 1981).

⁸⁴ *Id.* at 125.

⁸⁵ See *In re Requested Extradition of Doherty*, 599 F. Supp. 270, 277 (S.D.N.Y. 1984).

⁸⁶ *Id.* at 276.

⁸⁷ See *In re Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995).

exception.⁸⁸ The Senate Foreign Relations Committee, however, sought to forge a compromise between the general distaste for use of the political offense exception as a shield for terrorists, and the tradition in the United States of providing refuge for political dissidents.⁸⁹ In 1985 this compromise became manifested in the Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Signed at London on 8 June 1972 (Supplementary Treaty).⁹⁰

C. *The Supplementary Treaty*

The Supplementary Treaty limits the impact of Article V of the 1977 Treaty by creating new standards for application of the political offense exception and by restricting the definition of what constitutes a political offense.⁹¹ Article 1 of the Supplementary Treaty lists certain offenses that are deemed not political in nature, notably "murder, voluntary manslaughter, and assault causing grievous bodily harm; kidnapping, abduction, or serious unlawful detention, including taking a hostage; an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person . . ."⁹² Such broad restrictions on what constitutes a political offense dramatically curtail use of Article V of the 1977 Treaty as a defense to extradition.⁹³ Article 1 of the Supplementary Treaty reverses the *McMullen*, *Mackin*, and *Doherty* trend of denying extradition for IRA and PIRA terrorists who commit heinous crimes and flee to the United States.⁹⁴ Such a reversal was one of the primary goals of the Supplementary Treaty.⁹⁵

The restrictions of Article 1, however, are counterbalanced by the terms of Article 3(a), which provide two scenarios under which the political offense exception *will* be allowed as a defense to extradition.⁹⁶ The first clause of Article 3(a), known as the Aquino clause,⁹⁷ states:

⁸⁸ *See id.*

⁸⁹ *See* 132 CONG. REC. 16,586 (1986) (comments of Sen. Lugar).

⁹⁰ Supplementary Treaty, *supra* note 2.

⁹¹ *See id.* arts. 1, 3.

⁹² *Id.* arts. 1(b),(c),(d).

⁹³ *See id.* art. 1; 1977 Treaty, *supra* note 2, art. V.

⁹⁴ *See supra* notes 79–86 and accompanying text (discussing these cases).

⁹⁵ *See* 132 CONG. REC. 16,586 (1986) (comments of Sen. Lugar).

⁹⁶ *See* Supplementary Treaty, *supra* note 2, art. 3(a).

⁹⁷ *See* Leslie A. Firtell, Note, *The Evidentiary Burden in Establishing an Article 3(a) Defense to Extradition in Light of In re the Requested Extradition of James Joseph Smyth, a Case of*

Notwithstanding [sic] any other provision of this Supplementary Treaty, extraditon [sic] shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions⁹⁸

The Aquino clause seeks to ensure that a request for extradition is not based on “trumped-up” charges designed to punish the defendant for his or her identity or ideology.⁹⁹ The second (“future treatment”)¹⁰⁰ clause of Article 3(a) prohibits extradition if the person sought establishes that “he would, if surrendered, be prejudiced at his trail [sic] or punished, detained, or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.”¹⁰¹

D. *The Scope of Judicial Inquiry Under Article 3(a)*

Under traditional U.S. extradition law, the courts maintain a general policy of “noninquiry.”¹⁰² Under that policy, the extraditing court will not inquire into the judicial system of the requesting country nor the treatment that will await the fugitive there.¹⁰³ Such matters are considered best left to the judgment of the State Department, reflecting the view that the courts generally lack both the expertise and the proper diplomatic posture to evaluate a foreign nation’s legal system.¹⁰⁴

Article 3(a) defies the traditional rule of noninquiry, authorizing the courts to investigate the foreign judicial system to ascertain whether the extraditee might be denied a fair trial or otherwise be prejudiced under that system.¹⁰⁵ Accordingly, the Supplementary Treaty engendered a debate over the proper scope of judicial inquiry

First Impression, 4 CARDOZO J. INT’L & COMP. L. 73, 77 n.25 (1996). This clause was devised in response to the Philippine Government’s plan to file false charges against Nimoy Aquino to secure his extradition from the United States. *See id.*

⁹⁸ Supplementary Treaty, *supra* note 2, art. 3(a).

⁹⁹ *See* Senate Report, *supra* note 2, at 4.

¹⁰⁰ *In re Requested Extradition of Artt, Brennan, Kirby*, 158 F.3d 462, 473 (9th Cir. 1998), *reh’g granted*, 183 F.3d 944 (9th Cir. 1999).

¹⁰¹ Supplementary Treaty, *supra* note 2, art. 3(a).

¹⁰² *See In re Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995).

¹⁰³ *See id.*

¹⁰⁴ *See id.*; Judith Hippler Bello & Valerie Epps, *Rule of Expanded Political Offense-Type Exception*, 90 AM. J. INT’L L. 296, 297 (1996).

¹⁰⁵ *See* Supplementary Treaty, *supra* note 2, art. 3(a).

when the extraditee claims an Article 3(a) defense.¹⁰⁶ During congressional debate on the Supplementary Treaty, Senator Thomas Eagleton offered the view that the scope of inquiry should be narrow, limited only to analysis of specific factors that might deny the extraditee a fair trial in the foreign judicial system.¹⁰⁷ In the case of IRA or PIRA fugitives from Northern Ireland, Senator Eagleton would have had the court inquire only as to specific aspects of the Diplock Court system that might deny the defendant a fair trial, and not into the "abstract fairness" of the system of justice as a whole.¹⁰⁸ A much broader view was espoused by Senator John Kerry, who felt that Article 3(a) authorizes an expansive inquiry into whether the entire foreign system of justice is inherently prejudiced against the defendant's identity or ideology.¹⁰⁹ In the case of an IRA or PIRA fugitive, the inquiry would presumably involve questions of general bias against Catholics and/or republicans in the Northern Ireland justice system.¹¹⁰

III. JUDICIAL INTERPRETATION OF ARTICLE 3(A)

A. In re Howard

There have been only three instances in which fugitives have utilized an Article 3(a) defense before U.S. courts.¹¹¹ The first such instance was *In re Howard*, a case in which the United Kingdom sought the extradition of an American black male to face charges of brutally murdering a young white female in England.¹¹² Howard did not contest the existence of probable cause to believe he was the murderer, but instead argued that he would not get a fair trial in the United Kingdom owing to his race and nationality, and therefore he should be shielded from extradition under Article 3(a).¹¹³ To support his defense, Howard presented evidence which tended to demonstrate that a British jury would likely be prejudiced against a black man accused

¹⁰⁶ See Kiely, *supra* note 65, at 612-13.

¹⁰⁷ See 132 CONG. REC. 16,607 (1986) (remarks of Sen. Eagleton).

¹⁰⁸ See *id.*

¹⁰⁹ See 132 CONG. REC. 16,800 (1986) (remarks of Sen. Kerry).

¹¹⁰ See *id.*

¹¹¹ See *In re Requested Extradition of Artt, Brennan, Kirby*, 158 F.3d 462 (9th Cir. 1998), *reh'g granted*, 183 F.3d 944 (9th Cir. 1999); *In re Requested Extradition of Smyth*, 61 F.3d 711 (9th Cir. 1995); *In re Extradition of Howard*, 996 F.2d 1320 (1st Cir. 1993).

¹¹² See *In re Howard*, 996 F.2d at 1323.

¹¹³ See *id.* at 1324.

of murdering a white woman.¹¹⁴ He also pointed out that under the English legal system, there is no *voir dire* which might ferret out partial jurors.¹¹⁵ Despite these arguments, the magistrate judge ruled that Howard had not made a valid Article 3(a) defense, and the district court affirmed.¹¹⁶

The First Circuit reviewed and affirmed the district court's decision.¹¹⁷ In its analysis of the Article 3(a) defense, the court urged that the scope of inquiry be limited to "specific problems [of potential prejudice] encountered by specific respondents, as opposed to general grievances concerning systemic weaknesses inherent in every case. Otherwise, the extradition treaty actually becomes an impediment to extradition"¹¹⁸ The court went on to conclude that Howard had not established by a preponderance of the evidence that he would be treated differently by the English justice system because of his race, religion, nationality, or political opinions.¹¹⁹ The court also noted that when the Senate inserted Article 3(a) into the Supplementary Treaty, it was more concerned with potential unfairness in the Diplock system in Northern Ireland than with the legal system of Britain generally.¹²⁰

B. In re Smyth

The Diplock system itself came under scrutiny in the second case involving an Article 3(a) defense, *In re Smyth*.¹²¹ Defendant Smyth, a republican and reputed IRA member,¹²² was convicted in Northern Ireland of the 1978 attempted murder of a prison officer.¹²³ He was sentenced to twenty years' incarceration in the Maze Prison,¹²⁴ but escaped along with thirty-eight other republican prisoners during a

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *See In re Howard*, 996 F.2d at 1333.

¹¹⁸ *Id.* at 1330.

¹¹⁹ *See id.* at 1332.

¹²⁰ *See id.* at 1331.

¹²¹ *See In re Requested Extradition of Smyth*, 61 F.3d 711, 713-14 (9th Cir. 1995).

¹²² *See id.* at 713.

¹²³ *See id.* at 712.

¹²⁴ Conditions in Belfast's Maze Prison were "terrible" at this time, and prisoners were routinely treated in ways that would be unacceptable in a U.S. prison. *See In re Requested Extradition of Artt, Brennan, Kirby*, 972 F. Supp. 1253, 1270 (N.D. Cal. 1997), *rev'd* 158 F.3d 462 (9th Cir. 1998). The Maze Prison was the site of many protests and hunger strikes by prisoners. *See id.*

1983 prison break.¹²⁵ Smyth fled to the United States and lived in the San Francisco Bay area until 1992, when he was apprehended by United States officials.¹²⁶ The United Kingdom subsequently sought to extradite Smyth to serve out the remainder of his sentence.¹²⁷

The district court made extensive findings of fact, delving into the current violent political situation in Northern Ireland, and examining the treatment that both republicans and loyalists receive within the Diplock Court system and in the general populace.¹²⁸ From this investigation, the court concluded that as a convicted republican terrorist, Smyth would surely be subject to prejudicial treatment both in prison and upon eventual release back into society, should he be extradited.¹²⁹ The court held that the “[a]rrests, detentions and interrogations likely to occur because of Smyth’s status as a Catholic Irish national, a republican, and a Sinn Fein member—rather than because he is suspected of committing a crime—are detentions within the meaning of [the second clause of] Article 3(a).”¹³⁰ Relying on this broad inquiry into injustice in Northern Ireland, the district court accepted Smyth’s Article 3(a) defense, and denied the United Kingdom’s extradition request.¹³¹

The Ninth Circuit reversed, holding that the lower court erred when it relied upon evidence of general discrimination against Catholics and republicans.¹³² The court stressed that “Article 3(a) does not permit denial of extradition on the basis of an inquiry into the general political conditions extant in Northern Ireland.”¹³³ Instead, in order to mount a successful Article 3(a) defense, Smyth would have had to demonstrate that upon his return to Northern Ireland, the Diplock system would exact additional punishment beyond the remaining term of imprisonment, and that such additional punishment would be inflicted because of Smyth’s political beliefs, not because of his 1978 crime.¹³⁴ The court stated that because of the narrow scope of inquiry permitted by Article 3(a), extraditees indeed have a

¹²⁵ See *In re Smyth*, 61 F.3d at 713.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1139–48 (N.D. Cal. 1994), *rev’d* 61 F.3d 711 (9th Cir. 1995).

¹²⁹ See *id.* at 1155.

¹³⁰ *Id.*

¹³¹ See *id.*

¹³² See *In re Smyth*, 61 F.3d at 720.

¹³³ *Id.*

¹³⁴ See *id.*

“difficult burden,” one which Smyth did not adequately shoulder.¹³⁵ Smyth did not demonstrate to the court’s satisfaction that upon extradition, he would be punished by the Diplock system of justice—either inside or outside prison walls—on account of his religious or political beliefs.¹³⁶

C. *In re Artt, Brennan, Kirby*

The most recent judicial consideration of an Article 3(a) defense occurred in *In re Artt, Brennan, Kirby*.¹³⁷ The three defendants in that case were Catholics from Northern Ireland, convicted of criminal offenses by the Diplock Court system.¹³⁸ Brennan was sentenced to sixteen years’ imprisonment in 1977 for possession of explosives with intent to endanger life or injure property.¹³⁹ Kirby was given a life sentence in 1978 for felony murder, explosive and gun possession, assault, and false imprisonment.¹⁴⁰ Artt was convicted in 1983 of murdering a prison official, and was sentenced to life plus fifteen years’ imprisonment.¹⁴¹ All three escaped during the 1983 break out of the Maze Prison¹⁴² and fled to California, where they lived incognito until their capture by United States officials in 1992–1994.¹⁴³

During the extradition trial in the district court, Brennan first attempted to have his case excused as a political offense under Article V of the 1977 Treaty.¹⁴⁴ He claimed that the mere *possession* of explosives with intent to injure did not fall within the scope of the Supplementary Treaty.¹⁴⁵ The district court, however, rejected this contention,¹⁴⁶ and consequently all three defendants asserted Article 3(a)

¹³⁵ *See id.*

¹³⁶ *See id.* at 722.

¹³⁷ *In re Requested Extradition of Artt, Brennan, Kirby*, 158 F.3d 462 (9th Cir. 1998), *reh’g granted*, 183 F.3d 944 (9th Cir. 1999).

¹³⁸ *See id.* at 464.

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See In re Requested Extradition of Artt, Brennan, Kirby*, 972 F. Supp. 1253, 1259 (N.D. Cal. 1997), *rev’d* 158 F.3d 462 (9th Cir. 1998); *In re Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995).

¹⁴³ *See In re Artt, Brennan, Kirby*, 158 F.3d at 464.

¹⁴⁴ *See In re Artt, Brennan, Kirby*, 972 F. Supp. at 1260.

¹⁴⁵ *See* Supplementary Treaty, *supra* note 2, art. 1(d) (proscribing “an offense involving the use of a bomb . . .”) (emphasis added); *In re Artt, Brennan, Kirby*, 972 F. Supp. at 1260.

¹⁴⁶ *See In re Artt, Brennan, Kirby*, 972 F. Supp. at 1262. The judge held that “when one is carrying a large bomb, gasoline and detonating paraphernalia to place them in a downtown city area on a business day, and an arrest is the only thing that stops an explosion from occurring, that is an act ‘involving’ ‘the use of a bomb’ . . .” *Id.*

defenses—namely, that their convictions were “trumped-up” because of bias in the Diplock system, or that they would receive prejudicial treatment by that system if returned to Northern Ireland.¹⁴⁷ In considering the Article 3(a) claims, the judge looked solely at “the facts of each respondent’s conviction” and future treatment, and refused to make a “generalized inquiry into the Diplock court system.”¹⁴⁸ Using this narrow scope of inquiry, the district court concluded that none of the defendants demonstrated prejudice that had tainted their trials in the past, or that would unduly punish them in the future if returned to Northern Ireland.¹⁴⁹

In October of 1998, the Ninth Circuit reversed the lower court with respect to all three defendants, with one judge dissenting.¹⁵⁰ The court first held that Brennan’s crime of possession of explosives was indeed outside the scope of the Supplementary Treaty.¹⁵¹ The circuit court consequently remanded Brennan’s case for determination of whether his offense was political in nature and thus exempt from extradition under Article V of the 1977 Treaty.¹⁵² With respect to Artt and Kirby, the circuit court held that the lower court erred when it used a narrow inquiry to evaluate the defendants’ Article 3(a) claims of trumped-up convictions.¹⁵³ Accordingly, the circuit court remanded the cases of Artt and Kirby for reconsideration as well.¹⁵⁴

IV. ANALYSIS OF THE NINTH CIRCUIT’S REASONING IN *IN RE ARTT, BRENNAN, KIRBY*

The Ninth Circuit’s decision regarding Artt and Kirby is a well-reasoned and welcome step in the evolution of Article 3(a) doctrine.¹⁵⁵ In considering Artt and Kirby’s Article 3(a) defenses, the

¹⁴⁷ See *id.*

¹⁴⁸ *Id.* at 1260.

¹⁴⁹ See *id.* at 1274–75. “Respondents were convicted because they committed serious crimes, not because they are Catholics or Nationalists or Republicans And if returned to Northern Ireland, respondents’ further punishment will not be because of their beliefs, but because of the crimes which they committed.” *Id.* at 1275.

¹⁵⁰ See *In re Artt, Brennan, Kirby*, 158 F.3d at 475–76. Note: Since the publication of this decision, the Ninth Circuit has withdrawn its opinion pending a rehearing to consider some of the very issues discussed in Part IV of this Note. See *In re Artt, Brennan, Kirby*, 183 F.3d at 944–45.

¹⁵¹ See *In re Artt, Brennan, Kirby*, 158 F.3d at 472.

¹⁵² See *id.*

¹⁵³ See *id.* at 474.

¹⁵⁴ See *id.* at 475–76.

¹⁵⁵ As the court’s decision regarding Brennan involved simple treaty interpretation, discussion of that aspect of the case is beyond the scope of this Note.

court looked separately at claims made pursuant to the Aquino clause and those made pursuant to the future treatment clause.¹⁵⁶ This bifurcated analysis of Article 3(a) enabled the court to offer a more refined vision of the proper extent of judicial inquiry into Northern Ireland's justice system.¹⁵⁷

The court first addressed Artt and Kirby's claims that they would suffer discriminatory punishment in the future if returned to prison in Northern Ireland.¹⁵⁸ Confirming its earlier ruling in *Smyth*, the court utilized a narrow scope of inquiry into claims under the future treatment clause.¹⁵⁹ The court looked specifically at the treatment that Artt and Kirby were likely to receive both in prison and once released into society, and upheld the lower court's finding that such treatment would not entail discriminatory punishment.¹⁶⁰

The court arrived at a wholly different conclusion with respect to Artt and Kirby's Aquino clause defense.¹⁶¹ Both defendants claimed that their convictions in Northern Ireland were based on false confessions obtained by coercion, and that they never would have been convicted were it not for inherent anti-Catholic and anti-republican bias in the Diplock justice system.¹⁶² They urged that the United Kingdom's request for extradition was therefore made in order to punish them on religious and political grounds.¹⁶³ The court ruled that such allegations demand a broader scope of inquiry into Northern Ireland's system of justice.¹⁶⁴ The court was particularly concerned with the "opaque procedures" employed by the Diplock Court system and the consequent difficulty of proving bias by looking only at the defendants' courtroom experiences.¹⁶⁵ It stated, "The existence of bias is not always readily apparent from an individualized inquiry, particularly where, as in Northern Ireland, procedural safeguards have been eliminated. After all, a trial judge or detective is unlikely to memorial-

¹⁵⁶ See *In re Requested Extradition of Artt, Brennan, Kirby*, 158 F.3d 462, 472-75 (9th Cir. 1998), *reh'g granted*, 183 F.3d 944 (9th Cir. 1999).

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at 473.

¹⁵⁹ See *id.* at 473-74.

¹⁶⁰ See *id.* In arriving at this conclusion, the court noted that James Smyth himself had not suffered any such discriminatory punishment since being extradited and returned to the Maze Prison. See *In re Artt, Brennan, Kirby*, 158 F.3d at 473.

¹⁶¹ See *id.* at 474-76.

¹⁶² See *id.* at 474.

¹⁶³ See *id.*

¹⁶⁴ See *id.* at 474-75.

¹⁶⁵ See *In re Artt, Brennan, Kirby*, 158 F.3d at 474-75.

ize the fact that his or her decisions were motivated by political or religious bias."¹⁶⁶

While advocating a radical departure from the traditional rule of noninquiry, the court nonetheless was cautious about when broad judicial inquiries into systemic bias should take place.¹⁶⁷ It fashioned a rule whereby "if a potential extraditee establishes *prima facie* that significant procedural abuses occurred before or during trial, he or she may present evidence of systemic bias within Northern Ireland's justice system during the relevant time period."¹⁶⁸ Accordingly, the cases of Artt and Kirby were remanded to the lower court with instructions that the defendants should be given the opportunity to make a *prima facie* showing of procedural abuse, and if successful, to present evidence of generalized political or religious bias in the Northern Ireland justice system.¹⁶⁹

The traditional rule of noninquiry has been a major obstacle to the pursuit of justice in extradition proceedings, and the Ninth Circuit's qualified decision to abandon that rule is a step in the right direction.¹⁷⁰ As it is the function of the judiciary to certify or deny individuals for extradition,¹⁷¹ judges must be permitted to look at the "big picture" when considering a fugitive's Article 3(a) defenses.¹⁷² Understandably, some may fear that allowing judges broad powers of inquiry into a foreign justice system could weaken judicial resolve to extradite terrorists. This result is unlikely, because most judges will surely follow the admonition of the Senate Committee on Foreign Relations which drafted Article 3(a): "It would be a perversion of the committee's intent were [A]rticle 3(a) used to impede the extradition of those sought for acts of terrorism."¹⁷³ Furthermore, the Ninth Circuit did not universally broaden the role of judicial inquiry; it did so only for instances where the defendant claims to have been wrongfully convicted.¹⁷⁴

In ratifying the Supplementary Treaty, the Senate both expressly and implicitly manifested its intent that the judiciary should play a

¹⁶⁶ *Id.* at 474.

¹⁶⁷ *See id.* at 475.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at 475-76.

¹⁷⁰ *See In re Artt, Brennan, Kirby*, 158 F.3d at 475.

¹⁷¹ *See* 18 U.S.C. § 3184 (1994).

¹⁷² *See* Supplementary Treaty, *supra* note 2, art. 3(a).

¹⁷³ Senate Report, *supra* note 2, at 4.

¹⁷⁴ *See In re Artt, Brennan, Kirby*, 158 F.3d at 475.

greater role in extradition proceedings.¹⁷⁵ Noting the comments made by Senator Kerry,¹⁷⁶ the Ninth Circuit justified its decision to broaden judicial inquiry, pointing out that “[t]he drafters [of Article 3(a)] clearly envisioned *at least* a limited inquiry at the systemic level.”¹⁷⁷ In addition, the Senate surely anticipated Article 3(a) challenges, and thus its ratification of the Supplementary Treaty implicitly condoned greater judicial inquiry than had previously occurred.¹⁷⁸

Furthermore, given the nature of the judiciary in the United States, judges are perhaps better able than legislators or diplomats to render a neutral analysis of foreign judicial systems.¹⁷⁹ Members of the executive branch who set diplomatic policy are constrained by political considerations that have no place in the courtroom.¹⁸⁰ A federal judge sitting in an extradition proceeding, however, will hear evidence of systemic bias in an orderly courtroom setting, largely removed from the efforts of lobbyists or the influence of upcoming elections.¹⁸¹ Judges are therefore in an ideal position to analyze a fugitive’s claim that his or her conviction was based on prejudice rather than the fair application of law.¹⁸²

That being said, the dissent in *In re Artt, Brennan, Kirby* elucidates a problem that needs to be addressed.¹⁸³ The dissenting judge contends that the majority’s rule of law, in which evidence of systemic bias may be presented after a successful *prima facie* showing of procedural abuse, is too vague and will simply cause confusion.¹⁸⁴ According to the dissenting judge, the majority’s opinion provides no guidance for what constitutes a *prima facie* showing of procedural abuse, since the defendant cannot use generalized evidence of bias in the Diplock system to meet this threshold.¹⁸⁵ Though this is indeed a valid criticism, the concept of a *prima facie* threshold is nonetheless a good one, for otherwise every fugitive who contests extradition would stymie the

¹⁷⁵ See *infra* notes 176–78 and accompanying text.

¹⁷⁶ See *supra* note 109 and accompanying text.

¹⁷⁷ *In re Artt, Brennan, Kirby*, 158 F.3d at 475 (emphasis added).

¹⁷⁸ See Supplementary Treaty, *supra* note 2, art. 3(a).

¹⁷⁹ See 18 U.S.C. § 3184 (1994) (relegating extradition proceedings to the judiciary).

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *infra* notes 184–85 and accompanying text.

¹⁸⁴ See *In re Artt, Brennan, Kirby*, 158 F.3d at 476. (Goodwin, J., dissenting).

¹⁸⁵ See *id.*

court system with a prolonged investigation into the foreign legal system.¹⁸⁶

Rather than adopt a hard-and-fast *prima facie* evidentiary standard, courts should be afforded the discretion to determine for themselves if a fugitive's initial Article 3(a) claims warrant fuller investigation into the foreign judicial system.¹⁸⁷ A judge might take into consideration the written record of the fugitive's conviction, the circumstances surrounding his or her incarceration and flight to the United States, or simply the magnitude and nature of his or her allegations.¹⁸⁸ Judges must be given broad leeway to act as a prudential gatekeeper, allowing or disallowing a fugitive's claims of trumped-up, prejudicial conviction.¹⁸⁹

The United States was founded as a refuge for those who were persecuted on religious or political grounds. Today, the United States has a moral duty to uphold these ideals when considering the fate of potential extraditees.¹⁹⁰ Broad judicial inquiry under Article 3(a) is the best way to ensure that the United States does not extradite fugitives who have been wrongfully convicted because of bias in a foreign legal system.¹⁹¹

CONCLUSION

Though the Supplementary Treaty helped clarify the circumstances under which a fugitive may assert a defense to extradition, it did not fully elucidate the proper scope of judicial inquiry into a foreign country's legal system. The courts have been left to determine for themselves the appropriate extent of inquiry when faced with a fugitive who asserts an Article 3(a) defense to extradition. This job is further complicated when considering fugitives from Northern Ireland, a region torn by violent political and religious quarrels. In that province, where the Diplock system exists in order to combat terrorist activity, the potential for bias against suspected terrorists is very high. In considering the fate of alleged terrorists Artt, Brennan, and Kirby, the Ninth Circuit correctly called for broad judicial inquiry when considering a fugitive's claim of prejudicial, trumped-up conviction. Once an individually-tailored *prima facie* threshold for asserting such a de-

¹⁸⁶ See *id.* at 474.

¹⁸⁷ See Supplementary Treaty, *supra* note 2, art. 3(a).

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*; *In re Artt, Brennan, Kirby*, 158 F.3d at 475.

¹⁹⁰ See Supplementary Treaty, *supra* note 2, art. 3(a).

¹⁹¹ See *id.*

fense has been reached, the broad powers of inquiry called for in *Artt*, *Brennan*, *Kirby* should prevail as the rule of law in every circuit.

MATTHEW S. PODELL