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The Compromise Between Outrage and Compassion: Article 3(a) and *In re Requested Extradition of Smyth*

Daniel T. Kiely, Jr.*

Introduction

The 1986 ratification of a supplementary extradition treaty between the United States and the United Kingdom¹ marked a significant departure from established extradition law in the United States. The Supplementary Treaty was promulgated in response to four federal court decisions in the early 1980s refusing to extradite members of the Provisional Irish Republican Army (P.I.R.A.) to the United Kingdom.² In each case, the P.I.R.A. fugitives were deemed to be non-extraditable after the court concluded that the “political offense” exception barred their extradition.³ This exception is codified in all bilateral extradition treaties to which the United States is a party and grants U.S. courts the power to refuse a foreign nation’s request for extradition if the court finds that the offense committed by the potential extraditee was political in nature.⁴ The 1985 Supplementary Treaty between the United States and Great Britain significantly narrowed the political offense exception by explicitly excluding most violent crimes from

* J.D., Cornell Law School, 1997; B.A., College of the Holy Cross, 1994. This Note is dedicated to my parents, Daniel and Ellen Kiely, and to the memory of my uncle, Tim Kiely.

1. 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 [hereinafter Supplementary Treaty]. The text of this treaty can be found at S. EXEC. REP. No. 17, 99th Cong., 2d Sess. 15-17 (1986).

2. See *In re Mackin*, 668 F.2d 122, 125 (2d Cir. 1981); *In re Doherty*, 599 F. Supp. 270, 277 (S.D. N.Y. 1984), *aff’d*, 943 F.2d 204 (2d Cir. 1991), *rev’d*, 502 U.S. 314 (1992); *In re McMullen*, Mag. No. 3-78-1099 MG, slip op. (N.D. Cal. May 11, 1979); *Quinn v. Robinson*, No. C-82-6688 RPA, slip op. (N.D. Cal. Oct. 3, 1983), *rev’d*, 783 F.2d 776, 793 (9th Cir. 1986).

3. Extradition Treaty Between the Government of the United States of America and the Government of Great Britain and Northern Ireland, Oct. 21, 1976, art. V(1)(c)(i), U.S.-U.K., 28 U.S.T. 227 [hereinafter Extradition Treaty]. This provision of the treaty states that extradition “shall not be granted” in cases where the offense “is regarded by the requested party as one of a political character.”

4. See John Patrick Groarke, Comment, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515, 1519 (1988).

the definition of "political crime."⁵

Although the Supplementary Treaty effectively denies P.I.R.A. fugitives a defense predicated upon the political offense exception, it does provide for a new, more narrow, defense to extradition. This new defense is codified in article 3(a) of the Supplementary Treaty.⁶ Article 3(a) provides potential extraditees with a defense to extradition based upon racial, religious, political, or ethnic discrimination. Under article 3(a), a U.S. court may deny extradition in two situations: (1) if the request for extradition is motivated by a subjective desire to punish the person sought on account of his or her race, religion, nationality, or political opinions; or (2) in situations where the person sought would in fact be prejudiced at his or her trial, or prejudiced after his or her trial on account of the forbidden factors.⁷

Until 1994, no P.I.R.A. fugitive had asserted an article 3(a) defense to extradition. In *In re Requested Extradition of Smyth*, the U.S. District Court for the Northern District of California held that James Smyth, a suspected P.I.R.A. fugitive who had escaped from prison in Northern Ireland after serving five years of a twenty-year sentence for attempted murder, asserted a meritorious article 3(a) defense to extradition.⁸ The court held that Smyth had established this claim by showing that he would be punished both because of his religion and because of his political opinions upon his

5. Article 1 of the Treaty states:

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

(a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;

(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;

(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;

(d) 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;

(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

Supplementary Treaty, *supra* note 1, at 15.

6. Article 3(a) provides:

Notwithstanding any other provision of this Supplementary Treaty, extradition 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 opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his liberty by reason of his race, religion, nationality or political opinions.

Supplementary Treaty, *supra* note 1, at 16.

7. See *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1150 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996). The Smyth court noted that Article 3(a) granted two distinct powers: (1) the court may inquire into whether the requesting nation has "trumped up" charges against the fugitive; and (2) the court may inquire into whether the fugitive would be unfairly treated at his trial or punished, detained, or restricted in his liberty because of his race, religion, nationality, or political opinion. *Id.*

8. *Id.* at 1151.

return to prison in Northern Ireland and upon his subsequent release into the general population.⁹ Judge Barbara Caulfield arrived at this conclusion by relying upon presumptions awarded to James Smyth that were not rebutted by Great Britain and by using an analogous immigration provision called "withholding of deportation" to interpret article 3(a).¹⁰

The U.S. Court of Appeals for the Ninth Circuit reversed the Northern District's findings and ordered the Northern District to certify the extradition request.¹¹ In addition to holding that the presumptions awarded to James Smyth were inappropriate, the Ninth Circuit also rejected Judge Caulfield's use of the withholding of deportation statute and regulations.¹² The Supreme Court implicitly upheld the decision of the Ninth Circuit by refusing to hear Smyth's appeal.¹³

This Note explores the Smyth case in an effort to determine the proper scope of article 3(a) of the Supplementary Treaty. This Note does not seek to determine the relative merits of Mr. Smyth's article 3(a) claim. Rather, it critiques the Ninth Circuit's interpretation of that provision.

Part I discusses the historical roots of the Anglo-Irish relationship and the causes of the current conflict. Part I also discusses the judicial system that has been established in Northern Ireland in response to the political unrest there. Part II examines the 1986 Supplementary Treaty and its predecessor, the 1977 Treaty. Part III looks at the background of James Smyth and the circumstances surrounding his trial and appeals in U.S. federal courts. Finally, part IV analyzes the holdings of the federal courts that heard *Smyth* and offers suggestions regarding the future interpretation and application of article 3(a).

I. Background

A. History of the Conflict and the Beginning of British Rule

Irish historian Robert Kee once noted that when trouble began to escalate in Northern Ireland in the 1960s it took many people by surprise. Many people throughout the world thought that these problems signalled the beginning of unrest. However, these problems were not a beginning, but rather were "the latest events in an age old story which began long ago."¹⁴

To understand the violence that permeates Northern Ireland today it is necessary to understand the roots of the Anglo-Irish conflict. The Anglo-Irish saga dates back to the Norman Conquest of Ireland in 1170 when King Henry II succeeded in capturing Dublin and the surrounding area.¹⁵ For the next 800 years, London exerted great influence over the lives of the

9. *Id.*

10. *Id.* at 1152.

11. *In re Requested Extradition of Smyth*, 61 F.3d 711, 722 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2258 (1996).

12. *Id.* at 720.

13. *Smyth v. United States*, 116 S.Ct. 2258 (1996).

14. ROBERT KEE, *IRELAND: A HISTORY* 15 (1982).

15. See T.W. MOODY & F.X. MARTIN, *THE COURSE OF IRISH HISTORY* (1987) (offering a comprehensive history of Ireland from prehistoric times through 1982).

Irish people.¹⁶ The relationship that developed was not an amicable one, despite its longevity. The generations have been witness to countless Irishmen employing violence in vain attempts to recapture control of the island.¹⁷

B. Independence and Partition

The periodic insurrections which punctuated the English domination of Ireland were typically no more than sporadic expressions of Irish anger. These armed rebellions never posed a serious threat to British rule. However, these attempts were slightly more successful in the years following the Great Famine.¹⁸ In 1848, at the height of the famine's devastation, a small group of men attempted to incite an armed rebellion against British rule.¹⁹ Although the uprising amounted to little more than a glorified riot, the spirit of this revolt inspired others and led to the creation of the Fenian movement, a movement that eventually culminated in the establishment of the Irish Free State.

Despite increasing support among the population, the citizenry was not completely unified in its desire for independence from England. There were deep differences of opinion between the typically wealthy Protestant minority who supported the union with England and the typically poor Catholic majority who felt oppressed by British control.²⁰ The socio-economic division, more so than the religious division, was largely responsible for this difference of opinion. The wealthy upper-class enjoyed the stability of British control and liked to think of themselves as British citizens. Conversely, the peasants and lower class felt both socially and economically oppressed by the British government.²¹

The establishment of the Irish Republican Brotherhood, or Fenian organization, on St. Patrick's Day of 1858, represented the rising desire for independence.²² The Fenians, who drew their numbers primarily from working class Catholics, believed that armed confrontation was the only way in which Ireland could assert its independence from Britain.²³ The Fenians had a large base of support among Irish persons both in Ireland and overseas.²⁴ In addition to the Irish who survived the Great Famine, the Fenians enlisted the aid of Irish émigrés in the United States and elsewhere

16. See CONOR C. O'BRIEN, *THE SIEGE: THE SAGA OF ISRAEL AND ZIONISM* 329 (1986) (noting that medieval British rule wrought little oppression upon the Irish. It was not until the 16th century that the Irish were oppressed by the British).

17. See KEE, *supra* note 14; MOODY & MARTIN, *supra* note 15.

18. The Great Famine, 1845-49, was one of the most horrible experiences in the history of Ireland. During the 5 year potato blight almost 1 million people died from starvation and disease, and another 1.5 million were forced to emigrate. KEE, *supra* note 14, at 77-103.

19. *Id.* at 104-06.

20. See MOODY & MARTIN, *supra* note 15, at 276.

21. See KEE, *supra* note 14, at 137-51.

22. See F.S.L. LYONS, *IRELAND SINCE THE FAMINE* 114 (1971); JOSEPH MARONEY CURRAN, *THE BIRTH OF THE IRISH FREE STATE 1921-1923*, at 3-4 (1980); KEE, *supra* note 14, at 107.

23. See MOODY & MARTIN, *supra* note 15, at 278.

24. *Id.* at 279.

who had left during the famine. In 1867, the Fenians struck. Like the numerous uprisings that had occurred since 1170, this insurrection posed no serious threat to British control. Nevertheless, the 1867 uprising did have a lasting impact on the people of Ireland and the way in which they viewed the Anglo-Irish relationship. Although soundly defeated in 1867, the Fenians continued to work for independence. Their efforts were a substantial cause of the Anglo-Irish War which ultimately led to the creation of the Irish Free State.

In 1916, when England and the rest of the world were focused on mainland Europe and the devastation of World War I, the Fenians struck again.²⁵ On Easter morning, almost 1600 Irishmen attacked various British targets in Dublin, prompting a swift and severe reaction by the occupying British military.²⁶ The fighting continued for almost a week before the heavily outnumbered Fenian forces finally surrendered. Many historians believe that this rebellion would likely have warranted no more than a historical footnote if it were not for the British government's retaliation against the rebels.²⁷

The mounting desire for independence which followed the Easter Rebellion eventually manifested itself in the Anglo-Irish War of 1919-1921. In December 1920, in response to the war, the British government formally and unilaterally partitioned Ireland. The British government, through the Government of Ireland Act ("GIA"), established two Irish parliaments. One parliament was established in the North to govern six of the nine counties in the province of Ulster. The other parliament was established to govern the remaining twenty-six counties in Ireland. The six northern counties, comprised primarily of Protestant loyalists, quickly established a parliament, but the southern counties continued to fight for their independence.²⁸

The guerrilla tactics of the rebel forces eventually drove the English to negotiate. In December of 1921 the British government invited the rebel leaders to London to negotiate a cease-fire. After extensive negotiations, the Irish representatives were given an ultimatum: either sign an agreement

25. See F.S.L. LYONS, *CULTURE AND ANARCHY IN IRELAND 1890-1939*, at 85-86 (1979) (noting that the principal leaders of the Easter Rebellion saw themselves as heirs to the Fenian tradition); CURRAN, *supra* note 22, at 10-13.

26. See CURRAN, *supra* note 22, at 10-13 (providing an excellent overview of the Easter Rebellion).

27. See J.J. LEE, *IRELAND, 1912-1985: POLITICS AND SOCIETY* 28-38 (1989). Lee notes that it is widely believed that the majority of the Irish population were, at first, opposed to the Easter Rebellion but that after the mass executions of the unsuccessful rebels, public opinion turned against the British. According to Lee, this popular understanding of the Easter Rebellion has always been accepted as true but rarely subjected to academic scrutiny. Lee notes the fact that many rumors circulated that may account for the original antipathy toward the rebellion. Many people believed that the rebels were part of a communist plot to invade Ireland or a precursor to a German invasion. He asserts that public opinion may have been shaped more by these widely disseminated rumors rather than any real antipathy towards the attempt to break free from English control. *Id.*

28. *Id.* at 43.

or be attacked by the full force of the British military in three days.²⁹ A treaty, commonly known as "The Treaty," was subsequently signed in early December of 1921. It granted internal sovereignty to the twenty-six southern counties in return for their acceptance of partition of the six northern counties. As a result of The Treaty, the Irish Free State was created. The nation, comprised of the twenty-six counties, was and remains overwhelmingly Catholic. The six northern counties, composed primarily of Protestants, opted out of the Irish Free State. They chose to remain a part of the United Kingdom and were allowed to maintain their own local government.³⁰

The Treaty proved unacceptable to many Irish rebels who insisted on a united republic. This group, known as "republicans," rejected the treaty and those fellow Irishmen who had embraced it. Ultimately, this led to the civil war of 1922-1923, in which the republicans were defeated.³¹ In 1925, the Irish Free State, Northern Ireland, and England signed a boundary agreement that settled a dispute over the precise location of the boundary between Northern Ireland and the Irish Free State, solidifying the partition of north and south that is still in place today.³²

C. Reawakening of the Troubles in the North

The partition of the island did little to quell Irish unrest and the continuing calls for unification and an end to British domination. From the very outset, violence erupted in Northern Ireland between the Protestant majority and the Catholic minority.³³ Commentators have noted that the democratic system established in Northern Ireland was patterned on the Westminster style of democracy, but was never practiced in the same manner.³⁴ In 1922, the British attempted to calm the situation when they passed the Special Powers Act.³⁵ The Act imposed severe restrictions upon the personal liberties of citizens living in Northern Ireland. The Act did not on its face single out Catholics for persecution, but it was applied in a discriminatory manner.³⁶

29. *Id.* at 50.

30. See MOODY & MARTIN, *supra* note 15, at 311-12.

31. See KEE, *supra* note 14, at 191.

32. See MOODY & MARTIN, *supra* note 15, at 315; KEE, *supra* note 14, at 202.

33. See KEE, *supra* note 14, at 226 (the riots of 1922 in Belfast resulted in 232 deaths, mostly of Catholics, and encouraged thousands more to leave their homes and migrate to the Republic of Ireland).

34. See DERMOT P.J. WALSH, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND 8 (1983) (noting that the polarization between the Catholics and Protestants ensured that the Protestants would use their majority position to reinforce their power in Northern Ireland).

35. See *id.* at 23-24 (noting that the Special Powers Act invested the security forces with unprecedented powers ostensibly for the purpose of maintaining order); LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND LEGAL DEFENSE IN NORTHERN IRELAND: THE INTIMIDATION OF DEFENSE LAWYERS 17-18 (1993) [hereinafter LAWYERS COMMITTEE REPORT].

36. See WALSH, *supra* note 34, at 23-24.

Over the next forty years, polarization along religious lines ensured that Northern Ireland remained in turmoil. The situation was exacerbated when the Catholic minority in the North complained bitterly about what they perceived as discrimination in employment, housing, and voting.³⁷ Their protests led to the creation in 1967 of the Northern Ireland Civil Rights Association (NICRA), an organization patterned after the organizations that formed during the U.S. civil rights movement.³⁸ NICRA organized peaceful marches and demonstrations that were designed mainly to protest the discriminatory treatment of Catholics in the North, not to protest the existence of Northern Ireland. Extremist Protestants and the police responded to NICRA's demonstrations with force, thus propelling the North into greater disorder. In response, the North requested the presence of British troops in an attempt to restore some semblance of order.³⁹ At first, many Catholics regarded the arrival of troops as a victory against Protestant aggression and as a source of protection from the local police.⁴⁰ This belief quickly dissipated as Catholic protesters and British troops clashed in the major cities of Belfast and Derry.⁴¹ As a result of these clashes, the slow pace of reform, and the ineffectiveness of NICRA, the militant Irish Republican Army reemerged.⁴²

Since the initial partition of Ireland, the I.R.A. had sought the unification of Ireland through violent means. In 1962, however, it abandoned violence as a means of achieving its goals, and shifted its focus to political and social activities.⁴³ However, the escalating violence in Northern Ireland during the 1960s caused a split in the traditional I.R.A. Many members sought a return to their violent roots, while other members championed the continued use of social and political outreach. In 1970, the I.R.A. split into two factions: the "official" I.R.A., which continued to advocate social and political solutions to the turmoil; and the "provisional" I.R.A. (P.I.R.A.) which supported the use of force as a means of achieving reunification.⁴⁴ The P.I.R.A. immediately reverted to the violent tactics that the official I.R.A. had disavowed in 1962, targeting soldiers, police officers, and prominent Protestant extremists in Northern Ireland for attack. Later, in an effort to exert greater pressure on England, the P.I.R.A. began to conduct many of its violent activities within England. The emergence of the P.I.R.A. severely limited the prospects for a peaceful resolution to the problems of discrimination and oppression in Northern Ireland. In 1972, the P.I.R.A. increased the number of attacks on British targets. The British military responded by increasing its own activities. On January 31,

37. See LAWYERS COMMITTEE REPORT, *supra* note 35, at 14-15; WALSH, *supra* note 34, at 8-9.

38. See KEE, *supra* note 14, at 235; MOODY & MARTIN, *supra* note 15, at 344.

39. See MOODY & MARTIN, *supra* note 15, at 344.

40. See *id.*

41. See *id.* at 346.

42. See M.L.R. SMITH, FIGHTING FOR IRELAND? THE MILITARY STRATEGY OF THE IRISH REPUBLICAN MOVEMENT 72-87 (1995).

43. See *id.* at 87; LEE, *supra* note 27, at 432-33.

44. See SMITH, *supra* note 42, at 91.

in one of the most horrible confrontations of the conflict, commonly known as "Bloody Sunday," a British parachute regiment shot and killed thirteen unarmed demonstrators taking part in a banned, but peaceful, civil rights march in Londonderry.⁴⁵ The P.I.R.A. responded with equally appalling attacks.⁴⁶ In an attempt to quell the rapidly escalating violence, the British government suspended Northern Ireland's parliament and instituted direct rule from London.⁴⁷

In 1973, the Irish and British governments made a final attempt to defuse the situation. That final attempt was embodied in the Sunningdale Agreement of December 9, 1973. The Agreement sought a diplomatic and political resolution of the troubles in the North, calling for greater Catholic participation in the governance of the North. In it, the Irish government recognized, for the first time, Northern Ireland's status as part of the United Kingdom. In return, the British government promised to support reunification if a majority of Northern Ireland's population voted for reunification.⁴⁸ Catholics realized that increased political participation could inevitably eliminate the discrimination that had racked Northern Ireland since the partition. The Protestant community in Northern Ireland staunchly opposed the Sunningdale Agreement because it facilitated greater political and economic participation on the part of the Catholic minority, effectively diminishing their power in Northern Ireland.⁴⁹ In 1974, a general unionist strike, organized in opposition to the accord, effectively ended any chance that the Agreement would resolve Northern Ireland's long-standing political problems.

Since that strike, very little has changed in Northern Ireland. Violence continues to plague the region. Since British troops were first sent to Northern Ireland in 1969, the political violence has claimed the lives of over 3,000 people out of a population of approximately 1,500,000.⁵⁰ In addition, over 35,000 people, the majority of whom have been civilians, have been injured. Over the same time period, over 15,000 people have been charged with committing terrorist offenses.⁵¹ In a vain attempt to restore order, the British government has deployed thousands of troops. In 1994, the number of British troops serving in Northern Ireland exceeded 24,000.⁵²

45. See KEE, *supra* note 14, at 239; SMITH, *supra* note 42, at 89.

46. See SMITH, *supra* note 42, at 109-10. Among the responses was "Bloody Friday" when P.I.R.A. members planted twenty-two bombs in the center of Belfast. All twenty-two bombs exploded within an hour, leading to mass confusion, widespread terror, and nine deaths.

47. See Kee, *supra* note 14, at 239; MOODY & MARTIN, *supra* note 15, at 347.

48. See BRIGID HADFIELD, *THE CONSTITUTION OF NORTHERN IRELAND* 110-17 (1989).

49. See James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 *FORDHAM L. REV.* 317, 325-26 (1992).

50. *In Re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1140 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

51. *Id.*

52. *Id.* at 1141.

D. Northern Ireland Today

On December 15, 1993, British Prime Minister John Major and Irish Prime Minister Albert Reynolds unveiled the Downing Street Declaration, which excited both great hope and great apprehension about the possibility of a peaceful resolution to the problems in Northern Ireland.⁵³ The Declaration enunciated certain principles that were supposed to pave the way for peace talks and a possible amicable resolution to the violence.⁵⁴ Some commentators have asserted that the essence of the Declaration was a *quid pro quo*: if the P.I.R.A. renounces violence, then *Sinn Fein*, the political arm of the P.I.R.A., would be permitted to participate in negotiations concerning the future of Northern Ireland.⁵⁵ On August 31, 1994 the P.I.R.A. promised "a complete cessation of military operations."⁵⁶ This action was regarded as "the most hopeful step toward peace in Northern Ireland [in] . . . twenty-five years."⁵⁷

Despite this great advance towards peace, many in Northern Ireland were skeptical, and even fearful, that the violence that had raged for the past twenty-five years would not quickly abate.⁵⁸ Although the P.I.R.A. had committed itself to a cease-fire, the Protestant militant groups had not.⁵⁹ This was especially disconcerting to the Catholic population because Protestant paramilitary groups had, in recent years, become just as powerful, and just as vicious, as the P.I.R.A.⁶⁰ The early days of the cease-fire proved to be free from violence, and slowly some of the initial fears and skepticism began to subside.⁶¹ The prospects for peace increased when the Combined Loyalist Military Command, an organization that speaks on behalf of the Protestant paramilitary organizations, released a statement that suggested that they too were receptive to the idea of abandoning violence.⁶² The Protestant militants followed these peace overtures with their own cease-fire on October 14, 1994.⁶³ This was a momentous occasion in that it marked the first time "that the heavily armed paramilitaries on both sides of the reli-

53. See SMITH, *supra* note 42, at 206-11.

54. See *Main Points of Anglo-Irish Declaration on Northern Ireland*, AGENCE FRANCE PRESSE, Dec. 15, 1993, News.

55. See John Darnton, *Turning Point: The I.R.A. Cease-Fire*, N.Y. TIMES, Sept. 5, 1994, at A1.

56. *Cease-Fire In Northern Ireland: I.R.A.'s 'Cessation' of Fighting*, N.Y. TIMES, Sept. 1, 1994, at A12.

57. John Darnton, *End of 'the Troubles'?*, N.Y. TIMES, Sept. 1, 1994, at A1.

58. See William E. Schmidt, *Day 1 of I.R.A.'s Cease-Fire: Hopes Tinged by Skepticism*, N.Y. TIMES, Sept. 2, 1994, at A1.

59. See *id.*; Darnton, *supra* note 55.

60. See Schmidt, *supra* note 58, at A10 (noting that Protestant militias, like the Ulster Freedom Fighters and the Ulster Volunteers, "have become the equal of the I.R.A. in mayhem and murder.")

61. See William E. Schmidt, *In Belfast, Prosperity Eases Catholic Nationalism*, N.Y. TIMES, Sept. 6, 1994, at A3 (noting that the fact that the cease-fire seemed to hold led to "cautious hope" in some areas of Belfast).

62. See John Darnton, *Protestant Militants Weighing Response to I.R.A. Cease-Fire*, N.Y. TIMES, Sept. 9, 1994, at A2.

63. See John Darnton, *Militant Protestants In Truce, Lifting Peace Hopes In Ulster*, N.Y. TIMES, Oct. 14, 1994, at A1.

gious divide . . . [had stopped] fighting, not for short-term tactical reasons but to bring about negotiations and a democratic solution."⁶⁴

In the weeks following the cease-fire, there were more signs that negotiations and diplomacy would accomplish what twenty-five years of bombs and bullets had failed to achieve. English Prime Minister John Major accepted the P.I.R.A. truce as "genuine"⁶⁵ and as a result, opened an official dialogue with *Sinn Fein* leader Gerry Adams.⁶⁶ Although the British Government categorized this dialogue with *Sinn Fein* as "talks about talks," rather than as full negotiations, the fact that the British government and the political arm of the P.I.R.A. would, for the first time, openly discuss the prospects of peace was a tremendous advance towards a peaceful resolution of the troubles.⁶⁷ After opening the dialogue and acknowledging the legitimacy of the cease-fire, the British government announced that it would end daytime army patrols in Belfast, the capital of Northern Ireland.⁶⁸ The British government also made small reductions of troops stationed in Northern Ireland⁶⁹ and granted early release to several incarcerated P.I.R.A. members.⁷⁰

Despite these encouraging signs, the peace process moved forward very slowly and at times seemed to be on the verge of collapse. In July 1995, civil unrest reached its highest levels since the P.I.R.A. had declared a cease-fire ten months earlier.⁷¹ Violent protests, which lasted for two nights, erupted in Catholic areas of Belfast after the release of a British soldier who had been sentenced to life in prison for the 1990 murder of a seventeen year old Catholic girl.⁷² The riots, punctuated by vandalism, firebombing of cars, and "general disorder," led to thirty-two arrests but no serious injuries. Significantly, the P.I.R.A. did not abandon the cease-fire.⁷³ One week later, Protestant groups in Ulster rioted after the police refused to allow them to march through a Roman Catholic area to commemorate the Battle of the Boyne, the 1690 event that established Protestant domination of Northern Ireland.⁷⁴

The fear that the July riots might derail the peace process proved to be unfounded. However, the peace efforts had slowed considerably. The pri-

64. *Id.*

65. John Darnton, *Major Accepts I.R.A.'s Truce as Authentic*, N.Y. TIMES, Oct. 22, 1994, at A1.

66. See John Darnton, *Britain and the I.R.A. Group to Begin Talks in Northern Ireland*, N.Y. TIMES, Dec. 2, 1994, at A12.

67. *Id.*

68. See James F. Clarity, *Britain To End Daytime Patrols in Belfast*, N.Y. TIMES, Jan. 13, 1995, at A5.

69. See James F. Clarity, *Britain to Pull 400 More Troops Out of Ulster*, N.Y. TIMES, Apr. 13, 1995, at A5.

70. See Richard W. Stevenson, *Britain Offers to Cut Terms for 400 Irish Convicts*, N.Y. TIMES, Aug. 26, 1995, at A4.

71. See James F. Clarity, *Violence Erupts In Ulster Cities*, N.Y. TIMES, July 4, 1995, at A1.

72. *Id.*

73. *Id.*

74. See James F. Clarity, *Protestants Fight Police in Ulster*, N.Y. TIMES, July 11, 1995, at A11.

mary reason for this was the refusal of both sides to compromise on the question of whether disarmament of the P.I.R.A. should be a precursor to "all-party" talks.⁷⁵ The issue of "decommissioning" all of the P.I.R.A.'s weapons as a precondition to beginning negotiations ground the peace process to a halt. The British government insisted that the P.I.R.A. turn over all of its weapons before beginning negotiations.⁷⁶ *Sinn Fein* asserted that it was "backward thinking. . . to expect weapons to be surrendered or taken out of operation before—instead of after—some sort of overall accord."⁷⁷

This single issue threatened to destroy the P.I.R.A. cease-fire and return Northern Ireland to the state of war that it had known since 1970. U.S. President Clinton intervened in November of 1995 to revive the ailing peace process. His visit to Ireland, England, and Northern Ireland, the first U.S. Presidential visit to Northern Ireland, seemed to reinvigorate the peace process.⁷⁸ Furthermore, his trip to the area "concentrated the mind[s]" of the concerned parties and led to the formation of an international panel, led by former United States Senator George Mitchell, to fashion a compromise between *Sinn Fein* and the British government.⁷⁹ On January 23, 1996 the international panel recommended to Britain that it drop its demand that the P.I.R.A. disarm before *Sinn Fein* could participate in all-party peace talks.⁸⁰ John Major refused to accept the panel's recommendation.⁸¹ Instead, he proposed that Northern Ireland should call elections to elect members of an assembly that would serve as a "negotiating forum."⁸² After Major refused to drop his demand for decommissioning of weapons, it became apparent that P.I.R.A. resolve to maintain the eighteen-month cease-fire, which had been critical to the peace process, was waning.⁸³

At 7:01 P.M. on February 9, 1996, the P.I.R.A. abandoned the eighteen-month cease-fire by detonating a powerful bomb in the financial district of East London. The blast killed two people, injured 100 more, and caused more than \$100 million worth of damage.⁸⁴ Approximately one hour before the explosion, an Irish radio station received a statement announcing that "the complete cessation of military operations will end at 6:00 P.M." because "selfish party[,] political and sectional interests in the

75. See James F. Clarity, *Gerry Adams Discusses I.R.A. Arms*, N.Y. TIMES, Sept. 10, 1995, at A9.

76. See John Darnton, *Ulster Danger Point; Dublin Cancels Key Meeting with London Over British Demand that I.R.A. Disarm*, N.Y. TIMES, Sept. 11, 1995, at A6.

77. *Id.*

78. See R.W. Apple Jr., *On A Day of Peace in Belfast, Faiths Join to Cheer Clinton*, N.Y. TIMES, Dec. 1, 1995, at A1.

79. See *A Break in the Irish Impasse*, N.Y. TIMES, Nov. 30, 1995, at A28; James F. Clarity, *Northern Ireland Disarmament Panel Convenes*, N.Y. TIMES, Dec. 17, 1995, at A25.

80. See James F. Clarity, *International Panel Asks Britain to Ease Terms on I.R.A. at Talks*, N.Y. TIMES, Jan. 24, 1996, at A5.

81. See James F. Clarity, *British Make Offer to Sinn Fein, But It's Conditioned on Ulster Vote*, N.Y. TIMES, Jan. 25, 1996, at A3.

82. *Id.*

83. See Kevin Cullen, *Gun Issue Hinders Irish Peace Process*, BOSTON GLOBE, Feb. 5, 1996, at 9.

84. See Richard W. Stevenson, *Bomb Wounds 100 in London as I.R.A. Truce Is Said to End*, N.Y. TIMES, Feb. 10, 1996, at A1.

London Parliament have been placed before the rights of the people of Ireland."⁸⁵ In the days following the blast, it became clear that the P.I.R.A. was responsible for the bombing and that the attack represented a fundamental change in the P.I.R.A.'s policy.⁸⁶ On February 15, 1996, the P.I.R.A. placed another bomb in London.⁸⁷ Although the anti-terrorist unit of the London police force defused the bomb, commentators believe that its placement was a clear signal that the earlier explosion in East London was not intended as an isolated incident, but rather highlighted the fact that "the P.I.R.A. [was] prepared to return to its policy of sustained terrorist attacks in London."⁸⁸

Since February 1996, the P.I.R.A. has resumed its use of violence. With the return of P.I.R.A. violence, many in Northern Ireland have lost hope that a lasting resolution to the troubles will be found anytime soon.⁸⁹ In fact, the P.I.R.A.'s return to violence has led the British government to resume the old practice of having troops patrol the streets.⁹⁰ Furthermore, it seems only a matter of time before the Protestant paramilitaries put an end to their self-imposed cease-fire as well.⁹¹ When that happens, the peace talks, and the hopes of a lasting peace that they engendered, will be but a memory.

E. Justice in Northern Ireland

In 1973, when the British government instituted direct rule of Northern Ireland from London, the government feared that, by itself, such direct rule over Northern Ireland would be insufficient to restore order. In an attempt to limit the spread of terrorism, the British government enacted several laws to curtail the civil liberties of its citizens living in Northern Ireland. The Northern Ireland (Emergency Provisions) Act (EPA) was first enacted in 1973 and has been amended and reenacted several times since.⁹² The Prevention of Terrorism (Temporary Provisions) Act (PTA) was first enacted in 1974 and has also been amended and reenacted several times over the years.⁹³ The EPA applies only to Northern Ireland, while the PTA applies throughout the United Kingdom.⁹⁴

85. *Id.*

86. See Richard W. Stevenson, *I.R.A. Issues Claim of Responsibility for London Bomb*, N.Y. TIMES, Feb. 11, 1996, at A1.

87. See Sarah Lyall, *I.R.A. Bomb Destroyed in Central London*, N.Y. TIMES, Feb. 16, 1996, at A6.

88. *Id.*

89. See *Ulster's Battered Peace*, N.Y. TIMES, July 16, 1996, at A16.

90. See James F. Clarity, *Troops Patrol Belfast Again, Raising the Tension*, N.Y. TIMES, June 22, 1996, at A4.

91. See James F. Clarity, *Belfast Journal; "Like the Bad Old Days" As Fright Revisits Ulster*, N.Y. TIMES, Jan. 13, 1997, at A4.

92. Northern Ireland (Emergency Provisions) Act, 1991, ch. 24 [hereinafter EPA]. The first version of the EPA was enacted in 1973. Northern Ireland (Emergency Provisions) Act, 1973, ch. 53.

93. Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4.

94. See EPA, *supra* note 92.

1. *Restrictions on Personal Liberty*

The EPA and the PTA both permit significant restrictions and abridgments of personal liberty before and after an individual is or has been charged with a crime. In theory, the EPA and PTA, by their terms, apply to all citizens. However, some commentators have asserted that, in practice, the laws are used primarily to restrict the personal liberties of Catholic citizens only.⁹⁵ Under the provisions of the EPA, any constable or British soldier "may stop any person for so long as necessary" and demand that the individual answer "to the best of his knowledge and ability" any questions the officer asks.⁹⁶ The officer does not need reasonable suspicion of a crime to question the person. Any person who fails to stop and respond is guilty of a crime and faces imprisonment of up to six months and a fine of up to four hundred pounds. Additionally, the officer may shoot an individual who fails to stop at the command of the security forces.⁹⁷

Security personnel are also entitled, under the provisions of the EPA, to arrest, without a warrant, any person whom they suspect is committing, has committed or is about to commit a terrorist-style offense.⁹⁸ To facilitate the arrest, an officer is empowered to search, without a warrant, any premises in which he believes the suspect may be hiding.⁹⁹ Once arrested, the length of detention varies depending upon who arrested the suspect. Soldiers are only permitted to detain suspects for four hours, while constables have the authority to detain a suspect for up to forty-eight hours. This detention can be extended for an additional five days, if necessary, for a

95. See *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1142-43 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996) (noting the disparate treatment Catholics receive in Northern Ireland at the hands of the security forces. The court highlighted the fact that Catholics are arrested and killed by security personnel in staggeringly greater numbers).

96. EPA, *supra* note 92, § 23.

97. See Kelly D. Talcott, Note, *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, 486 (1987); R. J. Spjut, *The "Official" Use of Deadly Force by the Security Forces Against Suspected Terrorists: Some Lessons From Northern Ireland*, 1986 PUB. L. 38, 57-59.

98. EPA, *supra* note 92, § 18(1). As a point of reference, it might be useful to see how this compares to the rules in the United States governing arrests. In no way does this comparison imply that the U.S. system is the benchmark against which all other systems should be judged. Rather, the comparison highlights the fact that in some instances the American system of criminal procedure affords no more protection to individuals suspected of criminal behavior that does the system in Northern Ireland. In *United States v. Watson*, 423 U.S. 411 (1976), the Supreme Court held that arrest warrants are not constitutionally required. *Id.* at 423. The only situation where an arrest warrant may be constitutionally required is where the police wish to enter private premises to arrest a suspect. *Payton v. New York*, 445 U.S. 573 (1980) (holding that the Fourth Amendment prohibits the police from making a warrantless entry into a suspect's home for the purpose of making a routine arrest).

99. EPA, *supra* note 92, at § 18(1). This differs from American criminal procedure in that it seems likely that an arrest warrant would be required under U.S. law before the police would be constitutionally authorized to enter a private dwelling to make an arrest.

total of seven days.¹⁰⁰ Security personnel in Northern Ireland have often abused this broad authority by arresting and then detaining and interrogating at great length many persons who are subsequently released without ever having been formally charged with a crime.¹⁰¹

Detainees who are actually accused of terrorist-style offenses under the EPA are subjected to even greater restrictions on their personal liberties while they await trial.¹⁰² For example, in most situations, the EPA all but ensures that a person charged with a terrorist-style offense will stand little or no chance of being released on bail prior to trial. The EPA strips magistrates and justices of the peace of their power to grant bail in such cases. Bail is available only by application to a High Court judge.¹⁰³ Furthermore, the EPA shifts the burden of convincing the High Court judge that bail is warranted to the accused. In the United Kingdom, the burden of proof in bail hearings is ordinarily on the prosecution.¹⁰⁴

In addition to the effective denial of bail, many accused terrorists have been subjected to inhuman and degrading treatment in prison.¹⁰⁵ This abuse was most profound in 1971 when security personnel employed sensory deprivation techniques developed in colonial disputes in Kenya and Malaysia to gather information about the I.R.A.¹⁰⁶ In 1971, the Republic of Ireland filed a complaint with the European Commission on Human Rights alleging that the interrogation techniques used by the security personnel in Northern Ireland violated article 3 of the European Convention on Human Rights.¹⁰⁷ In 1978, the European Court of Human Rights found that the techniques employed constituted inhuman and degrading treatment, but

100. See *id.* at § 14(1); *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1141 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

101. *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1143 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996) (noting that over the years, only about 25% of those persons detained for terrorism-related interrogations are actually charged with a crime. In 1992, 1,795 persons were arrested for terrorist-related crimes, but only about 400 were charged with a crime. Of the over 1,300 persons arrested and not charged, almost 1,100 were Catholics.)

102. EPA, *supra* note 92, at §1. Terrorist-style offenses, called scheduled offenses, include murder, kidnapping, assault, and crimes involving weapons and explosives etc.

103. *Id.* § 12.

104. REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. Ser. 5, No. 5185 (Lord Diplock, Chairman) at 23-24 [hereinafter DIPLOCK REPORT].

105. REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY ARISING OUT OF EVENTS ON THE 9TH AUGUST 1971, 1971 Cmnd. Ser. 5, No. 4823 (Chairman Sir Edmund Compton). This British government report verified allegations of sensory deprivation and other maltreatment of prisoners in Northern Ireland.

106. STEVEN GREER, SUPERGRASSES: A STUDY IN ANTI-TERRORIST LAW ENFORCEMENT IN NORTHERN IRELAND 32-33 (1995) (noting that some internees were denied food and sleep and forced to stand spread-eagled against a wall for long periods of time while radio static was played in the background).

107. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, No. 2889, 213 U.N.T.S. 221. Article III provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

not torture.¹⁰⁸

2. *Protections for the Accused in Criminal Proceedings*

In addition to imposing significant restrictions on personal liberties, the British government has significantly curtailed the traditional procedural protection afforded to criminal defendants. These curtailments culminated in the establishment of special courts, known as "Diplock Courts," for the prosecution of persons charged with certain scheduled offenses.¹⁰⁹ Since its introduction, the Diplock Court system has been attacked by commentators as inherently unfair and incapable of protecting the rights of the accused.¹¹⁰ Criticism of the Diplock system has focused on two main areas: first, the elimination of the right to a jury trial,¹¹¹ and second, the admissibility of certain questionable evidence, specifically, confessions and uncorroborated testimony.¹¹²

In the United Kingdom an accused has the right to request a jury trial.¹¹³ The British government abolished this right in cases involving scheduled offenses, out of the fear that juries hearing these cases would be incapable of deciding the matter in an unbiased and uninfluenced manner.¹¹⁴ In addition, the British government believed that the jury system should also be replaced because of the possibility of jury tampering and intimidation.¹¹⁵ The Diplock Report cited this intimidation, stating that "[a] frightened juror is a bad juror even though his own safety and that of his family may not actually be at risk."¹¹⁶

Moreover, the Diplock Commission offered an additional ground for abolishing the right to a jury trial: jury bias premised on religious differences.¹¹⁷ Specifically, the Commission focused on the manner in which criminal juries in Northern Ireland are selected.¹¹⁸ The Commission concluded that the selection process tends to produce a jury with a disproportionate number of Protestant jurors.¹¹⁹ As a result, a Protestant defendant

108. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 66-67 (1978).

109. DIPLOCK REPORT, *supra* note 104, at 17-19. These courts were established after a commission, led by Lord Diplock, recommended that new trial techniques were necessary to combat terrorism.

110. *United States and United Kingdom Supplementary Extradition Treaty: Hearings on Treaty Doc. 99-8 Before the Senate Committee on Foreign Relations*, 99th Cong., 1st Sess. 121-25 (1985) (testimony of Christopher H. Pyle, Department of Politics, Mount Holyoke College) [hereinafter *Committee Hearings*].

111. S.C. GREER & A. WHITE, *ABOLISHING THE DIPLOCK COURTS* 78-80 (1986).

112. *Id.* at 16; Walsh *supra* note 34, at 46-53.

113. See BRICE DICKSON, *THE LEGAL SYSTEM IN NORTHERN IRELAND* 98 (1989) (noting that in all criminal cases heard in Northern Ireland's Crown Court there will be a jury of twelve persons, except when the defendant is charged with a scheduled offense); GREER, *supra* note 106, at 37.

114. DIPLOCK REPORT, *supra* note 104, at 17-18.

115. *Id.* § 36. See also *id.* § 17 (Diplock Commission describes the effects of IRA intimidation upon the government's prosecution of suspected terrorists).

116. *Id.* § 36.

117. *Id.* § 36.

118. *Id.*

119. *Id.* § 36.

charged with a scheduled offense had a better chance of acquittal than his Catholic counterpart.¹²⁰ The Commission concluded that religious and social differences in Northern Ireland had become so divisive that selection of an impartial jury was highly unlikely, if not impossible.¹²¹

The Commission's claim that the polarization of the jury system required the elimination of that system has been assailed as more pretextual than substantive. Several critics have asserted that the stated grounds for abolishing jury trials were not adequately supported by fact and were based upon uncertain and unjustifiable premises.¹²² Many commentators have asserted that judges who hear scheduled offenses lose their impartiality after they become "case-hardened" by the constant stream of terrorist offenders.¹²³ As proof of this phenomena, commentators have pointed to the significant drop in acquittal rates of defendants charged with scheduled offenses.¹²⁴ In addition to the elimination of jury trials, the Diplock courts also have greatly reduced the restrictions on the admissibility of evidence in criminal proceedings.¹²⁵ This reduction has had a significant effect on two distinct but related areas of the law: the admissibility of confessions and the defendant's right to remain silent.¹²⁶

The EPA eliminated the common law requirement that a confession be voluntary in order for it to be admissible.¹²⁷ Prior to the passage of the EPA, confessions were inadmissible if they were coerced from a defendant

120. GREER & WHITE, *supra* note 111, at 44.

121. See DIPLOCK REPORT, *supra* note 104, § 37; Brian P. Lenihan, Note, *Unsound Method: Judicial Inquiry and Extradition to Northern Ireland*, 34 B.C. L. REV. 591, 614 (1993); GREER & WHITE, *supra* note 111, at 42-46.

122. See John D. Jackson & Sean Doran, *The Diplock Court: Time for Re-Examination*, 139 NEW L.J. 464 (1989); GREER, *supra* note 106, at 37 n.33 (noting that subsequent research has shown that the evidence was at best equivocal and that other options, besides wholesale elimination of jury trials, could have been considered first).

123. See Jackson & Doran, *supra* note 122, at 464; Talcott, *supra* note 97, at 482.

124. Charles Carlton, *Judging Without Consensus-The Diplock Courts in Northern Ireland*, 3 L. & POL'Y Q. 225, 234 (1981).

125. Lenihan, *supra* note 121, at 613.

126. See Dickson, *supra* note 113, at 104 (noting that the test for admissibility of a confession in a scheduled offense has been changed by the EPA making it easier for a coerced confession to be admitted at trial); Jackson & Doran, *supra* note 122, at 464 (noting the EPA's abrogation of a defendant's right to silence).

127. EPA, *supra* note 92, § 11. In American criminal procedure, a confession is admissible if two criteria are satisfied. First, the confession must have been obtained after the suspect was informed of his rights under the *Miranda* decision. See *Miranda v. Arizona*, 384 U.S. 436 (1966). Second, the confession must have been made voluntarily. 18 U.S.C. § 3501 (1994). In the United States, the issue of voluntariness is determined after a judge has had the opportunity to consider all the circumstances surrounding the confession. *Id.* § 3501(b). These circumstances include the amount of time that elapsed between arrest and arraignment, whether or not the defendant was advised of, or aware of, the fact that he was not required to make a statement, and whether or not the defendant had assistance of counsel. *Id.* The voluntariness standard seeks to ensure that a confession is barred when (1) it is of questionable reliability because of the way in which they were obtained; (2) it is believed to be reliable but obtained by offensive interrogation tactics; (3) it is obtained under circumstances which impaired the defendant's free choice, even if the police did not employ offensive interrogation tactics. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 6.2(b) (2nd ed. 1992).

(i.e., if the police used oppression or other similar tactics to procure a confession).¹²⁸ The Diplock Commission believed that the voluntariness requirement was a serious impediment to the war on terrorism.¹²⁹ The Commission believed that the voluntariness requirement shielded terrorist defendants from the sting of their own words and permitted them to escape punishment.¹³⁰ Therefore, the Diplock Commission recommended abolition of the voluntariness requirement.¹³¹

The 1973 EPA incorporated this suggestion. The most recent amendment to the EPA retains the abolition of the voluntariness requirement. Section 11(2) states that the confession of a person charged with a scheduled offense is inadmissible if "the accused was subjected to torture, to inhuman or degrading treatment . . . in order to induce him to make his statement . . ." ¹³² Some commentators have posited that this provision of the EPA permits an interviewer to use a moderate amount of physical abuse to induce a person to make a statement.¹³³ Although the provision has been amended twice in an attempt to discourage violence, and threats of violence, from being employed as interrogation techniques, the provision still allows some involuntary confessions to be used against criminal defendants.¹³⁴

An additional concern informing the Diplock Commission's decision to relax the rules governing confessions was the fear that few witnesses would come forward to assist in the prosecution of terrorism.¹³⁵ The Commission believed that confessions were frequently the only tool that the security forces would have available in their investigation and prosecution of terrorists because the fear of terrorist reprisals would make potential witnesses reluctant to speak out.¹³⁶ As a result, the use of confessions increasingly became a tool for combatting and prosecuting terrorists.¹³⁷

In 1988, the British government became convinced that terrorists had learned that refusing to cooperate with security personnel during interrogations was the best way to ensure that they would not incriminate themselves.¹³⁸ In response, the British government enacted legislation that seriously limited the defendant's right to remain silent during interrogation and at trial. The passage of Criminal Evidence (Northern Ireland) Order 1988 ensures that suspected terrorists can incriminate themselves

128. See *Regina v. Cowan*, 1987 N.Ir. 338, 343 (C.A.).

129. DIPLOCK REPORT, *supra* note 104, § 73-87.

130. *Id.* See also *Lenihan*, *supra* note 121, at 618-19.

131. DIPLOCK REPORT, *supra* note 104, § 91.

132. EPA, *supra* note 92, § 11(2)(b).

133. See *Talcott*, *supra* note 97, at 483-84.

134. EPA, *supra* note 92, § 11(2)(b).

135. DIPLOCK REPORT, *supra* note 104, § 17.

136. *Id.*

137. *Id.*

138. See *David Walchomer, The Suspect's Silence and the Prima Facie Case*, 139 *NEW L.J.* 484, 485 (1989) (noting that increase in number of suspects exercising their right of silence supports the implication that professional criminals are hiding behind a right originally intended to protect "the weak and inadequate."); *Lenihan*, *supra* note 121, at 628.

not only when they choose to speak, but also when they refrain from speaking.¹³⁹ The Order permits Diplock Courts to draw adverse conclusions from a defendant's refusal to answer questions during his interrogation, and his refusal to testify during trial.¹⁴⁰ In an attempt to mitigate the harshness of this legislation, the Criminal Evidence Order imposes several limitations on the conclusions that a judge may infer from a defendant's silence.¹⁴¹ Despite these limitations, however, the practical consequence of this order is that defendants charged with scheduled offenses in Northern Ireland's courts cannot assert a right to silence without jeopardizing their defense.¹⁴²

Although the 1988 Criminal Evidence Order is significantly different from the American position that a criminal defendant has a privilege against self-incrimination, some commentators have asserted that the Order is not a significant departure from the right to silence rules that existed under English common law prior to the 1985 Order.¹⁴³ These commentators point to the fact that under the common law of Northern Ireland there has never been a *per se* rule against drawing adverse inferences from a defendant's refusal to testify or to answer questions during his interrogation.¹⁴⁴ Prior to 1988, however, Diplock Courts had generally refused to draw any inferences from such silence.¹⁴⁵ In addition, the 1988 Order authorized the Diplock Courts to go beyond the common law and to draw negative inferences from a defendant's failure to mention some fact during interrogation that the defendant later remembers and decides to use as a part of his defense.¹⁴⁶ Thus, courts can use the Order to the detriment of defendants who remain totally silent, as well as those who cooperate during interrogation.

II. The Supplementary Treaty

A. Elimination of the Political Offense Exception

The United States and the United Kingdom enacted their first extradition

139. Criminal Evidence (Northern Ireland) Order, S.I. 1988, No. 1987.

140. *Id.* §§ 4(2), 4(6). In the United States, if after being given his *Miranda* warnings, the defendant remains silent, the prosecution may not use that fact to attack the defendant's alibi at trial. See *Doyle v. Ohio*, 426 U.S. 610 (1976) (holding that the prosecution's use of petitioner's silence, after arrest and after receipt of *Miranda* warning, for impeachment purposes violated Due Process Clause of the Fourteenth Amendment). However, in cases where the police have not given *Miranda* warnings, as in the case of pre-arrest silence, the prosecution can use the defendant's silence to impeach the defendant's testimony. See *Jenkins v. Anderson*, 447 U.S. 231 (1980) (noting that the prosecution did not act improperly when it impeached defendant's self-defense claim by pointing out that defendant failed, for two weeks after the murder, to turn himself in to the authorities).

141. Criminal Evidence Order, *supra* note 139, §§ 2(4), 3(2)(c)(i), 4(5).

142. See Lenihan, *supra* note 121, at 628; Jackson & Doran, *supra* note 122, at 464.

143. See J.D. Jackson, *Curtailing the Right of Silence: Lessons From Northern Ireland*, 1991 CRIM. L. REV. 404, 405; Lenihan, *supra* note 121, at 630.

144. See Lenihan, *supra* note 121, at 630-31.

145. Lenihan, *supra* note 121, at 633.

146. Criminal Evidence Order, *supra* note 139, § 3.

treaty in 1794, when they signed the Jay Treaty.¹⁴⁷ The two nations have amended the terms of their extradition agreement several times over the past two hundred years, typically for the purpose of increasing the number of extraditable offenses.¹⁴⁸ The most recent amendment occurred in 1986 when the two nations signed the Supplementary Extradition Treaty.¹⁴⁹ The Supplementary Treaty differed from other treaty amendments in that it radically restricted the traditional authority of American courts to deny extradition requests. The treaty did this by explicitly limiting the scope of the political offense exception.¹⁵⁰

Article V of the 1977 Extradition Treaty provided that a request for extradition would be denied if the requested nation determined that the offense forming the basis of the request was political in nature.¹⁵¹ This provision, known as the political offense exception, was first codified in an extradition treaty between the United States and France in 1843,¹⁵² and has been a standard part of all United States extradition treaties ever since.¹⁵³ The political offense exception is premised on the belief that political dissent is a legitimate means of effecting social change, and that political dissidents should not face official governmental retaliation because of their sufficiently political activities.¹⁵⁴

It is generally believed that there are two types of political offenses: pure and relative. Pure political offenses are those that are aimed directly at a particular government or that government's representatives.¹⁵⁵ Pure political crimes include treason, sedition, and espionage.¹⁵⁶ Relative political offenses are merely common crimes perpetrated in furtherance of some political or ideological objective.¹⁵⁷ Most of the problems concerning extradition in political offense cases arise in connection with relative offenses, because common crimes, unlike pure political crimes, are extra-

147. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-U.K., 8 Stat. 116, art. XXVII.

148. See Groarke, *supra* note 4, at 1517.

149. Supplementary Treaty, *supra* note 1.

150. See Groarke, *supra* note 4, at 1526-27.

151. Extradition Treaty, *supra* note 3, art. V.

152. See Groarke, *supra* note 4, at 1520; I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 167 n.5 (1971).

153. See Groarke, *supra* note 4, at 1520; Steven Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 CORNELL INT'L L.J. 247, 250 (1982).

154. *Quinn v. Robinson*, 783 F.2d 776, 793 (9th Cir. 1986). In his majority opinion, Judge Reinhardt delineated three justifications for the political offense exception. First, it is grounded in the notion that individuals have the "right to resort to political activism to foster political change." Second, the exception reflects the view that unsuccessful rebels should not be returned to countries where they may be subjected to unfair punishments. Finally, the exception is premised on the belief that "governments should not intervene in the internal political struggles of other nations." *Id.*

155. Barbara Ann Banoff & Christopher H. 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, 178 (1984).

156. *Id.*

157. See *id.*; Groarke, *supra* note 4, at 1520.

ditable offenses.¹⁵⁸ Thus, the courts must determine if the common crime was done in furtherance of a political agenda, and if so, whether the individual deserves protection. In an attempt to assist jurists in determining how to apply the political offense exception when the underlying crime is a common crime, three different approaches to defining the scope of the political offense exception have developed.¹⁵⁹

The first approach, developed by the French, defines political offenses as only those crimes which threaten the state.¹⁶⁰ This test takes the position that only pure political offenses deserve the protection of the political offense exception. This "injured rights" test was first articulated in 1947 in *In re Giovanni Gatti*.¹⁶¹ In that case, France extradited a man to the Republic of San Marino who had attempted to murder a national of that nation. In distinguishing between relative and pure political offenses the French court stated, *inter alia*, that "the fact that the reasons of sentiment which prompted the offender to commit the offense belong to the realm of politics does not itself create a political offense."¹⁶² This narrow test ensures that common criminals cannot use the political offense exception to protect themselves from being prosecuted for their common crimes. Additionally, the test deviates from the goal of protecting all politically motivated actors in that it fails to protect fugitives whose actions, though motivated by a genuine desire for political change, do not directly harm the state.¹⁶³ The primary advantage of this test, as opposed to the other tests, is the certainty that it brings to the law. However, to achieve this measure of certainty, the French courts have minimized the importance and value of the political offense exception. Accordingly, those fugitives who truly seek political change but whose actions are not pure political crimes find no refuge in the French injured rights test.

A second approach, developed by the Swiss, is the "political motivation" test.¹⁶⁴ This test attempts to strike a more equitable balance between the competing values of administrative efficiency and protection of political offenders by distinguishing them from common criminals. Swiss courts weigh the political and common elements of a crime. Swiss courts cannot extradite fugitives if the political elements of the crime outweigh the common elements.¹⁶⁵

British and American Courts have rejected both the Swiss and French tests in favor of the "political incidence" test.¹⁶⁶ This test was first articu-

158. Banoff & Pyle, *supra* note 155, at 178; Groarke, *supra* note 4, at 1520.

159. Groarke, *supra* note 4, at 1521.

160. *Id.*

161. S. Jur. II 44 (Cours d'appel, Grenoble 1947), 14 Ann. Dig. 145 (Ct. App. Grenoble, Fr. 1947).

162. S. Jur. II at 45, 14 Ann. Dig. at 145.

163. Groarke, *supra* note 4, at 1521.

164. See Geoffrey S. Gilbert, *Terrorism and the Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 695, 701 (1985); Groarke, *supra* note 4, at 1521-22.

165. See Gilbert, *supra* note 164, at 701-02.

166. See Groarke, *supra* note 4, at 1522; Banoff & Pyle, *supra* note 155, at 183-84.

lated in 1890 by the British House of Lords in *In re Castioni*.¹⁶⁷ The fugitive in that case was a Swiss national who had fled to England. The fugitive had been responsible for leading an insurrection that ultimately resulted in the death of a local government official. The House of Lords refused to extradite Castioni on the grounds that his acts were political in nature. The holding in that case established a two-part test. To avoid extradition, the defendant must prove that: (1) the act was committed during an uprising instigated by a group of which the defendant is a member; and (2) the crime was a violent one whose commission was incidental to the furtherance of a political cause.¹⁶⁸

The United States first applied the political incidence test in 1894, in *In re Ezeta*.¹⁶⁹ Antonio Ezeta, a Salvadoran, had participated in a revolt that had succeeded in overthrowing the previous Salvadoran government. As the Commander-in-Chief of the new government's army, he actively participated in the elimination of resistance and the suppression of opposition.¹⁷⁰ Another revolution forced him to seek refuge in the United States. The new government requested that the United States return Ezeta to the Republic of Salvador to stand trial for murder, robbery and other common crimes that had occurred during the revolution and counter-revolution.¹⁷¹ The United States refused to extradite Ezeta.¹⁷² The *Ezeta* court applied the political incidence test without regard to the underlying purposes for the test.¹⁷³ After mechanically applying the reasoning of *In re Castioni*, the court held that offenses associated with the actual conflict of armed forces are political in nature and thus non-extraditable.¹⁷⁴

In the years following *In re Ezeta*, subsequent U.S. courts applied the political incidence test mechanically, whether or not the result was reasonable. The test became a bright-line rule that ensured that any common criminal act committed in the course of an armed revolt against a government would be protected as if it were a political act, notwithstanding the subjective motivation of the actor.¹⁷⁵ *United States ex rel. Karadzole v. Artukovic* is a good example of a case in which the test is applied in a way that ignores the test's underlying purposes.¹⁷⁶ In that case, the U.S. Dis-

167. [1891] 1 Q.B. 149.

168. See Groarke, *supra* note 4, at 1522-23; Bannoff & Pyle, *supra* note 155, at 183-84.

169. 62 F. 972 (N.D. Cal. 1894).

170. *Id.* at 977.

171. *Id.* at 975-76.

172. *Id.* at 976. The court held that the evidence of criminality, for a variety of charges, was sufficient in law to justify Ezeta's commitment for extradition, but that the crimes were of a political character, and therefore not extraditable.

173. See *supra* note 154 and accompanying text.

174. *Id.* at 997-99.

175. See Banoff & Pyle, *supra* note 155, at 184; Groarke, *supra* note 4, at 1523 n.68 (citing *Ornelas v. Ruiz*, 161 U.S. 502, 510-512 (1896), a case where the political offense barred extradition of a group of civilians who, as part of an armed gang, attacked Mexican soldiers, burned, looted, and stole from and murdered some of their victims).

176. 170 F. Supp. 383 (S.D. Cal. 1959), *rev'd*, 211 F.2d 565 (9th Cir. 1954). Although *Karadzole* was reversed by the Ninth Circuit, it nevertheless demonstrates the way in which some courts have reached bad results through mechanical application of the political incidence test.

strict Court for the Southern District of California refused to extradite an alleged war criminal, a member of the pro-Nazi regime in Croatia during World War II, who had participated in the mass extermination of Serbs, because those acts occurred during, and in furtherance of, an armed struggle between the Serbs and Croats.¹⁷⁷

In recent years, the application of the political incidence test in P.I.R.A.-related cases has resulted in outrage and condemnations in both the United States and Great Britain.¹⁷⁸ In one case, *In re McMullen*,¹⁷⁹ the court refused to extradite a P.I.R.A. member sought in connection with the bombing of a British army barracks in England. In 1981, another American court refused to extradite a different P.I.R.A. member wanted for the attempted murder of a police officer in Belfast.¹⁸⁰ Then, in 1984, the United States District Court for the Southern District of New York held that a P.I.R.A. fugitive, who had already been convicted of the murder of a British soldier could not be extradited because his act was political in nature.¹⁸¹

Several commentators have noted that the political incidence test is both overinclusive and underinclusive, and that blind application of the two-pronged test leads to ridiculous results.¹⁸² All crimes, regardless of the subjective motivations of the actor, committed during times of political turmoil are exempt from extradition, while ideologically motivated crimes, committed outside of these tumultuous periods, are totally unprotected.¹⁸³ These flaws, combined with the aforementioned cases, spurred the U.S. and British governments into action.¹⁸⁴ The Reagan Administration drafted an amended treaty and submitted it to the Senate for approval in 1985.¹⁸⁵ The primary difference between this treaty and its predecessor was found in article 1, which explicitly excluded a wide variety of common

177. *Id.* at 392-93.

178. *Committee Hearings*, *supra* note 110, at 4-5 (statement of Abraham D. Sofaer, Legal Adviser, United States Department of State); *British M.P.'s Criticize Ruling on Extradition*, N.Y. TIMES, Dec. 15, 1984, at 5.

179. Mag. No. 3-78-1099 M.G. (N.D. Cal. May 11, 1979).

180. *In re Mackin*, 668 F.2d 122 (2d Cir. 1981).

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

182. *See supra* notes 169-77 and accompanying text (examples of rigid application of test).

183. Banoff & Pyle, *supra* note 155, at 186.

184. *See* Stuart Taylor Jr., *U.S. Aide Faults Judge's I.R.A. Extradition Ruling*, N.Y. TIMES, Dec. 19, 1984, at A23; Stuart Taylor Jr., *Justice Department; Extradition: Hot Topic In Crusade On Terrorism*, N.Y. TIMES, Dec. 21, 1984, at A28; *Committee Hearings*, *supra* note 110, at 4-5.

185. *Supplementary Extradition Treaty with the United Kingdom: Message from the President of the United States Transmitting the Supplementary Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, with Annex, Signed at Washington on June 25, 1985*, 99th Cong., 1st Sess. 8 (1985) (Letter of Transmittal from President Ronald Reagan to the Senate) [hereinafter *Message from the President*]. In this message to the Senate, President Reagan stated that the amended treaty "represents a significant step in improving law enforcement cooperation and combatting terrorism, by excluding from the scope of the political offense exception serious offenses typically committed by terrorists." *Id.*

crimes from the political offense exception.¹⁸⁶ Article I of the Supplementary Treaty effectively denies potential extraditees a defense to extradition based upon the political offense exception if the individual is accused or has been convicted of a violent crime. Thus, prior to ratification of the Supplementary Treaty, an individual who used violence in order to effect political change in the United Kingdom could qualify for the protections of the political offense exception. However, after the passage of this treaty, the individual would have no defense predicated on the political offense exception because, under the Supplementary Treaty, violent acts which are on the Treaty's list of excluded common crimes are no longer regarded as an offense of a political character.

Political considerations, as opposed to substantive legal concerns, were the driving force behind the Administration's decision to amend the treaty. Prior to the 1986 amendments to the treaty, several federal courts had refused to apply the political incidence test in a mechanical and irrational fashion. Instead, they applied the test in a manner intended to effectuate the rational underlying purpose of the political offense exception.

For example, in *Eian v. Wilkes*¹⁸⁷ the Seventh Circuit upheld the decision of a federal magistrate to extradite a Palestinian terrorist to Israel. The fugitive was accused of setting off a bomb in an Israeli marketplace that killed two children.¹⁸⁸ The court refused to be constrained by a rigid application of the political incidence test. While acknowledging the fact that Eian's action was connected to an armed uprising, the court reasoned that the bombing, because of its indiscriminate nature, was not incidental to that armed uprising.¹⁸⁹ The *Eian* court carved out a "wanton crimes" exception to the incidence test.¹⁹⁰ This exception cured some of the over-inclusiveness problems of the political incidence test. The wanton crimes exception authorizes the extradition of a fugitive accused or convicted of killing civilians, even if the fugitive is otherwise not extraditable under the two-part political incidence test.¹⁹¹

In *Quinn v. Robinson*,¹⁹² the Ninth Circuit held that the political offense exception to extradition was inapplicable to a P.I.R.A. fugitive accused of conspiracy to cause explosions and murder in connection with terrorist acts in England.¹⁹³ In applying the incidence test, the court held that, while an uprising existed in Northern Ireland at the time of Quinn's actions, there was no such uprising in England, the place where Quinn's politically motivated crimes occurred.¹⁹⁴ In reversing the lower court, which held that Quinn established a defense premised on the political offense exception, the Ninth Circuit stated that the traditional incidence

186. Supplementary Treaty, *supra* note 1, at 15.

187. 641 F.2d 504 (7th Cir.).

188. *Id.* at 523-24.

189. *Id.* at 520-21.

190. *Id.*

191. *Id.*

192. 783 F.2d 776 (9th Cir. 1986).

193. *Id.* at 817-18.

194. *Id.* at 818.

test is sufficient to ensure that the two primary objectives of the political offense exception are met: (1) that international terrorists are extradited; and (2) that domestic revolutionaries are protected.¹⁹⁵ The court stated that it was sufficient that "for purposes of the political offense exception, an uprising cannot extend beyond the borders of the country or territory in which a group of citizens or residents is seeking to change their particular government."¹⁹⁶

The *Quinn* court did not adopt the Seventh Circuit's wanton crimes exception, stating that it was "inappropriate to make qualitative judgments regarding a foreign government or a struggle designed to alter that government."¹⁹⁷ Instead, the court retained the traditional incidence test and clarified its proper application. Of the test's two components, the court noted that it was the uprising requirement, and not the "incidental to" prong that played the pivotal role "in ensuring that the incidence test protects only those activities that the political offense doctrine was designed to protect."¹⁹⁸ According to the *Quinn* court, an act is incidental to an uprising when it is "causally or ideologically related to the uprising."¹⁹⁹

In light of these decisions, it would seem that President Reagan's promotion of the Supplemental Treaty was ill-advised and unwarranted. The Treaty virtually eliminated the political offense exception at a time when the federal courts were acting to eliminate mechanical and unreasonable application of the test in an attempt to put the doctrine back on sound theoretical footing. An executive action clarifying the proper interpretation of the test, in view of the discrepancy between the Ninth Circuit and Seventh Circuit, would have been more helpful, and less invasive, than the chosen course of action which had the practical effect of eliminating a 150-year-old cornerstone of American extradition law.

B. Legislative Response to the 1985 Proposal

1. *The Debate in the Senate*

The Supplementary Treaty met with significant resistance in the Senate when it was first offered for advice and consent.²⁰⁰ In fact, the Senate report described the Supplementary Treaty as "one of the most divisive and contentious issues the committee on Foreign Relations [had] faced" that term.²⁰¹ The hostile reception by the Senate was caused by two aspects of the Treaty: the virtual elimination of the political offense exception; and the apparent unfairness of the Diplock courts in Northern Ireland.

One of the chief criticisms leveled at the proposed treaty was its over-

195. *Id.* at 806.

196. *Id.* at 807.

197. *Id.* at 804.

198. *Id.* at 806.

199. *Id.* at 809.

200. Lenihan, *supra* note 121, at 599; Kelly, *supra* note 49, at 354-55.

201. S. Exec. Rep. No. 99-17, at 6 (1986).

inclusiveness.²⁰² The treaty, as proposed, exempted all violent acts from the protection of the political offense exception.²⁰³ Critics argued that by placing all violent acts beyond the protection of the political offense exception, the draft treaty denied the legitimacy of armed conflict as a means of effectuating political change.²⁰⁴ In addition, critics believed that the draft treaty set a bad precedent. Some commentators posited that this treaty would be the first step in a long march toward eliminating the political offense exception in all bilateral U.S. extradition treaties.²⁰⁵ Senator Jesse Helms of North Carolina noted that, if this happened, "freedom fighters" as well as anti-government forces fighting against oppressive and totalitarian regimes could be wrongly denied safe harbor in the United States.²⁰⁶

Another widespread concern within the Senate was that the President was abandoning the political offense exception, an important element of every American extradition treaty since 1843, for the sole purpose of furthering foreign policy objectives. Some Senators were outraged that the Reagan Administration would propose a new treaty as a means of doing what could not otherwise be done legally, namely returning political prisoners to governments that the prisoners had been unsuccessfully fighting.²⁰⁷ One member of Congress argued that the draft treaty was an attempt on the part of the British to force the United States to relinquish its neutrality and to explicitly support British rule in Northern Ireland.²⁰⁸ One commentator argued that the Reagan administration's proposed treaty eliminated the political offense exception as a way of thanking the British government for its support of the 1986 raid on Libya.²⁰⁹

Still other criticism centered on the perceived unfairness of Northern Ireland's justice system. Some senators felt that the United States should not return persons to stand trial before, or complete criminal sentences already meted out by, a judicial system like the Diplock court system.²¹⁰ As a result, some senators openly expressed their intentions to delay the

202. See *Committee Hearings*, *supra* note 110, at 228 (statement of Arthur Helton); *Committee Hearings*, *supra* note 110 at 231 (statement of David Carliner).

203. Supplementary Treaty, *supra* note 1, at 15.

204. 132 CONG. REC. 16,600-02 (1986) (remarks of Sen. Helms) (noting that the amended treaty makes no distinction between terrorists and freedom fighters).

205. See Phyllis Jo Baunach, *The U.S.-U.K. Supplementary Extradition Treaty: Justice for Terrorists or Terror for Justice?*, 2 CONN. J. INT'L L. 463, 484.

206. 132 CONG. REC. 16,600-01 (1986) (remarks of Sen. Helms).

207. See *Committee Hearings*, *supra* note 110, at 13-14 (statement of Senator Joseph Biden); Baunach, *supra* note 205, at 476 (noting that the treaty was "an effort to more narrowly circumscribe the political offense exception on a bilateral basis").

208. Mario Biaggi, *A Treaty That Would Belie U.S. Neutrality on Northern Ireland*, N.Y. TIMES, Aug. 22, 1985, at A22. The author was, at the time of this article, a Congressman representing New York's Nineteenth District in addition to serving as chairman of the *ad hoc* Congressional Committee for Irish Affairs. See also *Committee Hearings*, *supra* note 110, at 49.

209. Kelly, *supra* note 49, at 357-62. The author notes that after British Prime Minister Margaret Thatcher permitted American warplanes to use British bases in the Libyan raid, British and American sources adopted the view that the Supplemental Treaty should be passed as a way of demonstrating U.S. appreciation for Britain's support.

210. 132 CONG. REC. 16,592-93 (1986) (remarks of Sen. D'Amato).

ratification process and to use it as a forum for criticizing the British government's actions in Northern Ireland.²¹¹

2. *Compromise in the Senate: Adoption of Article 3(a) and the Rule of Partial Inquiry*

In response to the widespread dissatisfaction with the treaty as originally proposed, the Senate Foreign Relations Committee proposed a compromise treaty. On July 17, the full Senate approved the compromise treaty by a vote of 87-10.²¹² As part of the compromise treaty, the Senate Foreign Relations Committee inserted the new article 3(a), in addition to some other changes that would benefit potential extraditees.²¹³ Article 3(a) provides:

Notwithstanding any other provision of this Supplementary Treaty, extradition 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 opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his liberty by reason of his race, religion, nationality or political opinions.²¹⁴

Article 3(a) authorizes a court to deny extradition in two circumstances. The first circumstance is where the requesting state has "trumped up" charges against a fugitive.²¹⁵ The second circumstance involves cases where a fugitive would be unfairly treated at his trial or, upon his return to the country seeking extradition, would be punished or restricted in his liberty because of his race, religion, nationality or political opinions.²¹⁶ To ascertain if either of these defenses applies, article 3(a) replaces the traditional rule of non-inquiry with a rule of partial inquiry.²¹⁷ This rule of partial inquiry grants the fugitive the right to demonstrate that, as an individual, he would be prejudiced upon return because of discrimination within the requesting nation's criminal justice system.²¹⁸

The alteration of the rule of non-inquiry has spurred a great deal of

211. *Committee Hearings*, *supra* note 110, at 13-14.

212. See 132 CONG. REC. 16,819 (1986); Edward Walsh, *U.S.-British Extradition Pact Ratified*, WASH. POST, July 18, 1986, at A4.

213. *Supplementary Treaty*, *supra* note 1, at 16.

214. *Id.*

215. Smyth, *supra* note 7, at 1150 (N.D. Cal. 1994).

216. *Id.*

217. Lenihan, *supra* note 121, at 600-01; Groarke, *supra* note 4, at 1530-31. The traditional rule of non-inquiry is premised on the belief that the United States only enters into extradition treaties with nations that will treat extraditees fairly. *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911). Thus, American courts have refused to inquire into the treatment that a potential extraditee will suffer upon return to the requesting nation. Article 3(a) altered the rule of non-inquiry by expressly authorizing American courts to inquire into the treatment that a potential extraditee will face upon return to Northern Ireland.

218. *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1138 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

debate regarding its proper application.²¹⁹ According to the Senate Foreign Relations Committee, it is clear that the second clause of article 3(a) provides P.I.R.A. fugitives with a defense against extradition based on the unfairness of the Diplock court system.²²⁰ What is not clear is the proper scope of inquiry permitted under article 3(a).

During the congressional debate on the Supplementary Treaty three interpretations of the scope of inquiry permitted by article 3(a) were offered. Senator Thomas Eagleton of Missouri argued that the scope of article 3(a) was very narrow and that it limited judicial inquiry to particular facets of the Diplock Court system that would deny the individual opposing extradition a fair trial.²²¹ Under Senator Eagleton's view, American courts do not have the power to inquire into the inherent fairness or unfairness of a particular judicial system in the abstract.²²² A court will deny extradition only when it determines that, in light of the particular circumstances of the case, the judicial system of the requesting country is "so unfair as to violate fundamental notions of due process."²²³

Senator John Kerry of Massachusetts argued for a broader interpretation of article 3(a).²²⁴ He argued that the scope of inquiry permits a fugitive to base a defense to extradition on the inherent unfairness of the Diplock system, and the assertion that Catholic republicans in Northern Ireland accused of terrorism cannot receive a fair trial in that system.²²⁵ Senator Joseph Biden of Delaware also favored this interpretation.²²⁶

Since 1986 several commentators have endeavored to define the scope of the article 3(a) inquiry.²²⁷ The predominant view on the issue can be found in a colloquy inserted by the Senate Foreign Relations Committee into the Executive Report accompanying the Supplementary Treaty.²²⁸ This interpretation is a compromise of sorts in that it is not as broad as Senator Kerry's but is more expansive than Senator Eagleton's. The colloquy set forth the majority view, and the view of the amendment's principal sponsor, Senator Richard Lugar of Indiana, that the inquiry should not be limited to the procedures employed at trial.²²⁹ However, it seems apparent

219. *Id.* at 1150 (noting that the permissible scope of inquiry under Article 3(a) has been the source of considerable debate).

220. 132 CONG. REC. 16,798 (1986); S. EXEC. REP. NO. 99-17, at 5 (1986).

221. 132 CONG. REC. 16,605-07 (1986) (remarks of Sen. Thomas Eagleton) (noting that article 3(a) "has [a] narrow and focused scope. . . [it] is not intended to give courts authority generally to critique the abstract fairness of foreign judicial systems.").

222. *Id.*

223. *Id.* at 16,607.

224. *Id.* at 16,798-803 (remarks of Sen. John Kerry).

225. *Id.*

226. *Id.* at 16,798.

227. Talcott, *supra* note 97, at 491 (arguing that article 3(a) authorizes American courts to consider Northern Ireland's judicial system in future extradition requests); Lenihan, *supra* note 121, at 635 (asserting that American courts should not interpret article 3(a) as authorizing a "generalized inquiry" into the inherent fairness of Northern Ireland's judicial system when deciding future extradition requests).

228. S. EXEC. REP. NO. 99-17, at 4-5 (1986).

229. *In re Requested Extradition of Smyth*, 61 F.3d 711, 715 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

from the language of article 3(a) and the text of this colloquy that the inquiry permitted under article 3(a) is individual and case specific.²³⁰

C. Judicial Interpretation of Article 3(a)

The Northern District of California was the first American court to determine whether article 3(a) afforded any protection to P.I.R.A. fugitives.²³¹ However, the Northern District was not the first U.S. court to discuss the implications of article 3(a). Several other federal courts, including the U.S. Court of Appeals for the Second Circuit, addressed the issue in dicta, and one court dealt with the issue in the context of a non-P.I.R.A. member.

In *McMullen v. United States*,²³² the Second Circuit affirmed the district court's holding that application of the Supplementary Treaty to Peter McMullen, a P.I.R.A. fugitive who had successfully asserted the political offense exception as a defense to extradition, was an unlawful bill of attainder.²³³ In reaching this conclusion, the court addressed some of the implications of the article 3(a) defense. In particular, the appeals court asserted that article 3(a) "does not appear to provide the same judicial safeguards as the 'political offense' exception."²³⁴

Only one fugitive, a non-P.I.R.A. member, asserted an article 3(a) defense prior to James Smyth.²³⁵ In *In re Extradition of Howard*, the defendant was an African-American man accused of murder. British authorities wanted him extradited so that he could stand trial. At the extradition hearing, Howard did not dispute the existence of probable cause, a requirement for extradition. Instead, he argued that he would be unfairly prejudiced at his trial because of his nationality and race, and because of the inordinate amount of media coverage surrounding the case.²³⁶ In 1991, a U.S. Magistrate for the District Court of Massachusetts held that

230. *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1150 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996) (noting that the fugitive is granted the limited "right to establish that he himself would be prejudiced as a result of discriminatory treatment within the requesting country's criminal justice system").

231. *Id.* at 1137.

232. *McMullen v. United States*, 953 F.2d 761 (2d Cir. 1992).

233. *Id.* at 769. The court noted that Article I, § 9, cl. 3 of the Constitution provides that "[n]o Bill of Attainder . . . shall be passed." *Id.* at 764. The court then defined a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Id.* at 764 (quoting *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-47 (1984)).

234. *Id.* at 768. The appeals court cited approvingly to the following statement of Senator Eagleton:

It would be a ludicrous reading of the Supplementary Treaty as a whole to conclude that the United States and the United Kingdom went to enormous pains to eliminate the political offense defense . . . [and] then undid it all in article 3(a) by creating a huge new loophole by which terrorists could seek protracted sanctuary in the United States.

Id.

235. *In re Extradition of Howard*, 996 F.2d 1320 (1st Cir. 1993).

236. *Id.* at 1323-24.

article 3(a) did not prevent the extradition of Howard.²³⁷ In making this determination, the magistrate made some observations about the article 3(a) defense. Specifically, the magistrate noted that to avoid extradition the fugitive must show by a preponderance of the evidence that he had been prejudiced, or would be prejudiced, by the unfairness of the foreign judicial system.²³⁸ Furthermore, the magistrate asserted that a fugitive could not meet his burden merely by enumerating the differences between the Diplock court system and the United States Courts.²³⁹

The district court affirmed the magistrate's order.²⁴⁰ However, the district court judge did not address the soundness of the magistrate's interpretation of article 3(a).²⁴¹ Howard appealed the district court's decision and the First Circuit re-affirmed the magistrate's order.²⁴² The First Circuit endorsed the magistrate's interpretation of article 3(a) when it stated that the magistrate correctly construed the provision to "require a showing of actual respondent-specific prejudice."²⁴³ With regard to the scope of the inquiry authorized by article 3(a), the court stated that "Congress intended the words to authorize inquiry into the attributes of a country's justice system as that system would apply to a given individual."²⁴⁴ The court summarized its position by stating that to avail himself of an article 3(a) defense a fugitive must establish by a preponderance of the evidence that the requesting country would treat him differently from other similarly situated individuals because of his race, religion, nationality, or political affiliations.²⁴⁵

III. Applying the Supplementary Treaty to James Smyth's Case

A. Application of the Treaty by the U.S. District Court for the Northern District of California

Although there had been considerable legislative and judicial interpreta-

237. *United States v. Howard*, Mag.No. 91-0468L-01 U.S. Dist. Lexis 16729 *56 (D. Mass. Nov. 18, 1991).

238. *Id.*

239. *Id.* at *39.

240. *In re Extradition of Howard*, 791 F. Supp. 31, 35 (D. Mass. 1992), *aff'd*, 996 F.2d 1320 (1st Cir. 1993).

241. *In re Extradition of Howard*, 996 F.2d 1320, 1329 (1st Cir. 1993). The First Circuit noted that the lower court did not review the magistrate's interpretation of the treaty because it believed that interpretation of the treaty was a fact question, and not a legal question. The First Circuit noted that interpretation of the treaty was a legal question that was capable of being scrutinized by a higher court. The First Circuit decided to resolve the legal question rather than remand.

242. *Id.* at 1333.

243. *Id.* at 1332.

244. *Id.* at 1330. This language seems to endorse the magistrate's position that a fugitive cannot establish a meritorious article 3(a) defense merely by outlining the inadequacies of the Diplock court system. At the very least, the fugitive must show that these inadequacies, as they are applied to him individually, will be unfairly prejudicial.

245. *Id.* at 1331. "It is not enough simply to show some possibility that some performed ideas might exist; rather, under the terms of the Supplementary Treaty, the bias must rise to the level of prejudicing the accused."

tion of article 3(a) prior to the case of James Smyth,²⁴⁶ no P.I.R.A. member had ever asserted a defense to extradition based on this provision of the Supplementary Treaty.²⁴⁷ Thus, many of the issues raised in the Smyth case were questions of first impression.

Prior to ruling on the applicability of Smyth's Article 3(a) defense, Judge Caulfield carefully outlined the various facts of Smyth's life in Northern Ireland that she considered relevant to ascertaining the merits of his claim.²⁴⁸ Judge Caulfield noted that Smyth was Catholic, a republican, and a member of *Sinn Fein*.²⁴⁹ Caulfield also noted that in the years preceding his conviction for attempted murder, Smyth was the constant target of police harassment.²⁵⁰ Despite his frequent contact with the security forces, Smyth was not charged with a crime until 1978, when he was charged with, and subsequently convicted of, the attempted murder of John Carlisle, an off-duty prison guard.

In addition to outlining the facts of Smyth's life, Judge Caulfield made several inquiries regarding England's efforts to control the violence in Northern Ireland. Specifically, she examined the problems associated with the presence of British troops in Northern Ireland and with the Irish prison system.²⁵¹ The United Kingdom refused to cooperate with some aspects of this discovery process. Although the court determined that several documents were relevant for discovery purposes, the United Kingdom refused to produce documents regarding governmental inquiries into past indiscretions on the part of security personnel.²⁵² The United Kingdom premised its refusal on alternative grounds: (1) that the documents were not relevant to the inquiry; and (2) that the documents were protected by the state secrets privilege, deliberate process privilege, and investigatory files privilege.²⁵³ The district court found that the documents were relevant and

246. *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1150 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

247. *Id.* at 1150 (noting that the question of whether article 3(a) may prevent the extradition of an alleged I.R.A. fugitive is a question of first impression).

248. *Id.* at 1147-48.

249. *Id.* at 1147.

250. *Id.* at 1148. The court noted that the evidence established that Smyth had been arrested and detained by the police dozens of times before his arrest for attempted murder. During those detentions he was beaten and physically abused. He spent the entire year of 1974 in detention. In addition, evidence was presented establishing the fact that security personnel frequently searched Smyth's home, despite the fact that nothing criminal was ever found. *Id.*

251. *Id.* at 1140-47.

252. *Id.* at 1138-39. Smyth sought to compel the British government to release several documents that chronicled illegal and discriminatory practices perpetrated by the security forces in Northern Ireland. The Stalker-Sampson Reports documented an investigation of certain members of the security forces relating to the shooting deaths of six persons believed to be P.I.R.A. members. *Id.* at 1138. The Kelly Report was commissioned to determine if criminal charges should be brought against security personnel implicated in murder and other crimes by the Stalker-Sampson Report. *Id.* The Stevens Inquiry investigated charges of collusion between members of the security forces and loyalist paramilitaries. *Id.*

253. *Id.* at 1139.

were otherwise discoverable. The United Kingdom, however, refused to produce the documents. In response to this refusal, the court granted the following rebuttable presumptions to Smyth: "(1) Catholic Irish nationals accused or found guilty of offenses against members of the security forces or prison officials are subjected systematically to retaliatory harm, physical intimidation and death in Northern Ireland[;] (2) Members of the security forces in Northern Ireland either participate directly or tacitly endorse these actions."²⁵⁴

In trying to determine the appropriateness of an article 3(a) defense, Judge Caulfield looked to U.S. immigration law regarding withholding of deportation.²⁵⁵ She believed that certain aspects of that law, specifically 8 U.S.C. § 1253(h), would provide a helpful and useful analogy to article 3(a).²⁵⁶ Both Smyth and the U.K. agreed.²⁵⁷ Under this statute, the government will not deport an individual if that individual can prove that upon his return, his life or freedom will be endangered on account of his race, religion, nationality or political opinion.²⁵⁸ Because the protections afforded by article 3(a) and § 1253(h) were very similar, Judge Caulfield believed that the regulations implementing the withholding of deportation statute provided useful guidance for evaluating evidence and determining if the statutory requirements of article 3(a) had been met.²⁵⁹ Under § 1253(h), once an individual establishes that he has been the victim of past persecution in his homeland, a presumption arises that the person's life would be threatened upon return to that country.²⁶⁰ The burden then shifts to the U.S. government to prove, by a preponderance of the evidence, that sufficient changes have occurred within the potential deportee's homeland to ensure that the potential deportee's life would no longer be jeopardized by a forced return.²⁶¹ Further, the regulation mandates that the potential deportee need not provide evidence that he individually would be singled out for such persecution.²⁶² A person can also avoid deportation if he establishes that he is a member of a group that is systematically perse-

254. *Id.*

255. *See infra* Part IV.B.

256. *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1151 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

257. *Id.* at 1151, n.11.

258. 8 U.S.C. § 1253(h) (1987). The statute specifically states that "The Attorney General shall not deport or return any alien . . . to a 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." *Id.* *See supra* note 6 to compare this language with the similarly drafted article 3(a) of the Supplementary Treaty.

259. 8 C.F.R. § 208.16(b) (1997). This regulation enunciates eligibility requirements for individuals seeking to avoid deportation under authority of 8 U.S.C. § 1253(h). Since the language of this statute and article 3(a) of the Supplementary Treaty are so similar, it is logical that the regulations implementing 8 U.S.C. § 1253(h) would be equally applicable to article 3(a).

260. 8 C.F.R. § 208.16(b)(2) (1997).

261. *Id.*

262. *Id.*

cuted.²⁶³ If the individual establishes that he is identified with, or included in, that persecuted group, and that it is more likely than not that his life will be threatened upon return, he does not need to offer proof of individual harm.²⁶⁴

Judge Caulfield's extensive findings of fact, the presumptions awarded to Smyth, and the analogy of 1253(h) to article 3(a) in interpreting the latter formed the basis of her decision to deny the United Kingdom's request to certify Smyth for extradition. Judge Caulfield stated that Smyth would be punished and restricted in his personal liberty "by reason of his status as a Catholic Irish national and on account of his political opinions as a republican and member of Sinn Fein."²⁶⁵ After considering the evidence regarding events that occurred when Smyth was in Northern Ireland, the state of affairs there at that time, and the likelihood of change in the future, Judge Caulfield held that Smyth had established an article 3(a) defense to extradition.²⁶⁶

The court supported its holding in three ways. First, the United Kingdom did not rebut the presumption that Smyth would face retaliatory punishment and harm upon his return to Northern Ireland.²⁶⁷ Second, Smyth had established, without use of the presumption, that he would be persecuted on account of his religious and political beliefs punished upon his return to prison in Northern Ireland.²⁶⁸ Finally, Smyth established that he would be punished, detained and restricted in his personal liberties upon his release from prison.²⁶⁹

B. Application of the Treaty by the U.S. Court of Appeals for the Ninth Circuit

The government immediately appealed the district court's decision. According to the appellant, the district court erred in three respects: (1) it misinterpreted the terms of the treaty when it inquired into Smyth's likely post-incarceration treatment; (2) in awarding Smyth evidentiary presumptions; and (3) the evidence presented was insufficient to support the district court's findings and conclusions.²⁷⁰ After considering the government's appeal, the United States Court of Appeals for the Ninth Cir-

263. *Id.* § 208.16(b)(3) (1997).

264. *Id.*

265. *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1151 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* The court stated that the past mistreatment of Smyth, prior to his arrest for attempted murder, "is a harbinger of things to come if Mr. Smyth returns to the streets of Northern Ireland." *Id.* at 1154. The court then noted that the likelihood that Smyth would be harassed and targeted by the security forces after release from prison was greater in the future than it was in the past, primarily because in the future he will be deemed an actual, rather than a suspected, terrorist. *Id.* at 1155.

270. *In re Requested Extradition of Smyth*, 61 F.3d 711, 718-719 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

cuit reversed and remanded the matter for entry of an order authorizing extradition.²⁷¹

In response to the government's first ground for appeal, the Ninth Circuit held that the district court was correct in recognizing that the Supplementary Treaty authorizes courts to examine the treatment an extraditee might possibly suffer at the hands of the criminal justice system after extradition.²⁷² The Ninth Circuit agreed with the district court's conclusion that it is possible for punishment "to extend beyond the jailhouse door."²⁷³ According to the Ninth Circuit, this is especially true in Northern Ireland, particularly where evidence had been presented at trial showing that prison guards provided information to Loyalist forces concerning the time and place of the release of republican prisoners.²⁷⁴ The Ninth Circuit noted that if a fugitive demonstrates, by a preponderance of the evidence, that he will likely be the target of such misconduct following his release, then that person is entitled to protection under the terms of article 3(a).²⁷⁵

In response to the government's second ground for appeal, the Ninth Circuit discussed the implications of the presumptions awarded to Smyth. According to the Ninth Circuit, the presumptions granted to Smyth by the lower court as both a sanction for the United Kingdom's refusal to provide requested documents and as a remedy for Smyth's inability to obtain necessary evidence, were insufficient to establish the critical elements of the article 3(a) defense.²⁷⁶ While the presumptions effectively established that Smyth would be the target of retaliation if the United States returned him to Northern Ireland, they did not address the issue of whether the presumed retaliation would be inflicted because of Smyth's race, religion, nationality or political opinions, as required by article 3(a).²⁷⁷ The panel asserted that article 3(a) does not authorize denial of extradition in cases where the extraditee will be targeted for retaliation as a result of the underlying crime.²⁷⁸ Thus, the unrebutted presumptions established only that Smyth would be subject to retaliation and harm. The court held that the mere fact that Smyth would be subject to such harm upon his return, without a showing that this harm was the direct result of his political opinions, religion or nationality, was insufficient ground for an Article 3(a) defense.²⁷⁹ The court asserted that to qualify for the defense, the defendant must establish the crucial link between the extralegal harm to be sustained and the fact that such harm would be inflicted for reasons forbidden by article 3(a), rather than merely on account of his underlying crime.²⁸⁰

271. *Id.* at 722.

272. *Id.* at 719.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 720-21.

277. *Id.* at 721.

278. *Id.*

279. *Id.*

280. *Id.* at 720.

The government's final ground for appeal challenged the sufficiency of the evidence presented to support Smyth's claim that he would be harmed after being released from jail.²⁸¹ On this issue, the Ninth Circuit concluded that the district court erred in at least two respects. First, the circuit court held that the district court's resort to the withholding of deportation statute, which presumes a present danger of persecution from past persecution, cannot validate a presumption that Smyth will be at risk in the future.²⁸² Second, the Ninth Circuit held that the district court should not have relied to the extent that it did upon the evidence of discrimination in Northern Ireland against Catholics and republicans generally.²⁸³ The Ninth Circuit noted that the evidence regarding the treatment of Catholics generally does not necessarily relate to the treatment that Smyth would be likely to receive after his release from prison. In sum, the Ninth Circuit held that the evidence did not establish that Smyth would suffer retaliatory harm as a result of his religious or political views.²⁸⁴

IV. Deficiencies in the Ninth Circuit's Interpretation of Article 3(a)

On January 5, 1996, a panel of judges from the Ninth Circuit voted to deny Smyth's petition for a rehearing and his suggestion for rehearing *en banc*.²⁸⁵ On June 24, 1996, the Supreme Court denied Smyth's petition for writ of certiorari.²⁸⁶ On August 18, 1996 Smyth was extradited to Northern Ireland after U.S. Secretary of State Warren Christopher signed the extradition order.²⁸⁷

Although James Smyth has already been returned to Northern Ireland, and the Supreme Court has tacitly endorsed the Ninth Circuit's interpretation of article 3(a), it remains important to highlight the deficiencies in the Ninth Circuit's interpretation of article 3(a). The Ninth Circuit erred in three ways: (1) in holding that the district court erroneously relied on evidence of the type of harm extradited P.I.R.A. fugitives *in general* faced upon return to Northern Ireland rather than relying upon evidence that Smyth *as an individual* would suffer retaliatory harm from forbidden discrimination upon his return to Northern Ireland; (2) in rejecting § 1253(h), the withholding of deportation statute, as an analog to article 3(a); and (3) in holding that the presumptions awarded by the district court were insufficient to establish an article 3(a) defense to extradition.

A. The District Court Did Not Rely Solely on General Evidence

Since the Supplementary Treaty was enacted in 1986, most courts that have discussed the scope of the inquiry authorized by article 3(a) have asserted

281. *Id.* at 718-19.

282. *Id.* at 720.

283. *Id.*

284. *Id.*

285. *In re Requested Extradition of Smyth*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

286. *Smyth v. United States*, 116 S. Ct. 2558 (1996).

287. *Fugitive Returned to Northern Ireland*, S.F. CHRON., Aug. 19, 1996, at A13.

that the provision authorizes a focused inquiry into Northern Ireland's judicial system. This is consistent with the majority view expressed by Senator Lugar in the Senate's debate of the treaty.²⁸⁸ In light of this view and of the underlying intent of the Supplementary Treaty to facilitate the extradition of P.I.R.A. members found in the United States,²⁸⁹ the court of appeals was authorized by article 3(a) to engage in a focused inquiry.²⁹⁰ However, the court of appeals narrowed the scope of permissible inquiry too much. The Ninth Circuit erred in holding that the district court failed to make sufficient findings of fact specific to Smyth merely because it relied on some general evidence of discrimination against Catholics in the judicial system of Northern Ireland.²⁹¹

The Ninth Circuit was correct in asserting 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."²⁹² However, in applying this focused inquiry, the Ninth Circuit was wrong to conclude that the district court failed to engage in an individualized inquiry simply because the lower court highlighted some relevant evidence of the mistreatment of other Catholic republicans in Northern Ireland.

When district court Judge Caulfield concluded that James Smyth would, upon his return to Northern Ireland, likely suffer extralegal harms for forbidden reasons, she supported her holding with extensive evidence related specifically to James Smyth.²⁹³ The district court found that prior to being convicted of attempted murder in 1979, Smyth had been the frequent target of police harassment.²⁹⁴ Specifically, the court found that prior to 1979 Smyth had been arrested and detained by the police dozens of times, despite the fact that he was never actually charged with commission of a criminal act until he was charged with the attempted murder of John Carlisle.²⁹⁵ The court also noted that after being arrested Smyth was often detained for long periods of time, after which he would return home with bruises and marks indicating that he had been physically abused.²⁹⁶ Furthermore, the court noted that Smyth had been detained for the entire

288. See *supra* notes 228-30 and accompanying text.

289. *Message from the President*, *supra* note 185.

290. The First Circuit noted that Congress intended the provision to authorize the court to inquire into the attributes of Northern Ireland's justice system as that system would affect a given individual. *In re Extradition of Howard*, 996 F.2d 1320, 1330 (1st Cir. 1993).

291. *In re Requested Extradition of Smyth*, 72 F.3d 1433, 1439 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996) (dissenting opinion).

292. *In re Requested Extradition of Smyth*, 61 F.3d 711, 720 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996) (dissenting opinion). The court also noted that the history of article 3(a) establishes the fact that it requires an individualized inquiry.

293. *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1150 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

294. *Id.* at 1148.

295. *Id.*

296. *Id.*

year of 1974 without being charged with any criminal activity.²⁹⁷ The district court weighed all this evidence and stated, "the frequent law enforcement contact with Mr. Smyth—not leading to the filing of charges—leads to the conclusion that Mr. Smyth was targeted for attention not because he had committed crimes but instead because he was a member of Sinn Fein and a republican."²⁹⁸

Judge Caulfield did not rely solely on this strong evidence of individual political and religious discrimination against Smyth prior to his conviction in 1979. She also found evidence of forbidden religious and political discrimination against Smyth while he was in prison. Specifically, Judge Caulfield stated that after being incarcerated, "Smyth was treated worse than other prisoners because of the political nature of his crime."²⁹⁹ Smyth received an explicit death threat shortly after arriving at prison.³⁰⁰ Furthermore, he also received implicit death threats from a prison official.³⁰¹

After considering the abundance of evidence of forbidden discrimination endured by Smyth as an individual, both before and after his conviction in 1979, it is difficult to comprehend how the Ninth Circuit could find that "the district court erred in relying extensively upon evidence of the general discriminatory effects of the Diplock system upon Catholics and suspected republican sympathizers."³⁰² It is true that the thorough opinion of the district court analyzed many of the discriminatory features of the justice system in Northern Ireland, including the pattern of discriminatory practices exhibited by prison officials and security personnel. However, these general findings of discriminatory practices in no way detract from the strength of the aforementioned evidence of discrimination against Smyth. Rather, this general evidence should be seen as supplementing the individual evidence and creating a context in which the individual mistreatment of James Smyth can be understood. Courts should not inquire into the specific discrimination of one individual in Northern Ireland in a vacuum, as the Ninth Circuit seems to suggest. Rather, they should look at the totality of the extant conditions. Presentation and assessment of general evidence of discrimination can establish a general context within which the evidence of individual discrimination can be better understood and appreciated. This is not to suggest that a fugitive can support a valid article 3(a) defense to extradition without showing how he individually

297. *Id.*

298. *Id.* at 1153.

299. *Id.*

300. *Id.*

301. *Id.* at 1146. The court noted that prison officer Evans told Smyth that he could not guarantee Smyth's safety because of the political nature of his crime. The court asserted that the threatening nature of the statement is clear, because Smyth had no reason to fear that other republican prisoners would harm him because of his political crime. Thus, the only persons that would be apt to threaten Smyth's safety would be the prison guards themselves.

302. *In re Requested Extradition of Smyth*, 61 F.3d 711, 720 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

will be harmed or by merely presenting evidence of general discrimination in Northern Ireland.³⁰³ It does, however, suggest that in cases such as Smyth's, where the fugitive has presented a plethora of evidence indicating individual, religious and political discrimination, the presentation of general discriminatory treatment in Northern Ireland, as a supplement to that individual evidence, should not be dismissed wholesale and certainly should not be used by a reviewing court to nullify the findings of the lower court's individualized inquiry.

B. Justifying the Use of 8 U.S.C. § 1253(h) and Its Implementing Regulations as an Analog to Article 3(a)

Withholding of deportation forbids the return of an individual to a nation in which he or she would be subject to certain types of persecution. This procedure is required by Article 33 of the U.N. Convention Relating to the Status of Refugees, which is binding upon the United States because of our adherence to the U.N. Protocol on the same issue.³⁰⁴ This remedy is codified at 8 U.S.C. § 1253(h) which provides that, "the Attorney General shall not deport or return any alien . . . to a 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."³⁰⁵

To establish a defense to deportation premised upon § 1253(h), the individual must prove a "clear probability of persecution."³⁰⁶ In *INS v. Stevic*,³⁰⁷ the Supreme Court held that this standard requires an applicant to prove that it is more likely than not that he or she would be subject to persecution "on account of" one of the five factors enumerated in the statute.³⁰⁸ In § 1253(h) claims, courts have held that a showing of persecution "on account of" one of the five enumerated factors demands that the applicant establish mistreatment by the government or a particular organization.³⁰⁹ Furthermore, this harm must go beyond the general harms associated with civil unrest and periods of strife.³¹⁰ In the context of persecution on account of political opinion, the Board of Immigration Appeals (BIA) has held that an applicant must establish that:

303. See *In re Requested Extradition of Howard*, 996 F.2d 1320 (1st Cir. 1993). The court noted that "Congress intended the words to authorize inquiry into the attributes of a country's justice system as that system would apply to a given individual." *Id.* at 1330. The court later stated that the provision required "a showing of actual respondent-specific prejudice." *Id.* at 1332.

304. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150. The United States did not originally accede to the 1951 Convention. However, the United States has since acceded to the Convention after the adoption of a protocol in 1968. Protocol Relating to the Status of Refugees, Jan 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

305. 8 U.S.C. § 1253(h).

306. *INS v. Stevic*, 467 U.S. 407 (1984).

307. *Id.*

308. *Id.* at 424.

309. *Matter of T-*, 20 I. & N. Dec. 571, 575 (BIA 1992).

310. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

the particular belief or characteristic a persecutor seeks to overcome in an individual must be his political opinion. Thus, [it] refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of the persecution.³¹¹

Once an individual meets this burden, the relief authorized by the statute is mandatory and withholding of deportation must be granted.³¹²

The INS regulation implementing the withholding of deportation statute is 8 C.F.R. § 208.16. Eligibility for withholding of deportation is set forth in § 208.16(b). Judicial interpretation of the requirements for withholding of deportation has established that the applicant for withholding of deportation will carry his burden only by proving a "clear probability of persecution."³¹³ In addition, § 208.16(b) provides standards for evaluating the evidence.³¹⁴ 8 C.F.R. § 208.16(b)(1) provides that the applicant establishes a valid claim under § 1253(h) if the court finds that it is more likely than not that the applicant "would be persecuted on account of his race, religion, nationality, membership in a particular social group, or political opinion."³¹⁵ Sub-section (b)(2) provides that

if an individual establishes that he or she suffered past persecution on account of one of the impermissible factors, then it shall be presumed that his or her life would be threatened on return to that country unless a preponderance of the evidence establishes that conditions in the country have changed such that it is no longer more likely than not that the individual would be so persecuted there.³¹⁶

Finally, sub-section (b)(3) provides that

the finder of fact shall not require the applicant to provide evidence that he would be singled out for persecution if he establishes two things: (1) that there is a pattern and practice of persecution of groups of persons similarly situated to the applicant for impermissible reasons in the country of deportation; and (2) the individual establishes his own inclusion in and identification with such group such that it is more likely than not that his life or freedom would be punished upon his return.³¹⁷

In concluding that Smyth would be impermissibly punished upon his return to prison in Northern Ireland and upon his release into the general population, Judge Caulfield analogized the language of article 3(a) to 8

311. *Id.* at 234-35.

312. 8 U.S.C. § 1253(h) (1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987).

313. *INS v. Stevic*, 467 U.S. 407, 422 (1984). The court noted that to qualify for withholding of deportation an applicant must establish that he "would" be threatened in the country to which he would be deported to. The court highlighted the fact that the use of the term "would" as opposed to "could" or "might" evinces the intent of the legislature that a likelihood of persecution must exist to qualify the alien for withholding of deportation. *Id.*

314. 8 C.F.R. § 208.16(b) (1997).

315. *Id.*

316. *Id.*

317. *Id.*

U.S.C. § 1253(h).³¹⁸ In addition, Judge Caulfield asserted that the regulations implementing the withholding of deportation statute provided a useful standard for evaluating evidence.³¹⁹ Under 8 C.F.R. § 208.16(b)(2), a showing of past persecution creates a presumption that the individual's life or freedom will be threatened upon return to the country unless a preponderance of the evidence establishes that conditions in that country have sufficiently improved.³²⁰ Judge Caulfield noted that in establishing that his life or freedom will be threatened upon return to his home land, the individual need not provide that he or she would individually be targeted for persecution if he or she established two facts: (1) there is a pattern and practice in the country of persecution of groups of protected persons similarly situated to the individual; and (2) he or she establishes his or her inclusion in that group such that it is more likely than not that his life or freedom would be threatened upon his or her return.³²¹

After setting forth this analogy, Judge Caulfield applied it to the facts of Smyth's article 3(a) defense. Judge Caulfield held that it was more likely than not that Smyth had established that he would be impermissibly punished upon his return to prison in Northern Ireland.³²² Specifically, after applying the provisions of 8 C.F.R. § 208.16(2), the court found that Smyth's past treatment at the hands of prison personnel established that he would likely face the same harm upon his return to prison.³²³ Furthermore, after applying 8 C.F.R. § 208.16(3), the court found that the inappropriate treatment of other persons similarly situated to Smyth established that it was more likely than not that his life and freedom would be threatened upon his return to prison.³²⁴

Judge Caulfield also used this analogy to determine that Smyth's likely post-incarceration treatment further established a defense to extradition.³²⁵ Specifically, after applying § 208.16(b)(2), the court held that "[t]he past mistreatment of Mr. Smyth is a harbinger of things to come if Mr. Smyth returns to the streets of Northern Ireland."³²⁶ In addition, the court noted that the mistreatment of individuals similarly situated to James Smyth created a presumption that he too would be punished after serving the remaining years of his prison sentence.³²⁷

The Ninth Circuit rejected Judge Caulfield's use 8 C.F.R. § 208.16(b) to interpret article 3(a). The panel asserted that the use of § 208.16(b) did

318. *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1151 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

319. *Id.*

320. 8 C.F.R. § 208.16 (1997).

321. 8 C.F.R. § 208.16(b)(3) (1997).

322. *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1153 (N.D. Cal. 1994), *rev'd* 61 F.3d 711 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

323. *Id.*

324. *Id.* at 1153, 1154.

325. *Id.* at 1154.

326. *Id.*

327. *Id.* at 1155.

not establish that Smyth would be persecuted for religious or political grounds upon his post-incarceration release into the general population of Northern Ireland.³²⁸ The Ninth Circuit held that the district court's reliance upon § 208.16(b) was erroneous for two reasons. First, the appeals court held that the withholding of deportation statute presumes a *present* danger of persecution from past experience of persecution.³²⁹ Therefore, the statute cannot validate the district court's presumption of a risk of persecution *in the future*.³³⁰ Second, the appeals court found that the district court erroneously relied upon evidence of the general discriminatory effects of Northern Ireland's justice system upon Catholics and *Sinn Fein* supporters.³³¹

However, the issues raised by the Ninth Circuit are not serious impediments to the use of §1253(h) as an analog to article 3(a).

1. *8 C.F.R. § 208.16(b)(2) Presumes a Present and Not a Future Danger of Persecution*

The Ninth Circuit held that 8 C.F.R. § 208.16(b)(2) could not be used to support the district court's finding that Smyth would be punished upon his post-incarceration release into the general population of Northern Ireland.³³² The panel reached this conclusion by stating that evidence of past persecution of an individual, or a "pattern and practice" of persecution of persons similarly situated to that individual, presumes a present danger of persecution, not that such persecution is likely to occur in the future.³³³

This argument is flawed because it fails to recognize that drawing inferences from past conduct to predict future behavior is a common method of reasoning in our system of justice.³³⁴ Furthermore, inference-drawing, the process by which the presence of one fact leads to a probable estimate of a second fact, is an often-practiced tool for fact-finding.³³⁵ Therefore, the fact that § 208.16(b)(2) does not explicitly authorize a presumption of future harm to be drawn from evidence of past persecution is not a serious impediment to the use of § 208.16(b)(2) to evaluate evidence presented to support an article 3(a) defense to extradition.

328. *In re Requested Extradition of Smyth*, 61 F.3d 711, 720 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *In re Requested Extradition of Smyth*, 72 F.3d 1433, 1435 (9th Cir. 1996) (dissenting opinion), *cert. denied*, 116 S. Ct. 2258 (1996). Judge Noonan stated that the Supreme Court expressly noted in *Jurek v. Texas*, 428 U.S. 262, 275-76 (1976), that predicting future events by analyzing past experiences is performed countless times each day in U.S. courts.

335. *Id.*

2. *Article 3(a) Requires an Individual Inquiry*

The Ninth Circuit's attack of the district court's use of generalized evidence to support an article 3(a) defense to extradition poses a more significant problem to the use of § 208.16 in the evaluation of evidence in extradition cases. As noted above, article 3(a) requires a fugitive to establish that he or she would individually be subject to persecution if returned to Great Britain.³³⁶ Thus, a court could not use generalized evidence of persecution of persons similarly situated to the fugitive to establish a meritorious article 3(a) defense to extradition. 8 C.F.R. § 208.16(b)(3), however, provides that an individual seeking a remedy under § 1253(h) can use just that type of evidence. Specifically, § 208.16(b)(3) states that:

In evaluating whether the applicant has sustained the burden of proving that his life or freedom would be threatened in a particular country on account of his race, religion, nationality, membership in a particular social group, or political opinion, [the adjudicator] shall not require the applicant to provide evidence that he would be singled out individually for such persecution.³³⁷

Despite the discrepancy between the scope of inquiry authorized under article 3(a) and § 208.16(b)(3), the regulations implementing § 1253(h) can still serve as a useful tool in evaluating evidence presented in support of an article 3(a) defense. Specifically, it is important to note that § 208.16(b)(2) does not authorize the use of general evidence of persecution.³³⁸ Rather, this subsection authorizes a court to award a presumption of persecution if "the applicant is determined to have suffered persecution in the past such that his life or freedom was threatened in the proposed country of deportation" on account of one or more of the enumerated factors.³³⁹ Thus, in applying the provisions of 8 C.F.R. § 208.16 to evaluate evidence in the context of extradition proceedings, courts should apply subsection (b)(2) instead of (b)(3). Therefore, the district court was wrong to use 8 C.F.R. § 208.16(b)(3) to validate Smyth's article 3(a) defense. However, this fact should not detract from the district court's use of 8 C.F.R. § 208.16(b)(2) to validate Smyth's article 3(a) defense.

The withholding of deportation statute and regulations implementing that statute provide an excellent standard for evaluating evidence presented in support of an article 3(a) defense to extradition. Since no regulations exist to guide courts in applying the remedy afforded under article 3(a), the regulations implementing 8 U.S.C. § 1253(h) should have been used by the Court of Appeals in Smyth's case. Furthermore, 8 U.S.C. § 1253(h) should be used in future extradition cases where an individual asserts an article 3(a) defense to extradition because the burdens of proof are identical and the protections afforded by both remedies are so similar.

An individual seeking a remedy under § 1253(h) must establish a clear probability of persecution on account of his or her race, religion,

336. See *supra* notes 228-30 and accompanying text.

337. 8 C.F.R. § 208.16(b)(3) (1997).

338. 8 C.F.R. § 208.16(b)(2) (1997).

339. *Id.*

nationality, membership in a particular social group, or political opinions.³⁴⁰ Similarly, an individual seeking a remedy under article 3(a) must establish by a preponderance of the evidence that he or she will be subject to persecution on account of his or her race, religion, nationality, or political opinions.³⁴¹ Thus, the burden of proof that an individual must carry to establish a valid defense to extradition under article 3(a) is the same burden of proof required to establish persecution under § 1253(h).

The only difference between the protections afforded by these two provisions is that § 1253(h) protects membership in a particular social group, whereas article 3(a) does not. However, 8 U.S.C. § 1253(h) and article 3(a) both provide identical protection to persons persecuted on account of race, religion, nationality and political opinion. Since article 3(a) is relatively new and scarcely used, there has been little judicial interpretation of what constitutes punishment "on account of [an individual's] race, religion, nationality, or political opinions." Therefore, it is only logical that courts interpreting this provision look to the manner in which courts have defined persecution "on account of race, religion, nationality . . . or political opinion" in the context of § 1253(h) claims.

In light of the great similarities between 8 U.S.C. § 1253(h) and article 3(a), it is obvious that courts should look to § 1253(h) when applying article 3(a). Since § 1253(h) has been the subject of more judicial interpretation than the scarcely used article 3(a), courts interpreting the latter provision can benefit from these interpretations. In addition, since there are no regulations interpreting the language of article 3(a), courts should seek guidance from the regulations that have been drafted to assist courts facing withholding of deportation requests. As noted above, not all of the regulations interpreting § 1253(h) are perfectly applicable to article 3(a).³⁴² However, this is no reason to foreclose courts from employing the applicable provisions of 8 C.F.R. § 208.16, namely subsection (b)(2), in future extradition cases when an article 3(a) defense to extradition is asserted.

C. The Discovery Presumptions Awarded to Smyth Were Sufficient to Establish an Article 3(a) Defense to Extradition

During the district court proceedings, the United Kingdom failed to cooperate with certain discovery requests. In response, the district court awarded Smyth two rebuttable presumptions shifting the burden of production onto the United Kingdom.³⁴³ The Ninth Circuit held that these presumptions established that Smyth would be subject to retribution upon return to Northern Ireland, but that the presumptions failed to establish that this punishment would be on account of the four forbidden factors.³⁴⁴

340. *INS v. Stevic*, 467 U.S. 407, 430 (1984).

341. Supplementary Treaty, *supra* note 1, at 16.

342. See *supra* notes 328-31 and accompanying text.

343. See *supra* notes 252-54.

344. *In re Requested Extradition of Smyth*, 61 F.3d 711, 721 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

Furthermore, the panel held that the district court improperly shifted the burden of proof from Smyth to the United Kingdom "in contravention of the treaty provision."³⁴⁵

The Ninth Circuit's assertion that the presumptions awarded to Smyth failed to address the proper elements of article 3(a) has been attacked as "just plain wrong, and inexplicably so."³⁴⁶ Although the district court might have been clearer in drafting the presumptions, the unambiguous import of these presumptions is that Catholic Irish republicans are subjected to harm and retaliation as a result of their race, religion, nationality and political views.³⁴⁷ Judge Reinhardt argued that any reading contrary to this "amounts to a flagrant disregard of its clear meaning as well as an unwarranted insistence on pedantry."³⁴⁸ He went even further to argue that, following the majority's approach, "the statement, 'under Hitler, Jews in Germany were systematically subjected to enslavement and execution,' would *not* mean that Jews were persecuted on account of their religion."³⁴⁹ The Ninth Circuit's demands of precision can be used to subvert even the clearest of statements. For example, in concluding its decision, the panel stated, "[W]e conclude that the evidence was insufficient to support a finding that Smyth would face mistreatment in prison on account of his political or religious beliefs."³⁵⁰ Holding the Ninth Circuit to its own rigorous standards, a court deciding a 3(a) extradition issue after *Smyth* could assert that this statement does not sufficiently determine whether or not James Smyth has made a valid article 3(a) defense because that court has not determined whether or not Smyth would face mistreatment in prison because of his race or nationality. Such a ruling would, of course, miss the clear meaning of the Ninth Circuit's statement, just as the Ninth Circuit missed the unambiguous import of the presumptions awarded to Smyth.

The Ninth Circuit has also been criticized for holding that the district court improperly shifted the burden of proof from Smyth to the government.³⁵¹ According to rule thirty-seven of the Federal Rules of Civil Procedure, a district court may take "appropriate actions" against a party that fails to comply with the court's discovery orders.³⁵² In *Henry v. Gill Industries, Inc.*,³⁵³ the court held that dismissal of a case was an appropriate sanction. Since the treaty neither explicitly nor implicitly infringes on the right of the district court to enforce its orders by appropriate sanctions, it appears that the Ninth Circuit's holding that the district court lacked the

345. *Id.*

346. *In re Requested Extradition of Smyth*, 72 F.3d 1433, 1438 (9th Cir. 1996) (dissenting opinion), *cert. denied*, 116 S. Ct. 2258 (1996).

347. *Id.*

348. *Id.* at 1439.

349. *Id.*

350. *In re Requested Extradition of Smyth*, 61 F.3d 711, 722 (9th Cir. 1995), *reh'g denied*, 72 F.3d 1433 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 2258 (1996).

351. *In re Requested Extradition of Smyth*, 72 F.3d 1433, 1437 (9th Cir. 1996) (dissenting opinion), *cert. denied*, 116 S. Ct. 2258 (1996).

352. FED. R. CIV. P. 37.

353. *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 949 (9th Cir. 1993).

authority to award rebuttable presumptions as a discovery sanction contravenes the Federal Rules of Civil Procedure.³⁵⁴

Conclusion

It is imperative to reiterate that it has not been my intention to determine the validity of James Smyth's article 3(a) defense to extradition. Such a fact-intensive determination must be made within a courthouse, not within the pages of a law journal. However, the Ninth Circuit's flawed interpretation of article 3(a) does not comport with legislative intent, prior judicial interpretation of article 3(a), or with the similarly worded 8 U.S.C. § 1253(h). As a result of this flawed interpretation, James Smyth was denied a full opportunity to properly present his article 3(a) defense to extradition. Future courts facing article 3(a) defenses to extradition should be careful to avoid repeating these mistakes. Although it is too late for James Smyth to benefit from a better interpretation of article 3(a), other U.S. courts should consider the mistakes of the Ninth Circuit before blindly following the precedent set by *Smyth*.

354. *In re Requested Extradition of Smyth*, 72 F.3d 1433, 1437 (9th Cir. 1996) (dissenting opinion), *cert. denied*, 116 S. Ct. 2258 (1996).