F. e: Legis Gen

LEGISLATIVE ANALYSIS

Sum
GMC
File

Bill No. S. 220 Report No. _____ Companion No. _____

Title: Extradition Act of 1983

Subject: revision of the extradition laws

Amends. Chapter 209 of Title 18

Contacts: _____

Conclusion: XX No Agency objection

/ Agency objection and/or needs amendment

Analysis: As noted by Senator Thurmond in his statement on introduction, (January 27, 1983 - S. 220), this bill is virtually the same bill as passed the Senate in the 97th Congress in August 1982 with only a few clrifying/drafting changes. As such, it would still give the Agency two opportunities to make its concerns known in any extradition: Section 3192 (a) (Attorney General institutes extradition proceedings) and Section 3196 (Secretary of State determines whether or not to implement extradition order). As such, there is no Agency objection to the bill. We need only to continue to monitor it and insure that these provisions are retained in the bill.

Also, Susan, can you find the House companion?

(See the memoranda I wrote last year on S. 1940 & the House companion for in depth discussion of above)

STAT

2/16/83
(Date)

PS

II

98TH CONGRESS
1ST SESSION

S. 220

To amend chapter 209 of title 18, United States Code, relating to extradition, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 27 (legislative day, JANUARY 25), 1983

Mr. THURMOND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend chapter 209 of title 18, United States Code, relating to extradition, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Extradition Act of 1983".

SEC. 2. Chapter 209 of title 18, United States Code, is amended as follows:

(a) Section 3181 is deleted.

(b) Section 3182 is redesignated as section "3181".

(c) Section 3183 is redesignated as section "3182" and is amended by striking out "or the Panama Canal Zone" in the first sentence.

(d) A new section 3183 is added as follows:

"§ 3183. Payment of fees and costs

"All costs or expenses incurred in any interstate rendition proceeding and apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.".

(e) Sections 3184 through 3195 are deleted.

(f) The chapter heading and section analysis are amended to read as follows:

"CHAPTER 209—INTERSTATE RENDITION

"3181. Fugitives from State or Territory to State, District, or Territory.
"3182. Fugitives from State, Territory or Possession into extraterritorial jurisdiction of the United States.
"3183. Payment of fees and costs.".

SEC. 3. A new chapter 210 of title 18 of the United States Code is added as follows:

"CHAPTER 210—INTERNATIONAL EXTRADITION

"Sec.
"3191. Extradition authority in general.
"3192. Initial procedure.
"3193. Waiver of extradition hearing and consent to removal.
"3194. Extradition hearing.
"3195. Appeal.
"3196. Surrender of a person to a foreign state.
"3197. Receipt of a person from a foreign state.
"3198. General provisions for chapter.

"§ 3191. Extradition authority in general

"The United States may extradite a person to a foreign state pursuant to this chapter only if—

"(a) there is a treaty concerning extradition between the United States and the foreign state; and

"(b) the foreign state requests extradition within the terms of the applicable treaty.

"§ 3192. Initial procedure

"(a) IN GENERAL.—The Attorney General may file a complaint charging that a person is extraditable. The Attorney General shall file the complaint in the United States district court—

"(1) for the district in which the person may be found; or

"(2) for the District of Columbia, if the Attorney General does not know where the person may be found.

"(b) COMPLAINT.—The complaint shall be made under oath or affirmation, and shall specify the offense for which extradition is sought. The complaint—

"(1) shall be accompanied by a copy of the request for extradition and by the evidence and documents required by the applicable treaty; or

"(2) if not accompanied by the materials specified in paragraph (1)—

"(A) shall contain—

"(i) information sufficient to identify the person sought;

"(ii) a statement of the essential facts constituting the offense that the person is be-

lieved to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and

"(iii) a description of the circumstances that justify the person's arrest; or

"(B) shall contain such other information as is required by the applicable treaty;

and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

"(c) ARREST OR SUMMONS.—Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be taken without unnecessary delay before the nearest available court for an extradition hearing.

"(d) DETENTION OR RELEASE OF ARRESTED PERSON.—

"(1) The court shall order that a person arrested under this section be held in official detention pending the extradition hearing unless the person establishes to the satisfaction of the court that special circumstances require his release.

"(2) Unless otherwise provided by the applicable treaty, if a person is detained pursuant to paragraph (1) in a proceeding in which the complaint is filed under subsection (b)(2), and if, within sixty days of the person's arrest, the court has not received—

"(A) the evidence or documents required by the applicable treaty; or

"(B) notice that the evidence or documents have been received by the Department of State and will promptly be transmitted to the court;

the court may order that the person be released from official detention pending the extradition hearing.

"(3) If the court orders the release of the person pending the extradition hearing, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"§ 3193. Waiver of extradition hearing and consent to removal

"(a) INFORMING THE COURT OF WAIVER AND CONSENT.—A person against whom a complaint is filed may waive the requirements of formal extradition proceedings, including an order of surrender, by informing the court that he consents to removal to the foreign state.

"(b) INQUIRY BY THE COURT.—The court, upon being informed of the person's consent to removal, shall—

"(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) address the person to determine whether his consent is—

"(A) voluntary, and not the result of a threat or other improper inducement; and

"(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

"(c) FINDING OF CONSENT AND ORDER OF REMOVAL.—If the court finds that the person's consent to removal is voluntary and given with full knowledge of its consequences, it shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition. The court shall order that the person be held in official detention until surrendered.

"(d) LIMITATION ON DETENTION PENDING REMOVAL.—A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secre-

tary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings, the person is not removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3194. Extradition hearing

"(a) IN GENERAL.—The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable as provided in subsection (d), unless the hearing is waived pursuant to section 3193. The court does not have jurisdiction to determine—

"(1) the merits of the charge against the person by the foreign state;

"(2) whether the foreign state is seeking the extradition of the person for the purpose of prosecuting or punishing the person for his political opinions, race, religion, or nationality; or

"(3) whether the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.

The hearing shall be held as soon as practicable after the arrest of the person or issuance of the summons.

"(b) RIGHTS OF THE PERSON SOUGHT.—The court shall inform the person of the limited purpose of the hearing, and shall inform him that—

"(1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

"(c) EVIDENCE.—

"(1) A deposition, warrant, or other document, or a copy thereof, is admissible as evidence in the hearing if—

"(A) it is authenticated in accordance with the provisions of an applicable treaty or law of the United States;

"(B) it is authenticated in accordance with the applicable law of the foreign state, and such authentication may be established conclusively by a showing that—

"(i) a judge, magistrate, or other appropriate officer of the foreign state has signed a certification to that effect; and

"(ii) a diplomatic or consular officer of the United States who is assigned or accredited to the foreign state, or a diplomatic or consular officer of the foreign state who is assigned or accredited to the United States, has certified the signature and position of the judge, magistrate, or other officer; or

"(C) other evidence is sufficient to enable the court to conclude that the document is authentic.

"(2) A certificate or affidavit by an appropriate official of the Department of State is admissible as evidence of the existence of a treaty or its interpretation.

"(3) If the applicable treaty requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense had been committed in the United States, the requirement is satisfied if the evidence establishes probable cause to believe that an offense was committed and that the person sought committed it.

"(d) FINDINGS.—The court shall find that the person is extraditable if it finds that—

"(1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;

"(2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;

"(3) no defense to extradition specified in the applicable treaty, and within the jurisdiction of the court, exists; and

"(4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of—

"(A) the United States;

"(B) the State where the fugitive is found; or

"(C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

"(e) POLITICAL OFFENSES AND OFFENSES OF A POLITICAL CHARACTER.—The court shall not find the person extraditable after a hearing under this section if the court finds that the person has established by clear and convincing evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense or an offense of a political character. For the purposes of this subsection, the terms 'political offense' and 'offense of a political character'—

"(1) do not include—

"(A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;

"(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

"(C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

"(D) an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;

"(E) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs;

"(F) an offense that consists of rape;

"(G) an attempt or conspiracy to commit an offense described in subparagraphs (A) through (F) of this paragraph, or participation as an accom-

plice of a person who commits, attempts, or conspires to commit such an offense.

"(2) Except in extraordinary circumstances, do not include—

"(A) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnaping, the taking of a hostage, or a serious unlawful detention;

"(B) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

"(C) an attempt or conspiracy to commit an offense described in subparagraphs (A) or (B) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

The court shall not take evidence with respect to, or otherwise consider, an issue under this subsection until the court determines the person is otherwise extraditable. Upon motion of the Attorney General or the person sought to be extradited, the United States district court may order the determination of any issue under this subsection by a judge of such court.

"(f) CERTIFICATION OF FINDINGS TO THE SECRETARY OF STATE.—

"(1) If the court finds that the person is extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify its findings, together with a transcript of the proceedings, to the Secretary of State. The court shall order that the person be held in official detention until surrendered to a duly appointed agent of the foreign state, or until the Secretary of State declines to order the person's surrender.

"(2) If the court finds that the person is not extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify the findings, together with such report as the court considers appropriate, to the Secretary of State. The Attorney General may commence a new action for extradition of the person only with the agreement of the Secretary of State.

"§ 3195. Appeal

"(a) IN GENERAL.—Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal.

Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

"(b) DETENTION OR RELEASE PENDING APPEAL.—If the district court found that the person sought is—

"(1) extraditable, it shall order that the person be held in official detention pending determination of the appeal, or pending a finding by the court of appeals that the person has established that special circumstances require his release;

"(2) not extraditable, it shall order that the person be released pending determination of an appeal unless the court is satisfied that the person is likely to flee or to endanger the safety of any other person or the community.

If the court orders the release of a person pending determination of an appeal, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"(c) SUBSEQUENT REVIEW.—No court has jurisdiction to review a finding that a person is extraditable unless the person has exhausted his remedies under subsection (a). If the person files a petition for habeas corpus or for other review, he shall specify whether the finding that he is extraditable has been upheld by a court, and, if so, shall specify

the court, the date, and the nature of each such proceeding. A court does not have jurisdiction to entertain a person's petition for habeas corpus or for other review if his commitment has previously been upheld, unless the court finds that the grounds for the petition or appeal could not previously have been presented.

"§ 3196. Surrender of a person to a foreign state

"(a) RESPONSIBILITY OF THE SECRETARY OF STATE.—If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter—

"(1) may order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition;

"(2) may order such surrender of the person contingent on the acceptance by the foreign state of such conditions as the Secretary considers necessary to effectuate the purposes of the treaty or the interest of justice; or

"(3) may decline to order the surrender of the person if the Secretary is persuaded that—

"(A) the foreign state is seeking extradition of the person for the purpose of prosecuting or punishing the person because of his political opinions, race, religion, or nationality; or

"(B) the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.

The Secretary may order the surrender of a person who is a national of the United States unless such surrender is expressly forbidden by the applicable treaty or by the laws of the United States. A decision of the Secretary under paragraph (1), (2), or (3) is a matter solely within the discretion of the Secretary and is not subject to judicial review: *Provided, however,* That in determining the application of paragraph (3), the Secretary shall consult with the appropriate bureaus and offices of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs.".

"(b) NOTICE OF DECISION.—The Secretary of State, upon ordering a person's surrender or denying a request for extradition in whole, or in part, shall notify the person sought, the diplomatic representative of the foreign state, the Attorney General, and the court that found the person extraditable. If the Secretary orders the person's surrender, he also shall notify the diplomatic representative of the foreign state of the time limitation on the person's detention that is provided by subsection (c)(2).

"(c) LIMITATION ON DETENTION PENDING DECISION OR REMOVAL.—A person who is found extraditable pursuant to section 3194 may, upon reasonable notice to the Secretary

of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings—

"(1) the Secretary does not order the person's surrender, or decline to order the person's surrender, within forty-five days after his receipt of the court's findings and the transcript of the proceedings; or

"(2) the person is not removed from the United States within thirty days after the Secretary ordered the person's surrender.

The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3197. Receipt of a person from a foreign state

"(a) APPOINTMENT AND AUTHORITY OF RECEIVING AGENT.—The Attorney General shall appoint an agent to receive, from a foreign state, custody of a person accused of a Federal, State, or local offense. The agent shall have the authority of a United States marshal. The agent shall convey the person directly to the Federal or State jurisdiction that sought his return.

"(b) TEMPORARY EXTRADITION TO THE UNITED STATES.—If a foreign state delivers custody of a person accused of a Federal, State, or local offense to an agent of the United States on the condition that the person be re-

turned to the foreign state at the conclusion of criminal proceedings in the United States, the Bureau of Prisons shall hold the person in custody pending the conclusion of the proceedings, and shall then surrender the person to a duly appointed agent of the foreign state. The return of the person to the foreign state is not subject to the requirements of this chapter.

"§ 3198. General provisions for chapter

"(a) DEFINITIONS.—As used in this chapter—

"(1) 'court' means

"(A) a United States district court established pursuant to section 132 of title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands; or

"(B) a United States magistrate authorized to conduct an extradition proceeding;

"(2) 'foreign state', when used in other than a geographic sense, means the government of a foreign state;

"(3) 'foreign state', when used in a geographic sense, includes all territory under the jurisdiction of a foreign state, including a colony, dependency, and constituent part of the state; its air space and territorial waters; and vessels or aircraft registered in the state;

"(4) 'treaty' includes a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent by the Senate; and

"(5) 'warrant', as used with reference to a foreign state, means any judicial document authorizing the arrest or detention of a person accused or convicted of a crime.

"(b) PAYMENT OF FEES AND COSTS.—Unless otherwise specified by treaty, all transportation costs, subsistence expenses, and translation costs incurred in connection with the extradition or return of a person at the request of—

"(1) a foreign state, shall be borne by the foreign state unless the Secretary of State directs otherwise;

"(2) a State, shall be borne by the State; and

"(3) the United States, shall be borne by the United States.".

SEC. 4. This Act shall take effect on the first day of the first month after enactment, and shall be applicable to extradition and rendition proceedings commenced thereafter.

○

cially by organized crime, is the so-called arson-for-profit schemes. Last Congress, in response to the problems with arson fraud brought to light in previous hearings by the Senate Judiciary Subcommittee on Criminal Justice, I introduced a bill—S. 1386, 97th Congress, 1st session—to provide Federal criminal penalties for the more serious frauds of this type. I am today introducing the same measure to provide a vehicle to again focus our attention on one approach to help deal with the problem.

Mr. President, this legislation would make it a Federal crime punishable by a fine of $250,000 or imprisonment for not more than 10 years, or both, to engage in conduct in furtherance of a fraudulent scheme that affects interstate commerce and involves the obtaining of insurance proceeds of $100,000 or more by arson. This would supplement the provisions of the Anti-Arson Act enacted last Congress—Public Law 97-298—that added the crime of arson in the FBI major crime reports and provided a more flexible standard for application of current explosive statutes.

Every reasonable weapon against arson should be made available to the law enforcement community. As I noted last Congress, arson is a unique crime. It generally occurs with no eyewitnesses. Evidence of the crime is difficult to ascertain and often destroyed in the course of the fire. Investigative resources needed to determine the origin and cause of a fire are frequently beyond the capability of most jurisdictions. Arson-for-profit cases go even further because they usually involve detailed planning and extensive cover-up activities. Losses from arson fraud are estimated at over $1.25 billion a year and increasing.

The Federal Bureau of Investigation has recognized the growth of arson fraud by organized crime and is devoting substantial resources to deal with these crimes. Unfortunately, the Federal law is not adequate to meet the problem. Hopefully, this bill would help fill this gap.

The bill follows:

S. 219

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 5 of title 19 of the United States Code is amended by adding at the end thereof a new section as follows:

§ 82. Arson in executing a scheme to defraud

"(a) Whoever, having devised or intending to devise a scheme or artifice to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise, engages in conduct with intent to execute such scheme or artifice and the scheme or artifice affects interstate commerce and involves the obtaining of insurance proceeds of $100,000 or more by arson shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

"(b) As used in this section, 'arson' means the substantial damage of a building, dwelling, or structure by fire or explosion.".

Mr. THURMOND. Mr. President, I am reintroducing today a major administration-supported bill to modernize the international extradition procedures of the United States. This legislation has been under development for some 4 years under the leadership of both the Reagan and Carter administrations and was considered by the Senate as S. 1940 last Congress. The purpose is to modernize the conceded obsolete provisions of current law dealing with international extradition. Following hearings, in the 97th Congress, the Senate Committee on the Judiciary, on April 15, 1982, reported S. 1940 (S. Rept. No. 97-331), with several amendments to the Senate without a dissenting vote. The bill was then sequentially referred to the Senate Committee on Foreign Relations. On May 19, 1982, the Senate Committee on Foreign Relations reported the bill to the Senate with some suggestions for further improving the bill. (S. Rept. No. 97-475). It is this latter bill, S. 1940 with amendments agreeable to both Senate committees, that was passed by the Senate on August 19, 1982. The bill I am introducing today is the same bill that passed the Senate in August 1982, with only a few clarifying or organizational drafting changes.

Mr. President, the House of Representatives also made major strides last Congress in processing a companion bill—H.R. 6046. This measure was reported by the House Committee on the Judiciary (H. Rept. No. 97-627), but was not considered due to time constraints on the floor of the House in the final days of the Congress.

Mr. President, current extradition statutes have been on the books for more than a century without significant change. Officials responsible for administering extradition matters for the United States informed the committee in hearings that current provisions are increasingly inadequate to deal with modern problems in controlling international crime, including such serious areas as international illicit drug trafficking and terrorism.

Due to a relatively small number of cases in the past, minor inconveniences from deficiencies were a nuisance, but tolerable. Today, the number and complexity of cases have made such deficiencies a major problem.

Mr. President, it is unfortunate that we did not complete action on this legislation last Congress. It is time to modernize U.S. extradition laws to comport with the realities of international criminal activity. I hope we can act promptly.

A few of the highlights of the bill are:

Require the Attorney General to serve as complainant to extradition matters, thereby eliminating the possibility of a foreign government—or someone acting for a foreign government—instituting unjustified extradition proceedings.

Permit an arrest warrant to be issued when the location of the fugitive is not known, thereby facilitating law enforcement efforts in locating international fugitives.

Permit extradition proceedings to be commenced by means of a summons rather than an arrest warrant where the location of the fugitive is known and flight is unlikely.

Set standards and conditions for the release of the alleged fugitive in any stage of the proceeding, not just prior to the extradition hearing.

Keep the "political offense" issue as a matter for the courts, but define the term to clarify and strengthen the U.S. response to international terrorism.

Permit fugitives to be temporarily extradited to the United States for trial or sentencing.

Authorize the Attorney General to make all arrangements to take custody of fugitives found extraditable to the United States by foreign countries.

Mr. President, I ask unanimous consent that excerpts from both the Judiciary and Foreign Relations Committee reports on S. 1940 last Congress be inserted in the RECORD.

The excerpts and bill follow:

AMENDMENTS TO TITLE 18 OF THE UNITED STATES CODE RELATING TO INTERNATIONAL EXTRADITION

The Committee on the Judiciary, to which was referred the bill (S. 1940) to amend chapter 209 of title 18 of the United States Code, relating to international extradition, having considered the same, reports favorably thereon and recommends that the bill pass.

* * * * *

HISTORY OF THE LEGISLATION

Senator Thurmond introduced S. 1639 on September 18, 1981, to modernize the statutory provisions relating to international extradition. One day of hearings was held on October 14, 1981, during which the Committee heard from the Department of State, the Department of Justice, a distinguished professor, and a practicing attorney. The record was kept open for more than two and one-half months for other interested persons to submit written statements and comments for the record.[1] On December 11, 1981, Senator Thurmond introduced a clean bill—S. 1940—to incorporate several amendments suggested in the hearings, as well as to make a number of clarifying amendments. S. 1940 differs from S. 1639 in two significant respects. First, S. 1940 as introduced made it mandatory—rather than discretionary—for the Secretary of State to deny extradition when he is persuaded that the requesting State is seeking the person's extradition "for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions". Second, as introduced, S. 1940 made it explicit in the statute that this determination would not be subject to judicial review.

This bill was the result of several years of study by the Departments of State and Justice in cooperation with the professional staff of the Senate Committee on the Judiciary. It was originally contemplated that the primary vehicle for modernizing the extradition laws of the United States would be the Federal criminal code legislation. Since

Footnotes at end of report.

the subject matter, however, can be easily separated out as a package, Senator Thurmond elected to follow a two track procedure in this instance; thus, identical provisions to this bill are also included as subchapter B of chapter 32 in the new title 18 in the criminal code bill (S. 1630) reported by the Committee on January 25, 1982. Legislation separate from the criminal code bill has the advantage of promoting early application of this important reform to an increasing case load involving international fugitives from justice.

STATEMENT IN GENERAL

Chapter 209 of current title 18 of the United States code (18 U.S.C. 3181-3195) intitled "Extradition" covers both interstate rendition and international extradition. This bill would retain chapter 209 for interstate rendition provisions and create a new chapter 210 for international extradition laws.

International extradition is the process by which a person located in one nation is arrested and turned over to another nation for criminal trail or punishment. The new chapter 210 consists of eight sections. Sections 3191 through 3196 deal primarily with requests made to the United States by foreign governments and set forth the procedure for determining whether a person located in this country should be delivered up to a foreign power. Section 3197 deals with the return of a fugitive extradited to the United States from a foreign nation. Section 3198 contains definitions and a provision on payment of the expenses incident to extradition. The proposed chapter replaces 18 U.S.C. 3181 and 3184-3195. Other Federal statutes on extradition, which include 18 U.S.C. 751, 752, and 1502, are not affected by this legislation.

The provisions of the proposed chapter substantially alter the present statutory law for several reasons.

First, many of the statutes on extradition have been in force without major alteration since 1882. Several have not been significantly changed since 1848. These antiquated provisions have proven increasingly inadequate in dealing with the modern problems in the international control of crime.

Second, there has been a marked increase in the number of extradition request received and made by the United States in recent years. Those requests have revealed problems in the extradition process. Moreover, the requests have generated a number of published court decisions on constitutional and legal issues involved in international extradition. The judicial interpretation of the law contained in these court decisions fills important gaps in the present statutory law, and should be reflected in any new extradition legislation.

Third, the United States has concluded new extradition treaties with many foreign countries in the past few years. The language of the present law is not adequate to fully implement some of the provisions of the new treaties, and therefore impedes fulfillment by the United States of its international obligations.

In summary, the following significant improvements in international extradition are accomplished by S. 1940:

(1) Permits the United States to secure a warrant for the arrest of a foreign fugitive even though the fugitive's whereabouts in the United States is unknown or even if he is not in the United States. This warrant can then be entered into the FBI's NCIC system so that if the fugitive attempts to enter the United States or is apprehended in the United States for other reasons, he can be identified and arrested immediately for extradition to the requesting country.

(2) Provides a statutory procedure for waiver of extradition. This feature protects a fugitive's rights while facilitating his removal to the requesting country in instances in which he is willing to voluntarily go to the requesting country without a formal extradition hearing.

(3) Permits both a fugitive and the United States on behalf of the requesting country to directly appeal adverse decisions by an extradition court. Under present law a fugitive can only attack an adverse decision through habeas corpus. The only option available to the United States acting on behalf of a requesting country is to refile the extradition complaint with another magistrate.[2]

(4) Clarifies the applicable standards for bail at all stages of an extradition case by adopting standards largely derived from Federal court cases.

(5) Establishes clear statutory procedures and standards applicable to all critical phases of the handling and litigation of a foreign extradition request.

(6) Makes the determination of whether the requesting country is seeking extradition of a person for a "political offense" a matter for the Secretary of State consistent with statutory guidelines and subject to judicial review in the courts of appeal.

(7) Limits access to United States courts in connection with foreign extradition requests to cases initiated by the Attorney General.

(8) Permits use of a summons instead of a warrant of arrest in appropriate cases.

(9) Codified the rights of a fugitive to legal representation and to a speedy determination of an extradition request.

(10) Simplifies and rationalizes the procedures for authenticating documents for use in extradition proceedings.

(11) Facilitates temporary extradition of fugitives to the United States.

PROVISIONS OF THE BILL AS REPORTED

SECTION 3191—EXTRADITION AUTHORITY IN GENERAL

1. Present Federal law

18 U.S.C. 3181 states that the present Federal laws authorizing the extradition of persons from the United States shall continue in force only if there is a treaty in force with the foreign nation requesting extradition. 18 U.S.C. 3184 requires that an extradition treaty be in force before any court can conclude that a person may lawfully be extradited to the foreign country involved. In addition, 18 U.S.C. 3186 by implication requires that a court find that the person sought is extraditable before the Secretary of State may order surrender to the foreign state. These provisions, read together, permit the United States to surrender a person to a foreign country only in accordance with an applicable treaty in force between the United States and the foreign country involved.[3] This principle has become a settled aspect of United States practice in international extradition.

2. Provisions of section 3191

Section 3191 of the proposed chapter on extradition carries forward the basic principle of the present law. The provision specifies that the United States may extradite a person in this country only if there is a treaty concerning extradition in force with the country requesting extradition, and only if the request falls within the terms of that treaty. This section refers to a treaty "concerning extradition" rather than an "extradition treaty" because an obligation to extradite a particular class of offenders is sometimes included in international agreements other than extradition treaties.[4] However, the limitation established by this section applies only to the surrender of fugitives pursuant to the chapter, and does not apply to any other legal process which may result in a person facing trial or punishment in another country. Thus, the surrender of a United States serviceman to foreign authorities for trial in accordance with the reciprocal criminal jurisdiction provisions of a Status of Forces Agreement,[5] or the deportation of an alien who happens to face criminal charges abroad,[6] remain governed by the treaty provisions and statutes relating to those processes, and not by this chapter.

SECTION 3192—INITIAL PROCEDURE

This section sets forth the steps to be followed in instituting court proceedings necessary for extradition.

1. Present Federal law

Extradition proceedings under 18 U.S.C. 3184 commence when a complaint is filed, under oath charging that a person has committed, within the jurisdiction of a foreign government, any of the crimes for which extradition is provided under the treaty on extradition in force between the United States and that foreign government. There is no requirement under present law that a formal diplomatic request for extradition be made before the complaint is filed.

18 U.S.C. 3184 permits any Federal judge or justice, or duly authorized Federal magistrate, or any judge of a State court of record of general jurisdiction to receive complaint and issue warrants of arrest in international extradition matters. In practice, however, such cases are almost invariably filed in the Federal courts.

The present statutory scheme does not specify by whom a complaint may be filed in extradition matters. The rule developed by the courts appears to be that any person acting under the authority of the demanding government may filed a complain for extradition.[7] Thus, international extradition cases have been instituted by foreign diplomatic or consular representatives,[8] foreign policy officers[9] and even private citizens which claim to be acting on behalf of a foreign government.[10] This situation has required the courts to determine, in each case, whether the person filing the complaint is "authorized" to act on behalf of the foreign government.[11] However, in recent year, the United States Department of Justice has become the complainant in the overwhelming majority of extradition cases. The Department of Justice takes this action either pursuant to provisions in the applicable extradition treaty requiring the government of the requested state to provide assistance to the government seeking extradition[12] or pursuant to an informal international agreement for reciprocal legal representation.

The complaint must be filed in a Federal or State court in whose jurisdiction the fugitive may be found. Unfortunately, in many cases the international fugitive's location in the United States is unknown. Therefore, no complaint can be filed and no arrest warrant can be issued. The ability of United States law enforcement agencies to locate and apprehend international fugitives is greatly hampered by the lack of an outstanding arrest warrant or other judicial process in such cases.[13]

The present statutory scheme contains no provision for the release of an alleged fugitive on bail pending the extradition hearing.[14] However, the courts have claimed the inherent right to release an alleged fugitive on bail pending the extradition hearing in cases where "special circumstances" require such release.[15] The standard for release on bail in extradition cases is more demanding than in ordinary cases, and a clear presumption against bail is recognized.[16]

2. Provisions of section 3192

Subsection (a) permits the Attorney General to file a complaint charging that a fugitive is extraditable in the United States district court for the district in which the fugitive may be found. The subsection also permits a complaint to be filed in the United States District Court for the District of Columbia if the fugitive's location is not known. Under this provision, a complaint could be filed, and an arrest warrant issued, when the whereabouts of the fugitive in the United States are still being ascertained, or when it is believed that the fugitive has not yet entered the United States but may be about to do so. The word "found" is intended to have its usual, non-technical meaning, and permits extradition proceedings to be initiated in any district in which the fugitive can be physically apprehended, without regard to the manner in which the fugitive entered the district.[17]

Subsection (b) prescribes the contents of a complaint for extradition. Since all United States extradition treaties specify the documents and quantum of evidence necessary for surrender, paragraph (1) states that an extradition complaint is sufficient if it is accompanied by the evidence specified in the treaty and a copy of the formal request for extradition. Paragraph (2) deals with the documentation necessary to support a "provisional arrest," the process by which a fugitive from justice is arrested to prevent further flight while the foreign government seeking extradition assembles the necessary documents and evidence.[18] Subparagraph (A) of paragraph (2) provides that a complaint will support an arrest under subsection (c) if it contains information sufficient to identify the fugitive, explains the circumstances necessitating provisional arrest,[19] and either indicates that a warrant for the fugitive's arrest is outstanding in the foreign state,[20] or outlines the essential facts indicating that an extraditable crime has been committed and that the fugitive committed it. Since many of the extradition treaties contain articles which expressly set out requirements for obtaining the arrest of fugitives,[21] subparagraph (B) of paragraph (2) also permits the complaint to be filed if it contains the information required by the provisions of the applicable treaty.

Subsection (c) obliges the court to issue a warrant for the arrest of the fugitive upon receipt of the complaint unless the Attorney General requests that a summons to appear at the extradition hearing be issued instead. The subsection requires that the warrant of arrest be executed in accordance with Rule 4(d) of the Federal Rules of Criminal Procedure. This means that the warrant may be executed anywhere in the United States in the same manner as an ordinary Federal warrant of arrest. The subsection also requires that the person arrested be taken without unnecessary delay before the nearest available Federal court[22] for an extradition hearing. The language is similar to that of Rule 5 of the Federal Rules of Criminal Procedure, and is intended to insure that the person arrested under this section is speedily informed by a judicial officer of the reason for the arrest and of his rights to counsel, to cross-examine witnesses, and to introduce evidence on his behalf. It is not intended to require the dismissal of extradition proceedings solely on the ground that the fugitive arrested for extradition was taken without unnecessary delay before a judge or magistrate later determined not to be the "nearest" one. There is no requirement that the extradition hearing take place in the State in which the fugitive is found,[23] so long as there has been compliance with the provisions of this chapter.

Subsection (d)(1) provides that a fugitive arrested for extradition may be released on bail pending the extradition hearing only if he can demonstrate that "special circumstances" warrant his release. The provision continues the approach which has been followed by United States courts[24] in setting the standards for release on bail pending an extradition hearing considerably higher than the standards for release on bail pending trial on Federal charges in the United States. This approach is necessary to assure that the United States continues to carry out its treaty obligation to surrender extraditable fugitives. It is anticipated that the courts will find the "special circumstances" test satisfied "only in the most pressing circumstances and only when the requirements of justice are absolutely peremptory."[25] Such special circumstances might be found, for instance, when the incarceration of the fugitive would seriously damage his health,[26] or would endanger the welfare of a third party who is wholly dependent upon the fugitive for care.[27] It is anticipated that these circumstances would rarely be encountered.

Subsection (d)(3) provides that even if special circumstances are found, the release of the fugitive shall be permitted only upon such conditions as will reasonably assure his appearance at future proceedings, and assure the safety of other persons and the community. Such conditions might include surrender by the fugitive of any passport or travel documents, posting of a substantial bond, and the requirement that the fugitive maintain contact with appropriate federal agencies, such as the United States Marshals Service.

Subsection (d)(2) gives the court the discretion to release the fugitive provisionally arrested pursuant to this section if the evidence or documents required by the applicable treaty are not received within sixty days of the arrest (unless a longer period of detention is specified in the applicable treaty). The subsection resolves and ambiguity perceived by the courts with respect to the commencement and conclusion of the time period for provisional arrest by providing that this period should be calculated from the date on which the fugitive is taken into custody for extradition[28] to the date on which the documents are received by either the court or the Department of State.[29] If the court is notified that the documents have been received by the Department of State before the expiration of the 60-day period, the court is directed to defer release of the fugitive for a reasonable time pending the prompt transmission of the documents to the court by the Department of State. If a court does release the fugitive from custody due to the non-receipt of the documents within the applicable time period, subsection (d)(3) requires that the court frame conditions of release reasonably calculated to assure that person's appearance for future proceedings and the safety of other persons and the community. Release of the fugitive under subsection (d) does not terminate the proceedings, which can resume once appropriate documentation arrives.[30]

This section does not carry forward the little used authorization in 18 U.S.C. 3184 for extradition proceedings to be commenced before State judges. The section also specifies that extradition proceedings must be initiated by the Attorney General, rather than by a foreign government or one acting on behalf of a foreign government.[31] These changes reflect the fact that international extradition is strictly a function of the Federal Government,[32] and determining when and how to perform that function is properly the business of Federal officials and Federal courts. The United States Government has a sufficient interest in the vigorous enforcement of the laws (including the extradition law and treaties) to justify the participation of its legal counsel, the Department of Justice, in all court proceedings aimed at determining whether extradition can take place. Indeed, this is the approach which has been adopted in most foreign countries, many of which do not permit the United States to argue in court during proceedings in connection with a United States extradition request. In addition, United States courts are freed from any need to determine whether a private person is "authorized" by an "appropriate" foreign authority to initiate extradition proceedings. It should also significantly reduce the likelihood of extradition proceedings being used by private individuals as a tool for harassment, debt collection, or other improper purposes.

SECTION 3193—WAIVER OF EXTRADITION HEARING AND CONSENT TO REMOVAL

1. Present Federal law

Present Federal law provides no specific procedure by which a person arrested for extradition may waive the formalities and voluntarily return to the foreign country requesting surrender. This is especially unfortunate since a significant number of the fugitives arrested under 18 U.S.C. 3184 choose not to challenge the request for extradition and wish to expedite removal to the foreign country. Moreover, many of the newer extradition treaties to which the United States is a party contain provisions obliging the requested state to expedite the return of a fugitive who has waived a hearing or other procedures.[33]

2. Provisions of section 3193

Section 3193 of the proposed extradition chapter clarifies the method by which the fugitive who does not contest extradition can expedite his surrender. The provisions of this section are based on Federal statutory provisions governing a closely analogous situation: the verification of a prisoner's voluntary consent to transfer to his country of nationality under treaties on the execution of penal sanctions.[34] The section states that the court which would have handled the extradition proceeding shall verify that the fugitive's consent to be removed to a foreign country has been given voluntarily and with full knowledge of his right to consult with counsel before making a decision in the matter.

Under some circumstances, the foreign government may not be willing to accept custody of a fugitive who has offered to waive extradition.[35] There also may be situations in which the United States government would consider waiver inappropriate.[36] Therefore, the provision does not permit removal of the fugitive if the Attorney General notifies the court that the United States or the foreign state objects to the proposed waiver.

SECTION 3194—EXTRADITION HEARING

1. Present Federal law

Under 18 U.S.C. 3184, an alleged fugitive is entitled to a hearing at which a judicial officer determines whether extradition is lawful. 18 U.S.C. 3189 specifies that the hearing must be held "on land, publicly, and in a room or office easily accessible to the public".

At the extradition hearing, the judicial officer must determine whether the offense for which extradition is sought falls within the terms of the treaty. He must also determine whether the acts for which the fugitive is sought by the foreign country would constitute a crime had they been committed

in this country. This rule, known as "dual criminality" or "double criminality", is generally considered a basic principle of international extradition law,[37] and is expressly required by many of the extradition treaties to which the United States is a party.[38] The courts have held that the double criminality requirement is satisfied whenever the acts which the fugitive is charged with having committed in the foreign country would be punishable under Federal law, the law of the State where the fugitive is found, or the laws of a majority of the States, had those acts been committed in this country.[39]

A judicial officer must also determine whether there is sufficient proof that an extraditable offense in fact has been committed. Most of the treaties to which the United States is a party require that an extradition request be supported by "such evidence of criminality as, according to the laws of the place where the fugitive shall be found, would justify his commitment for trial had the crime or offense been there committed." Many years ago, the courts veiwed the words "place where the fugitive shall be found" as requiring the Federal court to determine if the foreign government's evidence is sufficient to justify a trial under the State laws of the State in which the fugitive is apprehended.[40] This approach was a reasonable one eight decades ago, because at that time Federal courts had no uniform rules of criminal procedure and routinely followed the procedural rules of the courts of the State in which they were located. However, the adoption of the Federal Rules of Criminal Procedure has made it generally unnecessary for Federal courts to refer to State law in these matters.[41] Moreover, extradition is a national act,[42] and the quantum of evidence necessary for extradition is precisely the kind of issue which should be determined by uniform national law, rather than by various State laws. For these reasons, all of the more recent extradition treaties contain language essentially requiring that the Federal law standard of commitment for trial—probable cause—be applied in weighing the sufficiency of the evidence for international extradition.[43]

The Federal Rules of Evidence do not apply in extradition proceedings,[44] where unique rules of wide latitude govern the reception of evidence on behalf of the foreign government.[45] It is settled law that hearsay is admissible, and the foreign government usually presents its case by submitting affidavits, depositions, and other written statements in order to satisfy the requirements of the applicable treaty.[46] 18 U.S.C. 3190 provides that originals or copies of depositions, warrants, or other papers are admissible in evidence at the extradition hearing if authenticated so as to be admissible for similar purposes according to the laws of the requesting country. The statute also provides that the certificate of the principal diplomatic or consular officer of the United States resident in the requesting country shall be proof that the documents are authenticated in the manner required. In essence, the documents need only be genuine and authentic—requirements that are deemed fulfilled once it is shown that under similar circumstances the requesting country's own courts would accept them as authentic. The courts have held that extradition documents bearing a certificate which is couched in the language of 18 U.S.C. 3190, and signed by one of the specified officials, are conclusively admissible.[47] As a result of these decisions, foreign governments routinely submit the documentation in support of extradition requests to the appropriate United States Embassy abroad for certification and transmission to the United States. This practice imposes undesirable burdens on the United States Foreign Service officers who must fill out the certification.[48]

The present statutory scheme offers little guidance with respect to the evidence which can be introduced on behalf of the alleged fugitive in an extradition hearing. Many cases emphasize that whether such evidence should be admitted is a decision for the court, in its discretion, to make.[49] The alleged fugitive is ordinarily permitted to testify on his own behalf [50] or to have witnesses testify for him.[51] However, it is clear from the case law that the alleged fugitive may offer to explain ambiguities in the evidence submitted against him, but may not offer evidence which merely contradicts that submitted by the requesting country, or which poses a question of credibility, or which raises an affirmative defense to conviction on the charges, or which is incompetent by the terms of the extradition treaty under which surrender is sought.[52] This restrictive approach is appropriate because the issue before the court at an extradition hearing is probable cause, not the ultimate guilt or innocence of the accused.

Finally, the judicial officer must determine whether the treaty contains a defense to extradition which would preclude surrender in the case before him. Extradition treaties frequently bar surrender if a statute of limitations has foreclosed prosecution or punishment for the offense in question,[53] or if the fugitive has been tried or punished in the requested state for the same offense,[54] or if any of several other legal considerations are present.

Virtually every extradition treaty contains a provision barring extradition for a political offense, and many treaties also preclude extradition if the requesting country has political motives for seeking the return of the fugitive. Under the present case law, the courts decide whether the crime for which extradition has been requested is a political offense [55] but traditionally have declined to consider whether the requesting country's motives in seeking extradition are political.[56] Since these issues are usually intertwined,[57] the possibility for inconsistent results is obvious.

If the judicial officer is persuaded that the crime charged falls within the treaty, that the acts involved would constitute an offense in this country, that the evidence submitted is sufficient to sustain the charge under the treaty, and that no legal defense to extradition is applicable, it is his duty to certify these conclusions to the Secretary of State. The judicial officer also must send the Secretary of State a copy of all the oral testimony taken at the hearing. 18 U.S.C. 3184 requires the judicial officers to order the commitment of the accused to jail pending surrender, and there is provision for release on bail at this stage of the proceedings. If the judicial officer finds that the fugitive is not extraditable, the proceedings are terminated, and the fugitive is released from custody.

2. Provisions of section 3194

Section 3194(a) requires that a judicial hearing be held to determine whether the person sought is extradictable (unless such as hearing has been waived under section 3193) and sets out the procedure for the hearing.

Section 3194(a) provides that the court does not have jurisdiction to determine whether extradition is sought for a political offense or because of the person's political beliefs, while section 3196(a)(3) specifies that the Secretary of State must decline to order surrender of a person if, after taking into account certain statutory principles generally eliminating specified types of crimes from the political offense exception (e.g., crimes of violence and drug trafficking), he is persuaded that the person's extradition is sought for one of these reasons. The provisions taken together provide that the Secretary of State shall have jurisdiction to decide the applicability of the "political offense" exception to extradition is sought for one of these reasons. The provisions taken together provide that the Secretary of State shall have jurisdiction to decide the applicability of the "political offense" exception to extradition contained in most extradition treaties, such decision to be consistent with the statutory guidelines and reviewable in the United States courts of appeal based on a substantial evidence standard. The Committee has concluded that this approach, also discussed in dealing with section 3196(a)(3) *infra*, is a desirable one for several reasons.

First, the most modern United States extradition treaties specify that the executive branch of the requested country shall decide the applicability of the political offense exception.[58] In the absence therefore of specific legislative endorsement of the court developed rule—an unlikely prospect in light of the trend in magistrate extradition decisions noted *infra* note 61—it is inevitable over the long term that the case law rule reserving the political offense decision to the courts will become the exception rather than the rule as the United States continues its ongoing program of negotiating new modern treaties. Moreover, as previously noted, under present case law the courts generally shun deciding whether the foreign government's extradition request is politically motivated, preferring to leave that decision to the executive branch. It should also be noted that the political offense decisions are made exclusively by the executive branch of the government in several foreign countries, including Canada and Germany.

Second, the decision to shield a criminal from extradition for an otherwise extraditable offense on the ground that his offense was "political" is not the type of issue which lends itself to resolution through the judicial process.[59] When dealing with a political situation in a foreign country and the relationship of particular conduct to that situation, there are few truly objective criteria by which a comprehensive definition of the term "political offense" can be based.[60] Moreover, a public court proceeding is not the most desirable forum for careful analysis of a friendly foreign state's intentions or political system. Such analysis and decisions are inextricably intertwined with, and require the expertise of those versed in the conduct of foreign relations. The Commtittee has concluded that this issue is best left to the Secretary of State, subject only to limited review in the courts of appeal, along with his traditional unreviewable responsibilities with respect to political asylum.

Finally, a decision on the political offense exception can have a devastating impact on United States relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise United State efforts to combat international terrorism.[61] The present law exacerbates this situation, because frequently the United States government, through the departments of State and Justice, must take a position on the applicability of the political offense exception while the case is before the court. Moreover, the government must take this position publicly, before all the evidence and arguments are in, and despite the fact that the court or the Secretary of State may subsequently decide against ex-

tradition on other grounds. By contrast, the approach taken by the proposed chapter permits a more informed decision on extradition to be made in a manner less likely to be offensive to the friendly foreign government involved in the case.

Subsection (b) supplements present law by expressly providing that the fugitive be informed of his right to be represented by counsel at the extradition hearing. Indigent fugitives will be provided with counsel pursuant to the provisions of section 3401 relating to court-appointed counsel. The provision also requires that the fugitive be informed of his right to introduce evidence in his own behalf on matters within the jurisdiction of the court. The subsection thereby leaves intact the extensive case law on this point.[62]

Subsection (c) deals with evidence in an extradition hearing. Paragraph 1 is designed to clarify the circumstances under which documentary evidence will be admissible on behalf of either party in an extradition hearing.

Many treaties specifically set out the manner in which extradition documents must be authenticated,[63] and subparagraph (A) of paragraph (1) provides that documents so authenticated shall be admissible. It also provides that documents authenticated in accordance with the provisions of United States law shall be deemed admissible as evidence in the extradition hearing. Thus, documents which comply with the requirements of Article IX of the Federal Rules of Evidence would be admissible in extradition proceedings. However, the provision does not require the exclusion from the hearing of evidence which fails to satisfy the Federal Rules of Evidence. Rather, the subsection merely underscores the commonsense proposition that evidence which satisfies the high standards set out in the Rules, and which would be admissible in civil or criminal proceedings in this country, should likewise be acceptable in extradition proceedings.

Subparagraph (B) of paragraph (1) is based on 18 U.S.C. 3190 and provides that a document authenticated accordance with the applicable laws of the foreign country requesting extradition shall be admissible if it is accompanied by an attestation to this effect from a judge, magistrate, or other appropriate officer of the foreign state. The phrase "other appropriate officer" would include an official of the foreign counterpart of the Department of Justice, or any other government official likely to be familiar with legal matters in the foreign country. It further requires that the signature and position of the person so attesting be certified by a diplomatic or consular officer of the United States posted in the foreign country, or by a diplomatic or consular officer of the foreign state assigned to this country.[64] The provision thus brings the essential requirements of 18 U.S.C. 3190 more into line with Rule 902(3) of the Federal Rules of Evidence.

Subparagraph (C) of paragraph (1) permits the court handling an extradition matter to accept as evidence any documents which it is persuaded are in fact authentic, regardless of compliance with either of the two previous provisions. This rule is similar to Rule 901(a) of the Federal Rules of Evidence, and is in accord with established case law permitting the authenticity of documents presented in extradition proceedings to be established by the testimony from expert witnesses or by other evidence.[65]

Paragraph (2) of subsection (c) provides that a cerfificate or affidavit by an appropriate State Department official as to the existence or interpretation of a treaty is admissible as evidence of that treaty or its interpretation.

The overwhelming majority of extradition treaties require that the requesting country present such evidence of criminality as would justify commitment for trial had the crime or offense been committed in the place where the fugitive has been found. Under paragraph (2) such a treaty provision may be satisfied by evidence establishing probable cause to believe that a crime was committed and that the person sought committed it. This is the usual standard for commitment for trial in Federal criminal cases.[66] This approach permits the Federal courts to apply the standard for commitment with which they are most familiar, and establishes a single, uniform standard by which the sufficiency of evidence in extradition proceedings may be measured. It is also consistent with the views expressed in several recent court decisions pointing out the advantages of dealing with the quantum of evidence for extradition in a manner consistent with Federal law.[67]

Paragraphs (1), (2), and (3) of subsection (d) carry forward the requirements of 18 U.S.C. 3184 that instruct the court to find the fugitive extraditable if the evidence presented is sufficient to sustain the complaint under the provisions of the applicable treaty, and also requires that the court find probable cause that the person before it is the person sought in the foreign state, and that none of the defenses to extradition which the court is empowered to consider are applicable. Paragraph (4) bars extradition unless the acts for which the fugitive's surrender is requested would constitute a crime punishable under State or Federal law in the United States. Finally, the subsection states that the findings required for extradition may be established by hearsay evidence or certified documents alone. This rule is similar to Rule 5.1 of the Federal Rules of Criminal Procedure, which permits a finding of probable cause to commit for trial to be based on hearsay evidence. It is also in accord with recent court decisions which point out that the kind of evidence necessary for extradition is an issue which should be determined by uniform national law.[68]

Subsection (e) details the procedures that the court must follow at the conclusion of the hearing. If the court finds that the fugitive is extraditable, it must state, in writing, its findings and rationale with respect to each of the offenses for which extradition is sought.[69] These findings must be sent to the Secretary of State, together with a transcript of the hearing.[70] If the court finds that the fugitive is not extraditable, the findings required by the subsection may be accompanied by a report rather than a transcript of the hearing.

SECTION 3195—APPEAL

1. Present Federal law

Under present Federal law, there is no direct appeal from a judicial officer's finding in an extradition hearing.[71] A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus.[72] The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition.[73] The lack of direct appeal in extradition matters adds undesirable delay, expense, and complication to a process which should be simple and expeditious.

2. Provisions of section 3195

Section 3195 of the proposed chapter permits either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision. It is anticipated that review on appeal will be very narrow, and that any findings of fact by the lower court will be affirmed unless they are clearly erroneous.

Subsection (a) specifies that the appeal shall be filed within the time limits set out in Rules 3 and 4(b) of the Federal Rules of Appellate Procedure, i.e., 10 days for the person sought and 30 days for the government. These are the same deadlines for filing a notice of appeal in criminal cases, and while the an extradition hearing is not a trial,[74] or even strictly a criminal proceeding,[75] these deadlines adequately balance the competing interests of fairness and expedition. It is anticipated that other aspects of the appeal process (such as the preparation and submission of the record, briefing, argument and decision) will be governed by the applicable provisions of the Federal Rules of Appellate Procedure.

If the fugitive has been found extraditable, subsection (a) requires that surrender to the foreign government be stayed pending determination of the appeal by the court of appeals.[76] This provision prevents the government from mooting the appeal by spiriting the petitioner out of the country while the matter is *sub judice.* The provision is designed to maintain the *status quo* with respect to the fugitive's custody pending appeal. It is anticipated that the district court will not ordinarily stay or delay any other element of the extradition process, such as the certification of its findings to the Secretary of State under section 3194(e).

Subsection (b) provides that a person found extraditable must remain in official detention pending the appeal unless the court of appeals finds that special circumstances require release. This is a slight amelioration of present law, which does not permit the release of a fugitive on bail after he has been found extraditable.[77] The change is desirable because the same kind of pressing, unusual situation which might require that the person sought be released from custody on bail pending the extradition hearing[78] could conceivably arise after the extradition hearing. However, it is anticipated that this authority to release a fugitive on bail will be utilized even more sparingly than the power to grant bail before the extradition hearing, and only after the most thorough and searching examination of the claimed need for release. It is expected that the courts of appeal will keep in mind that "no amount of money could answer the damage that would be sustained by the United States if [the fugitive] were to be released on bond, flee the jurisdiction, and be unavailable to surrender. . . ."[79]

If the person was found not extraditable, subsection (b)(2) permits the district court to order that the person be released pending an appeal by the government. Release shall be ordered unless the district court is satisfied that the appellee is likely to flee before the appeal is decided, or endanger the safety of any other person or the community.

A major purpose of section 3195 is to simplify, and thereby expedite, the extradition process by providing for a direct appeal from a contested decision on extradition. The direct appeal provided by this section largely eliminates the present need for habeas corpus proceedings in order to obtain judicial review of the initial finding that a person is extraditable. This purpose would be frustrated if a fugitive bent on dilatory tactics were permitted to pursue an appeal under this section, a petition for *certiorari* to the Supreme Court, and then begin one or more rounds of habeas corpus

proceedings. Such a course of action would lengthen the extradition process rather than shorten it. Therefore, subsection (c) deprives any court of jurisdiction to review a finding that a fugitive is extraditable under this chapter unless the fugitive has exhausted the appellate remedies available to him by right in this section. It also forecloses an appeal, a petition for habeas corpus, or declaratory judgement action if the validity of the fugitive's commitment for extradition has been ruled upon in prior proceedings, unless grounds are offered which could not have been presented previously.

The resolution of challenges to judicial action in international extradition cases should be especially prompt. Extradition cases are quasi-criminal in nature. Moreover, in such cases, our government's willingness to make a timely and ungrudging execution of its solemn treaty obligations to a friendly nation is in question.[80] Therefore, this section requires that courts of appeal decide cases arising under this chapter expeditiously.

SECTION 3196—SURRENDER OF A PERSON TO A FOREIGN STATE

1. Present Federal law

Under 18 U.S.C. 3186, the Secretary of State may order that any person found extraditable by a court under 18 U.S.C. 3184 be delivered to an authorized agent of the government seeking extradition. Although it is generally agreed that the Secretary's decision in this matter is discretionary,[81] present law provides no indication of the parameters of the Secretary's discretion.

18 U.S.C. 3188 states that if a fugitive found extraditable under 18 U.S.C. 3184 is not removed from the United States within "two calendar months" of the court's commitment order, he may be released from custody unless there is "sufficient cause" why release should not be ordered.[82] The courts have held that if the fugitive institutes litigation challenging his extradition, the two-month period commences when the claims are finally adjudicated rather than when the commitment order was issued.[83]

2. Provisions of section 3196

Subsection (a) carries forward the essence of 18 U.S.C. 3186 by providing that the Secretary of State shall make the final decision as to extradition. The subsection requires that the Secretary's decision be made in accordance with the chapter and the applicable treaty, and lists the actions that the Secretary may take.

Subsection (a)(1) simply permits the Secretary to order the surrender of a person the court has found to be extraditable to a duly appointed agent of the foreign state.

Subsection (a)(2) permits the Secretary to condition the surrender of a fugitive upon the acceptance by the foreign state of restrictions or conditions he considers necessary in the interest of justice or to effectuate the purposes of the treaty. This provision underscores the Department of State's authority to impose such restrictions where humanitarian concerns[84] or questions concerning trial procedures in the requesting state exist.[85] It would also permit the imposition of restrictions expressly contemplated in the provisions of some newer treaties.[86]

Subsection (a)(3) provides that the Secretary of State shall deny extradition where he is persuaded that the foreign state is seeking the person's extradition "for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions." The first of these determinations—i.e., whether the offense is a "political offense or an offense of a political character"—currently is decided by the courts. The Committee concluded that the adversary judicial procedure requiring State Department expert testimony on an evaluation of volatile political situations in foreign countries is an unsatisfactory way to resolve this issue. Other fundamental reasons underpinning structural alteration of the decision-making apparatus with respect to the political offense exception were addressed in the discussion relating to section 3194 *supra* and are not repeated here. This bill meets these problems by shifting the political offense exception decision to the Secretary of State, subject to judicial review based on a substantial evidence test in the court of appeals for the circuit in which the extradition proceeding took place. With respect to judicial review, it should be noted that an adequate administrative record must be made providing the factual basis for the Secretary's decision.

In addition, the bill provides guidelines to be applied by the Secretary of State that are intended to prevent relief from extradition for the specified offenses except in the most rare circumstances. This part of the bill reads as follows:

When it is claimed that the foreign government is seeking the person for a political offense or an offense of a political character, the Secretary will make his determination in accordance with the following principles. A political offense or an offense of a political character normally does not include—

(A) an offense within the scope of the Convention for the Supression of Unlawful Seizure of Aircraft, signed by The Hague on December 16, 1970;

(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

(C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

(D) an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of the offense;

(E) an offense that consists of homicide, assault with intent to commit serious bodily injury, rape, kidnapping, the taking of a hostage, or serious unlawful detention;

(F) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

(G) an offense that consists of the manufacture, importation, distribution or sale of narcotics or dangerous drugs; or

(H) an attempt or conspiracy to commit an offense described in paragraphs (A) through (G) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

The first four criteria involve commitments made by the United States pursuant to international conventions or agreement, such as aircraft hijacking and terrorist acts against internationally protected persons. The next two cover serious crimes of violence against the person, including endangering others through the use of firearms or explosives. The seventh criteria relates to drug trafficking, while the eighth factor deals with attempt, conspiracy, and accomplice liability for the preceding categories of offenses.

It should be noted that the guidelines in fact set forth certain types of offenses that should not "normally" be found to be "political offenses". Use of the term "normally" recognizes that there may be a rare situation in which the nature of, and events in, a foreign country and the traditions of freedom and political democracy in the United States combine to compel the Secretary of State to find one of the listed offenses a political offense under the circumstances of the case. While the Committee elected to retain this narrow flexibility, it is noted that the United States has well established principles governing executive authority to grant political asylum that should more than adequately provide the alternative and preferred basis for appropriate relief from extradition on political grounds consistent with the traditions, heritage, and foreign policy principles of this country.

It should also be noted that this provision provides that any evidence or arguments the fugitive wishes to present to the Secretary of State with respect to the alleged political nature of extradition shall be in writing. The Secretary is not required to provide a formal hearing on a political offense exception application,[87] but it is expected that the Secretary will utilize the resources of the Department of State for gathering evidence and assessing the claim.

Subsection (a) also makes it explicit in the statute that the decisions of the Secretary of State under paragraphs (1), (2), and (3) of that subsection are in the nature of post-judicial "last step" final administrative determinations prior to actually effecting the extradition and, as such, are not subject to judicial review.

Finally, subsection (a) expressly authorizes surrender of United States nationals unless surrender is expressly prohibited by the applicable treaty.[88] This provision is necessary in light of the decision in the *Valentine*[89] case in which the Supreme Court held that language contained in many of the older extradition treaties to which the United States is a party does not permit the surrender of United States citizens absent explicit statutory authority for such surrender. The result of the *Valentine* decision has been to effectively immunize United States citizens from extradition in many cases—a result never intended by the negotiators of the treaties involved. It is the policy of the United States to treat its citizens and aliens within its borders equally in extradition matter,[90] and this subsection permits that policy to operate effectively.

Subsection (b) requires that the Secretary of State notify all interested parties of his decision on extradition.

Subsection (c)(1) provides that the fugitive shall be released from custody if the Secretary of State does not order, or declines to order, the person's surrender within forty-five days after receiving the record of proceedings from the court. Of course, if the Secretary of State decides within the forty-five days to refuse to order extradition, the authority for holding the person sought in custody under section 3194(e)(1) immediately expires, and the person should be released from detention at once.

Subsection (c)(2) is based on the provisions of 18 U.S.C. 3188, and provides that when the Secretary of State has ordered a person extradited, the foreign country involved must take custody of the person and remove him from the United States within 30 days. This 30-day time period does not begin until all litigation challenging extradition has been completed. The subsection expressly excludes from consideration the time during which surrender has been stayed pending litigation.

Subsection (c) requires a person found extraditable to give the Secretary of State reasonable notice that he will seek release be-

cause of expiration of a time limitation set forth in subsection (c)(1) or (c)(2), and forbids release if good cause is shown for the delay in effecting surrender.

SECTION 3197—RECEIPT OF A PERSON FROM A FOREIGN STATE

1. Present Federal Law

18 U.S.C. 3192 authorizes the President to "take all necessary measures for the transportation and safekeeping" of a person extradited to the United States from a foreign country. At one time the President relied upon this statute to issue a warrant designating an agent to receive custody of a fugitive from a foreign government. 18 U.S.C. 3193 authorizes such an agent to convey the fugitive directly to the place of trial, and grants to the agent "all the powers of a Marshal of the United States, in the several federal districts through which it may be necessary for him to pass with [the] prisoner . . .". The authority to issue warrants and appoint agents under these sections has now been delegated to the Secretary of State.[91] However, the Department of State wishes to transfer to the Department of Justice the authority to appoint agents and issue warrants in these matters.

2. Provisions of section 3197

Section 3197 of the proposed chapter carries forward the provisions of 18 U.S.C. 3192 and 3193, with minor modifications reflecting present United States practice.

Subsection (a) authorizes the Attorney General to designate an agent to receive custody of a fugitive surrendered by a foreign government, and permits the agent to convey the fugitive to the place of trial in the United States. The final sentence of the subsection permits the extradited fugitive to be taken directly to the Federal district or State jurisdiction in which charges are outstanding without removal proceedings under Rule 40 of the Federal Rules of Criminal Procedures or interstate rendition proceedings.

Section 3197(b) is new, and is designed to implement provisions, found in some of the most recent United States extradition treaties. The laws in many foreign countries require that extradition be postponed until the person has satisfied any outstanding criminal charges in that country.[92] Frequently, a person sought by the United States has already been tried and convicted of other charges in the requested country and has a sentence to serve there. If the sentence abroad is a long one, the postponement of surrender could compromise the possibility of a speedy and fair trial in this country.[93] Some extradition treaties contain provisions which deal with this problem by permitting "temporary extradition". Under these treaty provisions, a fugitive convicted abroad would be surrendered to the United States solely for purpose of trial and sentencing here, then returned to the foreign country involved to finish the sentence previously imposed there.[94] This process balances our government's interest in adjudicating the charges while the evidence is fresh with the foreign country's desire to fully enforce its laws. It also works to a fugitive's benefit by enabling him to answer the charges in this country while evidence for his defense is still available, and by creating the possibility that the sentence imposed upon conviction in this country could run concurrently with that the fugitive must serve abroad.

Section 3197(b) provides implementing legislation for treaty provisions of this types. It provides that when a foreign state has delivered a person to the United States on the condition that the person be returned at the conclusion of the criminal trial or sentencing, the Bureau of Prisons shall keep the person in custody until the judicial proceedings are concluded, and thereafter surrender the person to a duly appointed agent of the foreign country. It also provides that the return to the foreign state of the person is not subject to the requirements of the chapter, such as an extradition hearing or an order of surrender by the Secretary of State.

SECTION 3198—GENERAL PROVISIONS FOR CHAPTER 210

1. In general

This section contains the definitions and general provisions applicable to the extradition chapter.

2. Present Federal law

18 U.S.C 3198 requires that the foreign government which sought extradition pay all costs and fees resulting from the request. The costs resulting from extradition requests here frequently are so small that it is uneconomical—and diplomatically embarrassing—to attempt to enforce this statute. Moreover, many of the extradition treaties to which the United States is a party contain provisions which modify this statutory rule.[95] Also, the United States has entered into informal arrangements with some countries whereby each country bears most of the cost of the other's extradition request. In short, the present statute does not adequately reflect government policy in extradition matters.

Present statutory law offers no guidance as to who must pay the costs associated with United States requests to foreign countries for the extradition of fugitives. The Department of State requests extradition on behalf of either the State within the United States in which the fugitive is charged, or, if Federal charges are involved, on behalf of the United States. Therefore, the long-standing policy of the Department of State has been that the State jurisdiction which sought the fugitive's return must pay any expenses incurred in connection with the extradition request, and the Department of Justice must pay the expenses incurred in obtaining the extradition of a fugitive Federal offender.

3. Provisions of section 3198

Subsection (a) of section 3198 sets forth definitions for the terms "court", "foreign state", "treaty", and "warrant".

Subsection (b) states that in general a foreign state which has requested the extradition of a fugitive located in the United States must bear all costs and expenses incurred in connection with that request. Since many of the extradition treaties contain provisions specifically dealing with costs in extradition matters, the subsection authorizes the Secretary of State to direct that this matter be handled in accordance with terms of the applicable treaty or agreement. Subsection (b) also requires that all cost and expenses incurred in connection with the execution of a request by a State of the United States for the return of a fugitive located in another country must be paid by that State. When the request for extradition is made to secure the return of a fugitive wanted for a Federal offense, the expenses must be borne by the United States. It is anticipated that when the fugitive involved is sought for both Federal and State offenses, the costs incurred abroad will be allocated accordingly.

FOOTNOTES

[1] Extradition Act of 1981, Hearings before the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st Sess. (1981) [hereinafter cited as Hearings].

[2] *United States* v. *Mackin*,—F.2d—(2d Cir. 1981).

[3] *Valentine* v. *U.S. ex rel. Neidecker*, 299 U.S. 5 (1936); *Argento* v. *Horn*, 241,. F.2d 258, 259 (6th Cir. 1957). *cert. denied* 355 U.S. 818 (1957); *Ivancevic* v. *Artukovic*, 211 F.2d 565, 566 (9th Cir. 1954) *cert. denied*, 34 U.S. 818 (1954); Evans, *Legal Basis for Extradition in the United States*. 16 New York Law Forum 526, 529-530 (1960); 6 Whiteman. Digest of International Law 727 (1968).

[4] See e.g., Art. 14, Amending Protocol to the 1961 Single Convention on Narcotic Drugs, done at Geneva. March 24, 1972, 26 U.S.T. 1439, T.I.A.S. 8118 (entered into force for the United States August 8, 1975); Art. 8, Convention on Suppression of Unlawful Seizures of Aircraft, done at The Hague, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. 7192 (entered into force for the United States October 14, 1971); Art. 8, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done at New York. December 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532 (entered into force for the United States February 20, 1977).

[5] See. e.g., *Holmes* v. *Laird*, 459 F.2d. 1211, 148 U.S. App. D.C. 187 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 889 (1972); *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971). *cert. denied*, 405 U.S. 926 (1972).

[6] See e.g., *Kalatiis* v. *Rosenberg*, 305 F.2d 249 (9th Cir. 1962).

[7] 6 Whiteman, *supra* note 3, at 935.

[8] *United States ex rel Caputo* v. *Kelley*, 92 F.2d 603 (2d Cir. 1937), *cert. denied*, 303 U.S. 635 (1938); *Ornelas* v. *Ruiz*, 161 U.S. 502 (1896); *Castro* v. *DeUrierte*, 12 Fed. 250 (S.D. N.Y. 1882). See, generally, 6 Whiteman *supra note 3, at 935; Note, United States Extradition Proceedings, 16* New York Law Forum 420, 432 (1980).

[9] 1 Moore, A Treatise on Extradition and Interstate Rendition, 410-415, (1891).

[10] See, e.g., *Schoenbrun* v. *Drieband*, 268 F. Supp. 332 (E.D. N.Y. 1967).

[11] See, e.g., *United States ex rel. Caputo* v. *Kelley*, *supra* note 8.

[12] *In re David*, 395 F. Supp. 803, 807 (E.D. Ill. 1975); *United States ex rel. Petruschansky* v. *Marasco*, 215 F. Supp. 953, 957 (E.D. N.Y. 1963) aff'd 325 F.2d 562 (2nd Cir. 1963). *cert. denied*, 376 U.S. 952 (1964).

[13] For example, many Federal, State, and local law enforcement agencies rely on the FBI National Crime Information Center-"NCIC"-in determining whether an individual is wanted for arrest in another jurisdiction. Since no complaint for extradition can be filed against a fugitive whose location is unknown, there can be no Federal arrest warrant issued, and no information on the person will appear in NCIC. Thus, law enforcement officers may have no way to learn that a particular person is an international fugitive sought for extradition.

[14] In *Wright* v. *Henkel*, 190 U.S. 40 (1903), the Supreme Court reviewed former section 596 of title 18 (now 18 U.S.C. 3141), in conjunction with former section 591 (now 18 U.S.C. 3041), and concluded that there was no statute providing for admission to bail in cases of foreign extradition. The Bail Reform Act (which amended Sections 3041, 3141-3143, and 3568, and enacted 18 U.S.C. 3147-3152) did not alter this result. The Act liberalized access to bail in those cases to which the bail statutes apply, but did not broaden the availability of bail generally. Both the previous sections of the law and the provisions of the Bail Reform Act apply only to "person(s) charged with an offense," and the term "offense" is expressly defined in 18 U.S.C. 3156 as "any criminal offense . . . which is in violation of any Act of Congress and is triable in any court established by Act of Congress . . .". Since fugitives facing extradition to a foreign country are not accused of any Federal criminal offense, and will not be tried in any Federal court, the bail statute's provisions do not apply to them. *Cf. Kelley* v. *Springette*, 527 F.2d 1090, 1093 (9th Cir. 1975); *Beaulieu* v. *Comm'r of Massachusetts*, 382 F. 2d 290 (1st Cir. 1967).

[15] *United States* v. *Williams*, 611 F.2d 914 (1st Cir. 1979); *Beaulieu* v. *Hartigan*, 554 F.2d 1 (1st Cir. 1977); *Wright* v. *Henkel*, *supra* note 14.

[16] *Hu Yan-Leung* v. *Soscia*,—F.2d—, (2d Cir. May 26, 1981).

[17] See, *In re Chan Kam-Shu*, 477 F.2d 333 (5th Cir. 1973), *cert. denied*, 414 U.S. 847 (1973); *Vardy* v. *United States*, 529 F.2d 404 (5th Cir. 1976), *rehearing denied*, 533 F.2d 310 (5th Cir. 1976); *In re David*, 390 F. Supp. 521 and 395 F. Supp. 903 (E.D. Ill. 1975).

[18] Provisional arrest is a well-recognized aspect of international extradition procedure, and is specifically provided for in most of the extradition treaties to which the United States is a party. See, e.g. Art. 11, Extradition Treaty, United States-Canada; signed Dec. 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force March 27, 1976). See generally,

Reuschlein, *Provisional Arrest and Detention in International Extradition*, 23 Georgetown Law Journal 37 (1934); Note, 16 New York Law Forum-420, 429-430 (1970).

[19] E.G., contains an indication that the fugitive is likely to flee the jurisdiction and be unavailable by the time the extradition documents arrive.

[20] See, 6 Whitemen, *supra* note 3, at 931; *Whitely* v. *Warden, Wyoming, State Penitentiary*, 401 U.S. 560, 568 (1970); *United States* v. *McCray*, 468 F.2d 848 (5th Cir. 1967).

[21] See, e.g., *Caltagirone* v. *Grant*, 629 F.2d 739 (2d Cir. 1980).

[22] "Court" is defined in section 3198(a)(1) to mean a United States district court established pursuant to 28 U.S.C. 132, or the District Court of Guam, the Virgin Islands, or the Northern Mariana Islands, or a United States magistrate authorized to conduct an extradition proceeding.

[23] Thus, the section eliminates the arbitrary rule created by the Supreme Court in *Pettit* v. *Waishe*, 194 U.S. 205 (1904). See note 40, *infra*, and accompanying text. This rule is unnecessary in light of proposed section 3194(c)(3).

[24] See notes 15 and 16, *supra*.

[25] *In re Mitchell*, 171 Fed. 289, 290 (S.D.N.Y. 1909).

[26] See, e.g., *In re Kaplan*, Civ. No. 79-2219 RF (C.D. Cal July 29, 1979).

[27] See, e.g., *In re Itoka*, Misc. No. 79-1536—M (D. N.M. Dec. 17, 1979).

[28] See, *In re Chan Kam-Shu*, 477 F.2d 333, 339-340 (5th Cir. 1973) *cert. denied*, 414 U.S. 847 (1973).

[29] *United States* v. *Clarke*, 470 F. Supp. 979 (D. Vermont 1979).

[30] E.g., Art. 13(2), Extradition Treaty, United States-Norway, signed June 9, 1977, — U.S.T. —, T.I.A.S. 9679 (entered into force March 6, 1980).

[31] It is anticipated that in most cases the Attorney General will act through the United States attorney for the district in which the fugitive is located. If the foreign government involved feels the need to participate in the judicial proceedings, it can retain counsel and seek to enter the case as *amicus curial*.

[32] *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936) ; *United States* v. *Rauscher*, 119 U.S. 407, 414 (1886).

[33] See e.g., Art. 10, Extradition Treaty, United States-Japan, signed March 3, 1978, — U.S.T. —, T.I.A.S. 9625 (entered into force March 25, 1980) ; Art. 18, Extradition Treaty, United States-Mexico, signed May 4, 1978, — U.S.T. —, T.I.A.S. 9656 (entered into force January 24, 1980).

[34] See 18 U.S.C. 4107-4108.

[35] For example, a fugitive might wish to waive extradition on only one of many outstanding charges against him in the requesting state. Under these circumstances, that foreign state might conceivably prefer to have extraditability determined as to all of the charges.

[36] For example, many extradition treaties permit the requested state to postpone extradition until the person sought has been tried and punished for criminal charges outstanding in that state. A person facing criminal charges or imprisonment in this country might well attempt to expedite his extradition to a foreign country where less serious charges are pending, in order to avoid prosecution or punishment here. In such circumstances, it would not be appropriate for the United States to permit expedited surrender, at least not until the charges in this country have been resolved or the sentence served.

[37] Shearer. Extradition in International Law, 137-141 (1971) ; 6 Whiteman, *supra* note 3, at 773-779 ; *Freeman* v. *United States*, 427 F. Supp. 1252, 1263 (N.D. Ga. 1977).

[38] See. e.g., Art. 2(1). Extradition Treaty, United States-Japan, signed March 3, 1978, — U.S.T. —, T.I.A.S. 9625 (entered into force March 25, 1980).

[39] *Cucuzella* v. *Kelikaa*, 638 F.2d 105 (9th Cir. 1981) ; *Brauch* v. *Raiche*, 618 F.2d 843, (1st Cir. 1980) ; *Freedman* v. *United States*, *supra* note 37, at 1252, 1263.

[40] *Pettit* v. *Walshe*, *supra* note 23 ; see e.g., U.S. ex rel. *LoPizzo* v. *Mathews*, 36 F.2d 565 (3d Cir. 1929) ; *U.S. ex rel, Rauch* v. *Stockinger*, 170 F. Supp. 506 (E.D. N.Y. 1959), *aff'd* 269 F.24 681 (2d Cir. 1959), *cert denied*, 371 U.S. 913 (1959) : *O'Brien* v. *Rozmann*, 554 F.2d 780 (6th Cir. 1977).

[41] *Greci* v. *Birkness*, 527 F.2d 956, 958, at note 3 (1st Cir. 1976) ; *Application of D'Amico*, 185 F. Supp. 925-930, at note 6 (S.D.N.Y. 1960), *appeal dismissed*, 286 F.2d 320 (2d Cir. 1960), *cert denied*, 366 U.S. 963 (1962).

[42] 6 Whiteman, *supra* note 3.

[43] *Greci* v. *Birkness*, *supra* note 41; *Sindona* v. *Grant*, 461 F. Supp. 199 (S.D.N.Y. 1978); *Brauch* v. *Raiche*, *supra* note 39.

[44] *Sayne* v. *Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 390 U.S. 903 (1970).

[45] Rule 1101. Federal Rules of Evidence.

[46] The Supreme Court has indicated that requiring the foreign state to produce live witnesses in extradition hearings would tend to "defeat the whole object of the treaty." *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916); see also, *Collins* v. *Loisel*, 259 U.S. 309, 317 (1922); *Sayne* v. *Shipley*, *supra* note 44; *In re David*, *supra* note 12; *O'Brien* v. *Rozmann*, *supra* note 40.

[47] *United States* v. *Galanis*, 429 F.2d 1215, 1225-1229 (D. Conn. 1977), *rev'd on other grounds*, 568 F.2d 234, 240 (2d Cir. 1977); *Shapiro* v. *Ferrandina*, 478 F.2d 894, 903 (2d Cir. 1973); *In re Edmonson*, et al. 352 F. Supp. 22, 24 (D. Minn. 1972).

[48] The consular and diplomatic officers who must sign the certificate are usually not lawyers, and it is difficult for them to know whether the documents presented to them are in fact acceptable "for similar purposes" in the courts of the requesting state.

[49] *Freedman* v. *United States*, *supra* note 37; *U.S. ex rel. Petrushansky* v. *Marasco*, *supra* note 12.

[50] Coppelman, *Extradition and Rendition: History-Law-Recommendations*, 14 Boston L.R. 591; 614 (1934).

[51] 18 U.S.. 3191 provides for compulsory process to secure the attendance at extradition hearings of witness on behalf of indigent fugitives. However, the statute applies only to witnesses who are resident in the United States. *Merino* v. *United States Marshal*, 326 F.2d 5, 11 (9th Cir. 1964), *cert. denied*, 377 U.S. 997 (1964).

[52] *Matter of Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978); *Shapiro* v. *Ferrandina*, *supra* note 47; *Freedman* v. *United States*, *supra* note 37; *Sayne* v. *Shipley*, *supra* note 44; *First National City Bank* v. *Aristequieta*, 287 F.2d 219, 226 (2d Cir. 1960); *Desmond* v. *Eggers*, 18 F.2d 503, 503-506 (9th Cir. 1927); *Collins* v. *Loisel*, *supra* note 46; *Charlton* v. *Kelley*, 229 U.S. 447, 458 (1913).

[53] See, generally, 6 Whiteman, *supra* note 3, at 859-865; Note, *Statute of Limitations in International Extradition*, 48 Yale L.J. 701 (1939).

[54] See, e.g., *Galanis* v. *Pallanck*, 568 F.2d 234 (2d Cir. 1978).

[55] *In re Ezeta et al.*, 62 Fed. 972 (N.D. Cal. 1894). Basically, under current case law, some courts have said that there are "pure" political offenses, such as treason or sedition, and "relative" political offenses, such as one "committed in the course of furthering civil war, insurrection or political commodition." *Id.; Karadzole* v. *Artukovic*, 242 F.2d 198 (9th Cir. 1957), rev'd on other grounds, 344 (U.S. 393 (1957); *United States ex rel. Karadzole* v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959); *Ramos* v. *Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959); see Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 Columbia Journal of Transnational Law 381 (1980).

[56] *In re Lincoln*, 228 Fed. 70 (E.D.N.Y. 1915), aff'd *per curium*, 241 U.S. 651 (1917); *In re Gonzalez*, 217 F.2d 717, 722 (S.D.N.Y. 1963); *Garcia-Guillerin* v. *United States*, 450 F.2d 1192 (5th Cir. 1971); *In re Locatelli*, 468 F. Supp. 568, F. Supp. 568, 575 (S.D.N.Y. 1979); *Sindono* v. *Grant*, *supra* note 43.

[57] Compare *Ziyad Abu Ecin* v. *Wilkes*, 641 F.2d 504 (7th Cir.), cert. denied.—U.S.—(1981), with the Memorandum decision of the Secretary of State in the case of *Ziyad Abu Eain*, Hearings pp. 133-139.

[58] See, e.g., Art. 5(1). Extradition Treaty, United States-Mexico, signed May 4, 1978,—U.S.T.—, T.I.A.S. 9656 (entered into force January 25, 1980).

[59] For an excellent discussion of the political offense exception to extradition and the impact of recent cases, see Hearings, pp. 25-28, statement of William M. Hannay; Hannay, *supra* note 55.

[60] See Hearings, pp. 3, 4, 25-28, statements of Daniel McGovern and William M. Hannay; Levy. *Contemporary International Law: A Concise Introduction*, 190 (1979). The courts in various countries differ widely on what kinds of offenses are covered by the term, and legal scholars here and abroad have proposed a host of different—and frequently contradictory—proposals on the topic. See generally, Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1 ASILS International Law Journal 1 (1977); Hannay, *supra* note 55.

[61] Three recent extradition cases graphically illustrate this point. In the *Peter McMullen* case. McMullen was charged with the bombing of a British army installation in England. In the *Desmond Mackin* case, Mackin was charged with an attempt to murder a British soldier dressed in civilian clothes in a Belfast bus station. In the third case, *Abu Eain* v. *Wilkes*, *supra* Abu Eain was charged with the bombing murder of several children in an Israeli resort town. In both the *McMullen* and *Mackin* cases the magistrates denied extradition on the grounds that the offenses charged were "political offenses". In the *Abu Eain* case the court of appeals held the political offense exception inapplicable. William Hannay, commenting on this judicial line drawing, observed (Hearing. p. 14):

> In each of these cases, the test set forth in the 19th century English case of *In re Castioni* . . . was accepted as the operative definition of a "relative" political offense. The court in a *Castioni* stated that a political offense is a crime which was "incidental to and formed a part of political disturbances" . . . The absurdity and ultimate cruelty of applying this test or any other "test" of a political offense is illustrated by the assertion of the magistrate in *McMullen* who taking the exception to its insane but logical end, stated: "[e]ven though the offense be deplorable and heinous, the criminal action will be excluded from deportation if the crime is committed under these prerequisites." . . . Mechanically applying the *Castioni* test the magistrates in *Mackin* and *McMullen* concluded that extradition was prohibited since "political disturbances" were taking place in Northern Ireland and the attempts by *Mackin* and *McMullen* to kill British soldiers were natural incidents of these disturbances.
>
> [With respect to the Seventh Circuit decision in *Abu Eain*] I find shocking the notion that the "political offense" exception is cut so far loose from any ethical mooring that Abu Eain's defense team could argue in apparent good faith that terror bombing of civilians is a legitimate technique in an "insurrection-liberation struggle," and that the political offense exception prevents extradition for such a crime. It was a sad spectacle to see a former Attorney General of the United States, representing Abu Eain, stand before the Seventh Circuit and utter that bankrupt shibboleth of moral relativism, "one man's terrorist is another man's freedom fighter." Second, the court's application of the [judicial] test for a political offense] in *Abu Eain* was ultimately just as mechanical as that in *Mackin* and *McMullen* and left the unmistakable impression that the court would have *denied* extradition if Abu Eain had directed his attacks at Israeli military or governmental officials. . . . We should, I suppose, feel some relief that the Seventh Circuit recognized that the killing of children on the streets of a resort town did not constitute a "political offense."
>
> Hannay has raised the issue factually (see Hannay, *supra* note 55 at 382) but has not speculated on the line the Seventh circuit would draw with respect to the bombing assassination of Lord Louis Mountbatten that incidentially killed his grandson, a local youth, and the mother-in-law of his daughter.

[62] See *supra* note 52, and accompanying text.

[63] See, e.g., Art. 10(6). Extradition Treaty, United States-Mexico, signed May 4, 1978. — U.S.T. —, T.I.A.A. 9656 (entered into force January 25, 1980). The United States will also be a party to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, done at The Hague, October 26, 1960, 527 U.N.T.S. 189 (ratified by the Senate Nov. 28 1979). This Convention will eliminate a substantial portion of the authentication requirement with respect to extradition documents submitted by one signatory country to another.

[64] It is anticipated that in most cases the foreign state's diplomatic or consular personnel assigned to the United States will make the certification required by the section, thereby relieving U.S. diplomatic and consular officers abroad of this chore.

[65] See, generally, *United States* v *Galanis*, 429 F. Supp. 1215 (D. Conn. 1977), rev'd on other grounds, 568 F.2d 234 (2d Cir. 1978).

[66] See Rule 5.1, Federal Rules of Criminal Procedure.

[67] *Greci* v. *Birkness*, *supra* note 41; *Brauch* v. *Raiche*, *supra* note 39.

[68] *U.S. ex rel. Sakaguchi* v. *Kaulukukui*, *520 F.2d 726, 728 (9th Cir. 1975); Shapiro* v. *Ferrandina*, *supra* note 47.

[69] This requirement is consistent with the practice followed by the courts today. See *Kaplan* v. *Vokes*, — *F.2d* —, *(9th Cir. July 6, 1981; Shapiro* v. *Ferrandina*, *supra* note 47.

[70] Present law (18 U.S.C. 3184) only requires that the court send the Secretary a transcript of the *testimony* taken at the hearing. By providing the executive branch with a fuller record of the proceedings the Secretary of State will be more fully informed in making his decision on extradition.

[71] *Collins* v. *Miller*, 252 U.S. 364, 369 (1920).

[72] See, e.g., *Sindona* v. *Grant*, *supra* note 43.

[18] *Hooker* v. *Klein*, 573 F.2d 1360 (9th Cir. 1978); *United States* v. *Mackin*, *supra* note 2.

[19] *Glucksman* v. *Henkel*, 221 U.S. 508, 512 (1911).

[20] *United States ex rel. Oppenheim* v. *Hecht*, 16 F.2d 955, 956 (2nd Cir. 1927); *United States ex rel. Klein* v. *Mulligan*, 1 F. Supp. 635, 636 (S.D. N.Y. 1922).

[21] The automatic stay of extradition expires when the court of appeals issues its mandate in the matter. Thus, the automatic stay would not ordinarily protect a fugitive seeking further, discretionary review, such as an applicant for a writ of *certiorari* from the Supreme Court. Of course, the fugitive whose case merits further review is free to request that either the court of appeals or the Supreme Court exercise its discretion by staying surrender while *certiorari* or other relief is considered.

[22] In fact, 18 U.S.C. 3184 specifically provides that a person found extraditable must be committed "to the proper jail, there to remain until . . . surrender shall be made".

[23] See *supra* notes 23 and 24, and accompanying text.

[24] *Jimenez* v. *Aristequieta*, 314 F.2d 649 (5th Cir. 1963).

[25] *Magisano* v. *Locke*, 545 F.2d 1228, 1230 (9th Cir. 1976).

[26] See, generally, Note, *Executive Discretion in Extradition*, 62 Columbia Law Review 1313 (1962).

[27] *In re Factors' Extradition*, 75 F.2d 10 (7th Cir. 1934); *In re Normano*, 7 F. Supp. 329 (D. Mass. 1934); 6 Whiteman, *supra* note 3, at 1064-69.

[28] *Jimenez* v. *United States District Court for the Southern District of Florida*, 84 S. Ct. 14, 11 L. Ed. 2nd 30 (1963); *Barrett* v. *United States*, 590 F.2d 624 (6th Cir. 1978).

[29] See, e.g., *Peroff* v. *Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Sindona* v. *Grant*, *supra* note 43 at 207 ; see Note, Columbia Law Review, *supra* note 81.

[30] For example, the Department of State has frequently conditioned surrender of a fugitive convicted in absentia upon a promise by the foreign country involved to permit a retrail. See, 6 Whiteman, *rupra*, note 3, at 1051, 1117-1122.

[31] For example, some treaties permit the requested state to condition extradition upon satisfactory assurances that the death penalty will not be imposed. See e.g., Art. 6, Extradition Treaty, Canada-United States, signed December 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force March 27, 1976).

[32] *Peroff* v. *Hylton*, 563 F.2d 1099, 1102-1103 (4th Cir. 1977).

[33] At present, no extradition treaty to which the United States is a party expressly prohibits surrender of citizens of the requested state.

[34] 299 U.S. 5 (1936), *supra* note 32.

[35] Many foreign countries do not extradite their citizens because those countries can instead prosecute and punish their citizens for crimes committed in another country. As a general rule, the United States has no such ability. *Escobedo* and *Castillo* v. *Forsch*, 623 F.2d 1098 (5th Cir. 1980); 6 Whiteman, *supra* note 3, at 876-878.

[36] Executive Order 11517, 35 Fed Reg. 4937 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News, at 6332.

[37] See, e.g., Extradition Act, R.S.C. 1952, c. 322 (Canada); s. 24, Ley de Extradicion (Dec. 29, 1975), Art. 11 (Mexico).

[38] *United States* v. *Rowbotham*, 430 F. Supp. 1254 (D. Mass. 1977); *United States* v. *Dolack*, 484 F.2d 527 (7th Cir. 1973). It is well to remember that both the prosecution and the defense suffer when a criminal trial is delayed too long. Indeed, as the Court of Appeals trenchantly remarked in *United States* v. *Judice*, 457 F. 2d 418, 418 (5th Cir. 1972); ". . . all practiced trial lawyers are well aware that attrition from . . . delay is more damaging to the prosecutor's case than to that of the defense. This will be so as long as the prosecution has the burden of proof."

[39] Cf. 6 Whiteman, *supra* note 3, at 1052-1053.

[40] For example, Art. 21, Extradition Treaty, United States-Mexico, signed May 4, 1978, —, U.S.T. —, T.I.A.S. 9656 (entered into force January 25, 1980) requires that the requested state bear all of the expenses of extradition except those incurred for the translation of the documents or the transportation of the fugitive. Extradition treaties are considered self-executing, Bassiouni, International Extradition and World Public Order 30-31 (1976), and supersede the provisions of prior inconsistent federal legislation. Restatement (Second) of Foreign Relations Law of the United States, § 141, Comment (b) at 433 (1965). Therefore, whether 18 U.S.C. 3195 or a differing treaty provision is applicable in a particular extradition case depends on when the treaty entered into force.

EXTRADITION ACT OF 1981

The Committee on Foreign Relations, to which was referred sequentially from the Committee on the Judiciary the bill, S. 1940 to amend Chapter 209 of Title 18, United States Code, relating to extradition, and for other purposes, for the purpose of considering only "political offense" and related provisions, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 1940 is to modernize federal practices and procedures with respect to international extradition. The amendments to S. 1940 proposed by the Committee on Foreign Relations are intended to retain limited court jurisdiction with respect to application of the political offense exception in international extradition proceedings while providing specific guidance to the courts in making such findings. The proposed amendments carry forward in slightly different format the proposal of the Judiciary Committee to provide the Secretary of State with the sole authority to inquire into the motivation of the foreign state in requesting extradition and to determine whether extradition would be incompatible with humanitarian considerations. In making either of the above determinations, the Secretary would be required to consult with the appropriate Bureaus and Offices of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs.

BACKGROUND

The present bill, S. 1940, was originally introduced as S. 1639 on September 18, 1981, by Senator Thurmond. On December 11, 1981, Senator Thurmond introduced a clean bill, S. 1940, to incorporate changes that had been suggested during the course of the Judiciary Committee's consideration of the original bill. The changes of specific interest to the Committee on Foreign Relations were twofold, as the Report of the Committee on the Judiciary notes:

"First, S. 1940, as introduced made it mandatory—rather than discretionary—for the Secretary of State to deny extradition when he is persuaded that the requesting State is seeking the person's extradition "for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions." Second, as introduced, S. 1940 made it explicit in the statute that this determination would not be subject to judicial review. (Senate Report No. 97-331, p. 3)"

On February 3, 1982, Senator Percy wrote to Senator Thurmond and requested that S. 1940 be referred sequentially to the Committee on Foreign Relations for a reasonable period of time. The request for sequential referral was based in large part on the Committee's interest in those aspects of S. 1940 concerning the "political offense exception"—a standard provision in U.S. bilateral extradition treaties. The request for sequential referral was also prompted by the longstanding interest of the Committee in matters concerning international extradition stemming from the Committee's primary jurisdiction over all treaties, including those relating to extradition. For example, during the first session of the 97th Congress, the Committee on Foreign Relations considered and favorably reported two extradition treaties: a U.S.-Colombian agreement and a U.S.-Netherlands agreement. Six extradition treaties were approved by the Committee during the 96th Congress.

On April 15, the Committee on the Judiciary reported S. 1940 with Committee amendments. Specifically of interest to the Committee on Foreign Relations, the Judiciary Committee amended section 3196(a) of S. 1940 to provide that the Secretary of State's authority to determine application of the political offense exception would be subject to judicial review and be upheld by the reviewing court if it is supported by susbtantial evidence.

COMMITTEE ACTION

S. 1940, as reported by the Committee on the Judiciary, was referred to the Committee on Foreign Relations on April 19.

Following referral, majority and minority staff of the Committee jointly reviewed the record from the three days of hearings held in the House and Senate on revision in the extradition law. Staff also consulted with and reviewed the comments of representatives of the Departments of Justice and State, the staffs of the House and Senate Judiciary Committees, a panel of experts assembled by the American Society of International Law, representatives from the American Civil Liberties Union, practicing attorneys, and scholars concerning S. 1940 and the political offense exception.

At its business meeting on May 19, the Committee met to consider its proposed amendments to S. 1940, as reported by the Committee on the Judiciary on April 15. The proposed amendments concerned the political offense exception and related provisions as set forth in S. 1940. Following discussion of S. 1940, the Committee by voice vote with a quorum present unanimously approved the proposed amendments described in this Report.

COMMITTEE COMMENTS

The political offense exception is a standard provision in U.S. extradition treaties and in its usual form provides that there shall be no extradition for crimes of a political nature. Political offenses are generally divided into two classes—"pure" political offenses and "relative" political offenses. Pure political offenses include treason, sedition, and espionage: crimes of political dissent that can only be committed against the state. Relative political offenses involve common crimes that are linked to political motivation or circumstances. Under one commonly-used standard, extradition for such offenses has been barred when the state from which extradition is sought determines that the political content of the act outweighs the harm that may have been done in committing the offense. This attitude, according to a leading expert, resulted from the "growth and evolution of political institutions towards the liberal state (which) together with the rise of individualism sparked the concern for the political offender, especially where he had escaped from a nation with more 'benighted' views of government." [1]

Another expert has characterized the exception in the following terms:

"The political offense exception is the embodiment of the notion that political dissenters or rebels ought not be turned over for trial and punishment to the very government which they have opposed. This concept is now well accepted in customary international law . . . It is in keeping with the very purpose of the political offense exception that its definition be a flexible one, which may encompass and protect a broad range of legitimate political dissent. A broad definition need not be a mechanistic or all-inclusive one. The word 'political' may have

[1] Epps, Valerie, "The Validity of the Political Offender Exception in Anglo-American Jurisprudence." *Harvard International Law Journal*, Winter 1979, pp. 69-88.

different meanings in different contexts, and the United States is under no legal or moral obligation to shelter a fugitive from extradition simply because he claims a political motive for his crime. (Professor Steven Lubet testifying before the House Committee on the Judiciary, Subcommittee on Crime, February 3, 1982)."[2]

While the assertion of a "pure" political offense is seldom at issue in extradition proceedings, claims of "relative" political offenses have been litigated in a number of extradition cases and have generated considerable academic debate about its present day utility. During the past decade, particular concern has been raised over the use of the exception to bar extradition for acts of international terrorism which ostensibly are associated with political activity or protest. For example, in two recent cases, by convincing the courts to invoke the political offense exception, members of the Provisional Irish Republican Army (PIRA) successfully resisted extradition to the United Kingdom for violent crimes that they were alleged to have committed against a British soldier and government property.[3] However, in another case involving a PLO member, Zyad Abu Eain, who was sought by the Israeli government for his participation in a bombing randomly directed at civilians in a marketplace in the country, the court refused to apply the political offense exception.[4] Subsequently, Abu Eain was extradited to Israel to stand trial.

The PIRA cases and the case of Abu Eain have raised serious questions about the ability of the courts to interpret consistently the political offense exception. Both the Carter and Reagan Administrations have argued that because of loose and inconsistent application of the exception, the United States may be viewed by international terrorists as a potential safehaven where their crimes may go unpunished if presented in the guise of justifiable political actions. Consequently, both Administrations have urged successively that clear guidelines be established to guide the determination of political offense exceptions. It has also been suggested, as reflected in the version of S. 1940 reported by the Judiciary Committee that the courts are ill-equipped to decide issues that turn so heavily on questions of U.S. foreign policy and that, consequently, the Secretary of State should be vested with the sole authority to determine the application of the exception subject to limited judicial review.

* * * * *

SECTION-BY-SECTION ANALYSES OF THOSE PROVISIONS OF S. 1940 AS REPORTED BY THE COMMITTEE ON THE JUDICIARY, PROPOSED TO BE AMENDED BY THE COMMITTEE ON FOREIGN RELATIONS

The major provision of S. 1940, as reported by the Committee on the Judiciary, and their comparison to present federal law are set forth in Senate Report No. 97-331. The Report of the Committee on Foreign Relations relates solely to a discussion and analyses of the amendments set forth above as reported on May 19 by the Committee on Foreign Relations.

Section 3194(a), as reported by the Committee on the Judiciary, provides that the courts do not have jurisdiction to determine whether extradition is sought for a political offense or because of a person's political belief. In turn, the authority to make such determinations is vested in the Secretary of State pursuant to Section 3196(a)(3).

According to the Report of the Judiciary Committee:

"Section 3196 (a)(3) specifies that the Secretary of State must decline to order surrender of a person if, after taking into account certain statutory principles generally eliminating specified types of crimes from the political offense exception (e.g., crimes of violence and drug trafficking), he is persuaded that the person's extradition is sought for one of these reasons. The provisions taken together provide that the Secretary of State shall have jurisdiction to decide the applicability of the "political offense" exception to extradition contained in most extradition treaties, such decision to be consistent with the statutory guidelines and reviewable in the United States courts of appeal based on a substantial evidence standard. (Report No. 97-331, p. 14)."

The Committee on Foreign Relations proposes amending section 3194(a), as reported by the Committee on the Judiciary, to permit the appropriate courts to make findings concerning the application of the political offense exception. While it can be argued that the Secretary of State is generally better able than the courts to assess the circumstances justifying a political offense exception, the Committee favors the retention of some role for the judicial process. Most countries with whom the U.S. has extradition agreements permit the courts to make such determinations. Moreover, American courts have reviewed political offense questions for nearly one hundred years. Preserving limited court jurisdiction to interpret the exception pursuant to legislative guidelines would continue this well-established tradition. It would also provide a check against an executive authority that could, depending upon the political sensitivities involved in a given case, result in inconsistent and unsound application of the political offense exception.

However, while the Committee on Foreign Relations has concluded that the courts should retain some jurisdiction over political offense cases, it is also very clear that in order to effect more consistent application of the exception, the courts must be given clearer guidelines with respect to certain classes of behavior that should never be considered political offense and others which should only be considered political offenses in extraordinary circumstances. This proposed guidance is set forth in section 3194 (e)(1) and (e)(2) as reported by the Committee on Foreign Relations and closely resembles the guidelines proposed for the Secretary of State by the Judiciary Committee in section 3196(a)(3) as reported by that Committee.

The Committee on Foreign Relations has proposed its amendments to section 3194 of S. 1940 based on the belief that it is inappropriate to apply the political offense exception to conduct that the international community has taken formal steps to prohibit and punish. Drawing on this standard, the Committee has concluded that the political offense exception should not be considered by the court when to apply it would have the effect of protecting behavior that is specifically outlawed internationally. Included in this category would be offenses within the scope of either the Hague Convention on Seizure of Aircraft; the Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the Convention on the Physical Protection of Nuclear Materials; the International Convention Against the Taking of Hostages; the Convention on the Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents; other multilateral treaties obligating the U.S. to either extradite or prosecute persons whose offenses are contemplated by the applicable treaty; and the manufacture, sale, or distribution of narcotics. The proposed amendment creating section 3194(e)(1) establishes an absolute prohibition against the courts considering such acts to be political offenses. The intended effect of this prohibition is to deter international terrorists and other criminals from using the United States as a safehaven from prosecution for crimes they claim to be political but whose characteristics violate overriding international legal standards.

While the Committee recognizes that current case law continues to apply to offenses not specified in section 3194 (e)(1) or (c)(2), it believes that a different standard should apply to those offenses involving the use of firearms or explosives, or other behavior involving the use of force or violence as set forth in section 3194(2). In such cases, extraordinary circumstances must be demonstrated by the person resisting extradition in order for the appropriate court to find that a political offense has been committed. This standard is consistent with the guidelines already set forth in S. 1940 and allows for the political offense exception to be applied potentially in that very narrow class of cases where an otherwise common crime may be transformed by the political content in which it is committed.

The Committee intends that the burden of the person resisting extradition in demonstrating such extraordinary circumstances should be a considerable one. While current case law may provide useful guidance it is not intended, for example, that the mere existence of a rebellion, civil war, riot or other disturbance, during which the offense in question is committed, should result in a finding that the offense itself is political in nature.[5] Nor should it be sufficient simply to show that the motivation of the individual committing the act—however sincere or noble—was related to a political objective. It should not be the policy of the United States to encourage or condone violent or other criminal behavior simply because it is the view of the persons committing such acts that they are somehow connected with a political activity or have an obstensible political purpose or justification. However, it should also not be the policy of the United States to render up automatically to foreign authorities an individual who, in the course of seeking to exercise legitimate civil or political rights in a non-violent manner, is placed in such a position that he has no reasonable choice except to commit

[2] Professor Steven Lubet testifying before the House Committee on the Judiciary, Subcommittee on Crime, February 3, 1982.

[3] United States v. Mackin—80 C.R. Misc. 1 (S.D. N.Y. 1981) *Gov't Appeal Dismissed with Opinion, Sub Nom.*—F2d—1981.

[4] *Zyad Abu Eain* v. *Wilkes*, 641 F.2d 504 (7th Cir. 1981).

[5] Two recent decisions in particular, the *Mackin and McMullen* cases, applied what is generally called the "Castioni test", after the 19th century English case of *In re Castioni* which is commonly understood as having established a two-part test which must be met for a common crime to be regarded as a relative political offense: (1) the act must have been committed during an uprising, involving a group of which the accused was a member; and (2) the act must have been "incidental to" the political uprising, that is, done in furtherance of or with the intention of assisting the uprising. The court in *Castioni* justified its decision not to extradite by saying that "one cannot look too harshly and weigh in golden scales the acts of men hot in their political excitement." Applying the test, the courts in the above-mentioned cases denied requests by the Government of the United Kindom for the extradition of two members of the Provisional Irish Republican Army who were alleged to have committed violent crimes in Northern Ireland but which were deemed "political offenses" by the U.S. courts.

an otherwise criminal act. For the court to make such a determination the test should be focused upon the individual and whether the offense for which he is sought was a consequence of the violation of his internationally recognized civil or political rights by the state requesting extradition. Acts of indiscriminate or excessive violence or acts of deliberate brutality would presumably never fall within the exception.

In short, while the occasions for recognizing the political offense exception will necessarily be few and far between, the Committee believes that it should continue to be within the authority of U.S. courts to determine that the exception should apply, subject to the procedural innovations and exclusions introduced in this legislation.

The belief that such findings are expected to be rare is further reinforced by the amendment proposed by the Foreign Relations Committee in section 3194(e) providing that the person claiming application of the exception must establish by clear and convincing evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense. This necessarily includes offenses that may not be subject to the extraordinary circumstances standard established in section 3194(e)(2). Shifting the burden of the proof to the person seeking application of the political offense exception reinforces the Committee's belief that its legitimate application should be infrequent and also in accords with the guidelines established in section 3194(e) (1) and (2).

Section 3194(g) (1) and (g) (2) restrict the jurisdiction of the courts with respect to questions that may turn largely on the conduct of U.S. foreign policy, thus falling within the domain of the executive branch. Section 3194(g)(1) clearly establishes the sole authority of the Secretary of State to deny extradition if a foreign state is seeking the person's return for the purposes of prosecuting or punishing the person because of his or her political opinions, race, religion, or nationality and if the applicable extradition agreement provides the Secretary with the authority to deny extradition for such reasons. This authority would, when applicable, follow the rule of non-inquiry whereby the courts refrain from making findings on issues largely concerned with the internal political or social circumstances in a foreign state. The Secretary of State, however, is considered uniquely qualified to make such inquiries as this practice is already a significant aspect of his foreign policymaking responsibilities. Section 3194(g)(2) provides the Secretary with the sole authority to determine if the person's extradition is incompatible with humanitarian considerations, such as the age or infirmity of the person being sought as well as the proportionality of the punishment that may be imposed in relation to the crime that may have been committed. This authority may be exercised so long as the applicable extradition agreement provides the Secretary with the authority to deny extradition for such reasons. Sections 3194(g)(1) and (g)(2) should in most cases provide the preferred basis for appropriate relief from extradition on grounds consistent with the traditions, heritage, and foreign policy principles of this country. Further, the Committee on Foreign Relations considers it desirable to provide for the authority established in sections 3194(g)(1) and (g)(2) in any future extradition agreements to which the United States may become a party.

Section 3194(g)(3) as proposed by the Committee on Foreign Relations requires the Secretary of State to consult with the appropriate Offices and Bureaus of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs. Requiring the Secretary to consult with that Bureau is intended to ensure that the Secretary is fully advised on the political and social conditions in the foreign state at issue. It also reinforces the Committee's belief that determinations by the Secretary of State concerning foreign state motivation in requesting extradition, as well as any determinations involving humanitarian considerations, should build upon existing principles governing asylum requests. As such they should be executive determinations and not judicial findings. Presently, the Bureau of Human Rights and Humanitarian Affairs advises the Secretary of State and the Department of Justice on asylum issues. The proposed amendment is, therefore, in keeping with the Bureau's current role in such matters.

The remaining amendments proposed by the Committee on Foreign Relations and contained in section 3196 of S. 1940 as reported by the Committee on the Judiciary are technical revisions setting forth the authority of the Secretary of State in matters relating to international extradition in accordance with the amendments proposed by the Committee on Foreign Relations in section 3194 supra.

S. 220

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Extradition Act of 1982".

SEC. 2. Chapter 209 of title 18, United States Code, is amended as follows:

(a) Section 3181 is deleted.

(b) Section 3182 is redesignated as section "3181."

(c) Section 3183 is redesignated as section "3182" and is amended by striking out "or the Panama Canal Zone" in the first sentence.

(d) A new section 3183 is added as follows:

"§ 3183. Payment of fees and costs

"All costs or expenses incurred in any interstate rendition proceeding and apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.".

(e) Sections 3184 through 3195 are deleted.

(f) The chapter heading and section analysis are amended to read as follows:

"CHAPTER 209—INTERSTATE RENDITION

"3181. Fugitives from State or Territory to State, District, or Territory.
"3182. Fugitives from State, Territory or Possession into extraterritorial jurisdiction of the United States.
"3183. Payment of fees and costs.".

SEC. 3. A new chapter 210 of title 18 of the United States Code is added as follows:

"CHAPTER 210—INTERNATIONAL EXTRADITION

"Sec.
"3191. Extradition authority in general.
"3192. Initial procedure.
"3193. Waiver of extradition hearing and consent to removal.
"3194. Extradition hearing.
"3195. Appeal.
"3196. Surrender of a person to a foreign state.
"3197. Receipt of a person from a foreign state.
"3198. General provisions for chapter.

"§ 3191. Extradition authority in general

"The United States may extradite a person to a foreign state pursuant to this chapter only if—

"(a) there is a treaty concerning extradition between the United States and the foreign state; and

"(b) the foreign state requests extradition within the terms of the applicable treaty.

"§ 3192. Initial procedure

"(a) IN GENERAL.—The Attorney General may file a complaint charging that a person is extraditable. The Attorney General shall file the complaint in the United States district court—

"(1) for the district in which the person may be found; or

"(2) for the District of Columbia, if the Attorney General does not know where the person may be found

"(b) COMPLAINT.—The complaint shall be made under oath or affirmation, and shall specify the offense for which extradition is sought. The complaint—

"(1) shall be accompanied by a copy of the request for extradition and by the evidence and documents required by the applicable treaty; or

"(2) shall be accompanied by the materials specified in paragraph (1)—

"(A) shall contain—

"(i) information sufficient to identify the person sought;

"(ii) a statement of the essential facts constituting the offense that the person is believed to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and

"(iii) a description of the circumstances that justify the person's arrest; or

"(B) shall contain such other information as is required by the applicable treaty;

and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

"(c) ARREST OR SUMMONS.—Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be taken without unnecessary delay before the nearest available court for an extradition hearing.

"(d) DETENTION OR RELEASE OF ARRESTED PERSON.—

"(1) The court shall order that a person arrested under this section be held in official detention pending the extradition hearing unless the person establishes to the satisfaction of the court that special circumstances require his release.

"(2) Unless otherwise provided by the applicable treaty, if a person is detained pursuant to paragraph (1) in a proceeding in which the complaint is filed under subsection (b)(2), and if, within sixty days of the person's arrest, the court has not received—

"(A) the evidence or documents required by the applicable treaty; or

"(B) notice that the evidence or documents have been received by the Department of State and will promptly be transmitted to the court; the court may order that the person be released from official detention pending the extradition hearing.

"(3) If the court orders the release of the person pending the extradition hearing, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"§ 3193. Waiver of extradition hearing and consent to removal

"(a) INFORMING THE COURT OF WAIVER AND CONSENT.—A person against whom a complaint is filed may waive the requirements of formal extradition proceedings, including an order of surrender, by informing the court that he consents to removal to the foreign state.

"(b) INQUIRY BY THE COURT.—The court, upon being informed of the person's consent to removal, shall—

"(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) address the person to determine whether his consent is—

"(A) voluntary, and not the result of a threat or other improper inducement; and

"(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

"(c) FINDING OF CONSENT AND ORDER OF REMOVAL.—If the court finds that the person's consent to removal is voluntary and given with full knowledge of its consequences, it shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition. The court shall order that the person be held in official detention until surrendered.

"(d) LIMITATION ON DETENTION PENDING REMOVAL.—A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings, the person is not removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3194. Extradition hearing

"(a) IN GENERAL.—The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable as provided in subsection (d), unless the hearing is waived pursuant to section 3193. The court does not have jurisdiction to determine—

"(1) the merits of the charge against the person by the foreign state;

"(2) whether the foreign state is seeking the extradition of the person for the purpose of prosecuting or punishing the person for his political opinions, race, religion, or nationality; or

"(3) whether the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.

The hearing shall be held as soon as practicable after the arrest of the person or issuance of the summons.

"(b) RIGHTS OF THE PERSON SOUGHT.—The court shall inform the person of the limited purpose of the hearing, and shall inform him that—

"(1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

"(c) EVIDENCE.—

"(1) a deposition, warrant, or other document, or a copy thereof, is admissible as evidence in the hearing if—

"(A) it is authenticated in accordance with the provisions of an applicable treaty or law of the United States;

"(B) it is authenticated in accordance with the applicable law of the foreign state, and such authentication may be established conclusively by a showing that—

"(i) a judge, magistrate, or other appropriate officer of the foreign state has signed a certification to that effect; and

"(ii) a diplomatic or consular officer of the United States who is assigned or accredited to the foreign state, or a diplomatic or consular officer of the foreign state who is assigned or accredited to the United States, has certified the signature and position of the judge, magistrate, or other officer; or

"(C) other evidence is sufficient to enable the court to conclude that the document is authentic.

"(2) A certificate or affidavit by an appropriate official of the Department of State is admissible as evidence of the existence of a treaty or its interpretation.

"(3) If the applicable treaty requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense has been committed in the United States, the requirement is satisfied if the evidence establishes probable cause to believe that an offense was committed and that the person sought committed it.

"(d) FINDINGS.—The court shall find that the person is extraditable if it finds that—

"(1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;

"(2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;

"(3) no defense to extradition specified in the applicable treaty, and within the jurisdiction of the court, exists; and

"(4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of—

"(A) the United States;

"(B) the State where the fugitive is found; or

"(C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

"(e) POLITICAL OFFENSES AND OFFENSES OF A POLITICAL CHARACTER.—The court shall not find the person extraditable after a hearing under this section if the court finds that the person has established by clear and convincing evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense or an offense of a political character. For the purposes of this subsection, the terms "political offense" and "offense of a political character"—

"(1) do not include—

"(A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;

"(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

"(C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

"(D) an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;

"(E) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs;

"(F) an offense that consists of rape;

"(G) an attempt or conspiracy to commit an offense described in subparagraphs (A) through (F) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

"(2) Except in extraordinary circumstances, do not include—

"(A) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, the taking of a hostage, or a serious unlawful detention;

"(B) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

"(C) an attempt or conspiracy to commit an offense described in subparagraphs (A) or (B) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

The court shall not take evidence with respect to, or otherwise consider, an issue under this subsection until the court determines the person is otherwise extraditable. Upon motion of the Attorney General or the person sought to be extradited, the United States district court may order the determination of any issue under this subsection by a judge of such court.

"(f) CERTIFICATION OF FINDINGS TO THE SECRETARY OF STATE.—

"(1) If the court finds that the person is extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify its findings, together with a transcript of the proceedings, to the Secretary of State. The court shall order that the person be held in official detention until surrendered to a duly appointed agent of the foreign state, or until the Secretary of State declines to order the person's surrender.

"(2) If the court finds that the person is not extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify the findings, together with such report as the court considers appropriate, to the Secretary of State. The Attorney General may commence a new action for extradition of the person only with the agreement of the Secretary of State.

"§ 3195. Appeal

"(a) IN GENERAL.—Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal. Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

"(b) DETENTION OR RELEASE PENDING APPEAL.—If the district court found that the person sought is—

"(1) extraditable, it shall order that the person be held in official detention pending determination of the appeal, or pending a finding by the court of appeals that the person has established that special circumstances require his release;

"(2) not extraditable, it shall order that the person be released pending determination of an appeal unless the court is satisfied that the person is likely to flee or to endanger the safety of any other person or the community.

If the court orders the release of a person pending determination of an appeal, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"(c) SUBSEQUENT REVIEW.—No court has jurisdiction to review a finding that a person is extraditable unless the person has exhausted his remedies under subsection (a). If the person files a petition for habeas corpus or for other review, he shall specify whether the finding that he is extraditable has been upheld by a court and if so, shall specify the court, the date, and the nature of each such proceeding. A court does not have jurisdiction to entertain a person's petition for habeas corpus or for other review if his commitment has previously been upheld, unless the court finds that the grounds for the petition or appeal could not previously have been presented.

"§ 3196. Surrender of a person to a foreign state

"(a) RESPONSIBILITY OF THE SECRETARY OF STATE.—If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter—

"(1) may order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition;

"(2) may order such surrender of the person contingent on the acceptance by the foreign state of such conditions as the Secretary considers necessary to effectuate the purposes of the treaty or the interest of justice; or

"(3) may decline to order the surrender of the person if the Secretary is persuaded that—

"(A) the foreign state is seeking extradition of the person for the purpose of prosecuting or punishing the person because of his political opinions, race, religion, or nationality; or

"(B) the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.

The Secretary may order the surrender of a person who is a national of the United States unless such surrender is expressly forbidden by the applicable treaty or by the laws of the United States. A decision of the Secretary under paragraphs (1), (2), or (3) is a matter solely within the discretion of the Secretary and is not subject to judicial review: *Provided, however,* That in determining the application of paragraph (3), the Secretary shall consult with the appropriate bureaus and offices of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs.".

"(b) NOTICE OF DECISION.—The Secretary of State, upon ordering a person's surrender or denying a request for extradition in whole, or in part, shall notify the person sought, the diplomatic representative of the foreign state, the Attorney General, and the court that found the person extraditable. If the Secretary orders the person's surrender, he also shall notify the diplomatic representative of the foreign state of the time limitation on the person's detention that is provided by subsection (c)(2).

"(c) LIMITATION ON DETENTION PENDING DECISION OR REMOVAL.—A person who is found extraditable pursuant to section 3194 may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any tme during which removal is delayed by judicial proceedings—

"(1) the Secretary does not order the person's surrender, or decline to order the person's surrender, within forty-five days after his receipt of the court's findings and the transcript of the proceedings; or

"(2) the person is not removed from the United States within thirty days after the Secretary ordered the person's surrender.

The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3197. Receipt of a person from a foreign state

"(a) APPOINTMENT AND AUTHORITY OF RECEIVING AGENT.—The Attorney General shall appoint an agent to receive, from a foreign state, custody of a person accused of a Federal, State, or local offense. The agent shall have the authority of a United States marshal. The agent shall convey the person directly to the Federal or State jurisdiction that sought his return.

"(b) TEMPORARY EXTRADITION TO THE UNITED STATES.—If a foreign state delivers custody of a person accused of a Federal, State, or local offense to an agent of the United States on the condition that the person be returned to the foreign state at the conclusion of criminal proceedings in the United States, the Bureau of Prisons shall hold the person in custody pending the conclusion of the proceedings, and shall then surrender the person to a duly appointed agent of the foreign state. The return of the person to the foreign state is not subject to the requirements of this chapter.

"§ 3198. General provisions for chapter

"(a) DEFINITIONS.—As used in this chapter—

"(1) 'court' means

"(A) a United States district court established pursuant to section 132 of title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, or

"(B) a United States magistrate authorized to conduct an extradition proceeding;

"(2) 'foreign state', when used in other than a geographic sense, means the government of a foreign state;

"(3) 'foreign state', when used in a geographic sense, includes all territory under the jurisdiction of a foreign state, including a colony, dependency, and constituent part of the state; its air space and territorial waters; and vessels or aircraft registered in the state;

"(4) 'treaty' includes a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent by the Senate; and

"(5) 'warrant', as used with reference to a foreign state, means any judicial document authorizing the arrest or detention of a person accused or convicted of a crime.

"(b) PAYMENT OF FEES AND COSTS.—Unless otherwise specified by treaty, all transportation costs, subsistence expenses, and translation costs incurred in connection with the extradition or return of a person at the request of—

"(1) a foreign state, shall be borne by the foreign state unless the Secretary of State directs otherwise;

"(2) a State, shall be borne by the State; and

"(3) the United States, shall be borne by the United States.".

SEC. 4. This Act shall take effect on the first day of the first month after enactment, and shall be applicable to extradition and rendition proceedings commenced thereafter.

Mr. THURMOND. I might mention that the Judiciary Committee is beginning to hold hearings now on organized crime. The first hearing is being held today in room 325 of the Russell Building. The Attorney General is the first witness today. The Director of the Federal Bureau of Investigation follows him. On other days, we will be holding hearings on organized crime. Some hearings will be held in cities outside of Washington in various parts of the country.

As I stated in my statement a few moments ago, crime is rated by the American people as the biggest problem in this country next to the economy. We must take remedial action in this Congress to guarantee the safety of our citizens in this Nation.

Mr. President, I commend the various Senators who have cosponsored these bills. The bills will indicate the names of the Senators. On some bills we have more cosponsors than others, but I am proud that they have joined on these bills. I hope others will see fit to join us since we intend to prosecute promptly the passage of these bills so that the American people can benefit from this legislation.

By Mr. THURMOND:

S. 221. A bill to temporarily suspend the duty on certain menthol feedstocks until June 30, 1986; to the Committee on Finance.

SUSPENSION OF DUTY ON CERTAIN FEEDSTOCKS

Mr. THURMOND. Mr. President, today I am introducing a bill to temporarily suspend the duty on certain menthol feedstocks until June 30, 1986. This bill is identical to one I introduced late in the 97th Congress; however, there was insufficient time for the Senate to consider this legislation before the end of the session.

The feedstocks that this bill concerns are utilized by domestic manufacturers to produce synthetic menthol. A duty is applied to these chemicals when they are imported to the United States from West Germany. Since there are no domestic industries that produce these particular feedstocks, this duty does not afford protection to any chemical manufacturer in the United States. To the contrary, it imposes an unnecessary economic cost on the U.S. menthol industry by increasing the production costs for that industry.

Mr. President, this unnecessary duty only compounds the problems that face our domestic menthol industry. In 1977, when mainland China was granted most-favored-nation status, the duty on Chinese menthol fell from 50 cents per pound to 17 cents per pound. This forced our domestic menthol producers to compete with highly subsidized and cheaply produced menthol imports. This situation coupled with tariffs on menthol imports imposed by countries such as Japan, have placed our domestic producers of menthol at a competitive disadvantage.

Mr. President, I realize that this legislation does not represent a complete solution to the numerous trade diffi-

II

98TH CONGRESS
1ST SESSION

S. 220

To amend chapter 209 of title 18, United States Code, relating to extradition, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 27 (legislative day, JANUARY 25), 1983

Mr. THURMOND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend chapter 209 of title 18, United States Code, relating to extradition, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Extradition Act of 1983".

SEC. 2. Chapter 209 of title 18, United States Code, is amended as follows:

(a) Section 3181 is deleted.

(b) Section 3182 is redesignated as section "3181".

(c) Section 3183 is redesignated as section "3182" and is amended by striking out "or the Panama Canal Zone" in the first sentence.

(d) A new section 3183 is added as follows:

"§ 3183. Payment of fees and costs

"All costs or expenses incurred in any interstate rendition proceeding and apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.".

(e) Sections 3184 through 3195 are deleted.

(f) The chapter heading and section analysis are amended to read as follows:

"CHAPTER 209—INTERSTATE RENDITION

"3181. Fugitives from State or Territory to State, District, or Territory.
"3182. Fugitives from State, Territory or Possession into extraterritorial jurisdiction of the United States.
"3183. Payment of fees and costs.".

SEC. 3. A new chapter 210 of title 18 of the United States Code is added as follows:

"CHAPTER 210—INTERNATIONAL EXTRADITION

"Sec.
"3191. Extradition authority in general.
"3192. Initial procedure.
"3193. Waiver of extradition hearing and consent to removal.
"3194. Extradition hearing.
"3195. Appeal.
"3196. Surrender of a person to a foreign state.
"3197. Receipt of a person from a foreign state.
"3198. General provisions for chapter.

"§ 3191. Extradition authority in general

"The United States may extradite a person to a foreign state pursuant to this chapter only if—

"(a) there is a treaty concerning extradition between the United States and the foreign state; and

"(b) the foreign state requests extradition within the terms of the applicable treaty.

"§ 3192. Initial procedure

"(a) IN GENERAL.—The Attorney General may file a complaint charging that a person is extraditable. The Attorney General shall file the complaint in the United States district court—

"(1) for the district in which the person may be found; or

"(2) for the District of Columbia, if the Attorney General does not know where the person may be found.

"(b) COMPLAINT.—The complaint shall be made under oath or affirmation, and shall specify the offense for which extradition is sought. The complaint—

"(1) shall be accompanied by a copy of the request for extradition and by the evidence and documents required by the applicable treaty; or

"(2) if not accompanied by the materials specified in paragraph (1)—

"(A) shall contain—

"(i) information sufficient to identify the person sought;

"(ii) a statement of the essential facts constituting the offense that the person is be-

lieved to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and

"(iii) a description of the circumstances that justify the person's arrest; or

"(B) shall contain such other information as is required by the applicable treaty;

and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

"(c) ARREST OR SUMMONS.—Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be taken without unnecessary delay before the nearest available court for an extradition hearing.

"(d) DETENTION OR RELEASE OF ARRESTED PERSON.—

"(1) The court shall order that a person arrested under this section be held in official detention pending the extradition hearing unless the person establishes to the satisfaction of the court that special circumstances require his release.

"(2) Unless otherwise provided by the applicable treaty, if a person is detained pursuant to paragraph (1) in a proceeding in which the complaint is filed under subsection (b)(2), and if, within sixty days of the person's arrest, the court has not received—

"(A) the evidence or documents required by the applicable treaty; or

"(B) notice that the evidence or documents have been received by the Department of State and will promptly be transmitted to the court;

the court may order that the person be released from official detention pending the extradition hearing.

"(3) If the court orders the release of the person pending the extradition hearing, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"§ 3193. Waiver of extradition hearing and consent to removal

"(a) INFORMING THE COURT OF WAIVER AND CONSENT.—A person against whom a complaint is filed may waive the requirements of formal extradition proceedings, including an order of surrender, by informing the court that he consents to removal to the foreign state.

"(b) INQUIRY BY THE COURT.—The court, upon being informed of the person's consent to removal, shall—

"(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) address the person to determine whether his consent is—

"(A) voluntary, and not the result of a threat or other improper inducement; and

"(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

"(c) FINDING OF CONSENT AND ORDER OF REMOVAL.—If the court finds that the person's consent to removal is voluntary and given with full knowledge of its consequences, it shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition. The court shall order that the person be held in official detention until surrendered.

"(d) LIMITATION ON DETENTION PENDING REMOVAL.—A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secre-

tary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings, the person is not removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3194. Extradition hearing

"(a) IN GENERAL.—The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable as provided in subsection (d), unless the hearing is waived pursuant to section 3193. The court does not have jurisdiction to determine—

"(1) the merits of the charge against the person by the foreign state;

"(2) whether the foreign state is seeking the extradition of the person for the purpose of prosecuting or punishing the person for his political opinions, race, religion, or nationality; or

"(3) whether the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.

The hearing shall be held as soon as practicable after the arrest of the person or issuance of the summons.

"(b) RIGHTS OF THE PERSON SOUGHT.—The court shall inform the person of the limited purpose of the hearing, and shall inform him that—

"(1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

"(c) EVIDENCE.—

"(1) A deposition, warrant, or other document, or a copy thereof, is admissible as evidence in the hearing if—

"(A) it is authenticated in accordance with the provisions of an applicable treaty or law of the United States;

"(B) it is authenticated in accordance with the applicable law of the foreign state, and such authentication may be established conclusively by a showing that—

"(i) a judge, magistrate, or other appropriate officer of the foreign state has signed a certification to that effect; and

"(ii) a diplomatic or consular officer of the United States who is assigned or accredited to the foreign state, or a diplomatic or consular officer of the foreign state who is assigned or accredited to the United States, has certified the signature and position of the judge, magistrate, or other officer; or

"(C) other evidence is sufficient to enable the court to conclude that the document is authentic.

"(2) A certificate or affidavit by an appropriate official of the Department of State is admissible as evidence of the existence of a treaty or its interpretation.

"(3) If the applicable treaty requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense had been committed in the United States, the requirement is satisfied if the evidence establishes probable cause to believe that an offense was committed and that the person sought committed it.

"(d) FINDINGS.—The court shall find that the person is extraditable if it finds that—

"(1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;

"(2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;

"(3) no defense to extradition specified in the applicable treaty, and within the jurisdiction of the court, exists; and

"(4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of—

"(A) the United States;

"(B) the State where the fugitive is found; or

"(C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

"(e) POLITICAL OFFENSES AND OFFENSES OF A POLITICAL CHARACTER.—The court shall not find the person extraditable after a hearing under this section if the court finds that the person has established by clear and convincing evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense or an offense of a political character. For the purposes of this subsection, the terms 'political offense' and 'offense of a political character'—

"(1) do not include—

"(A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;

"(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

"(C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

"(D) an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;

"(E) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs;

"(F) an offense that consists of rape;

"(G) an attempt or conspiracy to commit an offense described in subparagraphs (A) through (F) of this paragraph, or participation as an accom-

plice of a person who commits, attempts, or conspires to commit such an offense.

"(2) Except in extraordinary circumstances, do not include—

"(A) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnaping, the taking of a hostage, or a serious unlawful detention;

"(B) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

"(C) an attempt or conspiracy to commit an offense described in subparagraphs (A) or (B) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

The court shall not take evidence with respect to, or otherwise consider, an issue under this subsection until the court determines the person is otherwise extraditable. Upon motion of the Attorney General or the person sought to be extradited, the United States district court may order the determination of any issue under this subsection by a judge of such court.

"(f) CERTIFICATION OF FINDINGS TO THE SECRETARY OF STATE.—

"(1) If the court finds that the person is extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify its findings, together with a transcript of the proceedings, to the Secretary of State. The court shall order that the person be held in official detention until surrendered to a duly appointed agent of the foreign state, or until the Secretary of State declines to order the person's surrender.

"(2) If the court finds that the person is not extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify the findings, together with such report as the court considers appropriate, to the Secretary of State. The Attorney General may commence a new action for extradition of the person only with the agreement of the Secretary of State.

"§ 3195. Appeal

"(a) IN GENERAL.—Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal.

Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

"(b) DETENTION OR RELEASE PENDING APPEAL.—If the district court found that the person sought is—

"(1) extraditable, it shall order that the person be held in official detention pending determination of the appeal, or pending a finding by the court of appeals that the person has established that special circumstances require his release;

"(2) not extraditable, it shall order that the person be released pending determination of an appeal unless the court is satisfied that the person is likely to flee or to endanger the safety of any other person or the community.

If the court orders the release of a person pending determination of an appeal, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"(c) SUBSEQUENT REVIEW.—No court has jurisdiction to review a finding that a person is extraditable unless the person has exhausted his remedies under subsection (a). If the person files a petition for habeas corpus or for other review, he shall specify whether the finding that he is extraditable has been upheld by a court, and, if so, shall specify

the court, the date, and the nature of each such proceeding. A court does not have jurisdiction to entertain a person's petition for habeas corpus or for other review if his commitment has previously been upheld, unless the court finds that the grounds for the petition or appeal could not previously have been presented.

"§ 3196. Surrender of a person to a foreign state

"(a) RESPONSIBILITY OF THE SECRETARY OF STATE.—If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter—

"(1) may order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition;

"(2) may order such surrender of the person contingent on the acceptance by the foreign state of such conditions as the Secretary considers necessary to effectuate the purposes of the treaty or the interest of justice; or

"(3) may decline to order the surrender of the person if the Secretary is persuaded that—

"(A) the foreign state is seeking extradition of the person for the purpose of prosecuting or punishing the person because of his political opinions, race, religion, or nationality; or

"(B) the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.

The Secretary may order the surrender of a person who is a national of the United States unless such surrender is expressly forbidden by the applicable treaty or by the laws of the United States. A decision of the Secretary under paragraph (1), (2), or (3) is a matter solely within the discretion of the Secretary and is not subject to judicial review: *Provided, however,* That in determining the application of paragraph (3), the Secretary shall consult with the appropriate bureaus and offices of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs.".

"(b) NOTICE OF DECISION.—The Secretary of State, upon ordering a person's surrender or denying a request for extradition in whole, or in part, shall notify the person sought, the diplomatic representative of the foreign state, the Attorney General, and the court that found the person extraditable. If the Secretary orders the person's surrender, he also shall notify the diplomatic representative of the foreign state of the time limitation on the person's detention that is provided by subsection (c)(2).

"(c) LIMITATION ON DETENTION PENDING DECISION OR REMOVAL.—A person who is found extraditable pursuant to section 3194 may, upon reasonable notice to the Secretary

of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings—

"(1) the Secretary does not order the person's surrender, or decline to order the person's surrender, within forty-five days after his receipt of the court's findings and the transcript of the proceedings; or

"(2) the person is not removed from the United States within thirty days after the Secretary ordered the person's surrender.

The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3197. Receipt of a person from a foreign state

"(a) APPOINTMENT AND AUTHORITY OF RECEIVING AGENT.—The Attorney General shall appoint an agent to receive, from a foreign state, custody of a person accused of a Federal, State, or local offense. The agent shall have the authority of a United States marshal. The agent shall convey the person directly to the Federal or State jurisdiction that sought his return.

"(b) TEMPORARY EXTRADITION TO THE UNITED STATES.—If a foreign state delivers custody of a person accused of a Federal, State, or local offense to an agent of the United States on the condition that the person be re-

turned to the foreign state at the conclusion of criminal proceedings in the United States, the Bureau of Prisons shall hold the person in custody pending the conclusion of the proceedings, and shall then surrender the person to a duly appointed agent of the foreign state. The return of the person to the foreign state is not subject to the requirements of this chapter.

"§ 3198. General provisions for chapter

"(a) DEFINITIONS.—As used in this chapter—

"(1) 'court' means

"(A) a United States district court established pursuant to section 132 of title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands; or

"(B) a United States magistrate authorized to conduct an extradition proceeding;

"(2) 'foreign state', when used in other than a geographic sense, means the government of a foreign state;

"(3) 'foreign state', when used in a geographic sense, includes all territory under the jurisdiction of a foreign state, including a colony, dependency, and constituent part of the state; its air space and territorial waters; and vessels or aircraft registered in the state;

"(4) 'treaty' includes a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent by the Senate; and

"(5) 'warrant', as used with reference to a foreign state, means any judicial document authorizing the arrest or detention of a person accused or convicted of a crime.

"(b) PAYMENT OF FEES AND COSTS.—Unless otherwise specified by treaty, all transportation costs, subsistence expenses, and translation costs incurred in connection with the extradition or return of a person at the request of—

"(1) a foreign state, shall be borne by the foreign state unless the Secretary of State directs otherwise;

"(2) a State, shall be borne by the State; and

"(3) the United States, shall be borne by the United States.".

SEC. 4. This Act shall take effect on the first day of the first month after enactment, and shall be applicable to extradition and rendition proceedings commenced thereafter.

○

cially by organized crime, is the so-called arson-for-profit schemes. Last Congress, in response to the problems with arson fraud brought to light in previous hearings by the Senate Judiciary Subcommittee on Criminal Justice, I introduced a bill—S. 1386, 97th Congress, 1st session—to provide Federal criminal penalties for the more serious frauds of this type. I am today introducing the same measure to provide a vehicle to again focus our attention on one approach to help deal with the problem.

Mr. President, this legislation would make it a Federal crime punishable by a fine of $250,000 or imprisonment for not more than 10 years, or both, to engage in conduct in furtherance of a fraudulent scheme that affects interstate commerce and involves the obtaining of insurance proceeds of $100,000 or more by arson. This would supplement the provisions of the Anti-Arson Act enacted last Congress—Public Law 97-298—that added the crime of arson in the FBI major crime reports and provided a more flexible standard for application of current explosive statutes.

Every reasonable weapon against arson should be made available to the law enforcement community. As I noted last Congress, arson is a unique crime. It generally occurs with no eyewitnesses. Evidence of the crime is difficult to ascertain and often destroyed in the course of the fire. Investigative resources needed to determine the origin and cause of a fire are frequently beyond the capability of most jurisdictions. Arson-for-profit cases go even further because they usually involve detailed planning and extensive cover-up activities. Losses from arson fraud are estimated at over $1.25 billion a year and increasing.

The Federal Bureau of Investigation has recognized the growth of arson fraud by organized crime and is devoting substantial resources to deal with these crimes. Unfortunately, the Federal law is not adequate to meet the problem. Hopefully, this bill would help fill this gap.

The bill follows:

S. 219

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 5 of title 19 of the United States Code is amended by adding at the end thereof a new section as follows:

§ 32. Arson in executing a scheme to defraud

"(a) Whoever, having devised or intending to devise a scheme or artifice to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise, engages in conduct with intent to execute such scheme or artifice and the scheme or artifice affects interstate commerce and involves the obtaining of insurance proceeds of $100,000 or more by arson shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

"(b) As used in this section, 'arson' means the substantial damage of a building, dwelling, or structure by fire or explosion.".

Mr. THURMOND. Mr. President, I am reintroducing today a major administration-supported bill to modernize the international extradition procedures of the United States. This legislation has been under development for some 4 years under the leadership of both the Reagan and Carter administrations and was considered by the Senate as S. 1940 last Congress. The purpose is to modernize the conceded obsolete provisions of current law dealing with international extradition. Following hearings, in the 97th Congress, the Senate Committee on the Judiciary, on April 15, 1982, reported S. 1940 (S. Rept. No. 97-331), with several amendments to the Senate without a dissenting vote. The bill was then sequentially referred to the Senate Committee on Foreign Relations. On May 19, 1982, the Senate Committee on Foreign Relations reported the bill to the Senate with some suggestions for further improving the bill. (S. Rept. No. 97-475). It is this latter bill, S. 1940 with amendments agreeable to both Senate committees, that was passed by the Senate on August 19, 1982. The bill I am introducing today is the same bill that passed the Senate in August 1982, with only a few clarifying or organizational drafting changes.

Mr. President, the House of Representatives also made major strides last Congress in processing a companion bill—H.R. 6046. This measure was reported by the House Committee on the Judiciary (H. Rept. No. 97-627), but was not considered due to time constraints on the floor of the House in the final days of the Congress.

Mr. President, current extradition statutes have been on the books for more than a century without significant change. Officials responsible for administering extradition matters for the United States informed the committee in hearings that current provisions are increasingly inadequate to deal with modern problems in controlling international crime, including such serious areas as international illicit drug trafficking and terrorism.

Due to a relatively small number of cases in the past, minor inconveniences from deficiencies were a nuisance, but tolerable. Today, the number and complexity of cases have made such deficiencies a major problem.

Mr. President, it is unfortunate that we did not complete action on this legislation last Congress. It is time to modernize U.S. extradition laws to comport with the realities of international criminal activity. I hope we can act promptly.

A few of the highlights of the bill are:

Require the Attorney General to serve as complainant to extradition matters, thereby eliminating the possibility of a foreign government—or someone acting for a foreign government—instituting unjustified extradition proceedings.

Permit an arrest warrant to be issued when the location of the fugitive is not known, thereby facilitating law enforcement efforts in locating international fugitives.

Permit extradition proceedings to be commenced by means of a summons rather than an arrest warrant where the location of the fugitive is known and flight is unlikely.

Set standards and conditions for the release of the alleged fugitive in any stage of the proceeding, not just prior to the extradition hearing.

Keep the "political offense" issue as a matter for the courts, but define the term to clarify and strengthen the U.S. response to international terrorism.

Permit fugitives to be temporarily extradited to the United States for trial or sentencing.

Authorize the Attorney General to make all arrangements to take custody of fugitives found extraditable to the United States by foreign countries.

Mr. President, I ask unanimous consent that excerpts from both the Judiciary and Foreign Relations Committee reports on S. 1940 last Congress be inserted in the RECORD.

The excerpts and bill follow:

AMENDMENTS TO TITLE 18 OF THE UNITED STATES CODE RELATING TO INTERNATIONAL EXTRADITION

The Committee on the Judiciary, to which was referred the bill (S. 1940) to amend chapter 209 of title 18 of the United States Code, relating to international extradition, having considered the same, reports favorably thereon and recommends that the bill pass.

* * * * *

HISTORY OF THE LEGISLATION

Senator Thurmond introduced S. 1639 on September 18, 1981, to modernize the statutory provisions relating to international extradition. One day of hearings was held on October 14, 1981, during which the Committee heard from the Department of State, the Department of Justice, a distinguished professor, and a practicing attorney. The record was kept open for more than two and one-half months for other interested persons to submit written statements and comments for the record.[1] On December 11, 1981, Senator Thurmond introduced a clean bill—S. 1940—to incorporate several amendments suggested in the hearings, as well as to make a number of clarifying amendments. S. 1940 differs from S. 1639 in two significant respects. First, S. 1940 as introduced made it mandatory—rather than discretionary—for the Secretary of State to deny extradition when he is persuaded that the requesting State is seeking the person's extradition "for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions". Second, as introduced, S. 1940 made it explicit in the statute that this determination would not be subject to judicial review.

This bill was the result of several years of study by the Departments of State and Justice in cooperation with the professional staff of the Senate Committee on the Judiciary. It was originally contemplated that the primary vehicle for modernizing the extradition laws of the United States would be the Federal criminal code legislation. Since

Footnotes at end of report.

the subject matter, however, can be easily separated out as a package, Senator Thurmond elected to follow a two track procedure in this instance; thus, identical provisions to this bill are also included as subchapter B of chapter 32 in the new title 18 in the criminal code bill (S. 1630) reported by the Committee on January 25, 1982. Legislation separate from the criminal code bill has the advantage of promoting early application of this important reform to an increasing case load involving international fugitives from justice.

STATEMENT IN GENERAL

Chapter 209 of current title 18 of the United States code (18 U.S.C. 3181-3195) intitled "Extradition" covers both interstate rendition and international extradition. This bill would retain chapter 209 for interstate rendition provisions and create a new chapter 210 for international extradition laws.

International extradition is the process by which a person located in one nation is arrested and turned over to another nation for criminal trail or punishment. The new chapter 210 consists of eight sections. Sections 3191 through 3196 deal primarily with requests made to the United States by foreign governments and set forth the procedure for determining whether a person located in this country should be delivered up to a foreign power. Section 3197 deals with the return of a fugitive extradited to the United States from a foreign nation. Section 3198 contains definitions and a provision on payment of the expenses incident to extradition. The proposed chapter replaces 18 U.S.C. 3181 and 3184-3195. Other Federal statutes on extradition, which include 18 U.S.C. 751, 752, and 1502, are not affected by this legislation.

The provisions of the proposed chapter substantially alter the present statutory law for several reasons.

First, many of the statutes on extradition have been in force without major alteration since 1882. Several have not been significantly changed since 1848. These antiquated provisions have proven increasingly inadequate in dealing with the modern problems in the international control of crime.

Second, there has been a marked increase in the number of extradition request received and made by the United States in recent years. Those requests have revealed problems in the extradition process. Moreover, the requests have generated a number of published court decisions on constitutional and legal issues involved in international extradition. The judicial interpretation of the law contained in these court decisions fills important gaps in the present statutory law, and should be reflected in any new extradition legislation.

Third, the United States has concluded new extradition treaties with many foreign countries in the past few years. The language of the present law is not adequate to fully implement some of the provisions of the new treaties, and therefore impedes fulfillment by the United States of its international obligations.

In summary, the following significant improvements in international extradition are accomplished by S. 1940:

(1) Permits the United States to secure a warrant for the arrest of a foreign fugitive even though the fugitive's whereabouts in the United States is unknown or even if he is not in the United States. This warrant can then be entered into the FBI's NCIC system so that if the fugitive attempts to enter the United States or is apprehended in the United States for other reasons, he can be identified and arrested immediately for extradition to the requesting country.

(2) Provides a statutory procedure for waiver of extradition. This feature protects a fugitive's rights while facilitating his removal to the requesting country in instances in which he is willing to voluntarily go to the requesting country without a formal extradition hearing.

(3) Permits both a fugitive and the United States on behalf of the requesting country to directly appeal adverse decisions by an extradition court. Under present law a fugitive can only attack an adverse decision through habeas corpus. The only option available to the United States acting on behalf of a requesting country is to refile the extradition complaint with another magistrate.[3]

(4) Clarifies the applicable standards for bail at all stages of an extradition case by adopting standards largely derived from Federal court cases.

(5) Establishes clear statutory procedures and standards applicable to all critical phases of the handling and litigation of a foreign extradition request.

(6) Makes the determination of whether the requesting country is seeking extradition of a person for a "political offense" a matter for the Secretary of State consistent with statutory guidelines and subject to judicial review in the courts of appeal.

(7) Limits access to United States courts in connection with foreign extradition requests to cases initiated by the Attorney General.

(8) Permits use of a summons instead of a warrant of arrest in appropriate cases.

(9) Codified the rights of a fugitive to legal representation and to a speedy determination of an extradition request.

(10) Simplifies and rationalizes the procedures for authenticating documents for use in extradition proceedings.

(11) Facilitates temporary extradition of fugitives to the United States.

PROVISIONS OF THE BILL AS REPORTED

SECTION 3191—EXTRADITION AUTHORITY IN GENERAL

1. Present Federal law

18 U.S.C. 3181 states that the present Federal laws authorizing the extradition of persons from the United States shall continue in force only if there is a treaty in force with the foreign nation requesting extradition. 18 U.S.C. 3184 requires that an extradition treaty be in force before any court can conclude that a person may lawfully be extradited to the foreign country involved. In addition, 18 U.S.C. 3186 by implication requires that a court find that the person sought is extraditable before the Secretary of State may order surrender to the foreign state. These provisions, read together, permit the United States to surrender a person to a foreign country only in accordance with an applicable treaty in force between the United States and the foreign country involved.[4] This principle has become a settled aspect of United States practice in international extradition.

2. Provisions of section 3191

Section 3191 of the proposed chapter on extradition carries forward the basic principle of the present law. The provision specifies that the United States may extradite a person in this country only if there is a treaty concerning extradition in force with the country requesting extradition, and only if the request falls within the terms of that treaty. This section refers to a treaty "concerning extradition" rather than an "extradition treaty" because an obligation to extradite a particular class of offenders is sometimes included in international agreements other than extradition treaties.[4] However, the limitation established by this section applies only to the surrender of fugitives pursuant to the chapter, and does not apply to any other legal process which may result in a person facing trial or punishment in another country. Thus, the surrender of a United States serviceman to foreign authorities for trial in accordance with the reciprocal criminal jurisdiction provisions of a Status of Forces Agreement,[5] or the deportation of an alien who happens to face criminal charges abroad,[6] remain governed by the treaty provisions and statutes relating to those processes, and not by this chapter.

SECTION 3192—INITIAL PROCEDURE

This section sets forth the steps to be followed in instituting court proceedings necessary for extradition.

1. Present Federal law

Extradition proceedings under 18 U.S.C. 3184 commence when a complaint is filed, under oath charging that a person has committed, within the jurisdiction of a foreign government, any of the crimes for which extradition is provided under the treaty on extradition in force between the United States and that foreign government. There is no requirement under present law that a formal diplomatic request for extradition be made before the complaint is filed.

18 U.S.C. 3184 permits any Federal judge or justice, or duly authorized Federal magistrate, or any judge of a State court of record of general jurisdiction to receive complaint and issue warrants of arrest in international extradition matters. In practice, however, such cases are almost invariably filed in the Federal courts.

The present statutory scheme does not specify by whom a complaint may be filed in extradition matters. The rule developed by the courts appears to be that any person acting under the authority of the demanding government may filed a complain for extradition.[7] Thus, international extradition cases have been instituted by foreign diplomatic or consular representatives,[8] foreign policy officers[9] and even private citizens which claim to be acting on behalf of a foreign government.[10] This situation has required the courts to determine, in each case, whether the person filing the complaint is "authorized" to act on behalf of the foreign government.[11] However, in recent year, the United States Department of Justice has become the complainant in the overwhelming majority of extradition cases. The Department of Justice takes this action either pursuant to provisions in the applicable extradition treaty requiring the government of the requested state to provide assistance to the government seeking extradition[12] or pursuant to an informal international agreement for reciprocal legal representation.

The complaint must be filed in a Federal or State court in whose jurisdiction the fugitive may be found. Unfortunately, in many cases the international fugitive's location in the United States is unknown. Therefore, no complaint can be filed and no arrest warrant can be issued. The ability of United States law enforcement agencies to locate and apprehend international fugitives is greatly hampered by the lack of an outstanding arrest warrant or other judicial process in such cases.[13]

The present statutory scheme contains no provision for the release of an alleged fugitive on bail pending the extradition hearing.[14] However, the courts have claimed the inherent right to release an alleged fugitive on bail pending the extradition hearing in cases where "special circumstances" require such release.[15] The standard for release on bail in extradition cases is more demanding than in ordinary cases, and a clear presumption against bail is recognized.[16]

2. Provisions of section 3192

Subsection (a) permits the Attorney General to file a complaint charging that a fugitive is extraditable in the United States district court for the district in which the fugitive may be found. The subsection also permits a complaint to be filed in the United States District Court for the District of Columbia if the fugitive's location is not known. Under this provision, a complaint could be filed, and an arrest warrant issued, when the whereabouts of the fugitive in the United States are still being ascertained, or when it is believed that the fugitive has not yet entered the United States but may be about to do so. The word "found" is intended to have its usual, non-technical meaning, and permits extradition proceedings to be initiated in any district in which the fugitive can be physically apprehended, without regard to the manner in which the fugitive entered the district.[17]

Subsection (b) prescribes the contents of a complaint for extradition. Since all United States extradition treaties specify the documents and quantum of evidence necessary for surrender, paragraph (1) states that an extradition complaint is sufficient if it is accompanied by the evidence specified in the treaty and a copy of the formal request for extradition. Paragraph (2) deals with the documentation necessary to support a "provisional arrest," the process by which a fugitive from justice is arrested to prevent further flight while the foreign government seeking extradition assembles the necessary documents and evidence.[18] Subparagraph (A) of paragraph (2) provides that a complaint will support an arrest under subsection (c) if it contains information sufficient to identify the fugitive, explains the circumstances necessitating provisional arrest,[19] and either indicates that a warrant for the fugitive's arrest is outstanding in the foreign state,[20] or outlines the essential facts indicating that an extraditable crime has been committed and that the fugitive committed it. Since many of the extradition treaties contain articles which expressly set out requirements for obtaining the arrest of fugitives,[21] subparagraph (B) of paragraph (2) also permits the complaint to be filed if it contains the information required by the provisions of the applicable treaty.

Subsection (c) obliges the court to issue a warrant for the arrest of the fugitive upon receipt of the complaint unless the Attorney General requests that a summons to appear at the extradition hearing be issued instead. The subsection requires that the warrant of arrest be executed in accordance with Rule 4(d) of the Federal Rules of Criminal Procedure. This means that the warrant may be executed anywhere in the United States in the same manner as an ordinary Federal warrant of arrest. The subsection also requires that the person arrested be taken without unnecessary delay before the nearest available Federal court[22] for an extradition hearing. The language is similar to that of Rule 5 of the Federal Rules of Criminal Procedure, and is intended to insure that the person arrested under this section is speedily informed by a judicial officer of the reason for the arrest and of his rights to counsel, to cross-examine witnesses, and to introduce evidence on his behalf. It is not intended to require the dismissal of extradition proceedings solely on the ground that the fugitive arrested for extradition was taken without unnecessary delay before a judge or magistrate later determined not to be the "nearest" one. There is no requirement that the extradition hearing take place in the State in which the fugitive is found,[23] so long as there has been compliance with the provisions of this chapter.

Subsection (d)(1) provides that a fugitive arrested for extradition may be released on bail pending the extradition hearing only if he can demonstrate that "special circumstances" warrant his release. The provision continues the approach which has been followed by United States courts[24] in setting the standards for release on bail pending an extradition hearing considerably higher than the standards for release on bail pending trial on Federal charges in the United States. This approach is necessary to assure that the United States continues to carry out its treaty obligation to surrender extraditable fugitives. It is anticipated that the courts will find the "special circumstances" test satisfied "only in the most pressing circumstances and only when the requirements of justice are absolutely peremptory."[25] Such special circumstances might be found, for instance, when the incarceration of the fugitive would seriously damage his health,[26] or would endanger the welfare of a third party who is wholly dependent upon the fugitive for care.[27] It is anticipated that these circumstances would rarely be encountered.

Subsection (d)(3) provides that even if special circumstances are found, the release of the fugitive shall be permitted only upon such conditions as will reasonably assure his appearance at future proceedings, and assure the safety of other persons and the community. Such conditions might include surrender by the fugitive of any passport or travel documents, posting of a substantial bond, and the requirement that the fugitive maintain contact with appropriate federal agencies, such as the United States Marshals Service.

Subsection (d)(2) gives the court the discretion to release the fugitive provisionally arrested pursuant to this section if the evidence or documents required by the applicable treaty are not received within sixty days of the arrest (unless a longer period of detention is specified in the applicable treaty). The subsection resolves and ambiguity perceived by the courts with respect to the commencement and conclusion of the time period for provisional arrest by providing that this period should be calculated from the date on which the fugitive is taken into custody for extradition[28] to the date on which the documents are received by either the court or the Department of State.[29] If the court is notified that the documents have been received by the Department of State before the expiration of the 60-day period, the court is directed to defer release of the fugitive for a reasonable time pending the prompt transmission of the documents to the court by the Department of State. If a court does release the fugitive from custody due to the non-receipt of the documents within the applicable time period, subsection (d)(3) requires that the court frame conditions of release reasonably calculated to assure that person's appearance for future proceedings and the safety of other persons and the community. Release of the fugitive under subsection (d) does not terminate the proceedings, which can resume once appropriate documentation arrives.[30]

This section does not carry forward the little used authorization in 18 U.S.C. 3184 for extradition proceedings to be commenced before State judges. The section also specifies that extradition proceedings must be initiated by the Attorney General, rather than by a foreign government or one acting on behalf of a foreign government.[31] These changes reflect the fact that international extradition is strictly a function of the Federal Government,[32] and determining when and how to perform that function is properly the business of Federal officials and Federal courts. The United States Government has a sufficient interest in the vigorous enforcement of the laws (including the extradition law and treaties) to justify the participation of its legal counsel, the Department of Justice, in all court proceedings aimed at determining whether extradition can take place. Indeed, this is the approach which has been adopted in most foreign countries, many of which do not permit the United States to argue in court during proceedings in connection with a United States extradition request. In addition, United States courts are freed from any need to determine whether a private person is "authorized" by an "appropriate" foreign authority to initiate extradition proceedings. It should also significantly reduce the likelihood of extradition proceedings being used by private individuals as a tool for harassment, debt collection, or other improper purposes.

SECTION 3193—WAIVER OF EXTRADITION HEARING AND CONSENT TO REMOVAL

1. Present Federal law

Present Federal law provides no specific procedure by which a person arrested for extradition may waive the formalities and voluntarily return to the foreign country requesting surrender. This is especially unfortunate since a significant number of the fugitives arrested under 18 U.S.C. 3184 choose not to challenge the request for extradition and wish to expedite removal to the foreign country. Moreover, many of the newer extradition treaties to which the United States is a party contain provisions obliging the requested state to expedite the return of a fugitive who has waived a hearing or other procedures.[33]

2. Provisions of section 3193

Section 3193 of the proposed extradition chapter clarifies the method by which the fugitive who does not contest extradition can expedite his surrender. The provisions of this section are based on Federal statutory provisions governing a closely analogous situation: the verification of a prisoner's voluntary consent to transfer to his country of nationality under treaties on the execution of penal sanctions.[34] The section states that the court which would have handled the extradition proceeding shall verify that the fugitive's consent to be removed to a foreign country has been given voluntarily and with full knowledge of his right to consult with counsel before making a decision in the matter.

Under some circumstances, the foreign government may not be willing to accept custody of a fugitive who has offered to waive extradition.[35] There also may be situations in which the United States government would consider waiver inappropriate.[36] Therefore, the provision does not permit removal of the fugitive if the Attorney General notifies the court that the United States or the foreign state objects to the proposed waiver.

SECTION 3194—EXTRADITION HEARING

1. Present Federal law

Under 18 U.S.C. 3184, an alleged fugitive is entitled to a hearing at which a judicial officer determines whether extradition is lawful. 18 U.S.C. 3189 specifies that the hearing must be held "on land, publicly, and in a room or office easily accessible to the public".

At the extradition hearing, the judicial officer must determine whether the offense for which extradition is sought falls within the terms of the treaty. He must also determine whether the acts for which the fugitive is sought by the foreign country would constitute a crime had they been committed

in this country. This rule, known as "dual criminality" or "double criminality", is generally considered a basic principle of international extradition law,[37] and is expressly required by many of the extradition treaties to which the United States is a party.[38] The courts have held that the double criminality requirement is satisfied whenever the acts which the fugitive is charged with having committed in the foreign country would be punishable under Federal law, the law of the State where the fugitive is found, or the laws of a majority of the States, had those acts been committed in this country.[39]

A judicial officer must also determine whether there is sufficient proof that an extraditable offense in fact has been committed. Most of the treaties to which the United States is a party require that an extradition request be supported by "such evidence of criminality as, according to the laws of the place where the fugitive shall be found, would justify his commitment for trial had the crime or offense been there committed." Many years ago, the courts veiwed the words "place where the fugitive shall be found" as requiring the Federal court to determine if the foreign government's evidence is sufficient to justify a trial under the State laws of the State in which the fugitive is apprehended.[40] This approach was a reasonable one eight decades ago, because at that time Federal courts had no uniform rules of criminal procedure and routinely followed the procedural rules of the courts of the State in which they were located. However, the adoption of the Federal Rules of Criminal Procedure has made it generally unnecessary for Federal courts to refer to State law in these matters.[41] Moreover, extradition is a national act,[42] and the quantum of evidence necessary for extradition is precisely the kind of issue which should be determined by uniform national law, rather than by various State laws. For these reasons, all of the more recent extradition treaties contain language essentially requiring that the Federal law standard of commitment for trial—probable cause—be applied in weighing the sufficiency of the evidence for international extradition.[43]

The Federal Rules of Evidence do not apply in extradition proceedings,[44] where unique rules of wide latitude govern the reception of evidence on behalf of the foreign government.[45] It is settled law that hearsay is admissible, and the foreign government usually presents its case by submitting affidavits, depositions, and other written statements in order to satisfy the requirements of the applicable treaty.[46] 18 U.S.C. 3190 provides that originals or copies of depositions, warrants, or other papers are admissible in evidence at the extradition hearing if authenticated so as to be admissible for similar purposes according to the laws of the requesting country. The statute also provides that the certificate of the principal diplomatic or consular officer of the United States resident in the requesting country shall be proof that the documents are authenticated in the manner required. In essence, the documents need only be genuine and authentic—requirements that are deemed fulfilled once it is shown that under similar circumstances the requesting country's own courts would accept them as authentic. The courts have held that extradition documents bearing a certificate which is couched in the language of 18 U.S.C. 3190, and signed by one of the specified officials, are conclusively admissible.[47] As a result of these decisions, foreign governments routinely submit the documentation in support of extradition requests to the appropriate United States Embassy abroad for certification and transmission to the United States. This practice imposes undesirable burdens on the United States Foreign Service officers who must fill out the certification.[48]

The present statutory scheme offers little guidance with respect to the evidence which can be introduced on behalf of the alleged fugitive in an extradition hearing. Many cases emphasize that whether such evidence should be admitted is a decision for the court, in its discretion, to make.[49] The alleged fugitive is ordinarily permitted to testify on his own behalf [50] or to have witnesses testify for him.[51] However, it is clear from the case law that the alleged fugitive may offer to explain ambiguities in the evidence submitted against him, but may not offer evidence which merely contradicts that submitted by the requesting country, or which poses a question of credibility, or which raises an affirmative defense to conviction on the charges, or which is incompetent by the terms of the extradition treaty under which surrender is sought.[52] This restrictive approach is appropriate because the issue before the court at an extradition hearing is probable cause, not the ultimate guilt or innocence of the accused.

Finally, the judicial officer must determine whether the treaty contains a defense to extradition which would preclude surrender in the case before him. Extradition treaties frequently bar surrender if a statute of limitations has foreclosed prosecution or punishment for the offense in question,[53] or if the fugitive has been tried or punished in the requested state for the same offense,[54] or if any of several other legal considerations are present.

Virtually every extradition treaty contains a provision barring extradition for a political offense, and many treaties also preclude extradition if the requesting country has political motives for seeking the return of the fugitive. Under the present case law, the courts decide whether the crime for which extradition has been requested is a political offense [55] but traditionally have declined to consider whether the requesting country's motives in seeking extradition are political.[56] Since these issues are usually intertwined,[57] the possibility for inconsistent results is obvious.

If the judicial officer is persuaded that the crime charged falls within the treaty, that the acts involved would constitute an offense in this country, that the evidence submitted is sufficient to sustain the charge under the treaty, and that no legal defense to extradition is applicable, it is his duty to certify these conclusions to the Secretary of State. The judicial officer also must send the Secretary of State a copy of all the oral testimony taken at the hearing. 18 U.S.C. 3184 requires the judicial officers to order the commitment of the accused to jail pending surrender, and there is provision for release on bail at this stage of the proceedings. If the judicial officer finds that the fugitive is not extraditable, the proceedings are terminated, and the fugitive is released from custody.

2. Provisions of section 3194

Section 3194(a) requires that a judicial hearing be held to determine whether the person sought is extraditable (unless such as hearing has been waived under section 3193) and sets out the procedure for the hearing.

Section 3194(a) provides that the court does not have jurisdiction to determine whether extradition is sought for a political offense or because of the person's political beliefs, while section 3196(a)(3) specifies that the Secretary of State must decline to order surrender of a person if, after taking into account certain statutory principles generally eliminating specified types of crimes from the political offense exception (e.g., crimes of violence and drug trafficking), he is persuaded that the person's extradition is sought for one of these reasons. The provisions taken together provide that the Secretary of State shall have jurisdiction to decide the applicability of the "political offense" exception to extradition is sought for one of these reasons. The provisions taken together provide that the Secretary of State shall have jurisdiction to decide the applicability of the "political offense" exception to extradition contained in most extradition treaties, such decision to be consistent with the statutory guidelines and reviewable in the United States courts of appeal based on a substantial evidence standard. The Committee has concluded that this approach, also discussed in dealing with section 3196(a)(3) infra, is a desirable one for several reasons.

First, the most modern United States extradition treaties specify that the executive branch of the requested country shall decide the applicability of the political offense exception.[58] In the absence therefore of specific legislative endorsement of the court developed rule—an unlikely prospect in light of the trend in magistrate extradition decisions noted infra note 61—it is inevitable over the long term that the case law rule reserving the political offense decision to the courts will become the exception rather than the rule as the United States continues its ongoing program of negotiating new modern treaties. Moreover, as previously noted, under present case law the courts generally shun deciding whether the foreign government's extradition request is politically motivated, preferring to leave that decision to the executive branch. It should also be noted that the political offense decisions are made exclusively by the executive branch of the government in several foreign countries, including Canada and Germany.

Second, the decision to shield a criminal from extradition for an otherwise extraditable offense on the ground that his offense was "political" is not the type of issue which lends itself to resolution through the judicial process.[59] When dealing with a political situation in a foreign country and the relationship of particular conduct to that situation, there are few truly objective criteria by which a comprehensive definition of the term "political offense" can be based.[60] Moreover, a public court proceeding is not the most desirable forum for careful analysis of a friendly foreign state's intentions or political system. Such analysis and decisions are inextricably intertwined with, and require the expertise of those versed in the conduct of foreign relations. The Committee has concluded that this issue is best left to the Secretary of State, subject only to limited review in the courts of appeal, along with his traditional unreviewable responsibilities with respect to political asylum.

Finally, a decision on the political offense exception can have a devastating impact on United States relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise United State efforts to combat international terrorism.[61] The present law exacerbates this situation, because frequently the United States government, through the departments of State and Justice, must take a position on the applicability of the political offense exception while the case is before the court. Moreover, the government must take this position publicly, before all the evidence and arguments are in, and despite the fact that the court or the Secretary of State may subsequently decide against ex-

tradition on other grounds. By contrast, the approach taken by the proposed chapter permits a more informed decision on extradition to be made in a manner less likely to be offensive to the friendly foreign government involved in the case.

Subsection (b) supplements present law by expressly providing that the fugitive be informed of his right to be represented by counsel at the extradition hearing. Indigent fugitives will be provided with counsel pursuant to the provisions of section 3401 relating to court-appointed counsel. The provision also requires that the fugitive be informed of his right to introduce evidence in his own behalf on matters within the jurisdiction of the court. The subsection thereby leaves intact the extensive case law on this point.[62]

Subsection (c) deals with evidence in an extradition hearing. Paragraph 1 is designed to clarify the circumstances under which documentary evidence will be admissible on behalf of either party in an extradition hearing.

Many treaties specifically set out the manner in which extradition documents must be authenticated,[63] and subparagraph (A) of paragraph (1) provides that documents so authenticated shall be admissible. It also provides that documents authenticated in accordance with the provisions of United States law shall be deemed admissible as evidence in the extradition hearing. Thus, documents which comply with the requirements of Article IX of the Federal Rules of Evidence would be admissible in extradition proceedings. However, the provision does not require the exclusion from the hearing of evidence which fails to satisfy the Federal Rules of Evidence. Rather, the subsection merely underscores the commonsense proposition that evidence which satisfies the high standards set out in the Rules, and which would be admissible in civil or criminal proceedings in this country, should likewise be acceptable in extradition proceedings.

Subparagraph (B) of paragraph (1) is based on 18 U.S.C. 3190 and provides that a document authenticated accordance with the applicable laws of the foreign country requesting extradition shall be admissible if it is accompanied by an attestation to this effect from a judge, magistrate, or other appropriate officer of the foreign state. The phrase "other appropriate officer" would include an official of the foreign counterpart of the Department of Justice, or any other government official likely to be familiar with legal matters in the foreign country. It further requires that the signature and position of the person so attesting be certified by a diplomatic or consular officer of the United States posted in the foreign country, or by a diplomatic or consular officer of the foreign state assigned to this country.[64] The provision thus brings the essential requirements of 18 U.S.C. 3190 more into line with Rule 902(3) of the Federal Rules of Evidence.

Subparagraph (C) of paragraph (1) permits the court handling an extradition matter to accept as evidence any documents which it is persuaded are in fact authentic, regardless of compliance with either of the two previous provisions. This rule is similar to Rule 901(a) of the Federal Rules of Evidence, and is in accord with established case law permitting the authenticity of documents presented in extradition proceedings to be established by the testimony from expert witnesses or by other evidence.[65]

Paragraph (2) of subsection (c) provides that a cerfificate or affidavit by an appropriate State Department official as to the existence or interpretation of a treaty is admissible as evidence of that treaty or its interpretation.

The overwhelming majority of extradition treaties require that the requesting country present such evidence of criminality as would justify commitment for trial had the crime or offense been committed in the place where the fugitive has been found. Under paragraph (2) such a treaty provision may be satisfied by evidence establishing probable cause to believe that a crime was committed and that the person sought committed it. This is the usual standard for commitment for trial in Federal criminal cases.[66] This approach permits the Federal courts to apply the standard for commitment with which they are most familiar, and establishes a single, uniform standard by which the sufficiency of evidence in extradition proceedings may be measured. It is also consistent with the views expressed in several recent court decisions pointing out the advantages of dealing with the quantum of evidence for extradition in a manner consistent with Federal law.[67]

Paragraphs (1), (2), and (3) of subsection (d) carry forward the requirements of 18 U.S.C. 3184 that instruct the court to find the fugitive extraditable if the evidence presented is sufficient to sustain the complaint under the provisions of the applicable treaty, and also requires that the court find probable cause that the person before it is the person sought in the foreign state, and that none of the defenses to extradition which the court is empowered to consider are applicable. Paragraph (4) bars extradition unless the acts for which the fugitive's surrender is requested would constitute a crime punishable under State or Federal law in the United States. Finally, the subsection states that the findings required for extradition may be established by hearsay evidence or certified documents alone. This rule is similar to Rule 5.1 of the Federal Rules of Criminal Procedure, which permits a finding of probable cause to commit for trial to be based on hearsay evidence. It is also in accord with recent court decisions which point out that the kind of evidence necessary for extradition is an issue which should be determined by uniform national law.[68]

Subsection (e) details the procedures that the court must follow at the conclusion of the hearing. If the court finds that the fugitive is extraditable, it must state, in writing, its findings and rationale with respect to each of the offenses for which extradition is sought.[69] These findings must be sent to the Secretary of State, together with a transcript of the hearing.[70] If the court finds that the fugitive is not extraditable, the findings required by the subsection may be accompanied by a report rather than a transcript of the hearing.

SECTION 3195—APPEAL

1. Present Federal law

Under present Federal law, there is no direct appeal from a judicial officer's finding in an extradition hearing.[71] A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus.[72] The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition.[73] The lack of direct appeal in extradition matters adds undesirable delay, expense, and complication to a process which should be simple and expeditious.

2. Provisions of section 3195

Section 3195 of the proposed chapter permits either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision. It is anticipated that review on appeal will be very narrow, and that any findings of fact by the lower court will be affirmed unless they are clearly erroneous.

Subsection (a) specifies that the appeal shall be filed within the time limits set out in Rules 3 and 4(b) of the Federal Rules of Appellate Procedure, i.e., 10 days for the person sought and 30 days for the government. These are the same deadlines for filing a notice of appeal in criminal cases, and while the an extradition hearing is not a trial,[74] or even strictly a criminal proceeding,[75] these deadlines adequately balance the competing interests of fairness and expedition. It is anticipated that other aspects of the appeal process (such as the preparation and submission of the record, briefing, argument and decision) will be governed by the applicable provisions of the Federal Rules of Appellate Procedure.

If the fugitive has been found extraditable, subsection (a) requires that surrender to the foreign government be stayed pending determination of the appeal by the court of appeals.[76] This provision prevents the government from mooting the appeal by spiriting the petitioner out of the country while the matter is *sub judice.* The provision is designed to maintain the *status quo* with respect to the fugitive's custody pending appeal. It is anticipated that the district court will not ordinarily stay or delay any other element of the extradition process, such as the certification of its findings to the Secretary of State under section 3194(e).

Subsection (b) provides that a person found extraditable must remain in official detention pending the appeal unless the court of appeals finds that special circumstances require release. This is a slight amelioration of present law, which does not permit the release of a fugitive on bail after he has been found extraditable.[77] The change is desirable because the same kind of pressing, unusual situation which might require that the person sought be released from custody on bail pending the extradition hearing[78] could conceivably arise after the extradition hearing. However, it is anticipated that this authority to release a fugitive on bail will be utilized even more sparingly than the power to grant bail before the extradition hearing, and only after the most thorough and searching examination of the claimed need for release. It is expected that the courts of appeal will keep in mind that "no amount of money could answer the damage that would be sustained by the United States if [the fugitive] were to be released on bond, flee the jurisdiction, and be unavailable to surrender. . . ."[79]

If the person was found not extraditable, subsection (b)(2) permits the district court to order that the person be released pending an appeal by the government. Release shall be ordered unless the district court is satisfied that the appellee is likely to flee before the appeal is decided, or endanger the safety of any other person or the community.

A major purpose of section 3195 is to simplify, and thereby expedite, the extradition process by providing for a direct appeal from a contested decision on extradition. The direct appeal provided by this section largely eliminates the present need for habeas corpus proceedings in order to obtain judicial review of the initial finding that a person is extraditable. This purpose would be frustrated if a fugitive bent on dilatory tactics were permitted to pursue an appeal under this section, a petition for *certiorari* to the Supreme Court, and then begin one or more rounds of habeas corpus

proceedings. Such a course of action would lengthen the extradition process rather than shorten it. Therefore, subsection (c) deprives any court of jurisdiction to review a finding that a fugitive is extraditable under this chapter unless the fugitive has exhausted the appellate remedies available to him by right in this section. It also forecloses an appeal, a petition for habeas corpus, or declaratory judgement action if the validity of the fugitive's commitment for extradition has been ruled upon in prior proceedings, unless grounds are offered which could not have been presented previously.

The resolution of challenges to judicial action in international extradition cases should be especially prompt. Extradition cases are quasi-criminal in nature. Moreover, in such cases, our government's willingness to make a timely and ungrudging execution of its solemn treaty obligations to a friendly nation is in question.[80] Therefore, this section requires that courts of appeal decide cases arising under this chapter expeditiously.

SECTION 3196—SURRENDER OF A PERSON TO A FOREIGN STATE

1. Present Federal law

Under 18 U.S.C. 3186, the Secretary of State may order that any person found extraditable by a court under 18 U.S.C. 3184 be delivered to an authorized agent of the government seeking extradition. Although it is generally agreed that the Secretary's decision in this matter is discretionary,[81] present law provides no indication of the parameters of the Secretary's discretion.

18 U.S.C. 3188 states that if a fugitive found extraditable under 18 U.S.C. 3184 is not removed from the United States within "two calendar months" of the court's commitment order, he may be released from custody unless there is "sufficient cause" why release should not be ordered.[82] The courts have held that if the fugitive institutes litigation challenging his extradition, the two-month period commences when the claims are finally adjudicated rather than when the commitment order was issued.[83]

2. Provisions of section 3196

Subsection (a) carries forward the essence of 18 U.S.C. 3186 by providing that the Secretary of State shall make the final decision as to extradition. The subsection requires that the Secretary's decision be made in accordance with the chapter and the applicable treaty, and lists the actions that the Secretary may take.

Subsection (a)(1) simply permits the Secretary to order the surrender of a person the court has found to be extraditable to a duly appointed agent of the foreign state.

Subsection (a)(2) permits the Secretary to condition the surrender of a fugitive upon the acceptance by the foreign state of restrictions or conditions he considers necessary in the interest of justice or to effectuate the purposes of the treaty. This provision underscores the Department of State's authority to impose such restrictions where humanitarian concerns [84] or questions concerning trial procedures in the requesting state exist. [85] It would also permit the imposition of restrictions expressly contemplated in the provisions of some newer treaties. [86]

Subsection (a)(3) provides that the Secretary of State shall deny extradition where he is persuaded that the foreign state is seeking the person's extradition "for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions." The first of these determinations—i.e., whether the offense is a "political offense or an offense of a political character"—currently is decided by the courts. The Committee concluded that the adversary judicial procedure requiring State Department expert testimony on an evaluation of volatile political situations in foreign countries is an unsatisfactory way to resolve this issue. Other fundamental reasons underpinning structural alteration of the decision-making apparatus with respect to the political offense exception were addressed in the discussion relating to section 3194 *supra* and are not repeated here. This bill meets these problems by shifting the political offense exception decision to the Secretary of State, subject to judicial review based on a substantial evidence test in the court of appeals for the circuit in which the extradition proceeding took place. With respect to judicial review, it should be noted that an adequate administrative record must be made providing the factual basis for the Secretary's decision.

In addition, the bill provides guidelines to be applied by the Secretary of State that are intended to prevent relief from extradition for the specified offenses except in the most rare circumstances. This part of the bill reads as follows:

When it is claimed that the foreign government is seeking the person for a political offense or an offense of a political character, the Secretary will make his determination in accordance with the following principles. A political offense or an offense of a political character normally does not include—

(A) an offense within the scope of the Convention for the Supression of Unlawful Seizure of Aircraft, signed by The Hague on December 16, 1970;

(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

(C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

(D) an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of the offense;

(E) an offense that consists of homicide, assault with intent to commit serious bodily injury, rape, kidnapping, the taking of a hostage, or serious unlawful detention;

(F) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

(G) an offense that consists of the manufacture, importation, distribution or sale of narcotics or dangerous drugs; or

(H) an attempt or conspiracy to commit an offense described in paragraphs (A) through (G) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

The first four criteria involve commitments made by the United States pursuant to international conventions or agreement, such as aircraft hijacking and terrorist acts against internationally protected persons. The next two cover serious crimes of violence against the person, including endangering others through the use of firearms or explosives. The seventh criteria relates to drug trafficking, while the eighth factor deals with attempt, conspiracy, and accomplice liability for the preceding categories of offenses.

It should be noted that the guidelines in fact set forth certain types of offenses that should not "normally" be found to be "political offenses". Use of the term "normally" recognizes that there may be a rare situation in which the nature of, and events in, a foreign country and the traditions of freedom and political democracy in the United States combine to compel the Secretary of State to find one of the listed offenses a political offense under the circumstances of the case. While the Committee elected to retain this narrow flexibility, it is noted that the United States has well established principles governing executive authority to grant political asylum that should more than adequately provide the alternative and preferred basis for appropriate relief from extradition on political grounds consistent with the traditions, heritage, and foreign policy principles of this country.

It should also be noted that this provision provides that any evidence or arguments the fugitive wishes to present to the Secretary of State with respect to the alleged political nature of extradition shall be in writing. The Secretary is not required to provide a formal hearing on a political offense exception application,[87] but it is expected that the Secretary will utilize the resources of the Department of State for gathering evidence and assessing the claim.

Subsection (a) also makes it explicit in the statute that the decisions of the Secretary of State under paragraphs (1), (2), and (3) of that subsection are in the nature of post-judicial "last step" final administrative determinations prior to actually effecting the extradition and, as such, are not subject to judicial review.

Finally, subsection (a) expressly authorizes surrender of United States nationals unless surrender is expressly prohibited by the applicable treaty.[88] This provision is necessary in light of the decision in the *Valentine* [89] case in which the Supreme Court held that language contained in many of the older extradition treaties to which the United States is a party does not permit the surrender of United States citizens absent explicit statutory authority for such surrender. The result of the *Valentine* decision has been to effectively immunize United States citizens from extradition in many cases—a result never intended by the negotiators of the treaties involved. It is the policy of the United States to treat its citizens and aliens within its borders equally in extradition matter,[90] and this subsection permits that policy to operate effectively.

Subsection (b) requires that the Secretary of State notify all interested parties of his decision on extradition.

Subsection (c)(1) provides that the fugitive shall be released from custody if the Secretary of State does not order, or declines to order, the person's surrender within forty-five days after receiving the record of proceedings from the court. Of course, if the Secretary of State decides within the forty-five days to refuse to order extradition, the authority for holding the person sought in custody under section 3194(e)(1) immediately expires, and the person should be released from detention at once.

Subsection (c)(2) is based on the provisions of 18 U.S.C. 3188, and provides that when the Secretary of State has ordered a person extradited, the foreign country involved must take custody of the person and remove him from the United States within 30 days. This 30-day time period does not begin until all litigation challenging extradition has been completed. The subsection expressly excludes from consideration the time during which surrender has been stayed pending litigation.

Subsection (c) requires a person found extraditable to give the Secretary of State reasonable notice that he will seek release be-

cause of expiration of a time limitation set forth in subsection (c)(1) or (c)(2), and forbids release if good cause is shown for the delay in effecting surrender.

SECTION 3197—RECEIPT OF A PERSON FROM A FOREIGN STATE

1. Present Federal Law

18 U.S.C. 3192 authorizes the President to "take all necessary measures for the transportation and safekeeping" of a person extradited to the United States from a foreign country. At one time the President relied upon this statute to issue a warrant designating an agent to receive custody of a fugitive from a foreign government. 18 U.S.C. 3193 authorizes such an agent to convey the fugitive directly to the place of trial, and grants to the agent "all the powers of a Marshal of the United States, in the several federal districts through which it may be necessary for him to pass with [the] prisoner . . .". The authority to issue warrants and appoint agents under these sections has now been delegated to the Secretary of State.[91] However, the Department of State wishes to transfer to the Department of Justice the authority to appoint agents and issue warrants in these matters.

2. Provisions of section 3197

Section 3197 of the proposed chapter carries forward the provisions of 18 U.S.C. 3192 and 3193, with minor modifications reflecting present United States practice.

Subsection (a) authorizes the Attorney General to designate an agent to receive custody of a fugitive surrendered by a foreign government, and permits the agent to convey the fugitive to the place of trial in the United States. The final sentence of the subsection permits the extradited fugitive to be taken directly to the Federal district or State jurisdiction in which charges are outstanding without removal proceedings under Rule 40 of the Federal Rules of Criminal Procedures or interstate rendition proceedings.

Section 3197(b) is new, and is designed to implement provisions, found in some of the most recent United States extradition treaties. The laws in many foreign countries require that extradition be postponed until the person has satisfied any outstanding criminal charges in that country.[92] Frequently, a person sought by the United States has already been tried and convicted of other charges in the requested country and has a sentence to serve there. If the sentence abroad is a long one, the postponement of surrender could compromise the possibility of a speedy and fair trial in this country.[93] Some extradition treaties contain provisions which deal with this problem by permitting "temporary extradition". Under these treaty provisions, a fugitive convicted abroad would be surrendered to the United States solely for purpose of trial and sentencing here, then returned to the foreign country involved to finish the sentence previously imposed there.[94] This process balances our government's interest in adjudicating the charges while the evidence is fresh with the foreign country's desire to fully enforce its laws. It also works to a fugitive's benefit by enabling him to answer the charges in this country while evidence for his defense is still available, and by creating the possibility that the sentence imposed upon conviction in this country could run concurrently with that the fugitive must serve abroad.

Section 3197(b) provides implementing legislation for treaty provisions of this types. It provides that when a foreign state has delivered a person to the United States on the condition that the person be returned at the conclusion of the criminal trial or sentencing, the Bureau of Prisons shall keep the person in custody until the judicial proceedings are concluded, and thereafter surrender the person to a duly appointed agent of the foreign country. It also provides that the return to the foreign state of the person is not subject to the requirements of the chapter, such as an extradition hearing or an order of surrender by the Secretary of State.

SECTION 3198—GENERAL PROVISIONS FOR CHAPTER 210

1. In general

This section contains the definitions and general provisions applicable to the extradition chapter.

2. Present Federal law

18 U.S.C 3198 requires that the foreign government which sought extradition pay all costs and fees resulting from the request. The costs resulting from extradition requests here frequently are so small that it is uneconomical—and diplomatically embarrassing—to attempt to enforce this statute. Moreover, many of the extradition treaties to which the United States is a party contain provisions which modify this statutory rule.[95] Also, the United States has entered into informal arrangements with some countries whereby each country bears most of the cost of the other's extradition request. In short, the present statute does not adequately reflect government policy in extradition matters.

Present statutory law offers no guidance as to who must pay the costs associated with United States requests to foreign countries for the extradition of fugitives. The Department of State requests extradition on behalf of either the State within the United States in which the fugitive is charged, or, if Federal charges are involved, on behalf of the United States. Therefore, the long-standing policy of the Department of State has been that the State jurisdiction which sought the fugitive's return must pay any expenses incurred in connection with the extradition request, and the Department of Justice must pay the expenses incurred in obtaining the extradition of a fugitive Federal offender.

3. Provisions of section 3198

Subsection (a) of section 3198 sets forth definitions for the terms "court", "foreign state", "treaty", and "warrant".

Subsection (b) states that in general a foreign state which has requested the extradition of a fugitive located in the United States must bear all costs and expenses incurred in connection with that request. Since many of the extradition treaties contain provisions specifically dealing with costs in extradition matters, the subsection authorizes the Secretary of State to direct that this matter be handled in accordance with terms of the applicable treaty or agreement. Subsection (b) also requires that all cost and expenses incurred in connection with the execution of a request by a State of the United States for the return of a fugitive located in another country must be paid by that State. When the request for extradition is made to secure the return of a fugitive wanted for a Federal offense, the expenses must be borne by the United States. It is anticipated that when the fugitive involved is sought for both Federal and State offenses, the costs incurred abroad will be allocated accordingly.

FOOTNOTES

[1] Extradition Act of 1981, Hearings before the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st Sess. (1981) [hereinafter cited as Hearings].

[2] *United States* v. *Mackin*,—F.2d—(2d Cir. 1981).

[3] *Valentine* v. *U.S. ex rel. Neidecker*, 299 U.S. 5 (1936); *Argento* v. *Horn*, 241,. F.2d 258, 259 (6th Cir. 1957). *cert, denied* 355 U.S. 818 (1957); *Ivancevio* v. *Artukovic*, 211 F.2d 565, 566 (9th Cir. 1954) *cert. denied*, 34 U.S. 818 (1954); Evans, *Legal Basis for Extradition in the United States*. 16 New York Law Forum 525, 529-530 (1980); 6 Whiteman. Digest of International Law 727 (1968).

[4] See e.g., Art. 14, Amending Protocol to the 1961 Single Convention on Narcotic Drugs, done at Geneva. March 24, 1972, 26 U.S.T. 1439, T.I.A.S. 8118 (entered into force for the United States August 8, 1975); Art. 8, Convention on Suppression of Unlawful Seizures of Aircraft, done at The Hague, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. 7192 (entered into force for the United States October 14, 1971); Art. 8, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done at New York. December 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532 (entered into force for the United States February 20, 1977).

[5] See. e.g., *Holmes* v. *Laird*, 459 F.2d. 1211, 148 U.S. App. D.C. 187 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972); *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971). *cert. denied*, 405 U.S. 926 (1972).

[6] See e.g., *Kalatijis* v. *Rosenberg*, 305 F.2d 249 (9th Cir. 1962).

[7] 6 Whiteman, *supra* note 3, at 935.

[8] *United States ex rel Caputo* v. *Kelley*, 92 F.2d 603 (2d Cir. 1937), *cert. denied*, 303 U.S. 635 (1938); *Ornelas* v. *Ruiz*, 161 U.S. 502 (1896); *Castro* v. *DeUrierte*, 12 Fed. 250 (S.D. N.Y. 1882). See, generally, 6 Whiteman *supra note 3, at 935; Note, United States Extradition Proceedings, 16* New York Law Forum 420, 432 (1980).

[9] 1 Moore, A Treatise on Extradition and Interstate Rendition, 410-415, (1891).

[10] See, e.g., *Schoenbrun* v. *Drieband*, 268 F. Supp. 332 (E.D. N.Y. 1967).

[11] See, e.g., *United States ex rel. Caputo* v. *Kelley*, *supra* note 8.

[12] *In re David*, 395 F. Supp. 803, 807 (E.D. Ill. 1975); *United States ex rel. Petruschansky* v. *Marasco*, 215 F. Supp. 953, 957 (E.D. N.Y. 1963) aff'd 325 F.2d 562 (2nd Cir. 1963). *cert. denied*, 376 U.S. 952 (1964).

[13] For example, many Federal, State, and local law enforcement agencies rely on the FBI National Crime Information Center-"NCIC"-in determining whether an individual is wanted for arrest in another jurisdiction. Since no complaint for extradition can be filed against a fugitive whose location is unknown, there can be no Federal arrest warrant issued, and no information on the person will appear in NCIC. Thus, law enforcement officers may have no way to learn that a particular person is an international fugitive sought for extradition.

[14] In *Wright* v. *Henkel*, 190 U.S. 40 (1903), the Supreme Court reviewed former section 596 of title 18 (now 18 U.S.C. 3141), in conjunction with former section 591 (now 18 U.S.C. 3041), and concluded that there was no statute providing for admission to bail in cases of foreign extradition. The Bail Reform Act (which amended Sections 3041, 3141-3143, and 3568, and enacted 18 U.S.C. 3147-3152) did not alter this result. The Act liberalized access to bail in those cases to which the bail statutes apply, but did not broaden the availability of bail generally. Both the previous sections of the law and the provisions of the Bail Reform Act apply only to "person(s) charged with an offense," and the term "offense" is expressly defined in 18 U.S.C. 3156 as "any criminal offense . . . which is in violation of any Act of Congress and is triable in any court established by Act of Congress . . .". Since fugitives facing extradition to a foreign country are not accused of any Federal criminal offense, and will not be tried in any Federal court, the bail statute's provisions do not apply to them. *Cf. Kelley* v. *Springetie*, 527 F.2d 1090, 1093 (9th Cir. 1975); *Beaulieu* v. *Comm'r of Massachusetts*, 382 F. 2d 290 (1st Cir. 1967).

[15] *United States* v. *Williams*, 611 F.2d 914 (1st Cir. 1979); *Beaulieu* v. *Hartigan*, 554 F.2d 1 (1st Cir. 1977); *Wright* v. *Henkel*, *supra* note 14.

[16] *Hu Yan-Leung* v. *Soscia*,—F.2d—, (2d Cir. May 26, 1981).

[17] See, *In re Chan Kam-Shu*, 477 F.2d 333 (5th Cir. 1973), *cert. denied*, 414 U.S. 847 (1973); *Vardy* v. *United States*, 529 F.2d 404 (5th Cir. 1976), *rehearing denied*, 533 F.2d 310 (5th Cir. 1976); *In re Dana*, 390 F. Supp. 521 and 395 F. Supp. 903 (E.D. Ill. 1975).

[18] Provisional arrest is a well-recognized aspect of international extradition procedure, and is specifically provided for in most of the extradition treaties to which the United States is a party. See, e.g. Art. 11, Extradition Treaty, United States-Canada; signed Dec. 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force March 27, 1976). See generally,

Reuschlein, *Provisional Arrest and Detention in International Extradition*, 23 Georgetown Law Journal 37 (1934); Note, 16 New York Law Forum-420, 429-430 (1970).

[19] E.G., contains an indication that the fugitive is likely to flee the jurisdiction and be unavailable by the time the extradition documents arrive.

[20] See, 6 Whitemen, *supra* note 3, at 931; *Whitely* v. *Warden, Wyoming, State Penitentiary*, 401 U.S. 560, 568 (1970); *United States* v. *McCray*, 468 F.2d 848 (5th Cir. 1967).

[21] See, e.g., *Caltagirone* v. *Grant*, 629 F.2d 739 (2d Cir. 1980).

[22] "Court" is defined in section 3198(a)(1) to mean a United States district court established pursuant to 28 U.S.C. 132, or the District Court of Guam, the Virgin Islands, or the Northern Mariana Islands, or a United States magistrate authorized to conduct an extradition proceeding.

[23] Thus, the section eliminates the arbitrary rule created by the Supreme Court in *Pettit* v. *Walshe*, 194 U.S. 205 (1904). See note 40, *infra*, and accompanying text. This rule is unnecessary in light of proposed section 3194(c)(3).

[24] See notes 15 and 16, *supra*.

[25] *In re Mitchell*, 171 Fed. 289, 290 (S.D.N.Y. 1909).

[26] See, e.g., *In re Kaplan*, Civ. No. 79-2219 RF (C.D. Cal July 29, 1979).

[27] See, e.g., *In re Itoka*, Misc. No. 79-1536—M (D. N.M. Dec. 17, 1979).

[28] See, *In re Chan Kam-Shu*, 477 F.2d 333, 339-340 (5th Cir. 1973) *cert. denied*, 414 U.S. 847 (1973).

[29] *United States* v. *Clarke*, 470 F. Supp. 979 (D. Vermont 1979).

[30] E.g., Art. 13(2), Extradition Treaty, United States-Norway, signed June 9, 1977, — U.S.T. —, T.I.A.S. 9679 (entered into force March 6, 1980).

[31] It is anticipated that in most cases the Attorney General will act through the United States attorney for the district in which the fugitive is located. If the foreign government involved feels the need to participate in the judicial proceedings, it can retain counsel and seek to enter the case as *amicus curial*.

[32] *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936); *United States* v. *Rauscher*, 119 U.S. 407, 414 (1886).

[33] See e.g., Art. 10, Extradition Treaty, United States-Japan, signed March 3, 1978, — U.S.T. —, T.I.A.S. 9625 (entered into force March 25, 1980); Art. 18, Extradition Treaty, United States-Mexico, signed May 4, 1978, — U.S.T. —, T.I.A.S. 9656 (entered into force January 24, 1980).

[34] See 18 U.S.C. 4107-4108.

[35] For example, a fugitive might wish to waive extradition on only one of many outstanding charges against him in the requesting state. Under these circumstances, that foreign state might conceivably prefer to have extraditability determined as to all of the charges.

[36] For example, many extradition treaties permit the requested state to postpone extradition until the person sought has been tried and punished for criminal charges outstanding in that state. A person facing criminal charges or imprisonment in this country might well attempt to expedite his extradition to a foreign country where less serious charges are pending, in order to avoid prosecution or punishment here. In such circumstances, it would not be appropriate for the United States to permit expedited surrender, at least not until the charges in this country have been resolved or the sentence served.

[37] Shearer. Extradition in International Law, 137-141 (1971); 6 Whiteman, *supra* note 3, at 773-779; *Freeman* v. *United States*, 437 F. Supp. 1252, 1263 (N.D. Ga. 1977).

[38] See, e.g., Art. 2(1). Extradition Treaty, United States-Japan, signed March 3, 1978, — U.S.T. —, T.I.A.S. 9625 (entered into force March 25, 1980).

[39] *Cucuzella* v. *Kelitkaa*, 638 F.2d 105 (9th Cir. 1981); *Brauch* v. *Raiche*, 618 F.2d 843, (1st Cir. 1980); *Freedman* v. *United States*, *supra* note 37, at 1252, 1263.

[40] *Pettit* v. *Walshe*, *supra* note 23; see e.g., U.S. ex rel. *LoPizzo* v. *Mathews*, 36 F.2d 565 (3d Cir. 1929); *U.S. ex rel, Rauch* v. *Stockinger*, 170 F. Supp. 506 (E.D. N.Y. 1959), *aff'd* 269 F.24 681 (2d Cir. 1959), *cert denied*, 371 U.S. 913 (1959); *O'Brien* v. *Rozmann*, 554 F.2d 780 (6th Cir. 1977).

[41] *Greci* v. *Birkness*, 527 F.2d 956, 958, at note 3 (1st Cir. 1976); *Application of D'Amico*, 185 F. Supp. 925-930, at note 6 (S.D.N.Y. 1960), *appeal dismissed*, 286 F.2d 320 (2d Cir. 1960), *cert denied*, 366 U.S. 963 (1962).

[42] 6 Whiteman, *supra* note 3.

[43] *Greci* v. *Birkness*, *supra* note 41; *Sindona* v. *Grant*, 461 F. Supp. 199 (S.D.N.Y. 1978); *Brauch* v. *Raiche*, *supra* note 39.

[44] *Sayne* v. *Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 390 U.S. 903 (1970).

[45] Rule 1101. Federal Rules of Evidence.

[46] The Supreme Court has indicated that requiring the foreign state to produce live witnesses in extradition hearings would tend to "defeat the whole object of the treaty." *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916); see also, *Collins* v. *Loisel*, 259 U.S. 309, 317 (1922); *Sayne* v. *Shipley*, *supra* note 44; *In re David*, *supra* note 12; *O'Brien* v. *Rozmann*, *supra* note 40.

[47] *United States* v. *Galanis*, 429 F.2d 1215, 1225-1229 (D. Conn. 1977), *rev'd on other grounds*, 568 F.2d 234, 240 (2d Cir. 1977); *Shapiro* v. *Ferrandina*, 478 F.2d 894, 903 (2d Cir. 1973); *In re Edmonson*, et al. 352 F. Supp. 22, 24 (D. Minn. 1972).

[48] The consular and diplomatic officers who must sign the certificate are usually not lawyers, and it is difficult for them to know whether the documents presented to them are in fact acceptable "for similar purposes" in the courts of the requesting state.

[49] *Freedman* v. *United States*, *supra* note 37; *U.S. ex rel. Petrushansky* v. *Marasco*, *supra* note 12.

[50] Coppelman, *Extradition and Rendition: History-Law-Recommendations*, 14 Boston L.R. 591; 614 (1934).

[51] 18 U.S.. 3191 provides for compulsory process to secure the attendance at extradition hearings of witness on behalf of indigent fugitives. However, the statute applies only to witnesses who are resident in the United States. *Merino* v. *United States Marshal*, 326 F.2d 5, 11 (9th Cir. 1964), *cert. denied*, 377 U.S. 997 (1964).

[52] *Matter of Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978); *Shapiro* v. *Ferrandina*, *supra* note 47; *Freedman* v. *United States*, *supra* note 37; *Sayne* v. *Shipley*, *supra* note 44; *First National City Bank* v. *Aristequieta*, 287 F.2d 219, 226 (2d Cir. 1960); *Desmond* v. *Eggers*, 18 F.2d 503, 503-506 (9th Cir. 1927); *Collins* v. *Loisel*, *supra* note 46; *Charlton* v. *Kelley*, 229 U.S. 447, 458 (1913).

[53] See, generally, 6 Whiteman, *supra* note 3, at 859-865; Note, *Statute of Limitations in International Extradition*, 48 Yale L.J. 701 (1939).

[54] See, e.g., *Galanis* v. *Pallanck*, 568 F.2d 234 (2d Cir. 1978).

[55] *In re Ezeta et al.*, 62 Fed. 972 (N.D. Cal. 1894). Basically, under current case law, some courts have said that there are "pure" political offenses, such as treason or sedition, and "relative" political offenses, such as one "committed in the course of furthering civil war, insurrection or political commodition." *Id.; Karadzole* v. *Artukovic*, 242 F.2d 198 (9th Cir. 1957), rev'd on other grounds, 344 (U.S. 393 (1957); *United States ex rel. Karadzole* v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959); *Ramos* v. *Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959); see Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 Columbia Journal of Transnational Law 381 (1980).

[56] *In re Lincoln*, 228 Fed. 70 (E.D.N.Y. 1915), aff'd *per curium*, 241 U.S. 651 (1917); *In re Gonzalez*, 217 F.2d 717, 722 (S.D.N.Y. 1963); *Garcia-Guillerin* v. *United States*, 450 F.2d 1192 (5th Cir. 1971); *In re Locatelli*, 468 F. Supp. 568, F. Supp. 568, 575 (S.D.N.Y. 1979); *Sindono* v. *Grant*, *supra* note 43.

[57] Compare *Ziyad Abu Ecin* v. *Wilkes*, 641 F.2d 504 (7th Cir.), cert. denied.—U.S.—(1981), with the Memorandum decision of the Secretary of State in the case of *Ziyad Abu Eain*, Hearings pp. 133-139.

[58] See, e.g., Art. 5(1). Extradition Treaty, United States-Mexico, signed May 4, 1978,—U.S.T.—, T.I.A.S. 9656 (entered into force January 25, 1980).

[59] For an excellent discussion of the political offense exception to extradition and the impact of recent cases, see Hearings, pp. 25-28, statement of William M. Hannay; Hannay, *supra* note 55.

[60] See Hearings, pp. 3, 4, 25-28, statements of Daniel McGovern and William M. Hannay; Levy. *Contemporary International Law: A Concise Introduction*, 190 (1979). The courts in various countries differ widely on what kinds of offenses are covered by the term, and legal scholars here and abroad have proposed a host of different—and frequently contradictory—proposals on the topic. See generally, Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1 ASILS International Law Journal 1 (1977); Hannay, *supra* note 55.

[61] Three recent extradition cases graphically illustrate this point. In the *Peter McMullen* case. McMullen was charged with the bombing of a British army installation in England. In the *Desmond Mackin* case, Mackin was charged with an attempt to murder a British soldier dressed in civilian clothes in a Belfast bus station. In the third case, *Abu Eain* v. *Wilkes*, *supra* Abu Eain was charged with the bombing murder of several children in an Israeli resort town. In both the *McMullen* and *Mackin* cases the magistrates denied extradition on the grounds that the offenses charged were "political offenses". In the *Abu Eain* case the court of appeals held the political offense exception inapplicable. William Hannay, commenting on this judicial line drawing, observed (Hearing. p. 14):

> In each of these cases, the test set forth in the 19th century English case of *In re Castioni* . . . was accepted as the operative definition of a "relative" political offense. The court in a *Castioni* stated that a political offense is a crime which was "incidental to and formed a part of political disturbances" . . . The absurdity and ultimate cruelty of applying this test or any other "test" of a political offense is illustrated by the assertion of the magistrate in *McMullen* who taking the exception to its insane but logical end, stated: "[e]ven though the offense be deplorable and heinous, the criminal action will be excluded from deportation if the crime is committed under these prerequisites." . . . Mechanically applying the *Castioni* test the magistrates in *Mackin* and *McMullen* concluded that extradition was prohibited since "political disturbances" were taking place in Northern Ireland and the attempts by *Mackin* and *McMullen* to kill British soldiers were natural incidents of these disturbances.
>
> [With respect to the Seventh Circuit decision in *Abu Eain*] I find shocking the notion that the "political offense" exception is cut so far loose from any ethical mooring that Abu Eain's defense team could argue in apparent good faith that terror bombing of civilians is a legitimate technique in an "insurrection-liberation struggle," and that the political offense exception prevents extradition for such a crime. It was a sad spectacle to see a former Attorney General of the United States, representing Abu Eain, stand before the Seventh Circuit and utter that bankrupt shibboleth of moral relativism, "one man's terrorist is another man's freedom fighter." Second, the court's application of the [judicial] test for a political offense] in *Abu Eain* was ultimately just as mechanical as that in *Mackin* and *McMullen* and left the unmistakable impression that the court would have *denied* extradition if Abu Eain had directed his attacks at Israeli military or governmental officials. . . . We should, I suppose, feel some relief that the Seventh Circuit recognized that the killing of children on the streets of a resort town did not constitute a "political offense."

Hannay has raised the issue factually (see Hannay, *supra* note 55 at 382) but has not speculated on the line the Seventh circuit would draw with respect to the bombing assassination of Lord Louis Mountbatten that incidentially killed his grandson, a local youth, and the mother-in-law of his daughter.

[62] See *supra* note 52, and accompanying text.

[63] See, e.g., Art. 10(6). Extradition Treaty, United States-Mexico, signed May 4, 1978. — U.S.T. —, T.I.A.A. 9656 (entered into force January 25, 1980). The United States will also be a party to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, done at The Hague, October 26, 1960, 527 U.N.T.S. 189 (ratified by the Senate Nov. 28 1979). This Convention will eliminate a substantial portion of the authentication requirement with respect to extradition documents submitted by one signatory country to another.

[64] It is anticipated that in most cases the foreign state's diplomatic or consular personnel assigned to the United States will make the certification required by the section, thereby relieving U.S. diplomatic and consular officers abroad of this chore.

[65] See, generally, *United States* v. *Galanis*, 429 F. Supp. 1215 (D. Conn. 1977), rev'd on other grounds, 568 F.2d 234 (2d Cir. 1978).

[66] See Rule 5.1, Federal Rules of Criminal Precedure.

[67] *Greci* v. *Birkness*, *supra* note 41; *Brauch* v. *Raiche*, *supra* note 39.

[68] *U.S. ex rel. Sakaguchi* v. *Kaulukukui*, *520 F.2d 726, 728 (9th Cir. 1975); Shapiro* v. *Ferrandina*, *supra* note 47.

[69] This requirement is consistent with the practice followed by the courts today. See *Kaplan* v. *Vokes*, — *F.2d* —, *(9th Cir. July 6, 1981; Shapiro* v. *Ferrandina*, *supra* note 47.

[70] Present law (18 U.S.C. 3184) only requires that the court send the Secretary a transcript of the *testimony* taken at the hearing. By providing the executive branch with a fuller record of the proceedings the Secretary of State will be more fully informed in making his decision on extradition.

[71] *Collins* v. *Miller*, 252 U.S. 364, 369 (1920).

[72] See, e.g., *Sindona* v. *Grant*, *supra* note 43.

[78] *Hooker* v. *Klein*, 573 F.2d 1360 (9th Cir. 1978); *United States* v. *Mackin*, *supra* note 2.

[74] *Glucksman* v. *Henkel*, 221 U.S. 508, 512 (1911).

[75] *United States ex rel. Oppenheim* v. *Hecht*, 16 F.2d 955, 956 (2nd Cir. 1927); *United States ex rel. Klein* v. *Mulligan*, 1 F. Supp. 635, 636 (S.D. N.Y. 1922).

[76] The automatic stay of extradition expires when the court of appeals issues its mandate in the matter. Thus, the automatic stay would not ordinarily protect a fugitive seeking further, discretionary review, such as an applicant for a writ of *certiorari* from the Supreme Court. Of course, the fugitive whose case merits further review is free to request that either the court of appeals or the Supreme Court exercise its discretion by staying surrender while *certiorari* or other relief is considered.

[77] In fact, 18 U.S.C. 3184 specifically provides that a person found extraditable must be committed "to the proper jail, there to remain until . . . surrender shall be made".

[78] See *supra* notes 23 and 24, and accompanying text.

[79] *Jimenez* v. *Aristequieta*, 314 F.2d 649 (5th Cir. 1963).

[80] *Magisano* v. *Locke*, 545 F.2d 1228, 1230 (9th Cir. 1976).

[81] See, generally, Note, *Executive Discretion in Extradition*, 62 Columbia Law Review 1313 (1962).

[82] *In re Factors' Extradition*, 75 F.2d 10 (7th Cir. 1934); *In re Normano*, 7 F. Supp. 329 (D. Mass. 1934); 6 Whiteman, *supra* note 3, at 1064-69.

[83] *Jimenez* v. *United States District Court for the Southern District of Florida*, 84 S. Ct. 14, 11 L. Ed. 2nd 30 (1963); *Barrett* v. *United States*, 590 F.2d 624 (6th Cir. 1978).

[84] See, e.g., *Peraff* v. *Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Sindona* v. *Grant*, *supra* note 43 at 207 ; see Note, Columbia Law Review, *supra* note 81.

[85] For example, the Department of State has frequently conditioned surrender of a fugitive convicted in absentia upon a promise by the foreign country involved to permit a retrail. See, 6 Whiteman, *supra*, note 3, at 1051, 1117-1122.

[86] For example, some treaties permit the requested state to condition extradition upon satisfactory assurances that the death penalty will not be imposed. See e.g., Art. 6, Extradition Treaty. Canada-United States, signed December 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force March 27, 1976).

[87] *Peraff* v. *Hylton*, 563 F.2d 1099, 1102-1103 (4th Cir. 1977).

[88] At present, no extradition treaty to which the United States is a party expressly prohibits surrender of citizens of the requested state.

[89] 299 U.S. 5 (1936), *supra* note 32.

[90] Many foreign countries do not extradite their citizens because those countries can instead prosecute and punish their citizens for crimes committed in another country. As a general rule, the United States has no such ability. *Escobedo* and *Castillo* v. *Forsch*, 623 F.2d 1096 (5th Cir. 1980); 6 Whiteman, *supra* note 3, at 876-878.

[91] Executive Order 11517, 35 Fed Reg. 4937 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News, at 6332.

[92] See, e.g., Extradition Act, R.S.C. 1952, c. 322 (Canada); s. 24, Ley de Extradicion (Dec. 29, 1975), Art. 11 (Mexico).

[93] *United States* v. *Rowbotham*, 430 F. Supp. 1254 (D. Mass. 1977); *United States* v. *Dolack*, 484 F.2d 527 (7th Cir. 1973). It is well to remember that both the prosecution and the defense suffer when a criminal trial is delayed too long. Indeed, as the Court of Appeals trenchantly remarked in *United States* v. *Judice*, 457 F. 2d 418, 418 (5th Cir. 1972); ". . . all practiced trial lawyers are well aware that attrition from . . . delay is more damaging to the prosecutor's case than to that of the defense. This will be so as long as the prosecution has the burden of proof."

[94] Cf. 6 Whiteman, *supra* note 3, at 1052-1053.

[95] For example, Art. 21, Extradition Treaty, United States-Mexico, signed May 4, 1978, —, U.S.T. —, T.I.A.S. 9656 (entered into force January 25, 1980) requires that the requested state bear all of the expenses of extradition except those incurred for the translation of the documents or the transportation of the fugitive. Extradition treaties are considered self-executing, Bassiouni, International Extradition and World Public Order 30-31 (1976), and supersede the provisions of prior inconsistent federal legislation. Restatement (Second) of Foreign Relations Law of the United States, § 141, Comment (b) at 433 (1965). Therefore, whether 18 U.S.C. 3195 or a differing treaty provision is applicable in a particular extradition case depends on when the treaty entered into force.

EXTRADITION ACT OF 1981

The Committee on Foreign Relations, to which was referred sequentially from the Committee on the Judiciary the bill, S. 1940 to amend Chapter 209 of Title 18, United States Code, relating to extradition, and for other purposes, for the purpose of considering only "political offense" and related provisions, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 1940 is to modernize federal practices and procedures with respect to international extradition. The amendments to S. 1940 proposed by the Committee on Foreign Relations are intended to retain limited court jurisdiction with respect to application of the political offense exception in international extradition proceedings while providing specific guidance to the courts in making such findings. The proposed amendments carry forward in slightly different format the proposal of the Judiciary Committee to provide the Secretary of State with the sole authority to inquire into the motivation of the foreign state in requesting extradition and to determine whether extradition would be incompatible with humanitarian considerations. In making either of the above determinations, the Secretary would be required to consult with the appropriate Bureaus and Offices of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs.

BACKGROUND

The present bill, S. 1940, was originally introduced as S. 1639 on September 18, 1981, by Senator Thurmond. On December 11, 1981, Senator Thurmond introduced a clean bill, S. 1940, to incorporate changes that had been suggested during the course of the Judiciary Committee's consideration of the original bill. The changes of specific interest to the Committee on Foreign Relations were twofold, as the Report of the Committee on the Judiciary notes:

"First, S. 1940, as introduced made it mandatory—rather than discretionary—for the Secretary of State to deny extradition when he is persuaded that the requesting State is seeking the person's extradition "for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions." Second, as introduced, S. 1940 made it explicit in the statute that this determination would not be subject to judicial review. (Senate Report No. 97-331, p. 3)"

On February 3, 1982, Senator Percy wrote to Senator Thurmond and requested that S. 1940 be referred sequentially to the Committee on Foreign Relations for a reasonable period of time. The request for sequential referral was based in large part on the Committee's interest in those aspects of S. 1940 concerning the "political offense exception"—a standard provision in U.S. bilateral extradition treaties. The request for sequential referral was also prompted by the longstanding interest of the Committee in matters concerning international extradition stemming from the Committee's primary jurisdiction over all treaties, including those relating to extradition. For example, during the first session of the 97th Congress, the Committee on Foreign Relations considered and favorably reported two extradition treaties: a U.S.-Colombian agreement and a U.S.-Netherlands agreement. Six extradition treaties were approved by the Committee during the 96th Congress.

On April 15, the Committee on the Judiciary reported S. 1940 with Committee amendments. Specifically of interest to the Committee on Foreign Relations, the Judiciary Committee amended section 3196(a) of S. 1940 to provide that the Secretary of State's authority to determine application of the political offense exception would be subject to judicial review and be upheld by the reviewing court if it is supported by susbtantial evidence.

COMMITTEE ACTION

S. 1940, as reported by the Committee on the Judiciary, was referred to the Committee on Foreign Relations on April 19.

Following referral, majority and minority staff of the Committee jointly reviewed the record from the three days of hearings held in the House and Senate on revision in the extradition law. Staff also consulted with and reviewed the comments of representatives of the Departments of Justice and State, the staffs of the House and Senate Judiciary Committees, a panel of experts assembled by the American Society of International Law, representatives from the American Civil Liberties Union, practicing attorneys, and scholars concerning S. 1940 and the political offense exception.

At its business meeting on May 19, the Committee met to consider its proposed amendments to S. 1940, as reported by the Committee on the Judiciary on April 15. The proposed amendments concerned the political offense exception and related provisions as set forth in S. 1940. Following discussion of S. 1940, the Committee by voice vote with a quorum present unanimously approved the proposed amendments described in this Report.

COMMITTEE COMMENTS

The political offense exception is a standard provision in U.S. extradition treaties and in its usual form provides that there shall be no extradition for crimes of a political nature. Political offenses are generally divided into two classes—"pure" political offenses and "relative" political offenses. Pure political offenses include treason, sedition, and espionage: crimes of political dissent that can only be committed against the state. Relative political offenses involve common crimes that are linked to political motivation or circumstances. Under one commonly-used standard, extradition for such offenses has been barred when the state from which extradition is sought determines that the political content of the act outweighs the harm that may have been done in committing the offense. This attitude, according to a leading expert, resulted from the "growth and evolution of political institutions towards the liberal state (which) together with the rise of individualism sparked the concern for the political offender, especially where he had escaped from a nation with more 'benighted' views of government." [1]

Another expert has characterized the exception in the following terms:

"The political offense exception is the embodiment of the notion that political dissenters or rebels ought not be turned over for trial and punishment to the very government which they have opposed. This concept is now well accepted in customary international law . . . It is in keeping with the very purpose of the political offense exception that its definition be a flexible one, which may encompass and protect a broad range of legitimate political dissent. A broad definition need not be a mechanistic or all-inclusive one. The word 'political' may have

[1] Epps, Valerie, "The Validity of the Political Offender Exception in Anglo-American Jurisprudence." *Harvard International Law Journal*, Winter 1979, pp. 69-88.

different meanings in different contexts, and the United States is under no legal or moral obligation to shelter a fugitive from extradition simply because he claims a political motive for his crime. (Professor Steven Lubet testifying before the House Committee on the Judiciary, Subcommittee on Crime, February 3, 1982)."[1]

While the assertion of a "pure" political offense is seldom at issue in extradition proceedings, claims of "relative" political offenses have been litigated in a number of extradition cases and have generated considerable academic debate about its present day utility. During the past decade, particular concern has been raised over the use of the exception to bar extradition for acts of international terrorism which ostensibly are associated with political activity or protest. For example, in two recent cases, by convincing the courts to invoke the political offense exception, members of the Provisional Irish Republican Army (PIRA) successfully resisted extradition to the United Kingdom for violent crimes that they were alleged to have committed against a British soldier and government property.[2] However, in another case involving a PLO member, Zyad Abu Eain, who was sought by the Israeli government for his participation in a bombing randomly directed at civilians in a marketplace in the country, the court refused to apply the political offense exception.[4] Subsequently, Abu Eain was extradited to Israel to stand trial.

The PIRA cases and the case of Abu Eain have raised serious questions about the ability of the courts to interpret consistently the political offense exception. Both the Carter and Reagan Administrations have argued that because of loose and inconsistent application of the exception, the United States may be viewed by international terrorists as a potential safehaven where their crimes may go unpunished if presented in the guise of justifiable political actions. Consequently, both Administrations have urged successively that clear guidelines be established to guide the determination of political offense exceptions. It has also been suggested, as reflected in the version of S. 1940 reported by the Judiciary Committee that the courts are ill-equipped to decide issues that turn so heavily on questions of U.S. foreign policy and that, consequently, the Secretary of State should be vested with the sole authority to determine the application of the exception subject to limited judicial review.

* * * * *

SECTION-BY-SECTION ANALYSES OF THOSE PROVISIONS OF S. 1940 AS REPORTED BY THE COMMITTEE ON THE JUDICIARY, PROPOSED TO BE AMENDED BY THE COMMITTEE ON FOREIGN RELATIONS

The major provision of S. 1940, as reported by the Committee on the Judiciary, and their comparison to present federal law are set forth in Senate Report No. 97-331. The Report of the Committee on Foreign Relations relates solely to a discussion and analyses of the amendments set forth above as reported on May 19 by the Committee on Foreign Relations.

Section 3194(a), as reported by the Committee on the Judiciary, provides that the courts do not have jurisdiction to determine whether extradition is sought for a political offense or because of a person's political belief. In turn, the authority to make such determinations is vested in the Secretary of State pursuant to Section 3196(a)(3).

According to the Report of the Judiciary Committee:

"Section 3196 (a)(3) specifies that the Secretary of State must decline to order surrender of a person if, after taking into account certain statutory principles generally eliminating specified types of crimes from the political offense exception (e.g., crimes of violence and drug trafficking), he is persuaded that the person's extradition is sought for one of these reasons. The provisions taken together provide that the Secretary of State shall have jurisdiction to decide the applicability of the "political offense" exception to extradition contained in most extradition treaties, such decision to be consistent with the statutory guidelines and reviewable in the United States courts of appeal based on a substantial evidence standard. (Report No. 97-331, p. 14)."

The Committee on Foreign Relations proposes amending section 3194(a), as reported by the Committee on the Judiciary, to permit the appropriate courts to make findings concerning the application of the political offense exception. While it can be argued that the Secretary of State is generally better able than the courts to assess the circumstances justifying a political offense exception, the Committee favors the retention of some role for the judicial process. Most countries with whom the U.S. has extradition agreements permit the courts to make such determinations. Moreover, American courts have reviewed political offense questions for nearly one hundred years. Preserving limited court jurisdiction to interpret the exception pursuant to legislative guidelines would continue this well-established tradition. It would also provide a check against an executive authority that could, depending upon the political sensitivities involved in a given case, result in inconsistent and unsound application of the political offense exception.

However, while the Committee on Foreign Relations has concluded that the courts should retain some jurisdiction over political offense cases, it is also very clear that in order to effect more consistent application of the exception, the courts must be given clearer guidelines with respect to certain classes of behavior that should never be considered political offense and others which should only be considered political offenses in extraordinary circumstances. This proposed guidance is set forth in section 3194 (e)(1) and (e)(2) as reported by the Committee on Foreign Relations and closely resembles the guidelines proposed for the Secretary of State by the Judiciary Committee in section 3196(a)(3) as reported by that Committee.

The Committee on Foreign Relations has proposed its amendments to section 3194 of S. 1940 based on the belief that it is inappropriate to apply the political offense exception to conduct that the international community has taken formal steps to prohibit and punish. Drawing on this standard, the Committee has concluded that the political offense exception should not be considered by the court when to apply it would have the effect of protecting behavior that is specifically outlawed internationally. Included in this category would be offenses within the scope of either the Hague Convention on Seizure of Aircraft; the Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the Convention on the Physical Protection of Nuclear Materials; the International Convention Against the Taking of Hostages; the Convention on the Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents; other multilateral treaties obligating the U.S. to either extradite or prosecute persons whose offenses are contemplated by the applicable treaty; and the manufacture, sale, or distribution of narcotics. The proposed amendment creating section 3194(e)(1) establishes an absolute prohibition against the courts considering such acts to be political offenses. The intended effect of this prohibition is to deter international terrorists and other criminals from using the United States as a safehaven from prosecution for crimes they claim to be political but whose characteristics violate overriding international legal standards.

While the Committee recognizes that current case law continues to apply to offenses not specified in section 3194 (e)(1) or (c)(2), it believes that a different standard should apply to those offenses involving the use of firearms or explosives, or other behavior involving the use of force or violence as set forth in section 3194(2). In such cases, extraordinary circumstances must be demonstrated by the person resisting extradition in order for the appropriate court to find that a political offense has been committed. This standard is consistent with the guidelines already set forth in S. 1940 and allows for the political offense exception to be applied potentially in that very narrow class of cases where an otherwise common crime may be transformed by the political content in which it is committed.

The Committee intends that the burden of the person resisting extradition in demonstrating such extraordinary circumstances should be a considerable one. While current case law may provide useful guidance it is not intended, for example, that the mere existence of a rebellion, civil war, riot or other disturbance, during which the offense in question is committed, should result in a finding that the offense itself is political in nature.[3] Nor should it be sufficient simply to show that the motivation of the individual committing the act—however sincere or noble—was related to a political objective. It should not be the policy of the United States to encourage or condone violent or other criminal behavior simply because it is the view of the persons committing such acts that they are somehow connected with a political activity or have an obstensible political purpose or justification. However, it should also not be the policy of the United States to render up automatically to foreign authorities an individual who, in the course of seeking to exercise legitimate civil or political rights in a non-violent manner, is placed in such a position that he has no reasonable choice except to commit

---

[1] Professor Steven Lubet testifying before the House Committee on the Judiciary, Subcommittee on Crime, February 3, 1982.

[2] United States v. Mackin—80 C.R. Misc. 1 (S.D. N.Y. 1981) *Gov't Appeal Dismissed with Opinion, Sub Nom.*—F2d—1981.

[4] *Zyad Abu Eain* v. *Wilkes*, 641 F.2d 504 (7th Cir. 1981).

[3] Two recent decisions in particular, the *Mackin and McMullen* cases, applied what is generally called the "Castioni test", after the 19th century English case of *In re Castioni* which is commonly understood as having established a two-part test which must be met for a common crime to be regarded as a relative political offense: (1) the act must have been committed during an uprising, involving a group of which the accused was a member; and (2) the act must have been "incidental to" the political uprising, that is, done in furtherance of or with the intention of assisting the uprising. The court in *Castioni* justified its decision not to extradite by saying that "one cannot look too harshly and weigh in golden scales the acts of men hot in their political excitement." Applying the test, the courts in the above-mentioned cases denied requests by the Government of the United Kindom for the extradition of two members of the Provisional Irish Republican Army who were alleged to have committed violent crimes in Northern Ireland but which were deemed "political offenses" by the U.S. courts.

an otherwise criminal act. For the court to make such a determination the test should be focused upon the individual and whether the offense for which he is sought was a consequence of the violation of his internationally recognized civil or political rights by the state requesting extradition. Acts of indiscriminate or excessive violence or acts of deliberate brutality would presumably never fall within the exception.

In short, while the occasions for recognizing the political offense exception will necessarily be few and far between, the Committee believes that it should continue to be within the authority of U.S. courts to determine that the exception should apply, subject to the procedural innovations and exclusions introduced in this legislation.

The belief that such findings are expected to be rare is further reinforced by the amendment proposed by the Foreign Relations Committee in section 3194(e) providing that the person claiming application of the exception must establish by clear and convincing evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense. This necessarily includes offenses that may not be subject to the extraordinary circumstances standard established in section 3194(e)(2). Shifting the burden of the proof to the person seeking application of the political offense exception reinforces the Committee's belief that its legitimate application should be infrequent and also in accords with the guidelines established in section 3194(e) (1) and (2).

Section 3194(g) (1) and (g) (2) restrict the jurisdiction of the courts with respect to questions that may turn largely on the conduct of U.S. foreign policy, thus falling within the domain of the executive branch. Section 3194(g)(1) clearly establishes the sole authority of the Secretary of State to deny extradition if a foreign state is seeking the person's return for the purposes of prosecuting or punishing the person because of his or her political opinions, race, religion, or nationality and if the applicable extradition agreement provides the Secretary with the authority to deny extradition for such reasons. This authority would, when applicable, follow the rule of non-inquiry whereby the courts refrain from making findings on issues largely concerned with the internal political or social circumstances in a foreign state. The Secretary of State, however, is considered uniquely qualified to make such inquiries as this practice is already a significant aspect of his foreign policymaking responsibilities. Section 3194(g)(2) provides the Secretary with the sole authority to determine if the person's extradition is incompatible with humanitarian considerations, such as the age or infirmity of the person being sought as well as the proportionality of the punishment that may be imposed in relation to the crime that may have been committed. This authority may be exercised so long as the applicable extradition agreement provides the Secretary with the authority to deny extradition for such reasons. Sections 3194(g)(1) and (g)(2) should in most cases provide the preferred basis for appropriate relief from extradition on grounds consistent with the traditions, heritage, and foreign policy principles of this country. Further, the Committee on Foreign Relations considers it desirable to provide for the authority established in sections 3194(g)(1) and (g)(2) in any future extradition agreements to which the United States may become a party.

Section 3194(g)(3) as proposed by the Committee on Foreign Relations requires the Secretary of State to consult with the appropriate Offices and Bureaus of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs. Requiring the Secretary to consult with that Bureau is intended to ensure that the Secretary is fully advised on the political and social conditions in the foreign state at issue. It also reinforces the Committee's belief that determinations by the Secretary of State concerning foreign state motivation in requesting extradition, as well as any determinations involving humanitarian considerations, should build upon existing principles governing asylum requests. As such they should be executive determinations and not judicial findings. Presently, the Bureau of Human Rights and Humanitarian Affairs advises the Secretary of State and the Department of Justice on asylum issues. The proposed amendment is, therefore, in keeping with the Bureau's current role in such matters.

The remaining amendments proposed by the Committee on Foreign Relations and contained in section 3196 of S. 1940 as reported by the Committee on the Judiciary are technical revisions setting forth the authority of the Secretary of State in matters relating to international extradition in accordance with the amendments proposed by the Committee on Foreign Relations in section 3194 supra.

S. 220

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Extradition Act of 1982".

SEC. 2. Chapter 209 of title 18, United States Code, is amended as follows:

(a) Section 3181 is deleted.

(b) Section 3182 is redesignated as section "3181."

(c) Section 3183 is redesignated as section "3182" and is amended by striking out "or the Panama Canal Zone" in the first sentence.

(d) A new section 3183 is added as follows:

"§ 3183. Payment of fees and costs

"All costs or expenses incurred in any interstate rendition proceeding and apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.".

(e) Sections 3184 through 3195 are deleted.

(f) The chapter heading and section analysis are amended to read as follows:

"CHAPTER 209—INTERSTATE RENDITION

"3181. Fugitives from State or Territory to State, District, or Territory.
"3182. Fugitives from State, Territory or Possession into extraterritorial jurisdiction of the United States.
"3183. Payment of fees and costs.".

SEC. 3. A new chapter 210 of title 18 of the United States Code is added as follows:

"CHAPTER 210—INTERNATIONAL EXTRADITION

"Sec.
"3191. Extradition authority in general.
"3192. Initial procedure.
"3193. Waiver of extradition hearing and consent to removal.
"3194. Extradition hearing.
"3195. Appeal.
"3196. Surrender of a person to a foreign state.
"3197. Receipt of a person from a foreign state.
"3198. General provisions for chapter.

"§ 3191. Extradition authority in general

"The United States may extradite a person to a foreign state pursuant to this chapter only if—

"(a) there is a treaty concerning extradition between the United States and the foreign state; and

"(b) the foreign state requests extradition within the terms of the applicable treaty.

"§ 3192. Initial procedure

"(a) IN GENERAL.—The Attorney General may file a complaint charging that a person is extraditable. The Attorney General shall file the complaint in the United States district court—

"(1) for the district in which the person may be found; or

"(2) for the District of Columbia, if the Attorney General does not know where the person may be found

"(b) COMPLAINT.—The complaint shall be made under oath or affirmation, and shall specify the offense for which extradition is sought. The complaint—

"(1) shall be accompanied by a copy of the request for extradition and by the evidence and documents required by the applicable treaty; or

"(2) shall be accompanied by the materials specified in paragraph (1)—

"(A) shall contain—

"(i) information sufficient to identify the person sought;

"(ii) a statement of the essential facts constituting the offense that the person is believed to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and

"(iii) a description of the circumstances that justify the person's arrest; or

"(B) shall contain such other information as is required by the applicable treaty;

and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

"(c) ARREST OR SUMMONS.—Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be taken without unnecessary delay before the nearest available court for an extradition hearing.

"(d) DETENTION OR RELEASE OF ARRESTED PERSON.—

"(1) The court shall order that a person arrested under this section be held in official detention pending the extradition hearing unless the person establishes to the satisfaction of the court that special circumstances require his release.

"(2) Unless otherwise provided by the applicable treaty, if a person is detained pursuant to paragraph (1) in a proceeding in which the complaint is filed under subsection (b)(2), and if, within sixty days of the person's arrest, the court has not received—

"(A) the evidence or documents required by the applicable treaty; or

"(B) notice that the evidence or documents have been received by the Department of State and will promptly be transmitted to the court; the court may order that the person be released from official detention pending the extradition hearing.

"(3) If the court orders the release of the person pending the extradition hearing, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"§ 3193. Waiver of extradition hearing and consent to removal

"(a) INFORMING THE COURT OF WAIVER AND CONSENT.—A person against whom a complaint is filed may waive the requirements of formal extradition proceedings, including an order of surrender, by informing the court that he consents to removal to the foreign state.

"(b) INQUIRY BY THE COURT.—The court, upon being informed of the person's consent to removal, shall—

"(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) address the person to determine whether his consent is—

"(A) voluntary, and not the result of a threat or other improper inducement; and

"(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

"(c) FINDING OF CONSENT AND ORDER OF REMOVAL.—If the court finds that the person's consent to removal is voluntary and given with full knowledge of its consequences, it shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition. The court shall order that the person be held in official detention until surrendered.

"(d) LIMITATION ON DETENTION PENDING REMOVAL.—A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings, the person is not removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3194. Extradition hearing

"(a) IN GENERAL.—The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable as provided in subsection (d), unless the hearing is waived pursuant to section 3193. The court does not have jurisdiction to determine—

"(1) the merits of the charge against the person by the foreign state;

"(2) whether the foreign state is seeking the extradition of the person for the purpose of prosecuting or punishing the person for his political opinions, race, religion, or nationality; or

"(3) whether the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.

The hearing shall be held as soon as practicable after the arrest of the person or issuance of the summons.

"(b) RIGHTS OF THE PERSON SOUGHT.—The court shall inform the person of the limited purpose of the hearing, and shall inform him that—

"(1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

"(c) EVIDENCE.—

"(1) a deposition, warrant, or other document, or a copy thereof, is admissible as evidence in the hearing if—

"(A) it is authenticated in accordance with the provisions of an applicable treaty or law of the United States;

"(B) it is authenticated in accordance with the applicable law of the foreign state, and such authentication may be established conclusively by a showing that—

"(i) a judge, magistrate, or other appropriate officer of the foreign state has signed a certification to that effect; and

"(ii) a diplomatic or consular officer of the United States who is assigned or accredited to the foreign state, or a diplomatic or consular officer of the foreign state who is assigned or accredited to the United States, has certified the signature and position of the judge, magistrate, or other officer; or

"(C) other evidence is sufficient to enable the court to conclude that the document is authentic.

"(2) A certificate or affidavit by an appropriate official of the Department of State is admissible as evidence of the existence of a treaty or its interpretation.

"(3) If the applicable treaty requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense has been committed in the United States, the requirement is satisfied if the evidence establishes probable cause to believe that an offense was committed and that the person sought committed it.

"(d) FINDINGS.—The court shall find that the person is extraditable if it finds that—

"(1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;

"(2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;

"(3) no defense to extradition specified in the applicable treaty, and within the jurisdiction of the court, exists; and

"(4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of—

"(A) the United States;

"(B) the State where the fugitive is found; or

"(C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

"(e) POLITICAL OFFENSES AND OFFENSES OF A POLITICAL CHARACTER.—The court shall not find the person extraditable after a hearing under this section if the court finds that the person has established by clear and convincing evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense or an offense of a political character. For the purposes of this subsection, the terms "political offense" and "offense of a political character"—

"(1) do not include—

"(A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;

"(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

"(C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

"(D) an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;

"(E) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs;

"(F) an offense that consists of rape;

"(G) an attempt or conspiracy to commit an offense described in subparagraphs (A) through (F) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

"(2) Except in extraordinary circumstances, do not include—

"(A) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, the taking of a hostage, or a serious unlawful detention;

"(B) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

"(C) an attempt or conspiracy to commit an offense described in subparagraphs (A) or (B) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

The court shall not take evidence with respect to, or otherwise consider, an issue under this subsection until the court determines the person is otherwise extraditable. Upon motion of the Attorney General or the person sought to be extradited, the United States district court may order the determination of any issue under this subsection by a judge of such court.

"(f) CERTIFICATION OF FINDINGS TO THE SECRETARY OF STATE.—

"(1) If the court finds that the person is extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify its findings, together with a transcript of the proceedings, to the Secretary of State. The court shall order that the person be held in official detention until surrendered to a duly appointed agent of the foreign state, or until the Secretary of State declines to order the person's surrender.

"(2) If the court finds that the person is not extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify the findings, together with such report as the court considers appropriate, to the Secretary of State. The Attorney General may commence a new action for extradition of the person only with the agreement of the Secretary of State.

"§ 3195. Appeal

"(a) IN GENERAL.—Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal. Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

"(b) DETENTION OR RELEASE PENDING APPEAL.—If the district court found that the person sought is—

"(1) extraditable, it shall order that the person be held in official detention pending determination of the appeal, or pending a finding by the court of appeals that the person has established that special circumstances require his release;

"(2) not extraditable, it shall order that the person be released pending determination of an appeal unless the court is satisfied that the person is likely to flee or to endanger the safety of any other person or the community.

If the court orders the release of a person pending determination of an appeal, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"(c) SUBSEQUENT REVIEW.—No court has jurisdiction to review a finding that a person is extraditable unless the person has exhausted his remedies under subsection (a). If the person files a petition for habeas corpus or for other review, he shall specify whether the finding that he is extraditable has been upheld by a court and if so, shall specify the court, the date, and the nature of each such proceeding. A court does not have jurisdiction to entertain a person's petition for habeas corpus or for other review if his commitment has previously been upheld, unless the court finds that the grounds for the petition or appeal could not previously have been presented.

"§ 3196. Surrender of a person to a foreign state

"(a) RESPONSIBILITY OF THE SECRETARY OF STATE.—If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter—

"(1) may order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition;

"(2) may order such surrender of the person contingent on the acceptance by the foreign state of such conditions as the Secretary considers necessary to effectuate the purposes of the treaty or the interest of justice; or

"(3) may decline to order the surrender of the person if the Secretary is persuaded that—

"(A) the foreign state is seeking extradition of the person for the purpose of prosecuting or punishing the person because of his political opinions, race, religion, or nationality; or

"(B) the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.

The Secretary may order the surrender of a person who is a national of the United States unless such surrender is expressly forbidden by the applicable treaty or by the laws of the United States. A decision of the Secretary under paragraphs (1), (2), or (3) is a matter solely within the discretion of the Secretary and is not subject to judicial review: *Provided, however,* That in determining the application of paragraph (3), the Secretary shall consult with the appropriate bureaus and offices of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs.".

"(b) NOTICE OF DECISION.—The Secretary of State, upon ordering a person's surrender or denying a request for extradition in whole, or in part, shall notify the person sought, the diplomatic representative of the foreign state, the Attorney General, and the court that found the person extraditable. If the Secretary orders the person's surrender, he also shall notify the diplomatic representative of the foreign state of the time limitation on the person's detention that is provided by subsection (c)(2).

"(c) LIMITATION ON DETENTION PENDING DECISION OR REMOVAL.—A person who is found extraditable pursuant to section 3194 may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any tme during which removal is delayed by judicial proceedings—

"(1) the Secretary does not order the person's surrender, or decline to order the person's surrender, within forty-five days after his receipt of the court's findings and the transcript of the proceedings; or

"(2) the person is not removed from the United States within thirty days after the Secretary ordered the person's surrender.

The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3197. Receipt of a person from a foreign state

"(a) APPOINTMENT AND AUTHORITY OF RECEIVING AGENT.—The Attorney General shall appoint an agent to receive, from a foreign state, custody of a person accused of a Federal, State, or local offense. The agent shall have the authority of a United States marshal. The agent shall convey the person directly to the Federal or State jurisdiction that sought his return.

"(b) TEMPORARY EXTRADITION TO THE UNITED STATES.—If a foreign state delivers custody of a person accused of a Federal, State, or local offense to an agent of the United States on the condition that the person be returned to the foreign state at the conclusion of criminal proceedings in the United States, the Bureau of Prisons shall hold the person in custody pending the conclusion of the proceedings, and shall then surrender the person to a duly appointed agent of the foreign state. The return of the person to the foreign state is not subject to the requirements of this chapter.

"§ 3198. General provisions for chapter

"(a) DEFINITIONS.—As used in this chapter—

"(1) 'court' means

"(A) a United States district court established pursuant to section 132 of title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, or

"(B) a United States magistrate authorized to conduct an extradition proceeding;

"(2) 'foreign state', when used in other than a geographic sense, means the government of a foreign state;

"(3) 'foreign state', when used in a geographic sense, includes all territory under the jurisdiction of a foreign state, including a colony, dependency, and constituent part of the state; its air space and territorial waters; and vessels or aircraft registered in the state;

"(4) 'treaty' includes a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent by the Senate; and

"(5) 'warrant', as used with reference to a foreign state, means any judicial document authorizing the arrest or detention of a person accused or convicted of a crime.

"(b) PAYMENT OF FEES AND COSTS.—Unless otherwise specified by treaty, all transportation costs, subsistence expenses, and translation costs incurred in connection with the extradition or return of a person at the request of—

"(1) a foreign state, shall be borne by the foreign state unless the Secretary of State directs otherwise;

"(2) a State, shall be borne by the State; and

"(3) the United States, shall be borne by the United States.".

SEC. 4. This Act shall take effect on the first day of the first month after enactment, and shall be applicable to extradition and rendition proceedings commenced thereafter.

Mr. THURMOND. I might mention that the Judiciary Committee is beginning to hold hearings now on organized crime. The first hearing is being held today in room 325 of the Russell Building. The Attorney General is the first witness today. The Director of the Federal Bureau of Investigation follows him. On other days, we will be holding hearings on organized crime. Some hearings will be held in cities outside of Washington in various parts of the country.

As I stated in my statement a few moments ago, crime is rated by the American people as the biggest problem in this country next to the economy. We must take remedial action in this Congress to guarantee the safety of our citizens in this Nation.

Mr. President, I commend the various Senators who have cosponsored these bills. The bills will indicate the names of the Senators. On some bills we have more cosponsors than others, but I am proud that they have joined on these bills. I hope others will see fit to join us since we intend to prosecute promptly the passage of these bills so that the American people can benefit from this legislation.

By Mr. THURMOND:

S. 221. A bill to temporarily suspend the duty on certain menthol feedstocks until June 30, 1986; to the Committee on Finance.

SUSPENSION OF DUTY ON CERTAIN FEEDSTOCKS

Mr. THURMOND. Mr. President, today I am introducing a bill to temporarily suspend the duty on certain menthol feedstocks until June 30, 1986. This bill is identical to one I introduced late in the 97th Congress; however, there was insufficient time for the Senate to consider this legislation before the end of the session.

The feedstocks that this bill concerns are utilized by domestic manufacturers to produce synthetic menthol. A duty is applied to these chemicals when they are imported to the United States from West Germany. Since there are no domestic industries that produce these particular feedstocks, this duty does not afford protection to any chemical manufacturer in the United States. To the contrary, it imposes an unnecessary economic cost on the U.S. menthol industry by increasing the production costs for that industry.

Mr. President, this unnecessary duty only compounds the problems that face our domestic menthol industry. In 1977, when mainland China was granted most-favored-nation status, the duty on Chinese menthol fell from 50 cents per pound to 17 cents per pound. This forced our domestic menthol producers to compete with highly subsidized and cheaply produced menthol imports. This situation coupled with tariffs on menthol imports imposed by countries such as Japan, have placed our domestic producers of menthol at a competitive disadvantage.

Mr. President, I realize that this legislation does not represent a complete solution to the numerous trade diffi-