

Immigration and Naturalization Service v. Doherty: the Politics of Extradition, Deportation, and Asylum

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NOTES AND COMMENTS

IMMIGRATION AND NATURALIZATION SERVICE v. DOHERTY: THE POLITICS OF EXTRADITION, DEPORTATION, AND ASYLUM

I. INTRODUCTION

Joseph Patrick Thomas Doherty, an escapee from prison in Northern Ireland, was held without bail in the Metropolitan Correctional Center in Manhattan for eight years without ever having been charged with an offense in the United States.¹ Rather, Doherty was held awaiting deportation to the United Kingdom² to serve a life sentence for the murder of a British army captain in 1980.³ The Supreme Court removed all obstacles to Doherty's deportation on January 15, 1992.⁴ Finally, at 3:30 in the morning on February 19, 1992, Doherty was taken from his cell in the federal prison in Lewisburg, Pennsylvania, and put on a plane for a sixteen-hour trip to Belfast. Doherty is now in Crumlin Road Prison, the institution from which he escaped eleven years ago.⁵

Doherty's case compels a re-examination of time-honored precepts of international law, particularly the political offense exception to ex-

1. Paul Moses, *Reconsider Ruling On IRA Prisoner, Justice Dept. Asks*, *NEWSDAY*, Jul. 22, 1990, at 30.

2. Doherty was held pursuant to 8 U.S.C. §§ 1252(a)(1) & (a)(2)(A), authorizing the arrest and detainment of aliens awaiting deportation proceedings. A nine-year detainment is unusual but not unheard of; the average length of internment for aliens awaiting asylum or deportation proceedings is two years. Laurie Goodstein, *First Stop in America For Asylum Seekers: Jail*, *WASH. POST*, Sep. 15, 1991, at A3. Doherty twice sought and was denied habeas corpus relief, *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991); *Doherty v. Meese*, 808 F.2d 938 (2d Cir. 1986), and requested and was denied bail numerous times. *Doherty v. Thornburgh*, 943 F.2d at 206, 208.

3. *Doherty v. U.S. Dep't of Justice*, INS, 908 F.2d 1108, 1110-11 (2d Cir. 1990).

4. *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992).

5. Dennis Duggan, *Mixed Feelings at Doherty Reunion*, *NEWSDAY*, Feb. 21, 1992, at 8. In 1991 Doherty had requested a transfer from the Manhattan Correctional Center to the federal prison in Lewisburg where he could "enjoy getting out of doors to the little extent he may be able to." T. J. Collins, *IRA Prisoner Moved*, *NEWSDAY*, Aug. 17, 1991, at 14.

tradition⁶ and the humanitarian purposes of international refugee law.⁷ By characterizing Doherty's crime as a political offense, American judges refused to certify Doherty as extraditable,⁸ thereby prohibiting the surrender of a member of a terrorist organization to an allied democratic government.⁹ This failure to extradite Doherty pitted three attorneys general of the United States¹⁰ against United States judges and magistrates in a protracted nine-year battle with implications for United States foreign policy, immigration policies, and the United States' commitment to international human rights conventions.

This note will examine the situation of political offenders against the backdrop of Doherty's case. After discussing the factual and procedural history of *INS v. Doherty*, this note will examine the origins and applications of the political offense exception to extradition in United States law. Secondly, this note will discuss how deportation and asylum decisions regarding political offenders are made and whether such determinations are appropriately made in light of the United States' multilateral treaty obligations. Finally, this note will explore the tension between the United States' foreign policy objectives and its obligations under international law to segregate asylum decisions from political concerns. This note will conclude that the Supreme Court wrongly decided *Doherty*, and that the Court's interpretation fails to conform with either existing statutory law or the United States' obligations under international agreements regarding refugees.

II. STATEMENT OF THE CASE

In Britain, the internecine warfare between Protestants and

6. See generally Manuel R. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962) [hereinafter Garcia-Mora].

7. 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150 [hereinafter Convention], reprinted in Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 268 [hereinafter Protocol].

8. Matter of Doherty by Gov't of United Kingdom, 599 F. Supp. 270 (S.D.N.Y. 1984).

9. Reginald Dale, *Blocking the Terrorist Loophole*, FIN. TIMES (London), Dec. 19, 1985, at 4; see also McMullen v. INS, 788 F.2d 591, 597 (9th Cir. 1986).

10. Despite the Court's ruling that there was no procedural bar to Doherty's deportation, Doherty remained in the United States until February 19, 1992. During that time, John Cardinal O'Connor of New York and others asked Attorney General Barr to give Doherty a hearing despite the Court's ruling. Barr refused. See Cal McCrystal, *Notebook: A Tug-of-War for America's Irish Soul*, THE INDEPENDENT, Feb. 2, 1992, at 23 [hereinafter McCrystal].

Catholics is called "the troubles."¹¹ A complete history of the sectarian violence in Northern Ireland is beyond the scope of this note;¹² however some understanding of the environment in which Joseph Doherty grew up is helpful in understanding the complex issues of his case. Briefly, after the Anglo-Irish War of 1919-1921, the Irish government agreed to a partition of Ireland, under which the six northern counties, known as Ulster, would remain under British rule as Northern Ireland while the rest of the Irish Republic would be independent.¹³ Because the Catholic minority in Ulster was denied the same benefits of citizenship as the Protestant majority, the Catholics launched a civil rights movement in the 1960s. Catholic bitterness and Protestant hostility to the Catholics' demands soon destroyed the civil rights movement's strategy of nonviolence and set the stage for the terrorist activities of both sides that continues to this day.¹⁴

As a young man in Belfast, Joseph Doherty claimed he saw nonviolent civil disobedience in the tradition of Martin Luther King, Jr., as the route to end British occupation of Northern Ireland.¹⁵ Eventually, however, he abandoned nonviolence and joined the Irish Republican Army (IRA).¹⁶ Some time before 1980, Doherty became affiliated with the Provisional Irish Republican Army (PIRA) or "Provos," a "radical offshoot" of the IRA.¹⁷ On May 2, 1980, acting under orders of the IRA, Doherty and three other Provos captured a home in Belfast, holding the family hostage as they awaited the passing of a British convoy.¹⁸ Eventually a British Army vehicle stopped outside the house, and five members of the Army's Special Air Services (SAS) emerged, bearing machine guns.¹⁹ In the ensuing gun battle, SAS Captain Herbert

11. See, e.g., Leonard Doyle, *Irish Republican Family Given Political Asylum by U.S. Judge*, THE INDEPENDENT, Jan. 10, 1992, at 3.

12. For a more comprehensive discussion of the troubles and the history of the Irish Republican Army (IRA), see JOHN M. POLAND, UNDERSTANDING TERRORISM: GROUPS, STRATEGIES, AND RESPONSES 109-18 (1988).

13. LEONARD B. WEINBERG & PAUL B. DAVIS, INTRODUCTION TO POLITICAL TERRORISM 32 (1989) [hereinafter WEINBERG & DAVIS].

14. *Id.* at 52. Twenty-seven people died as a result of terrorist attacks in Northern Ireland in the first thirty-eight days of 1992. Craig R. Whitney, *Fear, Anger and Funerals: Belfast's Troubles Mount*, N.Y. TIMES, Feb. 8, 1992, at 2.

15. Andrew Blake, *2 IRA Members Detained in Legal Limbo by US-British Politics*, BOSTON GLOBE, June 17, 1989, at 1 [hereinafter *Legal Limbo*].

16. *Id.*

17. *Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp 270, 276 (S.D.N.Y. 1984).

18. *Id.* at 272.

19. *Id.*

Richard Westmacott was shot and killed.²⁰ Doherty was arrested and charged with murder.²¹ On June 10, 1981, after the trial was completed but before the court announced a decision, Doherty and seven others escaped from H.M. Prison, Crumlin Road, in Belfast.²² Two days later Doherty was convicted *in absentia* of murder, attempted murder, illegal possession of firearms and ammunition, and of belonging to a proscribed organization.²³ The court sentenced Doherty to life imprisonment.²⁴ At the direction and with the assistance of the PIRA,²⁵ using a false passport, Doherty escaped to the United States.²⁶

A. *Doherty's Extradition Proceeding*

On June 18, 1983, Immigration and Naturalization Service (INS) agents in New York City arrested Doherty in an Upper East Side Manhattan bar where he worked as a bartender.²⁷ On June 27, 1983, Judge Constance Baker Motley issued a provisional warrant of arrest pursuant to Article VIII of the extradition treaty between the United States and the United Kingdom.²⁸ The United States, on behalf of the United Kingdom, filed a formal request for extradition in accordance with Article VII of the Treaty in the United States District Court for the Southern District of New York on August 16, 1983.²⁹ District Judge John E. Sprizzo heard the case as an "extradition magistrate" pursuant to 18 U.S.C. § 3184.³⁰ At roughly the same time the United

20. *Id.* The M-60 machine gun used to kill Captain Westmacott had been stolen from the National Guard Armory in Danvers, Massachusetts. Andrew Blake, *U.S. Judge Bars Use of Extradition Pact on Ex-IRA Member*, BOSTON GLOBE, July 24, 1991, at 9.

21. *Matter of Doherty*, 599 F. Supp. at 272.

22. *Id.*

23. *Id.*

24. *Doherty v. U.S. Dep't of Justice, INS*, 908 F.2d 1108, 1111 (2d Cir. 1990).

25. *Matter of Doherty*, 599 F. Supp. at 276.

26. *Legal Limbo*, *supra* note 15, at 1.

27. *Doherty v. INS*, 908 F.2d at 1111.

28. Treaty of Extradition between the United States of America and the United Kingdom of Great Britain and Northern Ireland, 28 U.S.T. 227 ("the Treaty"): "In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on application through the diplomatic channel by the competent authorities of the requesting Party"

29. *Matter of Doherty*, 599 F. Supp. at 272.

30. *Id.* § 3184 reads:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized to do so by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon

States initiated deportation proceedings³¹ against Doherty, who applied for asylum.³² Subsequently, Doherty requested that the deportation proceeding and request for asylum be held in abeyance pending outcome of the extradition action.³³

In a December 12, 1984 decision, Judge Sprizzo ruled that Doherty's crimes in Belfast were "political offenses" within the meaning of the Treaty³⁴ and that extradition was therefore barred.³⁵ With direct appeal unavailable,³⁶ the United States inexplicably failed to take the procedural step available to it to overturn the judge's ruling,³⁷ and instead tried unsuccessfully to take the matter to the district court for collateral review in a declaratory judgment action.³⁸ District Judge Haight dismissed the action, holding that "declaratory judgment has no legitimate office to perform in extradition proceedings."³⁹ The Court of Appeals for the Second Circuit affirmed the dismissal.⁴⁰

B. *Doherty's Deportation Proceeding*

Extradition having been denied, Attorney General Meese renewed

complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

31. The deportation action was initiated pursuant to § 243(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1253(a).

32. *Doherty v. U.S. Dep't of Justice*, INS, 908 F.2d 1108, 1111 (2d Cir. 1990).

33. *Id.*

34. Art. V(1)(c)(i) ("Extradition shall not be granted if the offense for which extradition is requested is regarded by the requested Party as one of a political character.").

35. *Matter of Doherty*, 599 F. Supp. at 277.

36. *See Matter of Mackin*, 668 F.2d 122 (2d Cir. 1981) (denial of extradition is unappealable).

37. *See id.* at 128 (the only way the government may challenge a denial of a writ of extradition is to apply to a different judge).

38. *United States v. Doherty*, 615 F. Supp. 755, 761 (S.D.N.Y. 1985).

39. *Id.* at 760.

40. *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986).

deportation proceedings against Doherty in September 1986.⁴¹ Doherty, availing himself of a prerogative provided for in the Immigration and Nationality Act of 1952, chose to designate the country to which he would be deported.⁴² At a hearing before Immigration Judge (IJ) Howard Cohen, Doherty withdrew his application for asylum, conceded his deportability on the ground that he had entered the United States without valid immigration documents,⁴³ and designated the Republic of Ireland (Ireland) as his country of deportation, where he faced a ten-year sentence rather than the life sentence awaiting him in Northern Ireland.⁴⁴

The INS opposed Doherty's designation of Ireland on the ground that deporting Doherty to Ireland rather than to the United Kingdom would prejudice American interests in its relations with other nations and the fight against international terrorism.⁴⁵ Nonetheless, IJ Cohen ordered Doherty deported to Ireland.⁴⁶ The INS appealed.⁴⁷

C. *Doherty's Habeas Corpus Petition*

Immediately after IJ Cohen ordered Doherty deported to Ireland, Doherty petitioned for a writ of habeas corpus seeking immediate deportation to Ireland. Doherty did so in an attempt to ensure his deportation to Ireland before a supplemental extradition treaty between the United States and the United Kingdom, virtually eliminating the political offense exception, took effect.⁴⁸ The district court denied Doherty's petition, holding that the Attorney General was acting within his authority in appealing the order directing Doherty's deportation to Ireland⁴⁹ and that such deportation should not be carried out until the

41. *Doherty v. U.S. Dep't of Justice, INS*, 908 F.2d 1108, 1111 (2d Cir. 1990).

42. 8 U.S.C. § 1253(a) (Supp. 1991).

43. 8 U.S.C. §§ 1251(a)(1), 1182(a)(20) (1982).

44. *Doherty v. INS*, 908 F.2d at 1111.

45. *Doherty v. Meese*, 808 F.2d 938, 940 (2d Cir. 1986).

46. For the text of the IJ's opinion, see Appendix to Petition for Certiorari at 156a, *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992) (No. 90-925) [hereinafter Appendix].

47. *Doherty v. INS*, 980 F.2d at 1111.

48. The new treaty retroactively eliminated the political offense exception for violent crimes, thus making Doherty extraditable. See Supplementary Treaty Concerning Extradition Between the Government of the United States of America and the United Kingdom of Great Britain and Northern Ireland, Jun. 25, 1985, Treaty Doc. 99-8.

49. "The deportation of an alien . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." 8 U.S.C. §

INS appeal had been heard.⁵⁰

D. BIA Orders Doherty Deported to Ireland

On March 11, 1987, the Board of Immigration Appeals (BIA) rejected the government's appeal and upheld IJ Cohen's deportation order, declining to find that deportation to Ireland would be prejudicial to the interests of the United States absent clear evidence of that contention.⁵¹ At the request of the INS, the BIA certified the case to Attorney General Edwin Meese,⁵² who accepted the case for review in October, 1987.⁵³

E. Doherty Moves to Reopen Deportation Proceedings

On December 3, 1987, with the case still pending before the Attorney General, Doherty moved for the BIA to reopen his deportation proceedings so that he could withdraw his designation of Ireland, redesignate his country of deportation, and submit a new application for asylum and withholding of deportation.⁵⁴ Doherty was once again reacting to diplomatic events; Ireland had enacted a new law altering the applicability of the political offense exception in extradition cases between Council of Europe member states, including Britain.⁵⁵ If Doherty were deported to Ireland, under the new law he then would be subject to extradition to the United Kingdom.⁵⁶ Without deciding on the merits, the BIA referred Doherty's request to Attorney General Meese.⁵⁷

F. Meese Orders Doherty Deported to the United Kingdom

The Attorney General announced his decision on June 9, 1988.⁵⁸ Attorney General Meese, pursuant to his authority under § 243(a) of

1253(a) (Supp. 1991).

50. *Doherty v. Meese*, 808 F.2d 938, 941 (2d Cir. 1986).

51. *Doherty v. U.S. Dep't of Justice, INS*, 908 F.2d 1108, 1112 (2d Cir. 1990). For the text of the BIA's decision, see Appendix, *supra* note 46, at 148a.

52. 8 C.F.R. § 3.1(h) permits the attorney general to review decisions of the BIA.

53. *Doherty v. INS*, 908 F.2d at 1112.

54. *Id.*

55. The Extradition (European Convention on the Suppression of Terrorism) Act 1987 took effect in Ireland on December 1, 1987, and implemented the terms of the European Convention on the Suppression of Terrorism, which had been adopted by the Council of Europe in 1977. See WEINBERG & DAVIS, *supra* note 13, at 168.

56. *Doherty v. INS*, 908 F.2d at 1112.

57. *Id.* For the text of the BIA's decision, see Appendix, *supra* note 46, at 131a.

58. *Id.* For the text of the Attorney General's decision, see Appendix, *supra* note 46, at 116a.

the Immigration and Nationality Act, rejected Doherty's designation of Ireland as his country of deportation as prejudicial to the United States' interests.⁵⁹ Rather, Meese ordered Doherty deported directly to the United Kingdom.⁶⁰ Finally, the Attorney General remanded Doherty's motion to reopen for consideration by the BIA.⁶¹

G. *The BIA Grants Doherty's Motion to Reopen*

On November 14, 1988, the BIA granted Doherty's motion to reopen his deportation proceedings, giving Doherty the opportunity to reapply for asylum and withholding of deportation.⁶² The BIA based its decision on "changed circumstances" since Doherty withdrew his application for asylum, namely the redesignation of the United Kingdom by the Attorney General as the country to which Doherty would be deported and the change in Anglo-Irish extradition law.⁶³ Additionally, the BIA held that Doherty had established a prima facie case for asylum based on a well-founded fear of persecution if returned to the United Kingdom.⁶⁴ Finally, the BIA denied Doherty's request to redesignate his country of deportation.⁶⁵ Subsequently, the BIA again certified the case to the attorney general for review at the request of the INS.⁶⁶

H. *Thornburgh Denies Doherty's Motion to Reopen; Second Circuit Reverses*

On June 30, 1989, Attorney General Richard Thornburgh disapproved the BIA's decision and denied Doherty's motion to reopen asy-

59. *Id.*

60. *Id.*

61. *Doherty v. INS*, 908 F.2d at 1112.

62. *Id.* For the text of the BIA's decision, see Appendix, *supra* note 46, at 92a.

63. *Doherty v. INS*, 908 F.2d at 1112.

64. *Id.* at 1112-13. 8 U.S.C. § 1158(a) (Supp. 1991) gives the Attorney General discretion to grant asylum to any alien physically present in the United States whom the Attorney General determines to be a refugee. 8 U.S.C. § 1101(a)(42)(A) (Supp. 1991) defines "refugee" as:

[A]ny person who is outside any country of such person's nationality, or, in the case of a person having no nationality, is unable or unwilling to return to, and is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of *persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion*

(emphasis added).

65. *Doherty v. INS*, 908 F.2d at 1111-12.

66. *Id.* at 1113.

lum proceedings.⁶⁷ On June 29, 1990, the Second Circuit affirmed Attorney General Meese's order rejecting Ireland as Doherty's country of deportation and ordering Doherty deported to the United Kingdom and reversed Attorney General Thornburgh's order denying Doherty's motion to reopen his deportation proceedings.⁶⁸

I. *The Supreme Court Reverses the Second Circuit*

The Supreme Court granted certiorari⁶⁹ and ruled on January 15, 1992, reversing the Second Circuit on narrow procedural grounds. It held that Attorney General Thornburgh did not abuse his discretion in denying Doherty's motion to reopen his deportation proceedings.⁷⁰ Left for another case were several issues raised by the court of appeals,⁷¹ namely what international law requires of the United States' asylum and deportation laws and what role, if any, the United States' foreign policy interests may play in the execution of those laws. The Court's opinion will be explained more fully in the discussion to follow of United States asylum and deportation law. Furthermore, even though the Supreme Court did not discuss the merits of the government's failed attempt to extradite Doherty,⁷² because the Court placed its imprimatur on the government's strategy of accomplishing through deportation what it could not accomplish through extradition,⁷³ a brief analysis of extradition will inform this discussion.

67. *Id.* For the text of the Attorney General's decision, see Appendix, *supra* note 46, at 46a.

68. *Doherty v. INS*, 908 F.2d at 1113-14.

69. *INS v. Doherty*, 111 S. Ct. 950 (1991).

70. *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992).

71. *Doherty v. INS*, 908 F.2d 1108 (2d Cir. 1990).

72. The district court's denial of the government's attempt to extradite Doherty was not properly before the Court; indeed such denial is not subject to appellate review. See *Matter of Mackin*, 668 F.2d 122 (2d Cir. 1981) "[T]he Government's only remedy following denial of an extradition request is to refile the request with another immigration magistrate. . . ." *United States v. Doherty*, 786 F.2d 491, 495 (2d Cir. 1986). The Supreme Court has never addressed the political offense exception. See Andreas F. Lowenfeld, *Ahmad: Profile of an Extradition Case*, 23 N.Y.U. J. INT'L L. & POL. 723, 749 (1991) [hereinafter Lowenfeld].

73. *Doherty v. Thornburgh*, 943 F.2d 204, 213 (2d Cir. 1991) (Altimari, J., dissenting). See also Respondent's Brief at 3, *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14 1992) (No. 90-925) (quoting an INS district director as having said, "[I]n the extradition proceeding the objective was to get Doherty to the United Kingdom. And in the deportation proceeding our objective is to get him to the United Kingdom. This is just an alternate means to accomplish that.").

III. EXTRADITION AND THE POLITICAL OFFENSE EXCEPTION

Few areas of extradition law have evoked as much controversy in recent years as the political offense exception.⁷⁴ To understand the controversy it is necessary to examine the historical development of the exception.

When nation-states were governed by monarchs and absolute rulers, extradition was reserved for political offenders rather than common criminals.⁷⁵ With the American and French revolutions came a new application of the political offense exception. For example, the United States Declaration of Independence guaranteed the right of the people to alter or abolish any form of government that threatened liberty.⁷⁶ The new democracy saw political offenders as those fugitives most deserving of protection from extradition.⁷⁷ Political offenders were seen to be "heroically fighting tyrannical governments at best and committing government at worst."⁷⁸ Therefore, rather than being used to punish

74. See, e.g., Barbara Ann Banoff & Christopher H. Pyle, "To Surrender Political Offenders": *The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT'L L. & POL. 169 (1984) [hereinafter Banoff & Pyle]; M. Cherif Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K. - A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DENV. J. INT'L L. & POL'Y 255 (1987) [hereinafter Bassiouni]; Lowenfeld, *supra* note 72; Michelle M. Cain, Recent Decision, *Abrogating the Relative Political Offense Exception to Extradition: The United States-United Kingdom Supplementary Extradition Treaty*, 20 J. MARSHALL L. REV. 453 (1987) [hereinafter Cain]; Nancy M. Green, Note, *In the Matter of the Extradition of Atta: Limiting the Scope of the Political Offense Exception*, 17 BROOK. J. INT'L L. 447 (1991); Lloyd W. Grooms and Jane M. Samson, Note, *The Political Offense Exception to Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 NOTRE DAME L. REV. 1005 (1984) [hereinafter Grooms & Samson]; Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450 (1985) [hereinafter *Political Legitimacy*]; Miriam E. Sapiro, Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654 (1986) [hereinafter Sapiro].

75. BARBARA M. YARNOLD, INTERNATIONAL FUGITIVES: A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE 12 (1991). See also Grooms & Samson, *supra* note 74, at 1008.

76. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

77. President Franklin Pierce's Secretary of State William Marcy wrote in 1853: "To surrender political offenders . . . is not a duty; but on the contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind." Mr. Marcy, Secretary of State, to Mr. Huslemann, Sept. 26, 1853. Sec. Doc., 33rd Cong., 1st Sess., Vol. 1, 34 (quoted in Banoff & Pyle, *supra* note 74, at 169). See also *Quinn v. Robinson*, 783 F.2d 776, 792 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

78. Banoff & Pyle, *supra* note 74, at 180-81. Banoff & Pyle suggest that eight-

political offenders and ensure continued authoritarian rule, the political offense exception became a tool of democracies to protect those who would abolish despotic regimes in favor of democracy in other nations.⁷⁹

Extradition in American law means "the surrender of a criminal by a foreign state to which he has fled to refuge from prosecution to the state within whose jurisdiction the crime was committed upon the demand of the latter state, in order that he may be dealt with according to its laws."⁸⁰ Most nations, including the United States, will comply with a request for extradition only if there is an extradition treaty in force between the two nations.⁸¹ While extradition treaties are widespread within the world community,⁸² there is no universal definition of "political offense."⁸³ Three reasons have been given for this. First, domestic courts view extradition as purely a matter of domestic law so that each state is entitled to define the parameters of what constitutes a political offense. Second, the question of whether an offense is political is determined by factors too numerous to describe or define. The second reason perhaps explains the third, that historically treaties have not defined "political offense."⁸⁴

While there is no concrete definition of political offense, the international community recognizes, and gives varying protection to, two categories of offenses: purely political and relative political offenses.⁸⁵ A purely political offense comprises acts against the state that have no element of a common crime. In other words, a fugitive is accused of directly injuring a right of the government.⁸⁶ Characterization as purely political offenses has been limited to treason, sedition, and espionage.⁸⁷ These crimes are generally regarded as non-extraditable of-

eenth century proponents of the political offense exception benefitted from the practice not only for moral reasons but for practical ones: "[G]overnments rose and fell with sufficient frequency to warrant not taking sides. When today's refugee can be tomorrow's head of state, and vice versa, a neutral principle of non-intervention may best serve the interests of the asylum state." *Id.* at 181.

79. Grooms & Samson, *supra* note 74, at 1008.

80. *Terlinden v. Ames*, 184 U.S. 270 (1902).

81. Grooms & Samson, *supra* note 74, at 1008.

82. The United States is party to approximately 100 bilateral extradition treaties. See 18 U.S.C. § 3181. The United States is also a party to the Multilateral Convention on Extradition signed at Montevideo on Dec. 26, 1933, to which most South and Central American states are parties. 49 Stat. 3111, T.S. No. 882, 165 L.N.T.S. 45.

83. Sapiro, *supra* note 74, at 660.

84. *Garcia-Mora*, *supra* note 6, at 1229-30.

85. *Id.*

86. Grooms & Samson, *supra* note 74, at 1009.

87. *Garcia-Mora*, *supra* note 6, at 1234.

fenses.⁸⁸ Relative political offenses, on the other hand, are common crimes committed with a political motivation or purpose.⁸⁹

The distinction between purely political and relative political offenses leaves courts with difficulties of classification. If a court deems an offense purely political, the offender is non-extraditable. If the act was a relative political offense, however, the court must still decide if it was sufficiently political to prohibit extradition.⁹⁰ The task of the court in classifying an offense as pure or relative is complicated by the fact that some acts generally considered purely political also injure individual rights.⁹¹ Additionally, the court is often faced with mixed motives of the offender: a political intent plus some other interest, such as vengeance or greed.⁹² The relative political offense presents courts with the troubling dilemma of punishing the offender for the common crime while respecting the principle of the political offense exception.⁹³

The relative political offense also presents courts with the inquiry as to how much of a connection there must be between a common crime and the political motivation so that the offender may invoke the political offense exception. Joseph Doherty's case is an example of this inquiry, and Judge Sprizzo's resolution of the problem raises the question of the appropriate test to use in determining political offenses.

Judge Sprizzo began by rejecting Doherty's contention that all he need show to establish a political offense is that there was a political conflict in Northern Ireland and that his offense was committed during the course of and in furtherance of that conflict.⁹⁴ Judge Sprizzo em-

88. Sapiro, *supra* note 74, at 660.

89. Grooms & Samson, *supra* note 74, at 1009.

90. *See, e.g.*, Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990) ("Whether an extraditee is accused of an offense of a political nature is an issue for judicial determination.").

91. Sapiro, *supra* note 74, at 660.

92. For example, Sapiro discusses the pecuniary incentives of espionage. *Id.* at 660.

93. The Supplementary Extradition Treaty Between the United States and the United Kingdom solves the problem by effectively eliminating the relative political offense exception in extradition cases between the United States and Britain. *See generally* Cain, *supra* note 74, and Bassiouni, *supra* note 74.

94. Matter of Doherty by Gov't of United Kingdom, 599 F. Supp. 270, 274 (S.D.N.Y. 1984); *but see* In re Mackin, 80 Cr. Misc. 1, p. 54 at 49-74 (S.D.N.Y. Aug. 13, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981) (magistrate determined Mackin's offenses were political because (1) at the time of the offenses PIRA was conducting a political uprising in Belfast; (2) Mackin was an active member of PIRA; and (3) the offenses were incidental to Mackin's role in the uprising); *see also* Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); Matter of Mackin, 668 F.2d 122 (2d Cir. 1981).

phasized that “not every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offense.”⁹⁵

Rather, Sprizzo said the court must examine the nature of the act, the context in which it was committed, the status of the offender, the nature of the organization on whose behalf the offense was committed, and the place where the offense took place.⁹⁶ However, the test notwithstanding, no act may be regarded as political where the nature of the act is violative of international law and “inconsistent with international standards of civilized conduct.”⁹⁷

Applying the test to Doherty’s offense, Sprizzo found that Captain Westmacott’s murder occurred in the course of the “troubles” in Northern Ireland, thus meeting the context and place prongs of the test.⁹⁸ Sprizzo felt the need for further definition of the organization prong, however, because he was reluctant to confer legitimacy on the PIRA and its goals.⁹⁹ Therefore Sprizzo felt constrained to examine the nature of PIRA, its structure, and its mode of internal discipline, in

95. *Matter of Doherty*, 599 F. Supp. at 274. Judge Sprizzo’s reasoning here discussed late 20th century “offenses” that could be characterized as political under the interpretation urged by Doherty:

Surely the atrocities at Dachau, Aushwitz, and other death camps would be arguably political within the meaning of that definition. The same would be true of My Lai, the Bataan death march, Lidice, the Katyn Forest Massacre, and a whole host of violations of international law that the civilized world is, has been and should be unwilling to accept. Indeed, the Nuremberg trials would have no legitimacy or meaning if any act done for a political purpose could be properly classified as a political offense.

Id. While Judge Sprizzo’s reasoning is wholly in line with the primary purpose of the political offense exception—protection of the right to promote political change—some Circuits have not so viewed the exception. See *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *aff’g* *Artukovic v. Boyle*, 140 F. Supp. 254 (S.D. Cal. 1956), *vacated*, 355 U.S. 393 (1958) (holding that an alleged war criminal’s murder of thousands of civilians during World War II was a political offense).

96. *Matter of Doherty*, 599 F. Supp. at 275.

97. *Id.* at 274.

98. *Id.* at 276.

99. “[I]t would be most unwise as a matter of policy to extend the benefit of the political offense exception to every fanatic group or individual with loosely defined political objectives who commit acts of violence in the name of those so called political objectives.” *Id.* Judge Sprizzo’s careful analysis nonetheless came under attack for “sweepingly conferr[ing] upon the IRA the political and military status that has been denied it not only by the British government but by the government of the Irish Republic. The judge gave American blessing to the myth that the IRA is engaged in a war of liberation to free Ulster from British rule” *Sanctuary for Murderers*, CHI. TRIB., Jan. 12, 1985, at 12.

deciding whether offenses of its members may be deemed political.¹⁰⁰ Sprizzo determined that the PIRA had an organization, internal discipline, and a command structure.¹⁰¹ On these facts, Sprizzo found the PIRA to be such an organization that acts of its members may be considered political.¹⁰²

Furthermore, Sprizzo found the United States' argument that the PIRA was unlikely to achieve its goals irrelevant to the determination of Doherty's crime as a political offense.¹⁰³ Not only would such a determination require premonitory judgments by the court, but, according to Judge Sprizzo, "[h]istory is replete with examples of political and insurrectionary movements that have succeeded in effecting political changes that were believed to be improbable if not impossible."¹⁰⁴

Applying the test, Sprizzo found that the act of murdering an army captain during an uprising designed to effect political change in a place where hostilities were rampant by an active member of an organization devoted to political revolt was a political offense.¹⁰⁵ Furthermore, Judge Sprizzo found that Doherty's act, while "most tragic," did not transcend the limits of international law.¹⁰⁶

Judge Sprizzo's decision marked the fourth time in history that a United States federal court had found an IRA member to be non-extraditable because his offenses were political.¹⁰⁷ While IRA members

100. *Matter of Doherty*, 599 F. Supp. at 276.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 277.

106. *Id.* at 275.

107. See *Matter of Mackin*, 668 F.2d 122 (2d Cir. 1981) (Desmond Mackin, a PIRA member, was indicted in Northern Ireland for attempted murder of a British soldier. He jumped bail and was arrested in the United States. A magistrate found that Mackin's offense fell within the political offense exception, and that he was, therefore, not extraditable); *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986) (Peter McMullen was sought by the United Kingdom for the bombing of a military barracks. A magistrate found the offense of which McMullen was accused to be political); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986) (William Quinn was wanted in the United Kingdom for the murder of a police constable and for sending letter bombs to a Catholic bishop, a judge, and a newspaper publisher. Quinn was also implicated in the failed bombings of a pub, a restaurant, and a railway station in England. A magistrate found that Quinn's offenses did not fall within the political offense exception because, *inter alia*, they were directed at civilians. Quinn challenged the magistrate's ruling through a petition for a writ of habeas corpus to the district court, which held that the magistrate had erred and that Quinn's offenses were political. The Ninth Circuit reversed, and Quinn was extradited).

have been found to be political offenders, members of other terrorist organizations have not been so designated. For example, Palestinian terrorists have not fared well before United States courts. In *Eain v. Wilkes*,¹⁰⁸ the Seventh Circuit found that a member of the Palestine Liberation Organization (PLO) accused of bombing a marketplace in Israel, killing two children and injuring thirty others, was not a political offender.¹⁰⁹ The court differentiated between acts directed at the social structure of a nation and acts directed at its political structure.¹¹⁰ A bombing of civilian targets, despite a political objective, is not a political offense.¹¹¹ Another Palestinian, Mahmoud El-Abed Ahmad, was charged with attacking a bus filled with civilians in the occupied West Bank.¹¹² He too was found to have committed a non-political offense and was certified extraditable.¹¹³

The distinction between the cases of the Irish and Palestinian offenders appears to be that the targets in the cases of the Irish were military, while the Palestinians' targets were civilian. However, under this analysis, Doherty should not be protected by the political offense exception because, while his murder victim was military, he also held a civilian family hostage in their home.¹¹⁴ Yet the district court found Doherty's offenses to be political. In contrast, William Quinn, who, like Doherty, was accused of committing acts against military and civilian targets, was found to be extraditable.¹¹⁵ The conflicting results in the cases of Quinn and Doherty, and the seeming inconsistency of reasoning between the cases of Palestinian and Irish offenders, illustrates the shortcomings of the political offense exception as it is applied in American courts.¹¹⁶ Its application results in an inconsistent body of law that

108. 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

109. *Id.* at 518.

110. *Id.* at 520-21.

111. *Id.* at 504.

112. *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990).

113. *Id.*

114. *Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984).

115. *Quinn v. Robinson*, 783 F.2d 776, 818 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

116. The United States government has sought to clarify the political offense exception in its Supplementary Treaty of Extradition with the United Kingdom. *See supra* note 48. The supplementary treaty excludes from the definition of "political offense" a host of crimes, including hijacking, murder, manslaughter, kidnapping, and use of explosives. *Id.* art. 1. For an analysis of the supplementary treaty, *see Bassiouni, supra* note 74. For a discussion of alternate methods the United States could have adopted to better define the political offense exception, *see Cain, supra* note 74, at 474-

gives little guidance to the judges who must apply the law, to the nations that would seek to extradite offenders under the law, and to the revolutionaries seeking protection under the law. In Doherty's case, the government was confronted by a terrorist whom it could not extradite and an ally government demanding his return. To solve its conundrum the government sought to accomplish through deportation what it could not through extradition.¹¹⁷ The propriety of the government's strategy of appropriating the essentially humanitarian process of asylum to achieve foreign policy goals will be discussed below.

IV. ASYLUM AND DEPORTATION

As discussed above, when the United States instituted deportation proceedings against him, Doherty invoked his right under 8 U.S.C. § 1253(a) and designated his country of deportation as Ireland. In opposing such designation, the United States took the first step in what would become an increasingly politicized effort to return Joseph Doherty to the United Kingdom. The entry of foreign policy considerations into this legal battle made Joseph Doherty something of a *cause célèbre*¹¹⁸ and called into question whether the United States system of

81.

While the treaty will operate to ensure that the United States will not be barred from delivering to the United Kingdom IRA escapees who have committed crimes of violence, the Senate may have gone too far in drafting the treaty to apply retroactively to McMullen, Doherty, and Mackin. District Judge Robert Ward held that McMullen may not be extradited under the supplemental treaty because the treaty as applied to McMullen is an unconstitutional bill of attainder. *Matter of Extradition of McMullen*, 769 F. Supp. 1278, 1290 (S.D.N.Y. 1991), *aff'd*, Nos. 91-2402, 91-2420, 1992 U.S. App. LEXIS 210 (2d Cir. Jan. 7, 1992)(citing U.S. Const. art. I, § 9, cl. 3 and § 10, cl. 1). Judge Ward held that the legislative history of the treaty indicated that the Senate intended to single out McMullen, Doherty, and Mackin for punishment, and therefore the treaty violates the Constitution if applied to McMullen. *Id.* at 1287. The court indicated that the United States probably could not extradite Doherty or Mackin under the new treaty either. *Id.* at 1286, 1289.

117. See Brief of *Amicus Curiae* International Human Rights Law Group at 40-41, *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992) (No. 90-925) [hereinafter IHRLG] (“[T]he Attorney General here is claiming the . . . authority to manipulate the deportation laws to effectively return an alleged malefactor to a foreign government for the express purpose of imposing punishment — without the safeguards and judicial review imposed by congress through extradition treaties and procedures.”).

118. Amnesty International founder and Nobel Prize winner Sean McBride testified against Doherty's extradition. Reuters, Mar. 26, 1984, *available in* LEXIS, Nexis Library, OMNI file. City councils of Long Beach, New York, Baltimore, Chicago, Medford, Mass., and Carteret, N.J. passed resolutions calling for Doherty's release. Elizabeth Wasserman, *Council Urges Release of IRA Prisoner*, NEWSDAY, Sept. 20,

handling asylum cases comports with its obligations under international law.¹¹⁹

A. *Statutory Provisions Relating to Asylum and Deportation*

The Supreme Court reversed the Second Circuit's ruling granting Doherty's motion to reopen his deportation case so that he might apply for asylum and for withholding of deportation, two separate forms of relief.¹²⁰ The attorney general is authorized to withhold deportation of an alien to any country where he would be subject to persecution on account of race, religion, or political opinion.¹²¹ Doherty invoked that provision, proving to the BIA's satisfaction a well-founded fear of persecution for his political opinions if he was returned to Northern Ireland.¹²² In addition to § 1253(h) authorizing withholding of deportation, § 208(a) of the Immigration and Nationality Act of 1952 authorizes the attorney general to grant asylum to an alien who demonstrates a well-founded fear of persecution.¹²³ While both types of relief rest on the alien's ability to prove a well-founded fear of persecution, the attorney general's discretion differs for the two types of relief.

Withholding of deportation is mandatory, providing the attorney general no discretion once the alien has shown a clear probability that he would be persecuted if returned to a particular country, so long as the alien avoids the four exclusion clauses of 8 U.S.C. § 1253(h)(2).¹²⁴ Thus, even if the deportee establishes a prima facie case of persecution, the attorney general may deny withholding if: (1) the alien persecuted others for their political beliefs;¹²⁵ (2) the alien poses a danger to the

1989, at 31. New York City Mayor David Dinkins named a street corner in Manhattan after Doherty. See McCrystal, *supra* note 10, at 23. Doherty was named honorary chairman of St. Patrick's Day parades across the country. See, e.g., Mark A. Uhlig, *Gunman of the IRA: A 5-Year Wait*, N.Y. TIMES, July 4, 1988; *IRA Member Denied Jail Leave for Parade*, CHI. TRIB., Mar. 13, 1988, at 10. Doherty was visited in prison by John Cardinal O'Connor, former hostage Father Lawrence Jenco, and Rev. Jesse Jackson. See McCrystal, *supra* note 10, at 23. Finally, 132 members of Congress filed an *amicus* brief on Doherty's behalf with the Supreme Court. Brief of *Amici Curiae* Members of the United States Senate and Members of the United States House of Representatives, *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992) (No. 90-925) [hereinafter *Members of Congress*].

119. See Protocol, *supra* note 7.

120. *Doherty v. U.S. Dep't of Justice*, INS, 908 F.2d 1108, 1114 (2d Cir. 1990).

121. Refugee Act of 1980, 8 U.S.C. § 1253(h) (Supp. 1991).

122. *Doherty v. INS*, 908 F.2d at 1113.

123. 8 U.S.C. § 1158(a)(Supp. 1991).

124. *Id.*

125. 8 U.S.C. § 1253(h)(2)(A)(Supp. 1991).

people of the United States;¹²⁶ (3) the alien committed a serious nonpolitical crime outside the United States;¹²⁷ or (4) the alien is regarded as dangerous to national security.¹²⁸ Withholding of deportation is a limited form of relief, enjoining deportation only to the nation where the alien faces persecution but not to a non-threatening third nation.¹²⁹

Asylum is a broader form of relief. If granted, the alien may remain in the United States and apply for permanent residence.¹³⁰ A grant of asylum, however, is within the discretion of the attorney general.¹³¹ Therefore, even if the alien meets the statutory definition of "refugee," the attorney general may nonetheless deny asylum.¹³²

B. Attorney General Meese's Order

Attorney General Meese opposed Doherty's designation of Ireland as his country of deportation because it would be prejudicial to the United States' interests for two reasons: (1) United States policy calls for "swift and lawful" punishment of those who commit violence against democratic states, therefore it was in the United States' interests to return Doherty to Northern Ireland where he would be subject to a life sentence; and (2) deporting Doherty to Ireland rather than Northern Ireland would damage United States-United Kingdom relations.¹³³ The Second Circuit held that Attorney General Meese was

126. 8 U.S.C. § 1253(h)(2)(B)(Supp. 1991).

127. 8 U.S.C. § 1253(h)(2)(C)(Supp. 1991).

128. 8 U.S.C. § 1253(h)(2)(D)(Supp. 1991).

129. 8 U.S.C. § 1253(h)(1) (Supp. 1991).

130. 8 U.S.C. § 1158(a) (Supp. 1991).

131. *Id.*

132. *See* 8 U.S.C. §§ 1101(a)(42) & 1158(a) (Supp. 1991).

133. *Doherty v. U.S. Dept. of Justice*, INS, 908 F.2d 1103, 1113 (2d Cir. 1990). Attorney General Meese apparently had good reason to believe that failing to extradite Doherty would injure United States—United Kingdom relations. The United States ratified the supplemental treaty in response to warnings by former Prime Minister Margaret Thatcher that the failure of the United States to extradite IRA members "was becoming a major issue between the two nations." Ronald Sullivan, *U.S. Court Blocks I.R.A. Extradition*, N.Y. TIMES, Jan. 13, 1992, at A7. Former President Reagan expressly stated that he wanted the supplemental treaty passed as repayment for Britain allowing United States bombers to take off from Britain to bomb Libya in 1986. *Reagan Pushes for Extradition Treaty*, UPI, May 31, 1986, available in LEXIS, Nexis Library, UPI file. According to a book review of a new book by Martin Dillon, an expert on the troubles in Northern Ireland, Dillon was present when a British diplomat told Justice Department officials that, "[t]he Prime Minister believes you owe us this one. She allowed your government to use our territory for your F-111s when they were on their way to bomb Tripoli." McCrystal, *supra* note 10, at 23. Dillon

within his authority to oppose Doherty's designation;¹³⁴ Congress gave the attorney general broad discretion to determine what constitutes prejudice to national interests.¹³⁵ The Second Circuit recognized the decision as requiring an "essentially political determination" that is unreviewable by a court.¹³⁶

C. Attorney General Thornburgh's Order

Attorney General Thornburgh denied Doherty's motion to reopen.¹³⁷ Doherty had relied on three grounds for reopening: (1) that Attorney General Meese's decision ordering Doherty deported to the United Kingdom rather than to Ireland was an "unforeseen adverse administrative decision, constituting a 'new fact;'" (2) that the change in Anglo-Irish extradition law also constituted a new fact; and (3) that there was new and material evidence relating to the persecution he would face were Doherty deported to Northern Ireland.¹³⁸ The Attorney General rejected all three grounds.¹³⁹ As for the first argument, the Attorney General found that Meese's order that Doherty be deported to Northern Ireland was not unforeseen because Doherty knew the Attorney General had statutory authority to deny Doherty's designation of Ireland as the country to which he would be deported.¹⁴⁰ Also, the INS had consistently taken the position that it opposed deporting Doherty to any country except the United Kingdom.¹⁴¹ Finally, Attorney General Thornburgh commented that he doubted whether an attorney general's decision to redesignate the country of deportation could ever be considered "new evidence."¹⁴²

As for Doherty's argument that the new Irish law that would allow for his extradition to the United Kingdom was a new fact, Thorn-

also related that as recently as 1990, Prime Minister Thatcher had sent lobbyists to Washington to pressure the Bush administration to return Doherty. *Id.*

134. *Doherty v. INS*, 908 F.2d at 1113-14.

135. *Id.* at 1113; 8 U.S.C. § 1253(a) (Supp. 1991).

136. *Doherty v. Meese*, 808 F.2d 938, 943-44 (2d Cir. 1986).

137. *Doherty v. INS*, 908 F.2d at 1113.

138. *In re Doherty*, Mem. Att'y Gen. (Jun. 30, 1989), *reprinted in* Appendix, *supra* note 46, at 56a-57a. The new evidence Doherty submitted consisted of a report by Amnesty International concerning the treatment of IRA prisoners by British security forces, an affidavit from Doherty's mother Maureen describing recent harassment of her family and friends by the security forces, and an affidavit from Doherty's counsel. *Id.* at 57a-58a.

139. *Id.* at 58a-60a.

140. *See* 8 U.S.C. § 1253(a) (Supp. 1991).

141. Appendix, *supra* note 46, at 58a.

142. *Id.* at 58a.

burgh found that, even if the new law were a change in fact, it was immaterial because Attorney General Meese had ordered Doherty deported to the United Kingdom. As such, any change in Irish law was immaterial.¹⁴³ Also, Attorney General Thornburgh found that, when he designated Ireland as his country of deportation, Doherty knew the change in law was imminent because in 1985 Ireland had expressed its intention to sign the European Convention on the Suppression of Terrorism, which was implemented in Ireland by the Extradition Act of 1987.¹⁴⁴ Finally, Attorney General Thornburgh also rejected Doherty's "new" evidence, finding that it had been available at the time of Doherty's earlier proceedings or that it was immaterial.¹⁴⁵

Attorney General Thornburgh cited as an additional ground for denying Doherty's motion to reopen that Doherty had waived his claims to asylum and withholding of deportation when he conceded de-

143. *Id.* at 59a.

144. *Id.* The Attorney General rested his determination that the change in Irish law was foreseeable on the fact that Ireland had in 1985 announced its intention to sign the European Convention on the Suppression of Terrorism ("European Convention"), which eviscerated the political offense exception to extradition between member states. However, that announcement did not necessarily mean that adoption of the Convention into Irish law was imminent. Ireland signed the European Convention in February, 1986. This had no force or effect in Irish law, however, until the Irish Parliament enacted implementing legislation, and as of 1986 when Doherty designated Ireland, such legislation was very much in doubt. Ireland had agreed to sign the European Convention as part of the Anglo-Irish Agreement of 1985. Anglo-Irish Agreement, Nov. 15, 1985, Ireland-U.K., 24 I.L.M. 1597 ("the Agreement") (The Agreement established a system for addressing political, legal, and security issues in Northern Ireland). However, the Agreement, and thus Ireland's promise to sign the European Convention, was on shaky ground from the beginning. First, Unionists and Loyalists in Northern Ireland launched a campaign of rioting and protests to destroy the Agreement. This strategy had worked to dismantle a similar agreement in 1974. Second, the legality of the Agreement had been challenged in Ulster courts. Third, the opposition leader in Ireland, who was expected to take office during the term of the Agreement, opposed it and announced that he would renegotiate it. Thus, when Doherty designated Ireland in 1986, the continued existence of the Anglo-Irish Agreement was in doubt.

In addition to doubts about the Anglo-Irish Agreement, there was no guarantee that the Irish Parliament would enact the legislation necessary to enact the European Convention. Enactment was conditioned upon changes in the legal system of Northern Ireland, and the Irish Parliament refused to enact the legislation until the reforms took place. Even after the Irish Parliament passed the Extradition Act, the effective date clause contained numerous contingencies, making the effective date uncertain. Thus, it is arguable that Doherty could not have foreseen that Irish law would change so as to mandate his extradition to Northern Ireland. Brief of *Amici Curiae* American Civil Liberties Union and American Immigration Lawyers Association at 14-17, *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992) (No. 90-925) [hereinafter *ACLU*].

145. Appendix, *supra* note 46, at 59a.

portability and designated Ireland in September 1986.¹⁴⁶ The Attorney General described Doherty's decision as "part of a calculated plan to ensure immediate deportation to Ireland before the United Kingdom ratified its treaty with the United States"¹⁴⁷ The Attorney General concluded that it was in the interests of the administrative process to hold to the consequences of his tactical decisions any deportee who makes such decisions with the advice and assistance of counsel.¹⁴⁸

Thornburgh cited, as the final reason for denying Doherty's motion to reopen, that Doherty would not ultimately be entitled to the relief he sought from the new hearing, asylum and withholding of deportation.¹⁴⁹ Dealing with the asylum claim first, Thornburgh pointed out that a grant of asylum is within the attorney general's discretion, and that in his view, Doherty would not be entitled to asylum even if he could make out a prima facie case of his refugee status.¹⁵⁰ First, the Attorney General stated that it was the policy of the United States to ensure that those who commit acts of violence against democratic states should be punished.¹⁵¹ Second, the State Department had specifically stated that Doherty's deportation to the United Kingdom was in the United States' interests.¹⁵² Third, Doherty had waived his asylum claim in 1986.¹⁵³ Finally, Thornburgh found that Doherty's membership and participation in PIRA suggested that he was not "deserving of equitable relief."¹⁵⁴

As for Doherty's withholding of deportation claim, the Attorney General found Doherty would ultimately be ineligible for such relief.¹⁵⁵ Thornburgh held that Doherty would be unable to clear two statutory hurdles: (1) to prove that he was eligible under the inclusion clause of 8 U.S.C. § 1253(h)(1) because he would face persecution on account of his political opinions were he returned to Northern Ireland, and (2) to prove that he was not excluded from withholding because he had committed serious nonpolitical crimes and/or had persecuted others because of their political beliefs.

The Attorney General did not specifically discuss Doherty's claim

146. *Id.* at 60a.

147. *Id.*

148. *Id.*

149. *Id.* at 60a-61a.

150. *Id.* at 82a.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 83a.

that he would be persecuted if he were returned to the United Kingdom. Instead, the Attorney General discussed the two grounds upon which Doherty would be excluded from relief. First, the Attorney General found there were "serious reasons for considering that [Doherty] has committed a serious nonpolitical crime" ¹⁵⁶ Adopting the analysis of the Ninth Circuit in *McMullen*, ¹⁵⁷ the Attorney General found that Doherty's acts satisfied the *McMullen* test for a serious nonpolitical crime in that there was a "close and direct causal link between the crime committed and its alleged political purpose and object," and that either Doherty's acts were disproportionate to the objective or were atrocious or barbarous. ¹⁵⁸ As support for this contention, Thornburgh cited the official position of the United States government that PIRA was a terrorist organization. ¹⁵⁹ Thornburgh considered relevant that, in *McMullen*'s hearing before the BIA, the INS had introduced "substantial evidence" of PIRA's violent attacks against civilians. ¹⁶⁰ The Attorney General concluded that PIRA's "random acts of violence" constituted serious nonpolitical crimes, and, because he had probable cause to believe Doherty had committed such crimes, Doherty was excluded from withholding relief by 8 U.S.C. § 1253(h)(2)(C). ¹⁶¹ The Attorney General found that Doherty's membership and participation in PIRA, standing alone, was sufficient to constitute probable cause. ¹⁶²

The Attorney General also found that Doherty would be ineligible for withholding of deportation because of the second ground, that Doherty had "assisted, or otherwise participated in the persecution of . . . person[s] on account of . . . political opinion." ¹⁶³ The Attorney General once again based his determination on Doherty's membership in PIRA, "an organization that the BIA found has killed or attempted to kill those who politically oppose its activities." ¹⁶⁴ Specifically, the Attorney General cited Doherty's role as a PIRA officer, responsible for distributing weapons and training PIRA soldiers. ¹⁶⁵ Attorney General

156. *Id.*

157. *McMullen v. INS*, 788 F.2d 591, 595, 597 (9th Cir. 1986).

158. Appendix, *supra* note 46, at 84a.

159. *Id.*

160. *Id.* at 85a (citing Matter of *McMullen*, Interim Dec. 2967 (BIA May 25, 1984)).

161. Appendix, *supra* note 46, at 85a.

162. *Id.* at 87a.

163. *Id.* at 89a (citing 8 U.S.C. § 1253(h)(2)(A) (Supp. 1991)).

164. Appendix, *supra* note 46, at 89a (citing Matter of *McMullen*, Interim Dec. 2967 (BIA May 25, 1984)).

165. Appendix, *supra* note 46, at 89a.

Thornburgh concluded, "[t]hese facts establish by ample evidence that [Doherty] would be ineligible for withholding because of his participation in the PIRA's persecution of political opponents."¹⁶⁶ In sum, the Attorney General reversed the BIA and held that Doherty would not ultimately be entitled to withholding or asylum; therefore, he was not entitled to reopen his deportation proceedings.¹⁶⁷

D. *The Second Circuit Reverses Attorney General Thornburgh*

The Second Circuit upheld Attorney General Meese's order redesignating Doherty's country of deportation as the United Kingdom, essentially because the Attorney General's finding that failure to deport Doherty to the United Kingdom would prejudice United States' interests is "essentially unreviewable" by a court.¹⁶⁸ As for the Thornburgh decision, the Second Circuit held that, while the asylum decision is discretionary with the attorney general, his discretion is not completely unfettered. "[I]t is a fundamental principle of our immigration law that the attorney general must base his discretionary decisions only on the 'legitimate concerns' of the relevant statutory provision."¹⁶⁹ Thus, the Second Circuit found that Attorney General Thornburgh had abused his discretion by denying Doherty's motion to reopen.¹⁷⁰

First, the court addressed the Attorney General's statement that "[i]t is unnecessary for me to address (and I do not) the question whether [Doherty] has established a prima facie case for the substantive relief sought."¹⁷¹ Because the denial of a motion to reopen may be upheld only on the grounds relied upon in the Attorney General's decision, Circuit Judge Pratt assumed, as had the BIA, that Doherty had met his burden of demonstrating prima facie eligibility for relief.¹⁷²

Next, the court discussed the Attorney General's finding that Doherty was ineligible for reopening because he had failed to prove a change in circumstances.¹⁷³ The court held that Thornburgh relied on a mistaken view of the law when he determined that both Attorney General Meese's redesignation of the United Kingdom as the country of deportation and the change in Anglo-Irish extradition law constituted

166. *Id.*

167. *Id.* at 91a.

168. *Doherty v. U.S. Dep't of Justice, INS*, 908 F.2d 1108, 1113 (2d Cir. 1990) (quoting *Doherty v. Meese*, 808 F.2d 938, 944 (2d Cir. 1986)).

169. *Doherty v. INS*, 908 F.2d at 1117.

170. *Id.* at 1115.

171. *Id.*

172. *Id.*

173. *Id.*

foreseeable circumstances.¹⁷⁴ The court held that, “[n]either the regulations nor the applicable decisional law require expressly or by implication that the new evidence be ‘unforeseeable’”¹⁷⁵ Further, even if the law required unforeseeability of the new evidence, the court doubted that Doherty’s changed circumstances were as foreseeable as Attorney General Thornburgh purported.¹⁷⁶ The court noted that no attorney general had ever rejected an alien’s designation of country of deportation on the ground of prejudice to United States’ interests, thus the Attorney General’s action could hardly have been foreseeable.¹⁷⁷ The court found the decision of Attorney General Meese and the change in Irish law to be sufficiently changed circumstances to satisfy Doherty’s burden that he produce new evidence and explain his withdrawal of his original application for asylum.¹⁷⁸ The court found that Thornburgh abused his discretion when he denied reopening on the basis of a different view of the facts than the BIA had developed, and because he applied an erroneous requirement of foreseeability.¹⁷⁹

The court next addressed Thornburgh’s finding that Doherty was ineligible for withholding of deportation. The court found that, because withholding of deportation is mandatory once an alien establishes statutory eligibility, a determination of a deportee’s ultimate entitlement to relief is improper in the context of a motion to reopen.¹⁸⁰ The court cited *INS v. Abudu*¹⁸¹ for the proposition that the attorney general’s power to deny a motion to reopen for reasons other than the alien’s failure to establish a prima facie case of entitlement to relief or to provide new, material evidence is restricted to grants of relief that are discretionary: “[A]sylum, suspension of deportation, and adjustment of status, *but not withholding of deportation.*”¹⁸²

Additionally, the court found that the issues raised in Doherty’s claim for withholding necessitated an evidentiary hearing.¹⁸³ A complete factual record was necessary to determine whether Doherty would be persecuted upon his return to Belfast, whether his acts were political or nonpolitical, and whether he had persecuted others because of their

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1116.

178. *Id.*

179. *Id.*

180. *Id.*

181. 485 U.S. 94 (1988).

182. *Id.* at 105 (emphasis added).

183. *Doherty v. U.S. Dep’t of Justice, INS*, 908 F.2d 1108, 1117 (2d Cir. 1990).

political opinions.¹⁸⁴ A hearing was necessary to develop such a record. Therefore, the Attorney General abused his discretion by deciding Doherty's ultimate entitlement to relief without a developed record.¹⁸⁵

The court next addressed Doherty's entitlement to a hearing on his asylum claim, a "more difficult question" because asylum is a discretionary remedy.¹⁸⁶ The court again cited the Supreme Court's holding in *Abudu*, that the attorney general may "leap ahead" to determine whether he would grant the alien asylum; thus, there is no entitlement to a hearing if the attorney general decides that, even after a hearing, he would not grant asylum to the applicant.¹⁸⁷ However, the court also felt the attorney general's discretion had limits. A reviewing court could find abuse of discretion if the attorney general: (1) acted arbitrarily; (2) departed from established policies; (3) discriminated invidiously against a particular group; or (4) gave effect to considerations that Congress could not have intended to make relevant.¹⁸⁸ The court found that, in this case, Thornburgh had abused his discretion by basing his decision on other than "legitimate concerns of asylum."¹⁸⁹

The Second Circuit found Congress intended to insulate the asylum process from political influences.¹⁹⁰ Furthermore, under the United Nations Protocol Relating to the Status of Refugees, to which the United States is a party, a person's status as a refugee is determined without regard to political considerations or the politics of the country from which the refugee had fled.¹⁹¹ Prior to 1980, the attorney general had limitless discretion in granting asylum to refugees. Amid concern that the Attorney General was making asylum determinations in violation of the Protocol by considering political exigencies, Congress revised asylum procedures in the Refugee Act of 1980.¹⁹² By linking eligibility for asylum to the politically neutral definition of "refugee" in

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* (quoting *INS v. Abudu*, 485 U.S. 94, 105 (1988)).

188. *Doherty v. INS*, 908 F.2d at 1117-18.

189. *Id.* at 1118, 1121.

190. *Id.* at 1118; see also *Political Legitimacy*, *supra* note 74, at 458 ("The Refugee Act of 1980 was explicitly designed to remove ideological bias from our immigration law.").

191. *Doherty v. INS*, 908 F.2d at 1118. The Protocol incorporates the 1951 Convention Relating to the Status of Refugees. See *supra* note 7. Article 1 of the Convention defines "refugee" as one who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality." Protocol, *supra* note 7, art. 1.

192. Pub. L. No. 96-212, 94 Stat. 102.

the Protocol, the Act limited the attorney general's discretion by instituting a procedure for adjudicating asylum claims devoid of ideological, geographical, and political considerations.¹⁹³

The Second Circuit found that in the decade since the Refugee Act took effect, denials of asylum have been for legitimate humanitarian reasons rather than to preserve the United States' political relationship with the persecuting state.¹⁹⁴ Attorney General Thornburgh, however, based his decision "in large part on the types of geopolitical concerns that Congress intended to eliminate from asylum cases."¹⁹⁵ As such, the Second Circuit found Attorney General Thornburgh abused his discretion by denying Doherty's motion to reopen his deportation proceedings.

E. The Supreme Court Reverses the Second Circuit

The Supreme Court announced its decision in *INS v. Doherty* on January 15, 1992. In a 5 to 3 decision,¹⁹⁶ the Court found that Attorney General Thornburgh did not abuse his discretion in denying Doherty's motion to reopen.¹⁹⁷

1. The Majority and Plurality Opinions

Chief Justice William Rehnquist wrote the majority opinion. The opinion consisted of four parts, only the first of which commanded a five-vote majority.¹⁹⁸ Part I, in which Justices White, Blackmun, O'Connor, and Kennedy joined, concluded that the Attorney General's discretion to deny motions to reopen was broad. First, the Court noted that the authority to reopen deportation proceedings was not created by statute, but rather "derive[d] solely from regulations promulgated by the Attorney General."¹⁹⁹ The regulation at issue provided that "[m]otions to reopen . . . shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former

193. *Doherty v. INS*, 908 F.2d at 1119.

194. Two types of cases have regularly been denied: (1) cases in which applicants have abused the asylum process by fraudulently circumventing the overseas admissions process; and (2) cases in which the refugee has found safe haven in a third country. *Id.* at 1120-21.

195. *Id.* at 1121.

196. Justice Thomas did not hear the case.

197. *INS v. Doherty*, 60 U.S.L.W. 4085, 4086 (U.S. Jan. 14, 1992).

198. *Id.*

199. *Id.* at 4088.

hearing”²⁰⁰ From that regulation, the Court determined that it was within the broad discretion of the Attorney General to reopen deportation proceedings.²⁰¹

The Court then discussed the nature of the motion to reopen, comparing it to the petition for rehearing or motion for new trial based on new evidence, describing both such motions as “disfavored” for the same reasons.²⁰² The Court recited *Abudu* as holding there were “at least” three grounds upon which the BIA might deny a motion to reopen: failure to establish a prima facie case for relief, failure to introduce new, material evidence, and a determination by the attorney general that the applicant was ineligible for the discretionary relief sought.²⁰³ The Court further held that abuse of discretion was the proper standard of review for denial of motions to reopen regardless of whether the alien was seeking asylum or withholding of deportation.²⁰⁴ Thus, the Court tautologically concluded that, “[T]he proper application of these principles leads inexorably to the conclusion that the Attorney General did not abuse his discretion in denying reopening . . . ,”²⁰⁵ and thereby authorized the attorney general to deny motions to reopen with unfettered discretion.

Justices White, Blackmun, and O’Connor joined Chief Justice Rehnquist in Part II of his opinion. The plurality in Part II addressed the Attorney General’s findings that neither Attorney General Meese’s redesignation of Doherty’s country of deportation nor the change in Anglo-Irish extradition law constituted new facts such as to justify reopening because each event had been foreseeable at the time of Doherty’s first hearing. Recall that the court of appeals had determined that Attorney General Thornburgh’s requirement that the new evidence had been unforeseen at the time of the original proceeding, was contrary to law.²⁰⁶ The Chief Justice found justification for the Attorney General’s foreseeability requirement in 8 C.F.R. § 3.2 (1987), the

200. 8 C.F.R. § 3.2 (1987).

201. *INS v. Doherty*, 60 U.S.L.W. at 4088.

202. *Id.* The “reasons” the Court alluded to came from *Abudu*, which listed one such reason on the pages cited by the Court in *Doherty*: “There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.” *INS v. Abudu*, 485 U.S. 94, 107-08 (1988).

203. *INS v. Doherty*, 60 U.S.L.W. at 4088.

204. *Id.* (quoting *Abudu*, 485 U.S. at 99 n.3).

205. *Id.*

206. *Doherty v. U.S. Dep’t of Justice, INS*, 908 F.2d 1108, 1115-16 (2d Cir. 1990).

regulation authorizing the Attorney General to reopen proceedings.²⁰⁷ Thus, Part II of the opinion upheld the Attorney General's decision, holding that his refusal to reopen a case because material evidence was foreseeable was not an abuse of discretion.

Part III of the Chief Justice's opinion garnered the support only of Justice Kennedy. Part III concentrated on the Attorney General's argument that, by withdrawing his application for asylum and withholding at his first deportation hearing, Doherty had waived his claim to that relief.²⁰⁸ The Chief Justice and Justice Kennedy felt that what Attorney General Thornburgh meant to say was that withdrawing one's claim to gain a tactical advantage was not a reasonable explanation for failing to pursue the claim at an earlier hearing, as required by 8 C.F.R. § 208.11 (1987).²⁰⁹ As such, the Attorney General did not abuse his discretion in holding that Doherty had waived his right to reopen.²¹⁰ According to Chief Justice Rehnquist, the alien who wishes to gain a tactical advantage by withdrawing his application for withholding of deportation should plead in the alternative rather than withdraw his claim.²¹¹ "There was nothing which prevented [Doherty] from bringing evidence in support of his asylum and withholding of deportation claims at his first deportation proceeding, in case the Attorney General did contest his designation of Ireland as the country to which he be deported."²¹²

2. The Dissent

Justice Scalia wrote the dissent, joined by Justices Stevens and Souter.²¹³ Justice Scalia agreed that denying Doherty's motion to reo-

207. *INS v. Doherty*, 60 U.S.L.W. at 4089. "[M]otions to reopen . . . shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2 (1987).

208. *Id.*

209. *Id.* 8 C.F.R. § 208.11 provides that "[A motion to reopen to request asylum] must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding." (quoted in *Abudu*, 485 U.S. at 98 n.2). The Court acknowledged that § 208.11 applied to asylum claims, not claims for withholding of deportation, but repeated *Abudu's* holding that the requirements of § 208.11 regarding asylum and § 3.2 regarding withholding of deportation are often duplicative. *INS v. Doherty*, 60 U.S.L.W. at 4089 n.10.

210. *INS v. Doherty*, 60 U.S.L.W. at 4089.

211. *Id.*

212. *Id.*

213. *Id.* at 4090 (Scalia, J., concurring in the judgment in part and dissenting in part).

pen his proceedings so that he might apply for asylum was justified by the attorney general's broad discretion to deny the ultimate grant of asylum.²¹⁴ However, because the attorney general has no discretion to deny withholding once a deportee has established statutory eligibility, the same reasoning did not apply to the withholding of deportation.²¹⁵ In addition, the dissenting justices felt that Doherty had not waived his right to reopen his proceedings to adjudicate his withholding claim; thus, Attorney General Thornburgh had abused his discretion in denying Doherty's motion to reopen to apply for withholding.²¹⁶

First, the dissent agreed with the court of appeals that, while the decision to reopen is discretionary, "[e]ven discretion . . . has its legal limits."²¹⁷ The standard for reviewing the Attorney General's exercise of discretion in this case, according to the dissent, are "those standards of federal administration embodied in what we have described as 'the 'common law' of judicial review of agency action.'" ²¹⁸ If the Attorney General did so abuse his discretion, the judicial review provisions of the Administrative Procedure Act²¹⁹ require courts to set aside the Attorney General's decision.²²⁰

The dissent then examined the scope of the attorney general's discretion to deny reopening. Justice Scalia contradicted the majority's view that the attorney general's discretion to deny reopening was extremely broad and argued instead that the motion to reopen is more analogous to a remand to further proceedings than a reopening of a court's final judgment.²²¹ The majority, according to Justice Scalia, erroneously viewed the motion to reopen deportation proceedings in the same light as would a court asked to reopen a final judgment — as "a rarely accorded matter of grace."²²² What is nominally a "reopening" is in fact a "remand" in immigration proceedings because reopening is the only way a deportee may raise issues that become relevant only

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* See also *Doherty v. U.S. Dep't of Justice*, INS, 908 F.2d 1108, 1117 (2d Cir. 1990) ("[I]t is a fundamental principle of our immigration law that the attorney general must base his discretionary decisions only on the 'legitimate concerns' of the relevant statutory provision.").

218. *INS v. Doherty*, 60 U.S.L.W. at 4090 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

219. 5 U.S.C. § 706(2).

220. *INS v. Doherty*, 60 U.S.L.W. at 4090 (Scalia, J., concurring in the judgment in part and dissenting in part).

221. *Id.*

222. *Id.*

after an appellate decision.²²³ Reopening to argue newly-relevant issues cannot be denied, according to Justice Scalia, "with the breadth of discretion that the Court today suggests."²²⁴

The second justification offered by the dissent against the majority's grant of unlimited discretion to the attorney general was that the majority misread previous cases.²²⁵ For example, the majority relied upon the statement in *INS v. Rios-Pineda*²²⁶ that the attorney general had broad discretion to deny reopening. The dissent attacked the majority's reliance on *Rios-Pineda* because that case involved a petition to reopen so that the deportee could apply for relief that was itself subject to the attorney general's discretion.²²⁷ In contrast, Doherty had petitioned to reopen to apply for withholding of deportation, which the attorney general may not deny once the deportee establishes statutory eligibility.

The dissent then discussed the reasons why Congress denied the attorney general discretion with respect to withholding of deportation. The attorney general's nondiscretionary duty to withhold deportation of an alien to a country where he or she faces persecution comports with the United States' obligations under the United Nations Convention Relating to the Status of Refugees.²²⁸ Article 33.1 of the Convention imposes an obligation of *nonrefoulement*, or refusal to return aliens to a country where they will be persecuted. After the United States signed the Protocol in 1968, and thereby bound itself by the *nonrefoulement* provisions of the Convention, the attorney general was presumed to honor the dictates of Article 33.1 in administering the law authorizing withholding of deportation.²²⁹ The presumption was replaced by positive law when Congress passed the Refugee Act of 1980, making withholding mandatory upon a showing of statutory eligibility and thus conforming American law to Article 33 of the Convention.²³⁰

Given this history of the withholding provision, the dissent found that the attorney general's discretion to deny withholding claims differs

223. *Id.*

224. *Id.*

225. *Id.*

226. 471 U.S. 444, 449 (1985).

227. *INS v. Doherty*, 60 U.S.L.W. at 4090 (Scalia, J., concurring in the judgment in part and dissenting in part).

228. *Id.* See also Convention, *supra* note 7.

229. *INS v. Doherty*, 60 U.S.L.W. at 4090 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987)).

230. *Id.* (Scalia, J., concurring in part in the judgment and dissenting in part) (quoting *INS v. Stevic*, 467 U.S. 407, 421 (1984)).

substantially from his discretion to deny non-mandatory relief such as asylum.²³¹ In denying a petition to reopen proceedings for nonmandatory relief, the Attorney General was within his discretion in deciding that "Doherty [was] a sufficiently unsavory character not to be granted asylum in this country."²³² However, such a determination is inappropriate in the context of mandatory relief. "The Attorney General could not deny reopening here . . . simply because he did not wish to provide Doherty the relief of withholding."²³³

The dissent next rejected the INS's three procedural bases for denying Doherty's motion to reopen: (1) that Doherty had waived his claim by withdrawing it at his first deportation proceeding, (2) that Doherty failed to present new, material evidence, and (3) that Doherty waived his right to object to the redesignation of the country to which he would be deported by not raising his objection at his first deportation proceeding.²³⁴ As for the argument that withdrawal equalled waiver, Justice Scalia found no statutory or regulatory justification for the INS's reasoning.²³⁵ Justice Scalia also attacked the Part III plurality opinion regarding waiver, in which the Chief Justice and Justice Kennedy suggested Doherty waived his right to withholding because he failed to assert it as soon as possible.²³⁶ According to Justice Scalia: "To state this argument is to expose its frailty; it simply does not follow. Unless there is some rule that says you must object to a country named in any capacity as soon as the opportunity presents itself, there is no apparent reason why the failure to do so should cause the loss of a legal right."²³⁷ The dissent discounted the Chief Justice's explanation that such a rule exists — 8 C.F.R. § 208.11 — because that regulation applies only to asylum, not withholding.²³⁸ As a final rejection of the waiver argument, the dissent contradicted the majority's reasoning that Doherty waived his right to reopen by not providing a reasonable explanation for his failure to argue against the designation of the United Kingdom as the alternate country in his first deportation proceeding:

[I]t was surely arbitrary and therefore unlawful for the Attorney General to say that the following did not qualify: "I did not

231. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

232. *Id.* at 4091.

233. *Id.*

234. *Id.* at 4091-92.

235. *Id.* at 4091.

236. *Id.*

237. *Id.* at 4091-92.

238. *Id.* at 4092.

raise it earlier because I agreed I would abstain from doing so in exchange for acceptance of my concession of deportability and designation of Ireland; only when that acceptance was withdrawn did I withdraw my abstention; and until then the claim had absolutely no practical importance." If that is not well within the term "reasonably explain," the words of the regulation are a sham and a snare.²³⁹

According to the dissent, exercising such a tactical choice did not operate as a waiver.

Next, the dissent addressed the plurality's assertion that the Attorney General properly denied Doherty's motion to reopen because he failed to present new, material evidence. Justice Scalia agreed that the change in Irish extradition law was irrelevant, but disagreed as to the materiality of Attorney General Meese's redesignation of the United Kingdom as the country to which Doherty would be deported.²⁴⁰ Conceding that such a redesignation was not what is typically considered to be a "new fact," the dissent nonetheless argued that the regulations made sense only if such administrative action did constitute a new fact. Otherwise, the regulations would prohibit obviously necessary remands.²⁴¹

To conclude his derogation of the INS's justifications for denying Doherty's motion to reopen, Justice Scalia discussed an argument raised by INS for the first time in oral argument: that under INS procedures Doherty was *required* to raise or waive his claim for withholding during his deportation hearing.²⁴² Aside from the observation that "[t]he belated discovery of this point renders it somewhat suspect," the dissent noted that counsel for INS had not even cited regulatory authority for this proposition.²⁴³ Justice Scalia rejected INS's argument, and determined that denial of a motion to reopen based on the INS's automatic waiver argument would certainly be an abuse of discretion.²⁴⁴

The dissent acknowledged the significance of the unusual facts and procedural activity in the case:

It is also, in my view, an "abuse of discretion," if not indeed

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 4093.

positively contrary to law, to deny "reopening" when the Attorney General's decision substitutes a country that *was* an alternate, at least where, as here, (1) the alien had assurance that the country of primary destination would accept him, and (2) there was no clear indication in the INS's rules or practice that a country not objected to as an alternate could not later be objected to as the primary designation. . . . The term "arbitrary" does not have a very precise content, but it is precise enough to cover this.²⁴⁵

Finally, the dissent discussed the argument that the attorney general may "leap ahead" and decide the ultimate issue of entitlement to the relief requested.²⁴⁶ While Justice Scalia disagreed with the court of appeals' holding that the attorney general may never decide whether the alien is statutorily eligible for withholding without first holding a hearing, the dissent specified that such a determination must be made on the basis of a sufficiently developed record. If the Attorney General had had before him a well-developed record from Doherty's first BIA hearing, he properly could have decided whether Doherty was statutorily eligible for withholding.²⁴⁷ Thus, according to the dissenters, the Attorney General could not deny a deportee's motion to reopen proceedings in order to establish the factual basis for statutory eligibility if the record was not sufficiently developed to make that determination.²⁴⁸

Justice Scalia concluded that, as for Doherty's petition for withholding of deportation, Attorney General Thornburgh had abused his discretion in denying Doherty's motion to reopen. Justice Scalia's reasoning notwithstanding, the Court held that Attorney General Thornburgh had not abused his discretion regarding both the asylum and withholding of deportation claims, thereby tacitly endorsing the attorney general's discretion to consider United States foreign policy concerns in refugee determinations.

V. FOREIGN POLICY IN ASYLUM DECISIONS

While the Supreme Court decided *Doherty* on narrow procedural grounds, the case raises important questions regarding United States

245. *Id.* (emphasis in original).

246. *Id.*

247. *Id.* at 4094.

248. *Id.* The dissent did not decide whether the record before the Attorney General was sufficient to permit him to make such a determination as to Doherty's statutory eligibility; rather, the dissent would have remanded to the Second Circuit for that determination.

immigration law. Justice Scalia's dissent touched on the issue of what is required of United States immigration law under the Convention and the Protocol, but the majority opinion did not mention either agreement. Because these conventions are the law of the land,²⁴⁹ it bears discussion of what is required under the Protocol, whether existing United States statutes and regulations comply, and whether their implementation by the executive branch, as exemplified by the Attorney Generals' conduct in *Doherty*, is consistent with our obligations under international law.

A. Requirements of the Protocol

The Protocol and the Convention "represent the international community's legal, social and humanitarian response to the plight of refugees."²⁵⁰ The principal element of both agreements is the definition of "refugee," a determination based on humanitarian rather than political or geopolitical considerations.²⁵¹ Another central tenet of the Convention and Protocol is the principle of *nonrefoulement*: that contracting states may not, in accordance with the Convention, return an alien to a country where he or she would face persecution.²⁵²

The first step in any proceeding under the Convention is to determine whether the alien is a refugee; the second step is to apply the Convention and the Protocol to the facts of the case.²⁵³ The first step requires fact-finding "adequate to protect this fundamental right."²⁵⁴ Adequate fact-finding is also required to determine whether the refugee would be persecuted if returned to a particular country, the circumstance that triggers a contracting state's duty of *nonrefoulement*.²⁵⁵

249. U.S. Const. art. VI § 2.

250. Brief of *Amicus Curiae* Office of the United Nations High Commissioner for Refugees at 8, *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992) (No. 90-925) [hereinafter UNHCR].

251. *Id.* at 20 ("It is clear that foreign policy considerations are not a factor in the application of the humanitarian definition of refugee.").

252. Convention, *supra* note 7, art. 33.1.

253. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 29 (1979) [hereinafter HANDBOOK]. The HANDBOOK was prepared by the office of the UNHCR, which is responsible for overseeing international protection of refugees. Specifically, UNHCR promotes ratification of the Convention and Protocol and supervises their application by contracting states. UNHCR, *supra* note 250, at 2.

254. Brief for *Amici Curiae* Amnesty International and Amnesty International — USA at 24, *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992) (No. 90-925) [hereinafter Amnesty International].

255. *Id.* at 27.

However, neither the Convention nor the Protocol define specific procedures necessary to ensure adequate fact-finding for these purposes.²⁵⁶ The *Handbook* does set forth certain minimum procedural requirements, including the requirement that aliens have access to the necessary facilities to present their claims.²⁵⁷ Another minimum requirement is a complete personal interview with the applicant.²⁵⁸ Generally, however, the rule is that refugee and asylum status cannot be decided without an opportunity for the alien to present his or her claim to the appropriate authorities.²⁵⁹

B. Statutory Compliance with the Protocol

The Supreme Court has held that Congress, in enacting the Refugee Act of 1980, intended to bring United States law into compliance with the Protocol and the Convention.²⁶⁰ Further, Congress intended the *nonrefoulement* (withholding of deportation) provisions of the law to be construed in accordance with the Protocol.²⁶¹ Thus, in accordance with the Protocol as interpreted by the UNHCR, § 208(a) of the Refugee Act provides for individualized decisionmaking.²⁶² Eligibility for asylum is decided on an "ideologically neutral and apolitical standard."²⁶³ The law as written, therefore, complies with the United States' obligations under the Convention and the Protocol.²⁶⁴

256. *Id.* at 27-28.

257. HANDBOOK, *supra* note 253, ¶ 192.

258. UNHCR, *supra* note 250, at 12 (quoting Executive Committee Conclusions No. 30 (XXXIV), Report of the 34th Session of the High Commissioner's Programme, UN Doc. A/AC 96/631 (1983)).

259. *Id.* at 13. *See also* Amnesty International, *supra* note 254, at 34 ("[I]nternational law implicitly requires that asylum and deportation determinations be made by means of a hearing on the merits.").

260. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). *See also* H.R. Rep. No. 96-608, 96th Cong., 1st Sess. (1979) at 9 (Adoption of the Convention's definition of "refugee" intended to bring United States law into conformity with the Convention).

261. S. Rep. No. 96-590, 96th Cong., 2nd Sess. (1980) at 19.

262. Members of Congress, *supra* note 118, at 7.

263. *Id.* at 8. Prior to 1980, the refugee laws of the United States were politically-driven, limiting eligibility for asylum to refugees from communist or Middle Eastern countries. *Id.*

264. 8 U.S.C. § 1253(a) (Supp. 1991), allowing the Attorney General to redesignate the country to which an alien will be deported if deporting the alien to his or her designated country would be prejudicial to the interests of the United States, does not on its face violate the prohibition against consideration of foreign policy concerns in asylum decisions so long as the principle of *nonrefoulement* is respected. Attorney General Meese, however, ordered Doherty deported to a country where, arguably, he faced persecution. Such an exercise of discretion violated the United States' obligations under

C. *Administrative Compliance with the Protocol*

1. Individualized Factfinding

Having determined that United States law regarding asylum and deportation comports with the obligations imposed by the Convention and the Protocol, the next inquiry is whether the regulations promulgated by the attorney general to implement those laws, and the actual administrative decisions of the BIA and the attorney general, are likewise consistent.²⁶⁵ Returning to the facts of *Doherty*, recall that Attorney General Thornburgh determined that Doherty would be ineligible for the ultimate relief of withholding of deportation because he had committed serious nonpolitical crimes outside the United States and because he had persecuted others for their political beliefs. Recall also that the Attorney General made this decision based largely on the record of PIRA activities developed in the *McMullen* case.²⁶⁶ Basing the decision as to Doherty's ultimate entitlement to relief on facts developed in the case of a *different* alien flatly contradicted the requirements of the Convention.²⁶⁷

2. Balancing of Inclusion and Exclusion Clauses

The Attorney General also failed to follow the prescribed procedure for balancing inclusion and exclusion clauses.²⁶⁸ Article 1F(b) of the Convention permits a contracting state to exclude from refugee status any alien for whom there are serious reasons for considering that the alien committed a serious non-political crime. This provision is duplicated in United States law by 8 U.S.C. § 1253(h)(2)(C). The Attorney General found that Doherty was excluded by § 1253(h)(2)(A) &

the Convention and the Protocol.

265. See IHRLG, *supra* note 117, at 13 ("As an executive official, the Attorney General must conform his actions to the laws and treaties of the United States. Any discretion granted him by Congress with respect to asylum must therefore be exercised in accordance with the Protocol.").

266. See Appendix, *supra* note 46, at 84a-90a.

267. UNHCR, *supra* note 250, at 13. See also ACLU, *supra* note 144, at 24 ("It borders on the Orwellian for the Attorney General to contend that he can deny Doherty's right to a hearing on the basis of a conclusion that can be reached only after a hearing has been conducted.").

268. The inclusion clauses are the definition of refugee and *nonrefoulement*. Aliens meeting these definitions are thereby "included" within the protection of the Convention and the Protocol. The exclusion clauses outline situations in which a bona fide refugee may nonetheless be excluded from protection because of his or her past actions.

(C) and ended the inquiry. However, the *Handbook* requires a weighing of the inclusion clauses. The contracting party must weigh the nature of the offense thought to have been committed by the alien against the degree of persecution the alien fears.²⁶⁹ Thus, even though an applicant falls within the exclusion clause of Article 1F(b) of the Convention and 8 U.S.C. § 1253(h)(2), if the fear of persecution is great, the Convention requires *nonrefoulement*. In addition to foregoing individualized factfinding, the Attorney General failed to balance properly the inclusion clauses against the exclusion clauses.²⁷⁰ While the regulations as written comport with the United States' obligations under the Convention and Protocol,²⁷¹ as applied by the Attorneys General and as sanctioned by the Supreme Court, they fall short.

3. Foreign Policy Considerations

Perhaps the most disturbing aspect of the *Doherty* case is the consideration by Attorneys General Meese and Thornburgh of foreign policy concerns, and the failure of the Supreme Court to put an end to such consideration. Attorney General Meese considered foreign policy when he redesignated the country to which Doherty would be deported from Ireland to the United Kingdom, finding that deporting Doherty to Ireland "would be injurious to our relations with the United Kingdom."²⁷² The Second Circuit upheld the Attorney General's redesignation.²⁷³

Foreign policy considerations next appeared in Attorney General Thornburgh's denial of Doherty's motion to reopen; Thornburgh cited as one the reasons for his decision that Doherty would not ultimately

269. HANDBOOK, *supra* note 253, ¶ 156.

270. See Amnesty International, *supra* note 254, at 47-48.

271. See *INS v. Doherty*, 60 U.S.L.W. at 4090-94 (Scalia, J., concurring in the judgment in part and dissenting in part).

272. Appendix, *supra* note 46, at 126a-27a. Meese based his decision on the strength of a recommendation by the State Department suggesting that Doherty should be returned to the United Kingdom because: (1) "The government and the people of the United Kingdom would not welcome a decision by the Attorney General to deport Doherty elsewhere;" (2) failure to do so would erode confidence in the willingness of the United States to fight terrorism; and (3) the United Kingdom felt so strongly about the case that failure to return Doherty would damage the relationship between the two nations. *Id.* For a discussion of the role of State Department advisory opinions in asylum adjudications, see Richard K. Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 MD. L. REV. 91 (1986).

273. *Doherty v. U.S. Dep't of Justice, INS*, 908 F.2d 1108, 1113-14 (2d Cir. 1990).

be entitled to asylum because it would further United States policy against terrorism to deport Doherty to the United Kingdom, and because it would damage United States-United Kingdom relations not to.²⁷⁴ The Second Circuit found this consideration to be an abuse of discretion.²⁷⁵ Before the Supreme Court, the INS argued that, because the Convention and the Protocol require only *nonrefoulement*, not a grant of asylum, a contracting state properly may consider foreign policy objectives in the asylum decision.²⁷⁶ The Supreme Court did not consider the question.²⁷⁷ While such restraint may have been justified because the Court decided the issue on procedural grounds, the question of whether the attorney general may consider foreign policy considerations in asylum decisions remains open and eventually must be resolved.

The *amici* were unanimous in arguing that the Convention and Protocol prohibit consideration of foreign policy in asylum adjudications.²⁷⁸ To allow such consideration would "render virtually meaningless the politically neutral international definition of 'refugee.'"²⁷⁹ First, the Convention and Protocol list criteria that states should consider in granting refugee status; foreign policy grounds are not included.²⁸⁰ In fact, the drafters of the Convention and Protocol recognized that refugee situations could create foreign policy concerns.²⁸¹ Rather than allowing such concerns to influence asylum decisions, the Convention requires contracting states to "do everything within their power to prevent this problem from becoming a cause of tension between States."²⁸² In so doing, the Convention reaffirms the humanitarian nature of the refugee criteria by regarding the grant of refugee status as a non-political act with no foreign policy consequences.²⁸³

274. *Id.* at 1121.

275. *Id.* The distinction between the Meese order considering foreign policy in redesignating the United Kingdom and the Thornburgh order considering foreign policy in determining that Doherty would not ultimately be entitled to asylum was that the Meese order was expressly authorized by statute, while the Thornburgh order contravened the non-political nature of the Refugee Act. *Id.*

276. Brief of Petitioner at 24-25, *INS v. Doherty*, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992) (No. 90-925).

277. *INS v. Doherty*, 60 U.S.L.W. at 4087-88.

278. ACLU, *supra* note 144, at 25-28; Amnesty International, *supra* note 254, at 50-62; IHRIG, *supra* note 117, at 9-48; Members of Congress, *supra* note 118, at 7-26; UNHCR, *supra* note 250, at 19-24.

279. UNHCR, *supra* note 250, at 20.

280. *Id.*

281. *Id.* at 21-22.

282. *Id.* at 22 (quoting the Preamble to the Convention).

283. *Id.* at 22. IHRIG posed the following hypothetical that illustrates how dan-

Another basis for considering that the Convention and Protocol do not allow states to raise foreign policy concerns in asylum decisions is that Article 3 of the Convention prohibits discrimination against refugees on the basis of country of origin; denial of asylum claims for foreign policy reasons implicates Article 3.²⁸⁴ Thus, the weight of authority precludes foreign policy considerations from entering into asylum adjudications. While United States statutory law conforms to the dictates of the Protocol and the Convention, executive administration and Supreme Court interpretation of the law impermissibly allows foreign policy considerations in asylum adjudications.

VI. ANALYSIS

The Supreme Court decision reversing the Second Circuit and upholding Attorney General Thornburgh's exercise of discretion contravenes international law. Also, the failure of the Supreme Court to rein in the Attorney General's unfettered discretion to consider foreign policy in asylum adjudications virtually guarantees that the Court will be forced to revisit the subject.

By ignoring Congress' expressly stated purpose in enacting the Refugee Act of 1980 — to bring the United States into compliance with the Convention and the Protocol — the Court sanctioned the United States' continued violation of its international obligations. The Court let stand INS procedures that short-circuit due process by erecting "raise it or waive it" hurdles where they do not exist statutorily and that resurrect the politically-motivated asylum laws of the past.

Worse yet, there is still no bar to the INS or the Attorney General making asylum decisions based on foreign policy concerns. Rather than

gerous it would be to allow foreign policy considerations to influence asylum adjudications:

The United Kingdom may consider Mr. Doherty's presence in the United States to be a nuisance, and that may cause some tension with an old ally. But under international law, the British (like the Chinese) have no right to take umbrage at a grant of asylum made on purely humanitarian grounds. If, however, the Attorney General can deny asylum to an allegedly *British* citizen because we have good relations with the United Kingdom, but grant it to a *Chinese* citizen because we disapprove of that government's actions, then the offended government would be absolutely correct in claiming that the grant of asylum is an unfriendly act.

IHRLG, *supra* note 117, at 32-33.

284. Amnesty International, *supra* note 254, at 51. In granting Doherty's motion to reopen, one member of the BIA suggested that the Attorney General's decision to deny reopening was based on Doherty's national origin. Appendix, *supra* note 46, at 114a-15a. See also IHRLG, *supra* note 117, at 20-21.

being an interesting pedagogical exercise to determine the role of foreign policy in refugee law, the question is of critical and timely importance. It is apparent from the case law that courts and administrative boards have excluded certain claimants on the basis of political ideology rather than the statutory standard of well-founded fear,²⁸⁵ and some argue that such invalid considerations continue to be weighed to this day.²⁸⁶ Thus, while *Doherty* may not have been the appropriate vehicle for the Court to address foreign policy-driven asylum decisions, the pressure is mounting to bring United States asylum procedures into compliance with international law.²⁸⁷ If Congress fails to fix the problem by explicitly limiting the attorney general's discretion to deny withholding and reopening, the Court will have to do so eventually.

Perhaps the most unfortunate aspect of the *Doherty* case is that it did not have to drag on for nine years. Concededly, the United States government has a right to refuse to provide a safe haven to terrorists who exploit the political offense exception to extradition. Unfortunately, in its zeal to please the United Kingdom, the United States bypassed the simplest way to ensure *Doherty's* return to Britain — filing the extradition request with another judge. Recall that such a strategy worked in *Ahmad*.²⁸⁸

Assuming that the United States again lost its bid to extradite Do-

285. See *Political Legitimacy*, *supra* note 74, at 450-51.

286. For example, human rights groups have protested the United States' policy of returning Haitian "boat people" who have escaped to the United States since the overthrow of President Jean-Bertrand Aristide. The United States asserts these people are economic, rather than political, refugees. On the other hand, Cuban refugees are still routinely granted political asylum without having to prove individualized fear of persecution. "U.S. officials — at the Immigration and Naturalization Service, the State Department, and Congress — privately admit that the preferential treatment of Cubans over all other nationalities, not just Haitians, is a remnant of the cold war as well as the spoil of the powerful Cuban-American lobby based in southern Florida." Clara Germani, *U.S. in Quandary Over Treatment of Boat People*, CHRISTIAN SCIENCE MONITOR, Feb. 5, 1992, at 1.

287. The Justice Department recently settled a case brought by Salvadoran and Guatemalan refugees who claimed that the INS had treated aliens who came from countries with whom the United States had friendly relations less favorably than aliens who came from countries toward whom the United States was openly hostile, such as Nicaragua. In the settlement agreement, the INS stipulated that, "foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;" and "the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

288. *Ahmad v. Wigen*, 910 F.2d 1063, 1065 (2d Cir. 1990).

herty, it had other options. Because it is illegitimate for the United States to accomplish through deportation what it could not through extradition, the United States would have to abandon its hope of returning Doherty to the United Kingdom. However, under the Convention and the Protocol, such foreign policy considerations have no place in refugee law — the United Kingdom may not regard the grant of asylum as a hostile act *with political consequences*. While concededly this is a legal fiction bearing little resemblance to geopolitical reality, it is nonetheless the law that binds the United States.

As for expelling this “terrorist” from its shores failing extradition, the United States should have proceeded with deportation proceedings *in accordance with the Convention*. The Convention provides for, and United States law embodies, legitimate reasons to exclude refugees. Assuming Doherty had a hearing with the full panoply of procedural rights required by the Convention, he would still have had to establish statutory eligibility for withholding. To do so, he first would have had to prove himself to be a refugee: that he had a well-founded fear of persecution if returned to Northern Ireland. Assuming he made out a prima facie case of refugee status, the INS could then have introduced evidence that Doherty should be excluded because: (1) there were serious reasons for believing Doherty committed serious nonpolitical crimes in Northern Ireland, and/or (2) he persecuted others because of their political beliefs. The second is easier to prove: Doherty confessed to the murder and admitted his membership in a paramilitary organization with a history of persecution of those with divergent views toward British rule of Northern Ireland.²⁸⁹

The *Handbook* provides guidance in deciding the first issue, whether Doherty committed a serious nonpolitical crime in Northern Ireland.²⁹⁰ This prong of the test is a much closer call than the persecu-

289. *Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp. 270, 272-74 (S.D.N.Y. 1984). The United States has demonstrated that it is willing to go to great lengths to provide evidence that Doherty persecuted others. In August, 1990, the American Consul-General in Belfast asked author and journalist Martin Dillon to be a prosecution witness against Doherty. After Dillon expressed reluctance, he was contacted by the office of U.S. Attorney Otto Obermaier in New York. The U.S. Attorney wanted Dillon as an expert witness to testify about the nature of IRA membership. Dillon asked for the file on the case, and it was delivered to him in Belfast within twenty-four hours. The U.S. Attorney then flew Dillon to New York at United States expense to discuss the case. While Dillon never testified, the anecdote illustrates the effort the Justice Department is able and willing to put forth to prove that Doherty is ineligible for relief. McCrystal, *supra* note 10, at 23.

290. Issues to consider include: (1) the nature and purpose of the act committed — for political motives or personal gain? (2) a close and direct causal link between the

tion prong. Even assuming that the BIA would have found Doherty's crimes to have been political, the BIA should then, in accordance with the Convention, have weighed the reasons for exclusion against Doherty's fear of persecution. Even if the BIA were to have found Doherty statutorily eligible for withholding, the law allows, and the Convention does not prohibit, the INS to certify that question to the attorney general, who then would review the now completely developed factual record. The attorney general is the ultimate arbiter of whether an alien meets the statutory requirements for withholding. The Convention does not forbid, and even Justice Scalia would not object to, the attorney general overturning a decision of the BIA and finding Doherty ineligible for withholding, so long as the attorney general considered the fully and fairly developed factual record and did not consider such illegitimate concerns as foreign policy.

However, the government still would have had an option if the Attorney General could not, after reviewing the record, find that the BIA erred in finding Doherty eligible for withholding. Such a finding would have meant only that the United States could not deport Doherty to the United Kingdom. Recall that the Convention requires only *nonrefoulement*, not automatic grants of asylum for every refugee. Thus, the United States could have deported Doherty to a third country where he would not face persecution. Such a solution may not have satisfied the administration's desire to placate the United Kingdom, but it could have furthered United States policies of fighting terrorism by ensuring that such actors do not find safe haven on our shores, and, more importantly, it would have conformed to our obligations under international law.

VII. CONCLUSION

Despite the founding fathers' desire to protect those who advocate political change in other nations, few would contend that protection was designed to provide refuge to those who would bomb a civilian

crime committed and its political purpose, (3) the balance between the political element and the common law character of the act, and (4) whether the acts, even if politically motivated, were nonetheless atrocious. HANDBOOK, *supra* note 253, ¶ 152. Recall that Judge Sprizzo based his decision that Doherty's crimes were political on similar grounds. *Matter of Doherty*, 599 F. Supp. at 275-76. However, Judge Sprizzo's determination would not bind another immigration judge. *McMullen v. INS*, 788 F.2d 591, 597 (9th Cir. 1986) (extradition determinations have no *res judicata* effect in subsequent judicial proceedings); see also *Ahmad v. Wigen*, 910 F.2d 1063, 1063 (2d Cir. 1990).

bus,²⁹¹ send letter bombs to clergymen,²⁹² detonate a bomb in a crowded marketplace,²⁹³ or hold an innocent family hostage in its home in order to mount an ambush.²⁹⁴

Joseph Doherty is a convicted murderer, despite the political motivations of his act. While sending Doherty to a third country would not have ensured his punishment, a declared policy goal of the United States, it would have enabled the United States to respect the philosophy behind the political offense exception and the humanitarian purposes of refugee law while refusing to become a safe haven for terrorists.

Attorney General William Barr had an opportunity to correct the errors of his predecessors by granting Doherty a hearing despite the Court's ruling. Such an action by the Attorney General would have preserved the United States' integrity in the community of nations and reaffirmed our commitment to international law. Instead, Attorney General Barr perpetuated the corruption of United States asylum laws to accomplish a prohibited extradition in contravention of our international obligations.

Even though Doherty is back in the United Kingdom, many questions raised by his case remain. Irish citizens from both sides of the conflict continue to arrive in the United States,²⁹⁵ and it is only a matter of time before another Joe Doherty appears before a United States court. While the Supplementary Treaty of Extradition between the United States and the United Kingdom has addressed the extradition issue, the deportation and asylum questions raised in *Doherty* remain viable. Furthermore, the recent situation involving Haitian refugees demonstrates that foreign policy considerations are alive and well in

291. See *Ahmad v. Wigen*, 910 F.2d 1063 (2d Cir. 1990).

292. See *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

293. See *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

294. *Matter of Doherty*, 599 F. Supp. at 272.

295. For example, in January, 1992, an immigration judge in New York granted political asylum to Sean Mackin. Mackin, a Catholic, had left Belfast with his family in 1984, fleeing threats from British security forces. Mackin had been arrested more than 50 times in Belfast without ever having been convicted of a crime and had been severely beaten by prison guards. As with Joe Doherty's case, the United Kingdom pressured the United States to reject Mackin's asylum request. Mackin was the first Irish immigrant ever granted political asylum. See Charles Bremner, *Belfast Man Wins Asylum in America*, THE TIMES (London), Jan. 9, 1992, available in LEXIS, Nexis Library, MAJPAP file; M. P. McQueen, *Political Asylum for Irish Immigrant*, NEWSDAY, Jan. 8, 1992, at 7.

United States asylum adjudications. Three attorneys general and the Supreme Court passed on the opportunity to bring the United States into compliance with international law in *Doherty*; the chance will surely come again.

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