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The Doctrine of Specialty: An Argument for a More Restrictive Rauscher Interpretation After State v. Pang

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The Doctrine of Specialty: An Argument for a More Restrictive *Rauscher* Interpretation After *State v. Pang*

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I. INTRODUCTION

On January 5, 1995, four Seattle firefighters died fighting an arson fire.[1] Although the prime suspect, Martin Shaw Pang, was indicted in March of 1995, he did not enter into a plea agreement until February of 1998.[2] The three years between the indictment and plea were marked by Pang's flight to Rio de Janeiro, Brazil, his subsequent extradition to the United States, and a furious legal battle between his attorneys and the King County Prosecutor's Office over an element of extradition law known as the doctrine of specialty.[3]

Although the United States sought Pang's extradition for arson and four counts of felony murder, the Federal Supreme Court of the United States of Brazil granted extradition only for the arson count.[4] Upon Pang's return to Seattle he moved to sever or dismiss the murder counts from the indictment, arguing that under the doctrine of specialty he could only be charged with those offenses for which extradition was granted.[5] The Supreme Court of the State of Washington agreed with Pang, noting that the extradition order was clear and unambiguous, and that Brazil did not otherwise consent to Pang's prosecution for the felony murder charges.[6] In so holding, the *Pang* court became one of the few courts to strictly follow the specialty doctrine and hold that

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1. *See* Thomas W. Haines et al., *Four Seattle Firefighters Killed: Homicide Investigators Seek Clues in Deadliest Fire Ever for Department*, SEATTLE TIMES, Jan. 6, 1995, at A1 [hereinafter *Four Seattle Firefighters Killed*].

2. State v. Pang, 132 Wash. 2d 852, 940 P.2d 1293, 1295, 1997 WL 425977 (*en banc*) (pagination to Washington Reports, 2d Series, not yet available), *opinion modified and corrected by* State v. Pang, 948 P.2d 381 (Wash.) (citation to Washington Reports, 2d Series, not yet available) *cert denied* in Washington v. Pang, 118 S. Ct. 628 (1997). *See* Jack Broom & Eric Nalder, *Pang Plea Agreement: 'Finality,'* SEATTLE TIMES, Feb. 19, 1998, *available at* Seattle Times Web Archive <http://www.seattletimes.com> (visited July 25, 1998) (plea entered Feb. 19, 1998).

3. *See* Pang, 940 P.2d 1294-1314. In essence, the doctrine of specialty dictates that a state requesting extradition may prosecute an extradited person only for those offenses for which extradition is granted. *See* United States v. Rauscher, 119 U.S. 407, 419-20 (1886); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: U.S. LAW AND PRACTICE 429 (3d ed. 1996). If the state from which extradition is requested consents to prosecution on additional offenses then the doctrine does not apply. *See id.* at 429. The doctrine also allows the requested state to place limits on the punishment that may be meted out upon conviction. *See id.* at 434. The doctrine is also known as the principle of specialty, and specialty may be spelled "speciality." *See id.* at 429.

4. *See Pang*, 940 P.2d at 1325.

5. *See id.* at 1294-95.

6. *See id.* at 1325.

an extradited person cannot be charged with offenses other than those for which the extradition was granted.[7]

This Note examines how U.S. courts have weakened the specialty doctrine in treaty-based extradition to the United States. Although courts have consistently paid lip service to its vitality, the doctrine of a specialty has often been set aside to allow prosecution for additional offenses.[8] This Note examines the primary line of inquiry that has been used by courts to interpret the doctrine, and suggests that it is incorrect. A correct interpretation of the doctrine requires a *presumption* that the extradited person may not be charged with additional offenses.

Part II of this Note will outline the doctrine of specialty and the role it plays in international extradition. Part III will present the development of the modern interpretation of the doctrine. Part IV will highlight the problems created by this loose interpretation using *State v. Pang* as a paradigm. Part V will present a more restrictive interpretation: when extradition is granted pursuant to treaty it should be presumed that the extradited person may not be prosecuted for additional offenses.[9]

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7. *See generally* Johnson v. Browne, 205 U.S. 309, 318-22 (1907); *Rauscher*, 119 U.S. 407, 429-30; United States v. Khan, 993 F.2d 1368, 1374-75 (9th Cir. 1993).

8. For stronger specialty analyses, see *United States v. Puentes*, 50 F.3d 1567, 1572-76 (11th Cir. 1995), and *Khan*, 993 F.2d 1368, 1373-75. A person who is the subject of extradition proceedings is termed the "relator." The country seeking extradition is the "requesting" state, while the country asked to yield the relator is the "requested" state.

9. This Note will not address the dual criminality requirement of the specialty doctrine, nor will it address the impact of extra-territorial kidnapping upon the extradition process after *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188 (1992). In addition, this Note will not address the post-extradition standing of the relator to assert the rights of the requested state in United States courts. The portion of the specialty doctrine addressed herein is the interpretation of the doctrine after a challenge based on specialty has been raised and heard by the court, no matter who the petitioner. For a discussion of the relator's ability to assert the rights of the requested state, see Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of* United States v. Rauscher, 34 VA. J. INT'L L. 71 (1993); Mary-Rose Papandrea, Comment, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship between the Individual and the Sovereign*, 62 U. CHI. L. REV. 1187 (1995); David Runtz, Note, *The Principle of Specialty: A Bifurcated Analysis of the Rights of the Accused*, 29 COLUM. J. TRANSNAT'L L. 407 (1991).

II. EXTRADITION AND THE DOCTRINE OF SPECIALTY

A. *Extradition*

Extradition was first developed in ancient times as a tool to maintain the internal legal order of states.[10] As such, the focus of extradition was almost exclusively upon those persons who threatened a state's domestic legal order, including religious and political offenders.[11] Because the activities of common criminals did not typically impact the sovereign or public order, the extradition of these persons received low priority.[12]

One prominent authority has identified four periods of extradition history:

> (1) ancient times to the seventeenth century—a period revealing an almost exclusive concern for political and religious offenders; (2) the eighteenth century and half of the 19th century—a period of treaty-making chiefly concerned with military offenders . . .; (3) 1833 to 1948—a period of collective concern for suppressing common criminality; and (4) post-1948 . . . which ushered in a greater concern for protecting human rights of persons and revealed an awareness of the need to have international due process of law regulate international relations.[13]

Modern extradition practice dates from the eighteenth century, when European states began to develop extradition as a tool to engender peaceful relations between states.[14] This practice developed further in the mid-to-late nineteenth century when states began to express a collective concern for suppressing criminal activity.[15] The United States did not extradite anyone during the eighteenth and first half of the nineteenth centuries because there was only one extradition treaty in force (with Great Britain) and Congress had failed to pass any legislation implementing the treaty or authorizing extradition in the absence of a treaty.[16] By comparison, in 1995, the United States had extradition treaties with 103 states.[17]

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10. *See* BASSIOUNI, *supra* note 3, at 4.
11. *See id.* at 3-4.
12. *See id.*
13. *Id.*
14. *See id.* at 4-5; *see also* GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 10 (1991).
15. *See* BASSIOUNI, *supra* note 3, at 3.
16. *See* MICHAEL ABBELL & BRUNO A. RISTAU, 4 INTERNATIONAL JUDICIAL ASSISTANCE CRIMINAL: EXTRADITION 20-21 (Supp. 1995).
17. *See id.* at 55.

Although contemporary extradition practice is still concerned with the enforcement of criminal law, extradition remains the exception rather than the rule in international relations.[18] This is in part because extradition is the antithesis to the traditional right of a nation-state to grant asylum or shelter from prosecution to any person within its territory.[19] However, because the majority of criminal activity is still regulated by the criminal law of individual states,[20] extradition is necessary to allow a state with jurisdiction over a crime to gain personal jurisdiction over an accused person not within its territorial jurisdiction.[21]

The structure of international extradition emphasizes that it is an exception of limited application. Contemporary extradition practice holds that there is no duty to extradite in the absence of an extradition treaty.[22] Even when extradition is sought pursuant to a treaty, most states view extradition as within the discretion of the requested state.[23] Although the human rights theory of international relations advocates procedural safeguards in extradition to protect the rights of an extradited person, contemporary practice is predominantly influenced by realist international political theory and extradition is viewed as a process that protects the rights of states that are party to an extradition treaty.[24] In this framework, the rights of the accused are essentially those of the requested state and are strictly tailored to the specific protections granted in the particular treaty at issue.[25] Extradition terminology reflects this bias, as the state

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18. *See* United States v. Alvarez-Machain, 504 U.S. 655, 664 (1992); BASSIOUNI, *supra* note 3, at 383.

19. *See* BASSIOUNI, *supra* note 3, at 2.

20. *But see generally* LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW (1997). "International criminal law has expanded more in the last fifty years than in the previous five hundred." *Id.* at 2.

21. *See* I. A. SHEARER, STARKE'S INTERNATIONAL LAW 210 (11th ed. 1994); BASSIOUNI, *supra* note 3, at 5-6.

22. *See* BASSIOUNI, *supra* note 3, at 6; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 474, introductory note at 557 (1987) [hereinafter RESTATEMENT]. Other bases of extradition include comity and reciprocity. Although reciprocity in this context is an independent ground for extradition, it is also a sub-component of treaty-based extradition. *See infra* note 60 and accompanying text; *see also* BASSIOUNI, *supra* note 3, at 383.

23. *See* RESTATEMENT, *supra* note 22, § 475, at 562 (stating that even when a bilateral extradition treaty to which the United States is a party states that the U.S "shall" extradite, the executive has some discretion as to whether extradition will be granted); BASSIOUNI, *supra* note 3, at 7.

24. *See* Papandrea, *supra* note 9, at 1196-98; *see also* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 188-90 (1998) (noting that extradition is traditionally based on states' rights).

25. *See* United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986) (noting that treaty "protection exists only to the extent that the surrendering

asking for extradition is the "requesting" state, the state of refuge is the "requested" state, and the subject of extradition is termed the "relator."[26]

B. *Treaty Interpretation*

> *"There is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation."*[27]

U.S. extradition law is statutorily based, but relies on bilateral treaties for the creation and activation of any duty to extradite.[28] As a result, there must typically be an extradition treaty before extradition proceedings may be commenced.[29] This is consistent with well-established principles of international law, which provide that a nation-state does not have an obligation to surrender a person from its territory to another state absent a

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country wishes," and that "the person extradited may raise whatever objections the rendering country might have").

26. *See generally* BASSIOUNI, *supra* note 3.

27. LORD MCNAIR, QC, LL.D., B.F.A., THE LAW OF TREATIES, 1961, at 364 (1961).

28. *See* 18 U.S.C. §§ 3181-3189 (1994).

29. *See* 18 U.S.C. §§ 3181, 3184 (1994). 18 U.S.C. § 3181(b) creates a specific exception to the treaty requirement:

> (b) The provisions of this chapter shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies, in writing, that—
>
> (1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and
>
> (2) the offenses charged are not of a political nature.

18 U.S.C. § 3181(b) (1994); *see also* BASSIOUNI, *supra* note 3, at 53-54, 53 n.114 (describing one specific case where the United States granted extradition absent a treaty, and referring to two others in treatises) (citing JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 33-35 (2 vols. 1891); 6 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 744-45 (1968)). Although most extradition treaties create a mandatory obligation to extradite, the United States extradition statute may be construed as allowing the executive to have the discretion to extradite despite a formal approval by the judiciary. *See* RESTATEMENT, *supra* note 22, § 475, at 562; BASSIOUNI, *supra* note 3, at 767-68 (citing Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1316 (1962); Tracey Hughes, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 B.C. INT'L & COMP. L. REV. 293, 298-99 (1986)).

treaty provision.[30] The absence of such an obligation is an extension of a state's absolute domestic sovereignty over all persons within its territory, which necessarily results in the exclusion of other states, and the creation of asylum for persons prosecuted elsewhere.[31] States have consistently asserted their right to extend asylum; absent a treaty, a state is under no obligation to forego granting asylum, of retract an offer of asylum.[32]

Under the U.S. constitutional framework, treaties become part of U.S. domestic law, equivalent to statutes, and are subordinate only to the Constitution.[33] As such, treaties cannot authorize what the Constitution does not allow.[34] The Constitution provides that treaties are the law of the land, equal

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30. *See* United States v. Rauscher, 119 U.S. 407, 411-12 (1886); RESTATEMENT, *supra* note 22, § 475 at 564 (citing Factor v. Laubenheimer, 290 U.S. 276, 287 (1933)); BASSIOUNI, *supra* note 3, at 6; CAPTAIN EDWIN F. GLENN, HAND-BOOK OF INTERNATIONAL LAW 85 (1895).

31. *See* OPPENHEIM'S INTERNATIONAL LAW § 402, at 901 (Sir Robert Jennings, QC, & Sir Arthur Watts, KCMG, QC, eds., 9th ed., 1992) [hereinafter OPPENHEIM'S]. This Note uses asylum in its general sense, meaning the right of a state to allow a person to remain within its borders. There are numerous theories of jurisdiction that states utilize in order to assert jurisdiction over an accused person. *See* BASSIOUNI, *supra* note 3, at 295-381; SHEARER, *supra* note 21, at 183-217; Adelheid Puttler, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad*, in EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 103, 105-15 (Karl M. Meessen, ed., 1996). Prominent examples include territorial jurisdiction, which is based on the physical location of the crime within the boundaries of the state. *See* BASSIOUNI, *supra* note 3, at 297-300; SHEARER, *supra* note 21, at 184-210; Puttler, *supra*, at 106. Passive personality jurisdiction is asserted when the victim of a crime is a national or citizen of the state seeking to acquire the accused. *See* BASSIOUNI, *supra* note 3, at 349-53; SHEARER, *supra* note 21, at 210-11. Active personality jurisdiction provides that whenever a citizen or national of a state commits a crime that state has jurisdiction. *See* BASSIOUNI, *supra* note 3, at 346-49; SHEARER, *supra* note 21, at 210. Universal jurisdiction provides that a state may prosecute a person for an act internationally regarded as a crime regardless of where the act took place, and regardless of the law of the state where the act took place. *See* BASSIOUNI, *supra* note 3, at 356-67; Puttler, *supra*, at 110-12.

32. *See* GLENN, *supra* note 30, at 85-86; OPPENHEIM'S, *supra* note 31, § 402, at 901.

33. U.S. CONST. art. VI, cl. 2. *See also Rauscher*, 119 U.S. at 419 ("A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.").

34. *See* Reid v. Covert, 354 U.S. 1, 16-17 (1957). "It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions . . . ." *Id.* at 17 (citing discussion in the Virginia Convention on the adoption of the Constitution, 3 ELLIOT'S DEBATES 500-19 (1836)).

to Federal statutes in weight.[35] In the event that a statute conflicts with a treaty provision, the dates of enactment of the treaty and statute become dispositive; absent clear indication otherwise, a subsequently enacted statute will overrule an inconsistent treaty provision.[36] Although treaty creation (via negotiation and ratification) is an exclusive federal power allocated to the executive and legislature,[37] treaty interpretation is allocated to the judiciary.[38] An interpretation of a treaty by a federal court is binding upon the other branches of the federal government and the states.[39]

Federal and state courts have not utilized uniform and systematic methods to interpret treaties,[40] and a few courts have added to the confusion by utilizing international treaty interpretation methods as set forth in the Vienna Convention on the Law of Treaties.[41] Courts tend to use particular interpretive

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35. U.S. CONST. art. VI, cl. 2.

36. *See* BASSIOUNI, *supra* note 3, at 73; William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 289 (1998) (citing The Head Money Cases, 112 U.S. 580, 599 (1884)).

37. *See* BASSIOUNI, *supra* note 3, at 68.

38. *See* U.S CONST. art. III, § 2, cl. 1 (the jurisdiction of the courts extends to "all Cases, in Law and Equity, arising under . . . . Treaties made, or which shall be made, under . . . ."); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treates [sic] . . . ."); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("courts interpret treaties for themselves"); Harold Hongju Koh, *The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?*, 15 YALE J. INT'L L. 331, 333 (1990) ("the final authority to interpret the treaty rests . . . with the judiciary . . . .").

39. *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953, 956-57 (1994); Koh, *supra* note 38, at 333; Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y. 559, 677 (1996).

40. "[There is a] poverty of treaty construction in this country. There is no intelligible set of principles for determining meaning from treaty texts." Bederman, *supra* note 39, at 954. Nor, traditionally, has there been uniformity and consistency on an international basis: "Customary international law has not developed rules and modes of interpretation having the definiteness and precision to which this section aspires." RESTATEMENT, *supra* note 22, § 325, com. a., at 196. Bederman has suggested that this may be because of the way treaties are created (initiated by the executive with limited legislative oversight) and because of their unique status as concurrent international and domestic law. Bederman, *supra* note 39, at 954.

41. *See* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 308-09, 326-52 (1988) (discussing seven cases where U.S. courts invoked the Vienna Convention to assist with treaty interpretation). The Vienna Convention on the Law of Treaties has been described as the codification of rules of treaty interpretation that existed in customary international law as well as the reflection of progressive developments in international law. *See id.* at 287. *See also* Vienna Convention on

methods as guides rather than as obligatory legal norms.[42] Although the type of international agreement may have an impact on which interpretive method a court applies,[43] most courts utilize a combination of textual and intent-oriented analysis.[44]

1. Textual Approach

As suggested by the name, courts using a textual approach to analyze a treaty initially look to the text of the treaty to ascertain the plain meaning of the words.[45] If the text of the treaty is clear, no other interpretive methods may be used.[46] However, if the language is susceptible to more than one meaning, a court will move beyond the text of the treaty.[47] In determining how the language of the text is to be construed, the context of the

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the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980), *reprinted in* 8 I.L.M. 769 (1969) [hereinafter Vienna Convention]. Although the United States is a signatory, the agreement has not been ratified by the Senate. *See* Frankowska, *supra*, at 286, 295-98 (discussing the initial ratification proceedings and subsequent inaction). The Restatement chose to follow §§ 31 and 33 of the Vienna Convention rather than attempt to articulate the methods employed by U.S. courts. RESTATEMENT, *supra* note 22, § 325, at 196-97. The comment states that the section "represents generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis." *Id.*, cmt. a., at 196. *See id.*, cmt. g., at 198, and reporters note 4, at 200 (comparing the international and United States approach). A primary approaches difference between the United States and the Vienna Convention is the willingness of U.S. courts to look outside the text of a treaty in search of intent, and "embrace a meaning advanced by the executive branch that may not accord with international expectations or the canon of liberal interpretation and good faith." Bederman, *supra* note 39, at 972. *See infra* note 56 for the definition of rule of liberality.

42. *See* EDWARD SLAVKO YAMBRUSIC, TREATY INTERPRETATION: THEORY AND REALITY 26 (1987).

43. This is because courts have tried, in addition to labeling international agreements *sui generis*, to compare international agreements with domestic contracts and legislation to determine the appropriate interpretive rule. *See* Bederman, *supra* note 39, at 963. Courts have found similarity between both domestic concepts and several different types of international agreements. *See id.*

44. *See id.* at 964. The classification of methods into these two approaches is by no means a settled paradigm. *Compare id.* at 964-72 *with* BASSIOUNI, *supra* note 3, at 75-93. While both authors articulate many of the same approaches to interpretation, it is clear that there is no particular hierarchy or paradigmatic approach beyond an initial consideration of the text and the intent of the parties. *See also* P.K. MENON, THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS 69-77 (1992) (examining international schools of thought on treaty interpretation and identifying subjective (intent), teleological, and textual approaches).

45. *See* BASSIOUNI, *supra* note 3, at 75; Bederman, *supra* note 39, at 964.

46. *See* Bederman, *supra* note 39, at 965 (citing Maximov v. United States, 373 U.S. 49, 54 (1963)).

47. *See id.*

language is considered.[48] Moreover, a court may also disregard the plain meaning of the text if the plain meaning results in a reading inconsistent with the intent or expectations of the party states.[49]

2. Intent-Oriented Approach

The intent-oriented approach requires the court to interpret the treaty in a manner that effectuates the intentions of the parties.[50] If the intent is not clear from the language of the text, then courts may look to extrinsic sources for evidence of the parties' intent.[51] Two extrinsic sources that have been used by courts include the negotiating history of the agreement and subsequent practice by parties under the treaty.[52]

3. Application of Interpretive Methods

Both of the above methods are used and blended with each other by courts seeking to properly interpret treaties.[53] Both will also be modified by other interpretive canons that are used by U.S. courts. For example, courts typically give significant deference to senatorial and Executive interpretations of international agreements.[54] Courts also apply the rule of liberality, and assert that treaties must be construed in good faith.[55] The text of the treaty is usually interpreted in a fashion

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48. *See* Air France v. Saks, 470 U.S. 392, 396-97 (1985). This approach is similar to the Vienna Convention, which provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention, *supra* note 41, art. 31, para. 1.

49. *See Maximov*, 373 U.S. at 54.

50. *See* Valentine v. United States ex rel Neidecker, 299 U.S. 5, 10 (1936); BASSIOUNI, *supra* note 3, at 75 (citing Sumitomo Shoji American Inc. v. Avagliano, 457 U.S. 176 (1980)); Bederman, *supra* note 39, at 970.

51. *See* Bederman, *supra* note 39, at 970.

52. *See id.* at 970-71.

53. *See, e.g., Air France*, 470 U.S. 392.

54. *See* Bederman, *supra* note 39, at 957-63; Rogoff, *supra* note 39, at 566. *See also* Bederman, *supra* note 39, at 958 ("[A]n otherwise valid and *express* senatorial declaration about the meaning of a treaty provision, transmitted to the President with its advice and consent, is . . . dispositive on courts later construing the agreement.") (citing Northwest Bands of Shoshone Indians v. United States, 324 U.S. 335, 351-53 (1945); Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869); RESTATEMENT, *supra* note 22, § 314, cmt. d.)).

55. *See* Bederman, *supra* note 39, at 966-70. The rule of liberality requires that treaties be liberally construed. "[I]f a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933). *See also* Kolovrat v. Oregon, 366 U.S. 187, 192-93

that is consistent with the other terms of the treaty.[56] On occasion a court will use canons of statutory interpretation, including *expressio unius exclusio est alterius* and *eiusdem generis*.[57] Finally, some courts utilize the interpretive criteria set forth in the Vienna Convention on the Law of Treaties.[58]

C. *The Doctrine of Specialty*

U.S. law has five substantive requirements that must be satisfied for extradition to and from the United States: (1) reciprocity; (2) double criminality; (3) an extraditable offense; (4) non-inquiry; and (5) specialty.[59]

The first, reciprocity, essentially requires that either (a) the states involved in an extradition reciprocally recognize their respective judicial processes, or (b) symmetry exists between the

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(1961). "We cannot accept the state court's more restrictive interpretation when we view the Treaty in the light of its entire language and history. This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect." *Id.* (citing Bacardi Corp. v. Domenech, 311 U.S. 150, 163 (1940); Jordan v. Tashiro, 278 U.S. 123, 128-29 (1928)). Bederman is of the opinion that the rule of liberality and good faith may collapse into each other and form a teleological inquiry, Bederman, *supra* note 39, at 966-70, although the Restatement notes that this approach is disfavored. RESTATEMENT, *supra* note 22, § 325, reporters n.4 at 200.

56. *See* BASSIOUNI, *supra* note 3, at 84.

57. *See id.* at 88-91. *Expressio unius exclusio est alterius* posits that the inclusion of one thing (in the text) implies the exclusion of that which is not included. *See id.* at 88-89. *Eiusdem generis* posits that when general words in the text are followed by specific words, the specific words will control the general words. *See id.* at 89-91.

58. *See* Frankowska, *supra* note 41, at 308-09, 326-352; Bederman, *supra* note 39, at 955, 974. "[A] trend is developing for courts to at least consider the interpretive rules of the [Vienna Convention]. As yet, there exists little consistency in applying [it]." *Id.* at 956.

59. *See* BASSIOUNI, *supra* note 3, at 384. The requirements are applied at different stages of the extradition process. *See id.* Reciprocity, double criminality, extraditable offense status, and non-inquiry are typically applied at the extradition proceeding that is held immediately after a request for extradition has been made. *See id.* at 388-89. Accordingly, these are most often applied in U.S. courts when the United States is the requested country. Only if these elements are satisfied will extradition be granted. *See id.* at 384. For extradition to the United States, a similar type of hearing is held and these elements are applied by the appropriate foreign authority. By contrast, specialty is typically applied after extradition has occurred, as the relator is seeking to challenge his prosecution for a particular offense for which extradition was not granted. *See id.* at 429. Such a challenge will probably be heard in a U.S. court. It should also be noted that because specialty is the enforcement mechanism for other requirements of an extradition treaty, such as dual criminality, and the political offense exception, these elements are in turn raised as components of an alleged specialty violation. *See id.* at 436.

judicial processes of each state.[60] This element is typically addressed in U.S. courts prior to the extradition of a person to the United States.

Double criminality requires the offenses for which extradition is requested be a crime in both the requested and requesting states.[61] This requirement may be interpreted in one of three ways: In order to qualify, the crime must be (1) chargeable, (2) chargeable and prosecutable, or (3) chargeable, prosecutable, and likely to result in a conviction.[62] Unlike reciprocity, double criminality is often asserted by defendants who are either contesting their extradition from the United States or challenging their extradition to the United States (usually after they have arrived).[63]

The extraditable offense requirement necessitates either (1) that the offense be specifically listed in the extradition treaty, or (2) that the offense falls within the definition of an extraditable offense as created by a formula set forth in the extradition treaty.[64] This element also is asserted by defendants contesting extradition to and from the United States.[65]

The duty of non-inquiry is placed upon U.S. courts when considering an extradition request from another state. The court may not inquire into the procedures used by the requesting state to obtain probable cause for extradition, question the means by which a criminal conviction is obtained under the system of the requesting state, or inquire about the penalty that the relator will be subject to upon conviction.[66]

The doctrine of specialty provides that following extradition the relator may be charged only with those offenses for which

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60. *See id.* at 385. This may include reciprocity of jurisdictional basis for extradition, procedural basis, or whether a state consents to extradition of its own nationals. *See id.* at 385-87.

61. *See id.* at 388.

62. *See id.* at 389-90.

63. *See* United States v. Khan, 993 F.2d 1368, 1372 (9th Cir. 1993) (challenging charge of use of telephone to facilitate a drug felony under 21 U.S.C. § 843(b)).

64. See BASSIOUNI, *supra* note 3, at 394. A possible formulaic clause might provide for extradition for "any . . . offense which is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year, or by a more severe penalty, unless surrender for such offense is prohibited by the laws of the requested Party." Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 493, 494 (quoting proposed U.S-Hong Kong extradition agreement).

65. *See* United States v. Jetter, 722 F.2d 371, 373 (8th Cir. 1983) (challenging extradition on conspiracy charge because such a crime was not set forth in the extradition treaty).

66. *See* BASSIOUNI, *supra* note 3, at 486.

extradition is granted.[67] Because the requested state may grant extradition for any or all of the charges that the requesting state has set forth in the extradition request, the practical effect of the doctrine is that the requested state may exercise control over the prosecution of the relator long after the relator has left the jurisdiction or physical control of the requested state. This powerful right ensures the integrity of the extradition process because a relator may not be ceded upon false pretenses and charged with different crimes at a later time.[68]

Although states may enter into extradition agreements for a variety of reasons, the specialty doctrine undoubtedly provides an incentive to enter into such agreements.[69] A state using the doctrine can condition its discretion to extradite based on concrete requirements, ensuring that the policies supporting extradition are satisfied in a manner that is consistent with both the state's legal paradigm and any necessary political considerations.[70]

The specialty doctrine is typically incorporated into an extradition treaty through an express specialty provision.[71] In the United States, the doctrine is codified at 18 U.S.C. § 3186,[72] and the foundation for the doctrine in U.S. domestic law is the decision rendered in *United States v. Rauscher*.[73] William Rauscher, a U.S. national, was indicted for murder and cruel and unusual punishment after killing a crew member of a U.S. flag vessel at sea.[74] Rauscher was extradited by Great Britain to stand trial for murder at the United States' request.[75] Upon his arrival

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67. *See id.* at 429. The doctrine may also allow the requested state to limit the punishment meted out upon conviction if it is not commensurate with that which would be imposed by the requested state for the same crime. *See id.* at 435.

68. *See id.* at 433-34.

69. For a discussion of the factors that motivate states to enter into extradition agreements see Papandrea, *supra* note 9, at 1190-93.

70. *See* Rogoff, *supra* note 39, at 675-83 (addressing types of political pressures and their impact upon the treaty interpretation process by United States courts).

71. *See* ABBELL & RISTAU, *supra* note 16, at 80.

72. "The Secretary of State may order the person committed under sections 3184 [Fugitives from foreign country to United States] or 3185 [Fugitives from country under control of United States into the United States] of this title to be delivered to any authorized agent of such foreign government, to be tried *for the offense of which charged.*" 18 U.S.C. 3186 ¶ 1 (emphasis added).

73. 119 U.S. 407 (1886).

74. *See id.* at 409. Rauscher was the second mate on board the *J.F. Chapman*. *See id.*

75. *See id.*

in the United States he was charged with, and convicted of, cruel and unusual punishment instead of murder.[76]

The Supreme Court held that Rauscher's conviction could not stand because Great Britain had not granted extradition for that offense.[77] The Court began its discussion of the issue by noting that extradition was not the historical norm in international law:

> It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment . . . . [T]here was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.[78]

However, the Court noted that the instant matter was governed by the United States-Great Britain Webster-Ashburton Treaty,[79] which did create a duty to extradite, and that the matter before the court was one of treaty interpretation.[80]

The Court's interpretation did not start with the specific provisions of the treaty—probably because the treaty language did not address the doctrine of specialty either explicitly or implicitly.[81] Instead, the Court reviewed the persuasive authorities on international law, which uniformly asserted that an extradited person could only be charged with the offenses for which extradition was granted, even in the absence of a treaty.[82] The Court also discussed exactly how treaties were incorporated into the U.S. domestic legal structure, noting that "[a] treaty, then, is the law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."[83]

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76. *See id.*

77. *See id.* at 409, 433.

78. *Id.* at 411-12.

79. *See id.* at 410-11, 415; Webster-Ashburton Treaty August 9, 1842, U.S.-Gr. Brit., art. X, 8 Stat. 572, 576.

80. *See Rauscher,* 119 U.S. at 416.

81. *See* Webster-Ashburton Treaty, *supra* note 79, art. X, at 576.

82. *See Rauscher,* 119 U.S. at 416-17. This review included general authorities on international relations, (citing William Beach Lawrence, 14 ALBANY L. J. 85, 15 ALBANY L. J. 224, 16 ALBANY L. J. 361; Judge Lowell, 10 AM. L. REV. 617 (1875-6); David Dudley Field, 122 FIELD'S INT'L CODE § 237) and authorities that had reviewed the specific treaty that was before the court (citing Spear, EDWARD CLARKE, 38 CLARKE ON EXTRADITION (1867)). *See id.*

83. *Id.* at 419.

Following this review, the Court held that it was the intent of the parties that the specialty doctrine be included in the treaty.[84] Although the Court conceded at the outset that the starting point for treaty interpretation was the language of the treaty,[85] the Court's holding was based on *realpolitik*. In the Court's opinion, a state's decision to extradite would necessarily be limited by its own political interests. Although a state might grant extradition of common criminals out of goodwill, it might not see benefit accruing to it from the extradition of political offenders or minor offenders.[86] The Court noted that the tradition of granting asylum to political refugees was a long standing tradition, and that it was:

> very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences [sic] enumerated in the treaty.[87]

The specialty doctrine was "an appropriate adjunct to the discretionary exercise of the power of rendition . . . ."[88] It was an enforcement mechanism to protect the discretion of the state granting extradition by limiting the prosecution of the relator post-extradition.[89] The Court felt that this limitation was set forth explicitly in the procedural requirements of extradition, noting that if the requested state was "to have no influence in limiting the prosecution in the country where the offence [sic] is charged to have been committed, there is very little use for this particularity in charging a specific offence [sic] . . . ."[90]

The Court then set forth a second ground for its holding by noting that the specialty doctrine was codified in federal statutes.[91] The Court interpreted the statutes to apply to all treaties to which the United States was a party, and held that under the statutes persons extradited from the United States, or persons extradited to the United States, had a right to be prosecuted only for those offenses for which extradition was granted.[92] The Court's description of the right was summarized in the *Rauscher* holding:

> [H]e shall be tried only for the offence [sic] with which he is charged in the extradition proceedings and for which he was delivered up,

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84. *See id.* at 420.
85. *See id.* at 419.
86. *See id.* at 420.
87. *Id.*
88. *Id.* at 419.
89. *See id.*
90. *Id.* at 421.
91. *See id.* at 423 (citing Rev. Stat. §§ 5272, 5275).
92. *See id.* at 423-24.

> and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.[93]

Although the *Rauscher* decision has been criticized as particular to its time and a product of the political circumstances surrounding the treaty between the United States and Great Britain,[94] the decision remains the legal foundation for analysis of the specialty doctrine when the United States seeks, pursuant to treaty, to have an individual brought to the United States to stand trial.[95] The decision is widely accepted as standing for the proposition that the relator may only be charged with the offenses for which extradition is granted.[96] Subsequent interpretation of the doctrine, however, has weakened this holding significantly.

III. POST-RAUSCHER INTERPRETATION OF THE SPECIALTY DOCTRINE

Post-*Rauscher* interpretation and application of the specialty doctrine by U.S. courts has gradually weakened the doctrine. The approach of the courts has been similar to that articulated by the court in *United States v. Saccoccia*: "Specialty . . . is not a

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93. *Id.* at 424.

94. *See generally* United States v. Kaufman, 858 F.2d 994, 1008-09 (5th Cir. 1988); Fiocconi v. Attorney Gen., 462 F.2d 475, 480 (2d Cir. 1972); Semmelman, *supra* note 9.

95. *See generally* United States v. Alvarez-Machain. 504 U.S. 655, 659-70 (1992).

96. *See generally id.* at 659-60; United States v. Puentes, 50 F.3d 1567, 1573 (11th Cir. 1995); United States v. Khan, 993 F.2d 1368, 1373 (9th Cir. 1993); United States v. Riviere, 924 F.2d 1289, 1297 (3d Cir. 1991); *Kaufman*, 858 F.2d at 1007; United States v. Thirion, 813 F.2d 146, 151 (8th Cir. 1987). *But see* United States v. Gallo-Chamorro, 48 F.3d 502, 506 (11th Cir. 1995) (interpreting *Rauscher* as holding that a relator may not be charged with a crime not enumerated in the extradition treaty.); United States v. Sensi, 879 F.2d 888, 896 (D.C. Cir. 1989) ("*Rauscher* held that the indictment was invalid because it charged . . . a crime not enumerated in the treaty."); United States v. Flores, 538 F.2d 939, 944 (2d Cir. 1976) ("[A]n extradited defendant may not be charged and tried for crimes not enumerated in the . . . extradition treaty."); Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973) (interpreting *Rauscher* as proscribing prosecution for crimes not enumerated in the extradition treaty). These counter interpretations have been subject to criticism in turn. *See* David B. Sweet, *Application of Doctrine of Specialty to Federal Criminal Prosecution of Accused Extradited from Foreign Country*, 112 A.L.R. FED. 473, 518-19 (contrasting *Rauscher* interpretation in *United States v. Sensi* with *Rauscher* holding). Some courts that do not read *Rauscher* so broadly find the authority in other cases for the proposition that the relator may only be prosecuted on those offenses for which extradition is granted. *See Gallo-Chamorro*, 48 F.3d at 506 (citing United States v. Archbold-Newball, 554 F.2d 665, 685 n.21 (5th Cir. 1977)); *Flores*, 538 F.2d at 944 (citing Johnson v. Browne, 205 U.S. 309 (1907)).

hidebound dogma, but must be applied in a practical, common sense fashion. Thus, obeisance to the principle of specialty does not require that . . . the prosecution always be limited to specific offenses enumerated in the surrendering state's extradition order . . . ."[97]

In their efforts to reach "common sense" results, some courts have adopted a very general standard which evaluates the specialty claim from the perspective of the requested state. Courts have articulated this standard differently, but in essence, the standard allows the prosecution of the defendant so long as the requested state would not consider the prosecution on additional charges to breach the doctrine.[98] Because this standard is necessarily fact-specific, it allows the court applying the standard considerable leeway in determining if the requested state would indeed object to the prosecution.

A. *Paroutian-Fiocconi*

One of the first courts to loosen the strict specialty requirement set forth in *Rauscher* was the Second Circuit in *United States v. Paroutian*.[99] Paroutian was extradited from Lebanon for narcotics trafficking under an indictment issued by the Southern District of New York.[100] Upon his arrival in the United States, he was indicted in the Eastern District of New York, where he was convicted of conspiracy to import, receive, and sell heroin, and two counts of receipt and concealment of heroin.[101] Paroutian challenged his conviction of the two discrete counts, alleging that Lebanon had not extradited him for those

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97. 58 F.3d 754, 767 (1st Cir. 1995) (citations omitted).

98. *See infra* part III.A.

99. 299 F.2d 486 (2d Cir. 1962).

100. *See id.* at 490. The reported case does not state if the extradition was granted pursuant to treaty, although it does describe a formal extradition request, extradition proceedings in Lebanon, and a formal Lebanese Warrant of Extradition. *See id.* 18 U.S.C.A. § 3181 does not show that the United States has ever entered into an extradition agreement with Lebanon. However, the court in *Fiocconi v. Attorney General* noted that the United States-France extradition treaty was extended to Lebanon upon French acquisition of mandate in 1924. 462 F.2d 475, 479 n.6 (2d Cir. 1992). This reference is presumably to the extradition treaty signed between France and the United States on Jan. 6, 1909, effective July 27, 1911, 37 Stat. 1526. 18 U.S.C.A. § 3181 "Treaties of Extradition." The court in *Fiocconi* noted that it was questionable if the treaty continued to apply to Lebanon after independence (in 1946). *See Fiocconi*, 462 F.2d at 479 n.6. The court also noted that the United States' request for extradition in *Paroutian* was made under the U.S.-France treaty. *See id.*

101. *See Paroutian*, 299 F.2d at 487, 490.

offenses, and that as a result, his conviction on those counts should be overturned.[102]

Without citing any authority, the court held that the test as to whether the relator is tried for a separate offense is not "some technical refinement of local law, but whether the extraditing country would consider the offense" to be actually separate.[103] Reasoning that the purpose of the specialty doctrine as set forth in *Rauscher* is to protect the discretion of the requested state, the court acknowledged that the doctrine would prevent Paroutian's trial for an offense that was "totally unrelated" to narcotics trafficking. Nevertheless, the court held that because the Lebanese were aware of the facts presented in the initial indictment, they would not consider Paroutian to have been prosecuted for anything but narcotics trafficking.[104]

Although the *Paroutian* court did not cite any express authority for its new interpretation of the specialty doctrine, it did invite the reader to see generally *Greene v. United States*,[105] where the court was forced to reconcile the bright-line rule set forth in *Rauscher* with a technical defect in the extradition process.[106] In the *Greene*, the United States requested extradition of an individual from Canada, and extradition was granted for prosecution of "participation in fraud by an agent or trustee" and "participation in embezzlement."[107] Greene contested his convictions for conspiracy to defraud and embezzlement on the grounds that Canada had not granted extradition for either crime.[108] In holding that Greene's convictions did not violate the treaty, the court noted that "[w]hile the extradition and the indictment must be for the same criminal acts, it does not follow that the crime must have the same name in both countries . . . . We are of opinion that the record shows that the first and second indictments charge the defendants with an offense for which they were extradited."[109]

Thus, while *Greene* clearly supported the *Paroutian* court's conclusion that the specialty doctrine was not to be construed so strictly as to defeat the intent of the parties to an extradition treaty (i.e., to facilitate extradition), the *Paroutian* court did not have precedent supporting the new standard of evaluation. The

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102. *See id.* at 490-91.
103. *Id.* at 491.
104. *Id.*
105. 154 F. 401 (5th Cir. 1907).
106. *See id.* at 404-14.
107. *Id.* at 404. Extradition was sought pursuant to a 1889-90 treaty between Great Britain and the United States. *See id.* at 403.
108. *See id.* at 404.
109. *Id.* at 406-07.

court made a significant theoretical leap when it equated the procedural defects addressed in *Greene* with Lebanon's inability to decide whether extradition should be granted with regard to the discrete counts. The only possible way to squeeze *Paroutian* within the interpretive precedent set by *Greene* was if the term "narcotics trafficking" in the Lebanese indictment was intended as a descriptive phrase inclusive of the discrete counts comprising the whole.[110] Even if this was so, the doctrine was still weakened considerably, as the *Paroutian* court lent authority to the proposition that the requested state did not have the right to review each charge against a relator in order to satisfy the United States' obligations during, at least, formal extradition proceedings, and, at most, during extradition pursuant to treaty.

The *Paroutian* standard was utilized again by the Second Circuit in 1972 in *Fiocconi v. Attorney General.*[111] Although *Fiocconi* involved extradition based on comity, not a treaty, the court held that the specialty doctrine as encapsulated in *Rauscher* applied even when no treaty was present.[112] The court reasoned that the purpose of the doctrine of specialty was to prevent the United States from breaching international obligations, and that there was the same need to act in good faith when granting extradition based on comity.[113] Breach of the good faith obligation would occur in the instant matter only if Italy would consider the prosecution of Fiocconi to be a breach.[114]

The court in *Fiocconi* cited *Rauscher* as supporting this approach, reasoning that the *Rauscher* court did not explicitly discuss the need to consider the surrendering state's position on the issue because political circumstances surrounding the *Rauscher* decision made Great Britain's objection to Rauscher's prosecution self evident.[115] The court also cited *Paroutian* as authority for this approach, but acknowledged that the instant

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110. *See* Shapiro v. Ferrandina, 478 F.2d 894, 908 (2d Cir. 1973) (characterizing offenses in *Paroutian* as "so factually intertwined as to constitute a logical whole").

111. 462 F.2d 475, 480-81 (2d Cir. 1972).

112. *See id.* at 480. This holding may have been overruled by implication by *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1993), where the Court denied the defendant the rights that would have been accorded him under the United States-Mexico extradition treaty because he was not removed to the United States through formal proceedings under the treaty. It may be significant, however, that the defendant in *Fiocconi*, although not sought pursuant to treaty, was obtained through formal extradition procedures in Italy. *See Fiocconi*, 462 F.2d at 477. Alvarez-Machain was kidnapped from Mexico and brought to the United States by bounty hunters. *See Alvarez-Machain*, 504 U.S. at 657.

113. *See Fiocconi*, 462 F.2d at 480.

114. *See id.*

115. *See id.*

matter required the court to weaken the doctrine of specialty even more than *Paroutian*.[116] The charges challenged by the defendants in *Fiocconi* were brought in Massachusetts after the defendants were extradited to the United States based on indictments issued in New York.[117]

Although Italy was never offered the opportunity to evaluate the charges prior to extradition, the *Fiocconi* court rationalized the convictions because they were "of the same character" as the original charges, involved simply a change of venue, and "with appellants now having been found guilty, there can scarcely be a doubt that sufficient proof to warrant extradition exists."[118] The court then pointed out that its position was "somewhat fortified" by the fact that an express clause setting forth the doctrine of specialty was not to be found in the Italy-U.S. extradition convention, and that the lack of such a clause was "some indication of the limits of Italy's concern with the prosecution of persons whom it surrenders to the United States and of the conditions upon which extradition between the two countries normally occurs."[119]

Fiocconi firmly established the Second Circuit's *Paroutian* standard as precedent for courts interpreting the specialty doctrine, despite the fact that Paroutian's extradition may not have been pursuant to treaty, and that *Fiocconi* involved extradition based on comity. Although relatively few cases were decided using *Paroutian-Fiocconi* in the latter half of the 1970s,[120] the 1980s and 1990s saw a marked increase in the number of courts utilizing the *Paroutian-Fiocconi* reasoning. As courts grappled with difficult procedural and substantive issues, the Second Circuit's standard offered a means by which courts could appear to further the rationale behind the doctrine of specialty while allowing the extradition process to continue without little interference.

As the *Paroutian-Fiocconi* approach garnered a wide following in the 1980s and 90s, with several cases citing directly to *Paroutian* and *Fiocconi* or their progeny,[121] the standard was

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116. *See id.* at 481.
117. *See id.*
118. *Id.*
119. *Id.* at 482.
120. Some cases were denied using *Paroutian-Fiocconi*. *See* United States v. Rossi, 545 F.2d 814, 815 (2d Cir. 1976) (affirming conviction on conspiracy charge in superseding indictment when extradition was granted for charge in original indictment and superseding charge extended scope of conspiracy by five years).
121. *See* United States v. Diwan, 864 F.2d 715, 721 (11th Cir. 1989) (affirming mail fraud and conspiracy convictions in part because the United Kingdom waived any objections to charges set forth in the indictment); United

accorded additional authority in 1987 by the Restatement (3rd) of Foreign Relations Law of the United States.[122] The Restatement asserted that the "standard for adjudicating [a specialty violation] motion in the United States is whether the requested state has objected or would object to prosecution," and cited *Paroutian* and *Fiocconi* for authority.[123]

B. *The Application of Paroutian-Fiocconi to Treaty-Based Extradition*

The *Rauscher* specialty interpretation was weakened further in the 1980s and 1990s because the *Paroutian-Fiocconi* approach was applied to proceedings that were conducted pursuant to treaty.[124] However the types of issues that were addressed did not necessarily continue to expand the loophole. For example, in *United States v. Jetter*,[125] the court upheld the defendant's conviction on conspiracy charges using the same rationale set forth in *Paroutian*.[126] Because the Costa Rican court granted extradition after reviewing the indictment attached to the request for extradition, and extradition was granted for charges set forth in the indictment (apparently without any limitations), "it is clear that Costa Rica would not object to appellants' trial on the conspiracy counts."[127]

States v. Sensi, 879 F.2d 888, 895 (D.C. Cir. 1989) (affirming conviction on mail fraud and theft counts in part because counts based on same facts as those charges that extradition was granted for, and the treaty allowed such prosecutions); United States v. Kaufman, 858 F.2d 994, 1009 (5th Cir. 1988) (affirming the conviction of the relators on charges set forth in an indictment issued in Texas, when extradition had been granted pursuant to an indictment issued in Louisiana because the crimes in both indictments were of the same "character and nature" and Mexico did not protest the prosecution of the defendants on the additional charges); United States v. Herbage, 850 F.2d 1463, 1466-67 (11th Cir. 1988) (affirming conviction on mail fraud charges in part because British magistrate knew that use of mails was element of fraud charges); United States v. Jetter, 722 F.2d 371, 373 (8th Cir. 1983) (affirming conspiracy conviction in part because Costa Rican tribunal reviewed indictment with conspiracy charge and did not place any limitations on prosecution when extradition was granted). The exact disposition of this case is not clear as the record is brief and the rationale conclusory. *See Herbage*, *supra* at 1464, 1466.

122. *See* RESTATEMENT, *supra* note 22, § 477, at 578.

123. *Id.* § 477, cmt. b, at 579; reporters note 1, at 581.

124. *See Sensi*, 879 F.2d 888 (U.K.); *Herbage*, 850 F.2d 1463 (U.K.); United States v. Cuevas, 847 F.2d 1417 (9th Cir. 1988) (Switz.); *Jetter*, 722 F.2d 371 (Costa Rica).

125. 722 F.2d 371 (8th Cir. 1983).

126. *See id.* at 373.

127. *Id.*

Likewise, in *United States v. Cuevas*[128] the court was required to interpret an ambiguous Swiss extradition order which granted extradition for narcotics violations and related currency transactions but prohibited the United States from prosecuting the defendant for "the fiscal aspect of the factual circumstances of the indictment."[129] The defendant argued that his conviction on currency charges fell within the "fiscal aspect" identified by the indictment, and were thus barred by the specialty doctrine. The court, however, interpreted other language in the extradition order to define "fiscal aspect" as taxes and fines upon the currency transported by criminal activity.[130] The court then determined that because the Swiss order consistently characterized the narcotics and currency charges as integrally related, the Swiss would not consider the charges to be separate from those for which extradition was granted.[131]

At least two courts, however, used the *Paroutian-Fiocconi* standard to address conflicts that arose when the indictment that was used to support an extradition request was superseded by an indictment that served as the basis for the defendant's conviction. In *United States v. Abello Silva*[132] the defendant was extradited from Colombia[133] to face charges of conspiracy to import controlled schedule I and II substances (marijuana and cocaine) and conspiracy to possess marijuana and cocaine with intent to distribute.[134] A superseding indictment setting forth such charges was included with the United States extradition request.[135] After Abello-Silva's extradition a second superseding indictment was issued, and although it set forth the same offenses as the original and superseding indictments, it contained new facts detailing Abello-Silva's involvement in the conspiracies.[136]

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128. 847 F.2d 1417 (9th Cir. 1988).

129. *Id.* at 1420. The term "fiscal aspect" was not defined in the extradition order. *See id.*

130. *See id.* at 1427.

131. *See id.* at 1428.

132. 948 F.2d 1168 (10th Cir. 1991).

133. Extradition was not granted pursuant to treaty but instead under Presidential Decree No. 1860 (Republic of Colombia). *See id.* at 1171 n.1.

134. *See id.* at 1172.

135. *See id.*

136. *See id.* The superseding indictment (included in the extradition request) addressed several defendants and provided a general description of Abello-Silva's participation in the conspiracies. *See id.* The second superseding indictment was directed only at Abello-Silva, and linked Abello-Silva with the Medellin and Cali drug cartels and prominent drug lords such as Pablo Escobar-Gaviria, Jose Gonzalo Rodriguez-Gacha, and Jorge Ochoa-Vasquez, and provided details regarding the scope and operations of Abello-Silva's drug smuggling. *See id.*

The court rejected Abello-Silva's contention that his prosecution on the second superseding indictment violated the specialty doctrine.[137] The court framed the issue by describing the specialty doctrine as a means by which the ceding state could ascertain whether sufficient evidence exists to extradite the relator, and grant extradition for only those offenses supported by sufficient evidence.[138] The court also noted that the appropriate question under U.S. case law was whether the charges or offenses for which the relator was extradited were the same as those for which he was prosecuted, and not whether the facts on which extradition was granted were the same as those on which the prosecution of the relator was based.[139] In the court's eyes, this line of inquiry was appropriate because extradition would only be granted if the ceding state found sufficient evidence to grant extradition.[140] Accordingly, additional facts which made the case stronger would not change the outcome of the extradition request,[141] and the ceding state that found sufficient evidence for extradition would not be offended by the prosecution of the relator on the basis of additional facts.[142]

Likewise, the court in *United States v. Andonian*[143] rejected an argument by co-defendant Vivas that his prosecution under a superseding indictment violated the specialty doctrine.[144] Vivas was extradited from Uruguay for money laundering and conspiracy to aid and abet the possession and distribution of cocaine.[145] The superseding indictment that served as the basis for his extradition included nine counts of money laundering that were not included in the original indictment, and did not include three counts of money laundering that were included in the original indictment.[146] The defendant argued that the specialty doctrine was violated because he was not tried for the offenses for which he was extradited and because he was not tried on the facts that served as a basis for his extradition.[147]

The court held that "separate offenses" for purposes of the specialty doctrine did not mean separate counts.[148] "The superseding indictment altered neither the nature of the scheme

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137. *See id.* at 1172-76.
138. *See id.* at 1173.
139. *See id.* at 1173-74.
140. *See id.* at 1174-75.
141. *See id.* at 1175.
142. *See id.*
143. 29 F.3d 1432 (9th Cir. 1994).
144. *See id.* at 1437-38.
145. *See id.* at 1434.
146. *See id.*
147. *See id.* at 1435.
148. *See id.* at 1436.

alleged nor the particular offenses alleged."[149] Accordingly, the court was "confident" that Uruguay would not consider Vivas' prosecution on the additional counts to be a breach of the treaty.[150] Vivas' argument regarding his prosecution on facts that did not constitute part of the evidentiary basis for his extradition was also rejected: "The government is not required, under the auspices of specialty, to try a defendant on the same evidence that was presented to the surrendering state, so long as it satisfies the requirement that trial is for the same offenses arising out of the same allegations of fact."[151]

Finally, although the court in *United States v. Saccoccia*[152] did not have to apply the specialty doctrine because of a prosecutor's foresight, the court implied that it would consider loosening the doctrine further.[153] Saccoccia's extradition was requested from Switzerland to face Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy charges.[154] The predicate acts which constituted the racketeering activity were money laundering, failure to file currency transaction reports (CTRs),[155] and use of travel and facilities in interstate commerce to facilitate money laundering (Travel Act counts).[156] Switzerland granted extradition for all counts except failure to file CTRs and illegally structuring money transactions to avoid CTR requirements because the underlying conduct was not illegal under Swiss law.[157]

Although the individual CTR violations were subsequently dismissed, immediately preceding and during the trial Saccoccia's attorneys became concerned that Saccoccia could be convicted under the RICO and Travel Act counts based solely on the predicate offenses involving CTR violations, thus violating the

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149. *Id.* at 1437.
150. *See id.*
151. *Id.* at 1438.
152. 58 F.3d 754 (1st Cir. 1995).
153. *See id.* at 768.
154. *See id.* at 764. RICO requires the government to prove an illicit agreement to conduct pattern of racketeering activity. *See id.* A pattern requires proof of at least two acts of racketeering activity. *See id.* These acts must themselves be violations of specified criminal statutes and are referred to as predicates or predicate acts. *See id.*
155. A CTR must be filed when an individual seeks to transport monetary instruments of more than $10,000 at one time from a place in the United States to or through a place outside the United States, or to a place in the United States from or through a place outside the United States. 31 U.S.C. § 5316(a) (1994). Failure to file is a felony. 31 U.S.C § 5324(c) (1994).
156. *See Saccoccia*, 58 F.3d at 764. Defendants faced 128 substantive counts in addition to the RICO count. *See id.*
157. *See id.* at 765.

specialty doctrine.[158] This possibility was brought to the attention of a Swiss official, who then voiced her concerns to the U.S. Attorney's Office.[159] At the request of the prosecutor, the trial court instructed the jury that they could not use CTR violations as predicates for the RICO or Travel Act counts.[160]

The court ultimately held that the specialty doctrine was not violated because the jury instruction "purged any taint" that might have been created by allowing the jury to consider the CTR offenses as predicate acts for the RICO and Travel Act counts.[161] However, the court expressed disbelief that allowing the jury to utilize the CTR offenses would constitute a violation of the doctrine because extradition was granted when the CTR offenses were "prominently featured" as predicates to the RICO and Travel Act counts.[162]

> This approval—to which we must pay the substantial deference due to a surrendering court's resolution of questions pertaining to extraditability . . . strongly suggests that the RICO and Travel Act counts, despite their mention of predicates which, standing alone, would not support extradition, are compatible with the criminal laws of both jurisdictions.[163]

The court summarily dismissed the Swiss official's concerns regarding the prosecution as informal fretting, characterizing her involvement as a "gossamer showing" which was insufficient to show that Switzerland would object to the prosecution of the RICO and Travel Act charges with CTR offenses constituting predicate acts.[164]

IV. STATE V. PANG

State v. Pang[165] should have been an easy case. Most of the cases that followed the *Paroutian-Fiocconi* line of reasoning involved superseding indictments or extradition orders that courts deemed ambiguous.[166] However, in *Pang* the Federal Supreme

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158. *See id.*
159. *See id.*
160. *See id.*
161. *Id.* at 768.
162. *Id.*
163. *Id.*
164. *Id.*
165. 132 Wash. 2d 852, 940 P.2d 1293, 1997 WL 425977 (1997) (*en banc*) (pagination to Washington Reports, 2d Series, not yet available), *opinion modified and corrected by* State v. Pang, 948 P.2d 381 (Wash.) (citation to Washington Reports, 2d Series, not yet available), *cert denied* in Washington v. Pang, 118 S. Ct. 628 (1997).
166. *See supra* Part III.A.

Court of Brazil expressly denied extradition for the offenses in dispute.[167] Nonetheless, the *Pang* dissent mounted a strong attack upon the doctrine of specialty, drawing in part from those cases that have loosely interpreted the doctrine. Fortunately, the *Pang* majority stopped any further weakening of the doctrine by refusing to allow prosecution.[168]

The *Pang* case was highly publicized and politicized because it involved the death of four Seattle firefighters.[169] On January 5, 1995, a warehouse owned by the parents of Martin Shaw Pang burned to the ground.[170] The firefighters died in an attempt to extinguish the blaze.[171] The fire was determined to be arson, and a fugitive warrant was issued for Pang's arrest in February 1995.[172] In March 1995, Pang was charged with four counts of first degree murder, and a warrant was issued for his arrest.[173] Later that month, he was arrested in Rio de Janeiro, Brazil.[174] After Washington amended the information to include first degree arson,[175] the United States requested extradition pursuant to treaty for the arson charge and four counts of felony murder.[176]

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167. *See Pang*, 940 P.2d at 1304 (quoting Federal Supreme Court of Brazil decision on the Extradition, No. 00006541/120 Opinion Appendix "A" (English translation from Portuguese)).

168. *See id.* at 1325.

169. *See Four Seattle Firefighters Killed, supra* note 1, at A1; Susan Gilmore & Charles E. Brown, *Feds launch Pang offensive*, SEATTLE TIMES, Mar. 1, 1996, *available at* Seattle Times Web Archive, <http://www.seattletimes.com> (visited Sept. 29, 1998); Peyton Whitely, *Brazil 'Willing' to Deal on Pang—U.S. Seeks a Way Around Ruling*, SEATTLE TIMES, Mar. 2, 1996, *available at* Seattle Times Web Archive, <http://www.seattletimes.com> (visited Sept. 29, 1998); *House Bill Pressures Brazil on Pang Case*, SEATTLE TIMES, Sept. 25, 1996, *available at* Seattle Times Web Archive, *supra*; Susan Gilmore, *Maleng Seen as Both Tough, Soft*, SEATTLE TIMES, Apr. 1, 1996, *available at* Seattle Times Web Archive, *supra*; Janet I-Chin Tu & Dave Birkland, *Delays Expected in Pang's Trial*, SEATTLE TIMES, Nov. 13, 1996, *available at* Seattle Times Web Archive, *supra*; David Postman, *Three-way Supreme Court Race was Unexpected*, SEATTLE TIMES, Sept. 10, 1998, *available at* Seattle Times Web Archive, *supra*.

170. *See Four Seattle Firefighters Killed, supra* note 1, at A1.

171. *See Pang*, 940 P.2d at 1295. Pang is a U.S. citizen who was born in Hong Kong. *See id.* at 1301 (quoting Affidavit of Marilyn B. Brenneman, Senior Deputy Prosecuting Attorney). At the time of the fire he was living in the greater Seattle area. *See Four Seattle Firefighters Killed, supra* note 1, at A1.

172. *See Pang*, 940 P.2d at 1295.

173. *See id.* at 1301 (quoting Affidavit of Marilyn B. Brenneman, Senior Deputy Prosecuting Attorney).

174. *See id.* at 1296.

175. *See id.*

176. *See id.* at 1297, 1303 (referring to Treaty of Extradition, Jan. 13, 1961, U.S.-Braz., 15 U.S.T. 2093). For the text of the treaty, see also *id.* at 1354-61. An amended information charging Pang with first degree arson was filed after the original information. *See id.* (quoting Affidavit in Support of Extradition). First degree murder in Washington includes a felony murder rule, which provides for

The Federal Supreme Court of Brazil granted extradition for the arson charge, but denied extradition for the murder charges.[177] The court's opinion was delivered in series of individual opinions with an attached summary authored by the chief justice and the justice assigned as *rapporteur*.[178] The summary stated:

> The case files having been reviewed and the case stated and discussed, the Justices of the Federal Supreme Court, meeting in plenary session and acting by majority vote in accordance with the minutes of the judgment and the transcript thereof, *grants the extradition in part, on the grounds that the charges of arson in the first degree, as described in the extradition request, correspond in Brazil to the single crime that is defined in the main part of Article 250 and in Article 258 of the Brazilian Penal Code. Therefore, they exclude from the grant of extradition the charges of murder in the first degree.*[179]

The United States sought clarification of the order because it found the wording to be ambiguous.[180] The Federal Supreme

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prosecution when a person "commits or attempts to commit . . . (4) arson in the first . . . degree . . . and in the course of or in furtherance of such crime or in immediate flight therefrom, he . . . causes the death of a person other than one of the participants . . . ." WASH. REV. CODE ANN. § 9A.32.030(1)(c) (West Supp.1998). First degree arson is defined as follows:

> A person is guilty of [first degree arson] if he knowingly and maliciously:
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> (a) Causes a fire or explosion which is manifestly dangerous to any human life, including firemen; or
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> (b) Causes a fire or explosion which damages a dwelling; or
>
> (c) Causes a fire or explosion in any building in which there shall be at the time a human being who is not a participant in the crime; or
>
> (d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect the insurance proceeds.

Id. § 9A.48.020(1) (West 1988). Both first degree murder and first degree arson are Class A felonies, *see id.* §§ 9A.32.030(2), 9A.48.020(2), punishable by a maximum of life in prison or $50,000 fine, or both. *See id.* § 9A.20.21(1)(a).

177. *See Pang*, 940 P.2d at 1304-05 (quoting Federal Supreme Court of Brazil decision on the Extradition, No. 00006541/120 Opinion Appendix "A" (English translation from Portuguese) (emphasis in original).

178. *See id.* at 1334-54 (containing the English translations of each Justice's opinion). Justice Moreira Alves chose to follow the assigned justice's opinion, offering only one paragraph of his own analysis. *See id.* at 1353. It is not clear from the text of the *Pang* decision or the opinions of the Brazilian justices if the multiple opinion format is commonly used.

179. *Id.* at 1304-1305 (quoting Federal Supreme Court of Brazil decision on the Extradition, No. 00006541/120 Opinion Appendix "A" (English translation from Portuguese)).

180. *See id.* at 1305-06. The court's order stated that the crimes for which Pang could be prosecuted (arson) corresponded with Articles 250 and 258 of the Brazilian Penal Code. *See id.* at 1304 (quoting Federal Supreme Court of Brazil

Court denied the request for clarification, stating unambiguously that the grant of extradition did not include the murder charges.[181] The United States then sought to have officials within the Brazilian executive branch waive any objections to prosecution on the murder charges.[182] These efforts were unsuccessful.[183]

Upon returning to Washington state, Pang moved to dismiss the murder charges.[184] The trial court denied his motion, finding that although the Federal Supreme Court did not grant extradition for the murder charges, the prosecution could proceed because Brazil had implicitly waived its objection to Pang's prosecution on the charges.[185] The trial court held that Pang

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decision on the Extradition, No. 00006541/120 Opinion Appendix "A" (English translation from Portuguese)). The United States argued that only Article 250, simple arson, corresponded with the Washington arson statute because both code sections, respectively, did not take the results of the arson into account. *See id.* at 1305-06 (quoting Request for Declaration [sic]). Because Article 258, aggravated arson, took arson-caused deaths into account, the U.S. argued that the only comparable Washington offense that would allow consideration of such facts was the felony murder statute. *Id.* (quoting Request for Declaration [sic]).

181. *See id.* at 1307.

182. *See id.* at 1309-12. A letter was sent to the Minister of State for Justice of Brazil, who declined to alter the Federal Supreme Court's ruling, stating that the Brazilian separation of powers granted the Federal Supreme Court exclusive jurisdiction over extradition proceedings. *See id.* at 1311-12 (quoting letter from Nelson A. Jobim, Minister of State for Justice of Brazil to Janet Reno, United States Attorney General (Sept. 26, 1996) (English translation from Portuguese)). President Clinton also sent a letter to the President of Brazil, *see id.* at 1311, who likewise declined to alter the court's ruling. *See id.* at 1312 (quoting Letter from Fernando Henrique Cardoso, President of Brazil, to William J. Clinton, President of the United States (Oct. 20, 1996)).

183. *See id.* at 1311-12.

184. *See id.* at 1312-13.

185. *See id* at 1313. The trial court based its holding in part on its interpretation of Minister Jobim's letter to Janet Reno, *supra* note 182, the last paragraph of which stated:

> As for your concern regarding possible limits on the requesting State's right to punish vis-à-vis the extradited defendant, *it should be emphasized, on the basis of fundamental precepts of public international law, that legally binding international acts are the only legal instrument capable of binding two or more sovereign States together. Thus, provided that the terms of the Treaty of Extradition between Brazil and the United States of America, of January 13, 1961, are respected, it will be incumbent upon the Justice system of the United States of America to establish a suitable punishment for the crime of arson in the first degree, resulting in four deaths and the consequences thereof, under U.S. law. It goes without saying that the precise interpretation of this language, used by the Brazilian court in its decision, and the determination of how it might best be adapted to U.S. law, are for the justice system of your country to decide.*

Id. at 1312 (emphasis in original). The trial court stated that "[b]y not objecting and communicating as he did in the last paragraph and last sentence . . . it seems to this

lacked standing to assert a treaty violation.[186] Pang subsequently petitioned for direct review by the Supreme Court of Washington.[187]

The Washington Supreme Court reversed the trial court and dismissed the murder charges, holding that (1) Pang had standing to assert a treaty violation; (2) Brazil had not waived its right to object;[188] and (3) the doctrine of specialty required that Pang not be charged because Brazil expressly excluded the murder charges from its grant of extradition. [189]

The majority bifurcated its application of the specialty doctrine, addressing the presence of the doctrine first in international law, and then in the express language of the treaty.[190] In addressing the doctrine as a precept of international law, the court first discussed the *Rauscher* decision, highlighting the *Rauscher* Court's interpretation of specialty as a norm of

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Court tantamount to a waiver of the provision of Article XXI of the Treaty." *Id.* at 1313. The Supreme Court of Washington also noted the content of a particular affidavit submitted by the state in support of its Response to Motion to Dismiss. *See id.* at 1309. A portion of the affidavit described a meeting between the United States delegation of attorneys working on the Pang matter and Jobim, during which "*Justice Minister Jobim stated that Brazil has no objection to our prosecution of [Mr.]Pang on the charges of Murder and Arson. Additionally, the Minister told me that 'if I were you, I would prosecute on Murder—The United States system must decide.'*" *Id.* (emphasis in original). The affidavit was withdrawn by the state at the trial level, but submitted to the Supreme Court in support of the State's Answer to Motion for Discretionary Review. *See id.* at 1311. The court also noted that Pang's Brazilian counsel informed Jobim of the contents of the affidavit in January of 1997, and that Jobim returned a written response in which he stated, "*I'd like to inform you that at no time did I provide any type of interpretation on the content and reach of the decision passed by the Federal Supreme Court.*" *Id.* at 1314 (emphasis in original). The Washington Supreme Court strongly criticized the affidavit in a footnote in the original *Pang* opinion, stating that "[z]ealous prosecution of a criminal case is highly to be commended. But zealousness to the point of misleading, misrepresentation, or fabrication is greatly to be condemned." *Id.* at 1311 n.25. This footnote was withdrawn by a subsequent order that amended the text of the opinion. *See* State v. Pang, 948 P.2d 381 (Wash. 1997) (citation to Washington Reports, 2nd Series, not yet available).

186. *See Pang*, 940 P.2d at 1313.

187. *See id.* at 1314.

188. *See id.* at 1318, 1325. In holding that Pang had standing the court followed the Ninth Circuit's decision in *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988) (holding that an extradited person may raise any objections to post extradition proceedings which might have been raised by the requested state absent consent from the requested state) and *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986) (holding that only express consent to prosecution on additional charges will be considered a waiver of the doctrine of specialty). *See Pang* 940 P.2d. at 1318-19. The court determined that Brazil had not explicitly nor implicitly consented to prosecution. *See id.* Therefore, Pang had standing to assert a treaty violation. *See id.*

189. *See id.* at 1325.

190. *See id.* at 1318, 1322.

international comity.[191] The court also pointed out that the doctrine is codified at 18 U.S.C. § 3192, and observed that in *United States v. Alvarez-Machain* the Supreme Court noted that the federal statutes impose the doctrine of specialty upon all extradition treaties to which the United States is a party.[192] The court then found that the doctrine, as incorporated in international law and codified at 18 U.S.C. § 3192, required Washington to prosecute Pang only for the offenses for which he was surrendered.[193] Noting that Brazil expressly withheld its consent to Pang's prosecution on the murder charges, the court concluded that the doctrine obliged Washington to follow the limitations on prosecution imposed by the Federal Supreme Court of Brazil.[194]

The court then turned to the language of the United States-Brazil extradition treaty to see if the language of the treaty prevented Washington from prosecuting Pang on the murder charges.[195] If the right to demand extradition is created by treaty, the court noted, the treaty must usually list the particular offense as an extraditable offense, and must satisfy the dual criminality requirement.[196] The court also noted that the doctrine of dual criminality was specifically incorporated into the treaty, and that murder and arson were both crimes enumerated in the treaty.[197] Moreover, the court acknowledged that "[d]etermination of whether a crime is within the provisions of an extradition treaty is within the sole purview of the requested state."[198] The court, interpreting Article XXI of the treaty to incorporate the specialty doctrine, concluded that the terms of the treaty required Washington to prosecute Pang only on the arson charge.[199]

The dissent in *Pang* framed its discussion by creating a new analysis of the specialty doctrine. After examining the language typically used to express the specialty doctrine in extradition treaties, the dissent found three versions of the doctrine.[200] According to the dissent, the *Rauscher* version was the most restrictive version of the doctrine, which "the majority erroneously suggests is implied in every extradition treaty to which the United

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191. *See id.* at 1319 (citing United States v. Rauscher, 119 U.S. 407 (1886)).

192. *See id.* at 1319-20 (citing 18 U.S.C. § 3192 (1994), United States v. Alvarez-Machain, 504 U.S. 655, 660 (1992) (citing *Rauscher*, 119 U.S. at 423).

193. *See id.* at 1321.

194. *See id.* at 1321-22.

195. *See id.* at 1322.

196. *See id.*

197. *See id.* at 1323.

198. *Id.* (quoting United States v. Van Cauwenberghe, 827 F.2d 424, 429 (9th Cir. 1987) (citations omitted)).

199. *See id.* at 1325.

200. *Id.* at 1326-27.

States is a party."[201] The dissent further explained that the version set forth in the United States-Brazil extradition treaty was not the *Rauscher* version, but instead was a version which allowed prosecution for any offense based on the facts as set forth in the extradition request.[202]

The dissent stated that, the *Rauscher* standard is applicable only when the specialty doctrine is not expressly incorporated into the treaty at issue.[203] The dissent pointed out that this argument was supported by the language of the *Rauscher* decision, and by the numerous cases which have allowed prosecution on additional charges despite an alleged specialty violation.[204] Moreover, the dissent cited numerous cases where the courts had chosen not to imply the doctrine but had instead confined their decisions to the language of the particular treaties at issue.[205] Because the U.S.-Brazil treaty included a specialty clause, the dissent concluded that the more restrictive *Rauscher* interpretation could not be read into the treaty.[206]

Accordingly, the dissent focused on the actual language of the U.S.-Brazil treaty,[207] concluding that the plain meaning of the

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201. *See id.* at 1326.

202. *See id.* at 1326-27.

203. *See id.* at 1327.

204. *See id.* 1328-29 (citing United States v. Andonian, 29 F.3d 1432, 1435 (9th Cir. 1994); United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991); Leighnor v. Turner, 884 F.2d 385 (8th Cir. 1989); United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989); United States v. Levy, 905 F.2d 326, 328 (10th Cir. 1990); United States v. Diwan, 864 F.2d 715 (11th Cir. 1989); United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988); United States v. Cuevas, 847 F.2d 1417, 1427 (9th Cir. 1988); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986); Fiocconi v. Attorney Gen., 462 F.2d 475 (2d Cir. 1972)).

205. *See id.* at 1329 (citing United States v. Baramdyka, 95 F.3d 840, 845 n.3 (9th Cir. 1996); United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir. 1995); United States v. Fowlie, 24 F.3d 1059, 1064 n.2, 1065 (9th Cir. 1994); *Andonian*, 29 F.3d at 1435; United States v. Khan, 993 F.2d 1368, 1373 n.4 (9th Cir. 1993); *Levy*, 905 F.2d at 328; *Leighnor*, 884 F.2d at 386; *Sensi*, 879 F.2d at 895; United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir. 1988); *Cuevas*, 847 F.2d at 1427; United States v. Thirion, 813 F.2d 146, 151 (8th Cir. 1987); *Najohn*, 785 F.2d at 1422; *Fiocconi*, 462 F.2d at 481).

206. *See id.* at 1327.

207. *See id.* at 1330-33. The pertinent section of the treaty reads:

> A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request, nor may he be re-extradited by the requesting State to a third country which claims him, unless the surrendering State so agrees or unless the person extradited, having been set at liberty within the requesting State, remains voluntarily in the requesting State for more than 30 days from the date on which he was released. Upon such release, he shall be informed of the consequences to which his stay in the territory of the requesting State would subject him.

treaty required that the relator only be prosecuted for those offenses *for which extradition was requested.*[208] The dissent emphasized that giving effect to these plain terms and refusing to imply the strict *Rauscher* doctrine into the treaty had substantial support in federal case law and specifically discussed the *Fiocconi* and *Sensi* decisions, where prosecution on additional charges was allowed:[209] "The majority never explains how these cases could have been decided consistent with a rule that purportedly prohibits such prosecutions in every extradition case."[210]

The dissent's interpretation of the specialty doctrine was undoubtedly incorrect. The dissent failed to notice that the cases that it cited as precedent for allowing prosecution did not involve foreign states expressly denying extradition for the disputed offenses.[211] Most importantly, the dissent's interpretation of the doctrine would have read the specialty clause out of the treaty, as any crime set forth in the extradition request would be a prosecutable offense.[212]

Although the majority reached the correct decision in *State v. Pang,* this case should serve as a warning to those courts that would loosely interpret the specialty doctrine. Moreover, it suggests a need for a more restrictive interpretation of the specialty doctrine.

V. A MORE RESTRICTIVE INTERPRETATION OF THE SPECIALTY DOCTRINE

This Note suggests that the relaxed specialty interpretations set forth by the courts following *Paroutian-Fiocconi* are incorrect because they too easily allow prosecution of the relator for additional offenses. The correct method of interpretation would require a court to presume that the relator may not be prosecuted for additional offenses when extradition is conducted pursuant to treaty. This interpretation is a necessary compromise: Extradition treaties establish a bright-line rule that the requested state retains discretion to extradite for all offenses that the requesting state wishes to prosecute, but the procedural and logistical difficulties of extradition may make such a rule impracticable. Support for this interpretation is grounded in the

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Treaty of Extradition, *supra* note 176, at 2110.

208. *See Pang,* 940 P.2d at 1330.

209. *See id.* at 1330-32. The dissent also referred to other cases allowing prosecution for additional offenses, including many of the *Paroutian-Fiocconi* line. *See id.* at 1329.

210. *Id.* at 1330.

211. *See id.* at 1329.

212. *See id.* at 1330.

political realities of extradition as manifested in the structural mechanics of the extradition process. Support may also be found in *Rauscher* and through treaty interpretation.

A. *Extradition: An Exception to the Rule*

Contemporary extradition is a process by which state A voluntarily subordinates part of its right of sovereign jurisdiction to the interests of state B.[213] State A has no legal obligation to do so under customary international law.[214] Conversely, state B has no right under customary international law to obtain control over a person within the sovereign jurisdiction of state A to the exclusion of A's control.[215] An extradition treaty, then, creates a legal obligation which is an exception to customary international law.[216]

This fact is compatible with political reality: because a state's absolute sovereignty over its territorial jurisdiction is a fundamental assumption upon which the authority of the state is premised, any exception to the assertion of sovereignty must necessarily be carefully defined and contained so as not to impinge upon the authority of the state any further than necessary. Thus, "[e]xtradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures."[217]

This reality manifests itself openly in domestic legislation that addresses the interaction of extradition treaties and domestic criminal law. Almost all states have some domestic legislation of this kind.[218] In the United States, such legislation is codified at

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213. *See* BASSIOUNI, *supra* note 3, at 296; Papandrea, *supra* note 9, at 1187, 1197.

214. *See* Greene v. United States, 154 F. 401, 410 (5th Cir., 1907) ("[A] state is under no absolute obligation to surrender fugitives accused of [a] crime unless it has contracted to do so."); United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995) (citing Factor v. Laubenheimer, 290 U.S. 276, 287 (1933)); BASSIOUNI, *supra* note 3, at 383.

215. *See* Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 275, 277 (Nov. 20) (holding that Colombia had no right under international law to unilaterally grant asylum to Peruvian citizen at Colombian embassy in Lima, Peru, and have such a decision be binding on Peru).

216. *See* BASSIOUNI, *supra* note 3, at 383. *See also* United States v. Alvarez-Machain, 504 U.S. 655, 664 (1992) ("The [extradition] treaty thus provides a mechanism which would not otherwise exist . . . .").

217. *Alvarez-Machain*, 504 U.S. at 664 (citing 1 J. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION § 72 (1891)).

218. *See* ABBELL & RISTAU, *supra* note 16, at 281. "Although it is possible that one or more countries with which the United States has extradition relations may not have domestic statutes regulating international extradition, generally it

18 U.S.C. §§ 3181-3196, and courts have extensively interpreted and applied these sections. The most important restriction is that, with one small exception, extradition will not be granted absent a treaty.[219] Moreover, when an extradition request is presented to the United States, very specific limitations are placed upon the extradition process at the outset. For example:[220]

> 1. An evidentiary hearing must be held prior to granting extradition at which a judge must determine if there is sufficient evidence to sustain the charges.[221]
> 2. The offense alleged in the extradition request must be a crime in the United States (thereby satisfying the requirement of dual criminality).[222]
> 3. The offense must be listed in the treaty as an offense for which extradition may be granted, or fall within the formula set forth in the treaty.[223]

These examples illustrate how federal law carefully delineates the requirements that another state must satisfy to remove a person from the United States. A casual request to relinquish a fugitive will not suffice because the appropriate processes must be followed. Significantly, the punishable conduct must also be prohibited in the United States, not only to ensure that the subjective value judgments underlying U.S. criminal jurisprudence would sanction prosecution (i.e., we must think the conduct is criminal), but also to ensure that the theory of liability under which the fugitive is charged comports with a theory of liability recognized by the United States.

The application of these rules by a federal court prior to extradition results in prosecutions that are politically acceptable to the United States because the relator is yielded in a manner consistent with the boundaries articulated by the legislature and the courts, and because the prosecution is analogous to the criminal liability enforced in the United States. In short, the

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can be assumed that a country from which the United States seeks extradition regulates extradition by statute." *Id.*

219. *See* Valentine v. United States ex. rel. Neidecker, 299 U.S. 5, 8-9 (1936). *See also* 18 U.S.C. § 3181 (1994) (providing for extradition, as a matter of comity, of persons other than citizens, nationals, or permanent residents who have committed violent crimes against U.S. nationals abroad). For the text of 18 U.S.C. § 3181, see *supra* note 29.

220. The identification of these limitations is meant to be illustrative, not exhaustive.

221. *See* 18 U.S.C. § 3181 (1994). This is in essence a probable cause determination. *See* Then v. Melendez, 92 F.3d 851, 855 (9th Cir. 1996).

222. *See* BASSIOUNI, *supra* note 3, at 388-93. The offense may be a crime under federal law or the state where the relator is found. *See id.* at 392; *see also* Bozilov v. Seifert, 983 F.2d 140, 142 (9th Cir. 1992); Heilbronn v. Kendall, 775 F.Supp. 1020, 1024 (W.D. Mich. 1991) (citations omitted).

223. *See* BASSIOUNI, *supra* note 3, at 393-400.

limitations placed on the extradition process seek to mitigate the infringement on United States sovereignty.

The language of extradition treaties is also drafted to minimize extradition's impact upon a state's sovereignty. For example, in 1997, a new extradition agreement between Hong Kong and the United States was submitted to the Senate by President Clinton.[224] The agreement listed numerous offenses but provided that extradition would only occur for those offenses that are punishable under the law of both parties by more than one year in jail.[225] Extradition for a capital offense may be refused if the offense is not a capital offense under the laws of the requested party. It may be granted, however, if assurances are provided that the death penalty will not be imposed, or if imposed, will not be carried out.[226] Extradition will not be granted for political offenses, nor will it be granted if the extradition is politically motivated, or sought for the purpose of prosecuting or punishing the relator on account of his race, religion, nationality, or political opinion.[227]

When the doctrine of specialty is placed in the appropriate context, as a component of a finite extradition agreement, the doctrine is a consistent extension of a state's attempt to limit the impact of extradition upon its sovereignty: it is the enforcement tool which ensures that the procedures and rights established by the treaty are respected.[228] Because the requested state's grant of extradition also controls the subsequent prosecution, the doctrine ensures that the infringement on sovereignty will not be abused to the advantage of the requesting state. The requested state has the opportunity to enforce limits placed on extradition in the applicable treaty, such as restricting prosecution to those crimes for which probable cause has been established, or those crimes that are consistent with the requested state's criminal jurisprudence, or those which the requested state does not consider political in nature. Thus, when extradition is granted pursuant to treaty, specialty, like extradition in general, is not based on comity, but upon the specific extradition agreement created between two states.

Because extradition treaties go to great lengths to specify the exact manner in which extradition is to occur, measuring potential violations of the specialty doctrine by asking if the

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224. *See* Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 493, 493 (1997).

225. *See id.* at 493-94.

226. *See id.* at 494.

227. *See id.* at 495.

228. *See* United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995); Papandrea, *supra* note 9, at 1187.

requested state would object to, or be offended by, the prosecution of the relator on additional offenses assigns a nonsensical meaning to the doctrine. The fact that specific offenses are enumerated, particular conduct is prohibited, and substantive requirements articulated suggests that the doctrine is a bright-line rule: When extradition is conducted pursuant to treaty, the requested state retains the discretion to grant extradition for each offense that the requesting state seeks to prosecute.[229]

B. *United States v. Rauscher*

Support for a bright-line rule can be found in *United States v. Rauscher*.[230] The Court observed that under the United States-Great Britain treaty, the offenses for which extradition was sought had to be enumerated in the request.[231] The Court focused on the logical extension of such a requirement, noting that if the requested state had "no influence in limiting the prosecution in the country where the offence [sic] is charged to have been committed, there is very little use for this particularity in charging a specific offence [sic] . . . ."[232]

Moreover, the nature of the offenses in *Rauscher* also supports a bright-line rule. Rauscher's extradition was requested for murder.[233] He was prosecuted in the United States for cruel and unusual punishment arising out of the same killing.[234] Although he was prosecuted for a crime arising out of the same facts as those presented in support of the extradition request for murder, and although he was prosecuted for a lesser offense, the Supreme Court held he could not be so charged.[235]

C. *Treaty Interpretation*

Support may also be found for a bright-line specialty rule by utilizing standard treaty interpretation methods. Every extradition

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229. This should not be confused with the argument made by the defendant in *United States v. Alvarez-Machain*. 504 U.S. 655 (1992). Alvarez-Machain argued that a bright line specialty rule necessarily precluded any other type of extraterritorial transfer of fugitives. *See id.* at 664. The Court was very careful to distinguish between transfer proceedings pursuant to treaty and those that were not. *See id.* at 659-665. The proposition that this Note seeks to advance is limited to extradition pursuant to treaty.

230. 119 U.S. 407 (1886).

231. *See id.* at 421.

232. *Id.*

233. *See id.* at 409.

234. *See id.*

235. *See id.* at 432-33.

treaty that the United States has become party to since *Rauscher* has a specialty doctrine clause.[236] Although the specific language of each clause will control, and each may be somewhat different,[237] these clauses are all active components of a larger extradition agreement.

This means that the text of the specialty clause must be interpreted in the context of the extradition treaty.[238] Hopefully, the text of the clause will clearly describe the doctrine. If the clause is poorly drafted, and is ambiguous, courts should recall that while the intent of the parties in an extradition agreement is to facilitate the transport of fugitives, it is also the parties' intent that the requested state have considerable control over the extradition process in order to limit the impact upon its sovereignty. A court should not interpret a specialty clause to restrict or remove this discretion, even if the plain meaning of the text would produce such a result, because it is inconsistent with the intent of the parties as manifested in the totality of the agreement.

State v. Pang[239] is an excellent example of how a court may use treaty interpretation methods to find a bright-line specialty rule in an ambiguous treaty. The specialty clause in the United States-Brazil extradition treaty is not a model of clarity. Article XXI provides that "[a] person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request . . . ."[240] Read literally, the clause suggests that the

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236. *See* ABBELL & RISTAU, *supra* note 16, at 80.

237. *Compare* Extradition Treaty, June 8, 1972, U.S-U.K., art. XII, 28 U.S.T. 227, 233 ("A person extradited shall not be detained or proceeded against . . . for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted . . . .") *with* Treaty of Extradition, *supra* note 176, at 2110 ("A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for extradition, other than that which gave rise to the arrest . . . .").

238. *See supra* Part V.A. *See also* Air France v. Saks, 470 U.S. 392, 397-98 (1985) ("The analysis must begin . . . with the text of the treaty and context in which the written words are used.") (citing Maximov v. United States, 373 U.S. 49, 53-54 (1963)).

239. 940 P.2d 1293.

240. Treaty of Extradition, Jan. 13, 1961, U.S.-Braz., art. XXI, 15 U.S.T. 2093, 2110. The full text of Article XXI is as follows:

> A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request, nor may be re-extradited by the requesting State to a third country which claims him, unless the surrendering State so agrees or unless the person extradited, having been set at liberty within the

relator may be prosecuted for any crime for which extradition is requested, and this is the meaning that was adopted by the *Pang* dissent.[241]

The *Pang* majority, however, used the structure of the extradition agreement as a whole to ascertain the true meaning of the specialty clause. The court framed its discussion by noting that the treaty expressly incorporated the doctrine of dual criminality, and that the offense must be listed in the extradition treaty.[242] The court then emphasized that, under the treaty, the satisfaction of these two requirements was determined by the law of the requested state, and that determination of extraditability was exclusively within the purview of the requested state.[243] As a matter of good faith, the court felt obliged to yield to the Brazilian court's determination that the felony murder counts were not extraditable offenses.[244]

Implicit in the court's reasoning was the notion that the literal interpretation of the specialty doctrine in Article XXI would render the dual criminality and specific enumeration requirements meaningless. Under the literal interpretation of the clause, so long as an offense was set forth in the extradition request, a relator could be charged with an offense after extradition, even if it was not enumerated in the treaty, and even if it was not a crime in the requested state. Only by reading the clause in the context of the extradition treaty could the court arrive at the conclusion that the clause limits prosecution after extradition to those offenses for which extradition was granted.

D. *The Practical Reality of Extradition*

Although there is support for a bright-line specialty rule in the *Rauscher* holding, and extradition treaties may be interpreted to require strict specialty application, the procedural realities of present day extradition may not support such a rule.

Extradition is a usually a long, drawn-out, expensive undertaking.[245] And requests for extradition to and from the

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requesting State, remains voluntarily in the requested State for more than 30 days from the date on which he was released. Upon such release, he shall be informed of the consequences to which his stay in the territory of the requesting State would subject him.

Id.

241. *Pang*, 940 P.2d at 1330-32 (Durham, C.J., dissenting).

242. *See id.* at 1322-23.

243. *See id.* at 1323.

244. *See id.* at 1325.

245. Pang sat in a Brazilian jail for two weeks shy of one year. *See id.* at 1296, 1305. Most extradition treaties have a clause providing that the requesting

United States have increased sharply. From 1945 to 1960, there were approximately 137 requests for extradition pursuant to treaty made to the United States;[246] from 1980-82 U.S. authorities *arrested* 149 persons for extradition to foreign states.[247] While there were approximately twenty requests both to and from the United States each year in the 1960s, in 1991 alone there were 718 such requests.[248] These numbers are expected to increase as international criminal activity increases, and as states react to international criminal activity with increased law enforcement, legislation, and international agreements to facilitate states' responses.[249]

Any interpretation of international extradition agreements must take note of the increased volume of extradition requests and seek to avoid stilted procedures that, although reasonable on an individual basis, may cumulatively result in a serious impediment to extradition.[250] A bright-line specialty doctrine may have such an impact.

1. Fatal Variance

Many specialty doctrine arguments have been raised when an initial indictment is presented in support of an extradition request, and the relator is prosecuted under a superseding indictment which alleges new facts, new crimes, new counts, or

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state will pay all costs for the extradition proceedings. *See* ABBELL & RISTAU, *supra* note 16, at 153. At sentencing Pang was ordered to pay the $28,000 bill for his own extradition. *See* Ronald K. Fitten, *Family Strikes Deal with City in Pang Fire*, SEATTLE TIMES, Jul. 29, 1998, *available at* Seattle Times Web Archive, <http://www.seattletimes.com> (visited Sept. 13, 1998).

246. Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1313 n.1 (1962) (citing Letter from Eric Hager, Office of Legal Advisor of Department of State, to Malcolm Wilkey, Assistant Attorney General (Apr. 18, 1960) on file with Department of State, MS., File No. 211.3115 Perez Jimenez, Marcos /2-2960).

247. *See* ABBELL & RISTAU, *supra* note 16, at 12 n.5 (citing *Reform of Extradition Laws of the United States* (H.R. 2643): *Hearings Before the Subcomm. On Crime, House of Representatives, Comm. on Judiciary*, 98th Cong., 1st Sess. 42-43 (1983)).

248. *See id.* at 12 (citing *Consular Conventions, Extradition Treaties, and Treaties Relating to Mutual Legal Assistance in Legal Matters (MLATS): Hearing before the Senate Comm. on Foreign Relations*, 102nd Cong., 2nd Sess. 13 (1992)).

249. *See id.* at 12-17. *See generally* Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997); A. Paul Victor, *The Growth of International Criminal Antitrust Enforcement*, 6 GEO. MASON L. REV. 493 (1998) (discussing the expansion of international criminal antitrust enforcement by the United States).

250. *See* BASSIOUNI, *supra* note 3, at 18 (discussing increased volume of extradition proceedings and the "overburdened, understaffed, and underfunded national systems").

all three.[251] These situations occur because a request for extradition from the United States to a foreign state is usually accompanied by supporting material to assist the appropriate foreign authority in making the decision to extradite.[252] This material is typically required by the extradition treaty or domestic law of the requested state,[253] and some treaties require the requesting state to provide the official documents that set forth the formal legal basis for the requesting state's prosecution of the relator.[254] As a result, it is common practice for the United States to utilize a grand jury indictment or prosecutor's information as a component of the request for extradition.[255] When properly authenticated, an indictment or information provides the requested country with an official document specifying that the relator has been charged, the exact nature of the offense(s), and the facts supporting the United States' desire to prosecute.

Although an indictment or information may represent the basis for prosecution at the time that the request for extradition is

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251. *See generally* United States v. Rossi, 545 F.2d 814, 815 (2d Cir. 1976) (discussing a second indictment that attempted to charge the defendant with trafficking narcotics over a greater period of time than had been alleged in the initial indictment); United States v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991) (discussing a second indictment that added more facts about defendant's participation in drug smuggling activities).

252. *See* United States v. Khan, 993 F.2d 1368, 1371 (9th Cir. 1993); United States v. Cuevas, 847 F.2d 1417, 1427 (9th Cir. 1988); United States v. Herbage, 850 F.2d 1463, 1466 (11th Cir. 1988); *Rossi*, 545 F.2d at 815; State v. Pang, 940 P.2d 1293, 1297-1301 (Wash. 1997); *see also* ABBELL & RISTAU, *supra* note 16, at 326-28.

253. In the United States, such material must be submitted with any request to the United States for extradition because of the statutory requirement that probable cause be found before extradition may be granted. *See* ABBELL & RISTAU, *supra* note 16, at 41-42.

254. *See* Treaty of Extradition, *supra* note 176, at 2102-04.

> The request for extradition . . . shall be supported by the following documents . . . .
>
> (2) . . . In the case of a person who is merely charged with a crime or offense for which his extradition is sought: a duly certified or authenticated copy of the warrant of arrest or other order of detention issued by the competent authorities of the requesting State, together with the depositions upon which such warrant or order may have been issued and such other evidence or proof as may be deemed competent in the case.

Id. See also Protocol to Treaty of Extradition, Sept. 4, 1990, U.S-Austl., art. VII, 27 U.S.T. 957 ("A request for the extradition of a person who is sought for prosecution shall be supported by . . . a copy of the charging document, if any.").

255. *See Khan*, 993 F.2d at 1371 (using an indictment); *Cuevas*, 847 F.2d at 1427 (using an indictment); *Herbage*, 850 F.2d at 1466 (using an indictment); *Rossi*, 545 F.2d at 815 (using an indictment); *Pang*, 940 P.2d at 1297-1303 (using an information); ABBELL & RISTAU, *supra* note 16, at 327.

placed, new facts may change the theory of the prosecution's case, and, as a result, the prosecution may wish to use additional facts to support the existing charge or prosecute the relator on additional charges or counts. At this point, the extradition process collides with the constitutional rights of the defendant.

The allegations set forth in an information or indictment must closely follow the evidence that will be presented at trial.[256] Although this requirement is typically enumerated in rules of criminal procedure,[257] the bases for the rule are two constitutional rights of the defendant's: (1) to be placed on notice as to the charges against him, and (2) to assert double jeopardy in a subsequent prosecution for the same offense.[258] The constitutional requirement is satisfied so long as the defendant is sufficiently apprised of the elements of the charge against him (thus enabling him to mount a defense), and the charge is specific enough to allow the defendant to assert double jeopardy in a subsequent prosecution.[259] If the proof at trial varies from the averments in the indictment to such an extent that either right is substantially prejudiced, the variance is termed "fatal," and a conviction will be reversed.[260]

Accordingly, the prosecution must change the indictment or information to reflect the facts as the prosecutor's investigation of the case progresses. Although some jurisdictions allow a prosecutor to amend an indictment upon her own initiative, the Federal system and some states do not allow prosecutors to amend indictments once issued.[261] If any changes are to be made,

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256. *See* FED. R. CRIM. P. 7(c); NEIL P. COHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS 214-215 (1995).

257. *See* FED. R. CRIM. P. 7

258. At the federal level these rights are grounded in a defendant's Fifth Amendment double jeopardy right and Sixth Amendment right to be informed of the nature and cause of any accusation against him, as well as a defendant's Fifth Amendment right to be tried on an indictment issued by a grand jury for an infamous crime. *See* United States v. Miller, 471 U.S. 130, 134-35 (1985) (noting Fifth Amendment right); Russell v. United States, 369 U.S. 749, 763-64 (1962) (noting Fifth and Sixth Amendment rights); Berger v. United States, 295 U.S. 78, 82 (1935); United States v. Zelinka, 862 F.2d 92, 96-97 (6th Cir 1988) (noting Fifth Amendment right); MARK S. RHODES, 1 ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 7:5, 7:6 (2d ed. 1985) (noting courts that have identified a Sixth Amendment right). *See also* United States v. Illig, 288 F. 939, 942 (W.D. Pa. 1920) (noting that the two requirements also extend to informations).

259. *See Miller*, 471 U.S. at 134-35; *Russell*, 369 U.S. at 764; *Berger*, 295 U.S. at 82.

260. *See Miller*, 471 U.S. at 134-35; *Russell*, 369 U.S. at 761-72.

261. *See* Ex Parte Bain, 121 U.S. 1, 13 (1887); COHEN & HALL, *supra* note 256, at 208.

the prosecutor must go before a grand jury and have a superseding indictment issued.[262]

This substantive requirement of U.S. criminal law may conflict with a bright-line specialty rule. A bright-line specialty rule would not allow prosecution on new crimes or counts in a superseding indictment or amended information because the requested state did not have the discretion to allow prosecution for those offenses.[263] The addition of new facts could also run afoul of a bright-line rule because the conduct, as clarified in the superseding indictment, may not be criminal in the requested state.[264] Nor would a bright-line rule allow the addition of new counts.

If a bright-line specialty rule were applied, a prosecutor investigating a matter in which extradition was expected probably would have three choices: deferring the extradition requests; front-loading the investigation; or, proceeding as if the matter is an ordinary domestic criminal matter. First, a prosecutor could choose to defer a request for extradition until further investigation occurs. However, if the fugitive is located in a foreign state, it would probably be unwise for the prosecution to remain idle; having already fled the United States, the fugitive is a serious flight risk. Accordingly, the prosecution may wish to request provisional detention pending a formal extradition request from the United States. This is problematic, however, because once a request for provisional detention has been made, an extradition request typically must be submitted within a limited timeframe.[265] As a result, if a detention request is made, a

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262. *See* COHEN & HALL, *supra* note 256, at 208.

263. For additional counts the important determination to be made by the foreign state is not if the conduct is criminal but if there is sufficient evidence to sustain *each count.* This should be distinguished from the situation where a relator challenges his prosecution because the crimes in the extradition agreement and the subsequent order are not identified by the *same name,* a situation where the "technical niceties and distinctions recognized sometimes in criminal law as making a fatal variance cannot be applied." Greene v. United States, 154 F. 401, 406 (5th Cir. 1907).

264. This would be a fact-specific examination. If the extradition hearing is viewed from the perspective of probable cause, the addition of new facts at a later time would not be material if probable cause was already determined to be present on the original set of facts. If, however, extradition was granted on one set of facts, and a completely different set of facts was set forth in a superseding indictment or amended information, there would probably be a specialty violation as the requested state would not have the opportunity to determine if it considered the conduct criminal or if probable cause were present. *See generally* United States v. Abello-Silva, 948 F.2d 1168, 1172-76 (10th Cir. 1991); Mark S. Weinstein, Casenote, *A License to Mislead:* United States v. Abello-Silva, 24 U. MIAMI INTER-AM. L. Rev. 161, 172-90 (1992).

265. *See* 18 U.S.C. § 3188 (1994). *See also* Mariane Nash, *Contemporary Practice of the United States Relative to International Law,* 92 AM. J. INT'L L. 44, 46

prosecutor will have to proceed with whatever supporting documentation he has (i.e., the immediately available indictment or information).

The prosecution's second option is to front-load the investigative process, either through law enforcement or through grand jury inquisition, in order to expose as many criminal acts as possible prior to requesting extradition. The prosecutor's ability to do so, however, will be tempered by facts available, actual knowledge at an early stage of the investigation that the subject of the investigation is outside the United States, and the actual discovery of the fugitive, at which point the prosecutor will probably feel compelled to act promptly for the reasons set forth above.

The most likely alternative is that a prosecutor will proceed as if the matter is an ordinary domestic criminal matter. When the subject is located, the prosecutor will submit a request for extradition detailing the basis for prosecution, probably accompanied by an information or indictment.[266] If the ensuing investigation after extradition uncovers more facts or crimes, the prosecutor may try to avoid conflict with the specialty doctrine by seeking a partial waiver of specialty from the executive branch of the requested state.

If this fails, however, a bright-line specialty rule would force the prosecutor to resubmit the new basis for prosecution—typically the indictment or information—to the proper foreign authority for authorization to prosecute as the investigation evolves. Such action entails significant time and expense. In complex criminal investigations, numerous requests may have to be submitted to the requested state.[267] Alternatively, the prosecutor may choose not to prosecute crimes because the benefit or likelihood of conviction is outweighed by the expense of seeking the requested state's authorization to prosecute. A bright-

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(1998) (noting the limit on detention in requested state post-extradition request in new proposed United States-Organization of Eastern Caribbean States extradition treaty submitted to Senate for advice and consent).

266. This is done with the assistance of the Office of International Affairs in the Criminal Division of the Department of Justice. *See* ABBELL & RISTAU, *supra* note 16, at 322-23.

267. *See generally* United States v. Saccoccia, 58 F.3d 754, 764-65 (1st Cir. 1995) (first indictment with 150 counts, second superseding indictment with 141); United States v. Puentes, 50 F.3d 1567, 1569-70 (11th Cir. 1995) (two indictments); United States v. Andonian, 29 F.3d 1432, 1434 (9th Cir. 1994) (two indictments); *Abello-Silva*, 948 F.2d at 1172 (three indictments issued); United States v. Kaufman, 858 F.2d 994, 998-99 (5th Cir. 1988) (separate indictments in Louisiana and Texas); United States v. Rossi, 545 F.2d 814, 815 (2d Cir. 1976) (two indictments).

line specialty rule may be impracticable if a prosecutor has to go to such lengths on a significant number of extradition cases.[268]

2. Time and Distance and the Right to a Speedy Trial

A bright-line specialty rule may result in conflicts with the relator's right to a speedy trial. The Sixth Amendment's general guarantee of a speedy trial applies to federal and state criminal prosecutions.[269] Every state constitution except New York's contains a similar provision.[270] However, the fact-intensive nature of the inquiry utilized to determine violations of the Constitutional guarantees makes it difficult to predict when such guarantees will conflict with a bright-line specialty rule.[271]

Possible conflicts with statutory speedy trial guarantees are easier to identify. The Federal Speedy Trial Act of 1974[272] is an example. Although only federal prosecutions are governed by the Act, most states have also promulgated statutes that set definite time periods within which the trial must occur.[273] The federal and state acts provide for a finite timeline between arrest and indictment, and indictment and trial.[274] The acts also detail what time is to be counted towards the timeline, and what time may be excluded by the judge.[275]

If extradition to the United States has been granted, it is likely that formal legal proceedings in the United States have been initiated that are sufficient to trigger statutory speedy trial requirements.[276] Accordingly, any superseding indictment or

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268. The expansion of U.S. antitrust investigations into international cartels may provide such a flashpoint. As of February 1998, there were more than 20 U.S. grand juries investigating entities in 20 different countries covering industries of $10 million to $1 billion. *See* Victor, *supra* note 249, at 493.

269. U.S. CONST., amend. VI. *See* Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967).

270. *See* COHEN & HALL, *supra* note 253, at 457.

271. *See generally* Klopfer, 386 U.S. 213.

272. 18 U.S.C. §§ 3161, 3162, 3164, 3173 (1994).

273. *See* ROBERT L. MISNER, SPEEDY TRIAL: FEDERAL AND STATE PRACTICE 330-735 (1984) (detailing state constitutional and statutory speedy trial requirements).

274. *See* 18 U.S.C. § 3161 (b)-(c)(1) (1994); MISNER, *supra* note 273, at 337 (citing ALASKA R. of CRIM. P. 45) (providing that trial must occur within 120 days of arrest), 699-700 (citing WASH. SUP. CT. CRIM. R. 3.3) (requiring trial within 60 days for in-custody defendants and 90 days for released defendants).

275. *See* 18 U.S.C. § 3161(h) (1994); MISNER, *supra* note 273, at 702-03 (citing WASH. SUP. CT. CRIM. R. 3.3).

276. *See* 18 U.S.C. §1361(c)(1) (1994) (providing that trial must take place within 70 days of indictment or from the date that the defendant has appeared before the judicial officer of the court in which the charge is pending). Time spent imprisoned in a foreign state while waiting for extradition is excludable time for the 70 day period. United States v. Thirion, 813 F.2d 146, 153 (8th Cir. 1987). In

information that details a new basis for prosecution, and that is issued subsequent to extradition, must be submitted to the appropriate authority in the requested state and approved within the speedy trial time frame. In the Federal system, for example, this generally means seventy days from the relator's first appearance before the judge.[277]

This may present a problem in a federal prosecution or a state prosecution with similar timelines. Not only will all requests to the foreign authority have to be submitted and received within the requested time frame, but each request will be submitted without knowledge of when the appropriate foreign authority will render a decision. The issue becomes this: are the days that pass while awaiting a decision of a foreign tribunal to be counted towards the speedy trial limit or are they properly excludable from consideration?

The issue probably will be raised initially by the prosecution. Because the prosecution will want the speedy trial clock to stop while awaiting the judgment of the foreign authority, it is likely that the prosecution will concurrently (1) submit a request for specialty waiver or authorization to prosecute to the appropriate foreign authority, and (2) seek a continuance from the court to stop the speedy trial clock.[278] Although the Act does not contain any specific provisions addressing extradition, it does allow for continuances that do not count towards the speedy trial time period as "the ends of justice" require.[279] In most cases involving requests to foreign authorities a prosecutor will have to ask for a so-called "open-ended" "ends of justice" continuance because the end of the continuance is a time uncertain—the need for the continuance will end when the foreign authority responds to the United States' formal request for waiver or authorization to prosecute. At present, the circuits are split as to whether 18 U.S.C § 3161(h)(8)(A) allows "open-ended" "ends of justice" continuances.

Four circuits have held that 18 U.S.C § 3161(h)(8)(A) does allow open-ended continuances.[280] The Fifth Circuit has

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Thirion, the court held that the Act was triggered when the relator appeared before a federal judge after extradition to the United States. *See id.*

277. *See* 18 U.S.C. § 3161(c)(1) (1994). A qualifying appearance is usually an arraignment. *See Thirion*, 813 F.2d at 153.

278. *See, e.g.*, United States v. Pollock, 726 F.2d 1456, 1458 (9th Cir. 1984) (prosecution's motion to exclude time between arrest and indictment filed with court before indictment handed down).

279. *See* 18 U.S.C. 3161(h)(8)(A) (1994).

280. *See* United States v. Santiago-Becerril, 130 F.3d 11, 18 (1st Cir. 1997); United States v. Twitty, 107 F.3d 1482, 1489 (11th Cir. 1997); United States v. Spring, 80 F.3d 1450, 1458 (10th Cir. 1996); United States v. Lattany, 982 F.2d 866, 881 (3d Cir. 1992).

suggested that it would allow open-ended continuances,[281] but the Second Circuit has suggested that continuances should only be for a time certain.[282] The Ninth Circuit has explicitly rejected open-ended continuances.[283]

Even in those circuits that allow open-ended continuances, however, the ability of the court to grant such a continuance is tempered by reasonableness in three circuits.[284] Only the Eleventh Circuit has categorically stated that "[i]f the trial court determines that the 'ends of justice' require the grant of a continuance, and makes the required findings, *any* delay is excludable under § 3161(h)(8)(A) . . . ."[285]

It should also be noted that defendants in extradition cases are likely to be incarcerated in the United States following their extradition. Under the Federal Speedy Trial Act the incarceration of the defendant mandates that special attention be paid to the monitoring of the defendant's speedy trial status.[286] The Act provides that a defendant who is being detained solely because he is awaiting trial shall be tried within ninety days following the beginning of detention, and the criteria for excluding days under the normal speedy trial timeline in 18 U.S.C. § 3161 do not apply.[287]

Again, a bright-line specialty rule may be impracticable if the government's requests for waiver or authorization to prosecute results in the continued detention of relators in a significant number of cases.

E. *A Proposed Compromise: Stop and Count to Ten*

Application of the specialty doctrine should be done in a manner consistent with the applicable extradition treaty as well as the limitations created by present U.S. criminal and extradition practice. Courts should resolve the tension between these factors with care. An appropriate compromise is an elevated level of scrutiny: When a relator is charged with an offense for which extradition is not granted, courts should presume that the relator may not be so charged.

This presumption would be consistent with the intent of the party states to effectuate extradition and do so in a manner which

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281. *See* United States v. Jones, 56 F.3d 581, 585-86 (5th Cir. 1995).
282. *See* United States v. Gambino, 59 F.3d 353, 358 (2d Cir. 1995).
283. *See* United States v. Clymer, 25 F.3d 824, 828 (9th Cir. 1994).
284. *See Santiago-Becerril*, 130 F.3d at 18; *Spring*, 80 F.3d at 1458; *Lattany*, 982 F.2d at 881.
285. *Twitty*, 107 F.3d at 1489.
286. *See* 18 U.S.C. § 3164 (1994).
287. *Id.*

is respectful of the requested state's right to limit the prosecution of the relator post-extradition. Such a presumption would also comport with the established U.S. civil practice of assigning the burden of proof to the party with the best access to evidence. The prosecution's resources, including those portions of the Federal Government that interact with foreign governments on a regular basis, are far better equipped to ascertain if the requested state does indeed consent to prosecution on additional charges.[288]

It is a far more difficult proposition to identify the types of information that would overcome such a presumption. Express waiver of the doctrine by the requested state would easily satisfy the presumption. However, a court should not imply waiver by virtue of a state's silence when the relator has been prosecuted on additional charges.[289] Implied waiver should also be avoided unless there is clear evidence that the requested state has tacitly agreed to prosecution.

While each case will be necessarily fact-specific, a presumption that the relator may not be prosecuted for additional offenses will require a court interpreting the doctrine to do more than pause before allowing the prosecution to proceed. The specialty doctrine must be given its due place as intended by the parties, and not simply set aside with nominal consideration. Such a presumption will also contain the ramifications of the loose specialty interpretations set forth in *Paroutian* and *Fiocconi.*

VI. CONCLUSION

Courts must stop treating the specialty doctrine with disfavor and give close attention when a relator claims that the specialty doctrine has been violated. Because courts have consistently used perfunctory analyses, and have not examined the doctrine within the context of an extradition agreement, specialty interpretations that allow prosecution for additional offenses are reading the rule out of existence. An appropriate compromise between the bright-line specialty doctrine set forth in most extradition treaties and the realities of extradition is a presumption that the relator may not be prosecuted for additional offenses beyond those for which extradition was granted. Such a presumption will be consistent with the text of the extradition treaty and will give effect to the intent of the party states because it will facilitate extradition and

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288. *See* ABBELL & RISTAU, *supra* note 16, at 349.

289. *See* United States v. Khan, 993 F.2d 1368, 1374 (9th Cir. 1986) ("[W]e will not infer an agreement to extradite from Pakistan's silence concerning Count VIII.").

leave the discretion to extradite to the requested state. Above all, it will enable the doctrine of specialty to be viable in fact as well as in form.

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