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TOWARD A MORE PRINCIPLED APPROACH TO THE PRINCIPLE OF SPECIALTY*

When a nation surrenders a fugitive through its extradition process, the principle of specialty requires that the state requesting the extradition prosecute the accused only on those charges presented to the surrendering state. Specialty has become more important as the ease of travel between nations, the volatile nature of diplomatic relations between countries, and the awareness of individual rights have increased. Consequently, courts and legal theorists have given the principle of specialty increased attention, and a continuing debate has developed concerning the nature, scope, and function of the doctrine.

At the center of the debate is the “important and vexed question” of whether the principle of specialty confers any rights upon the extraditee, or rather operates solely to protect the sovereignty and extradition process of the surrendering state. Whether a court of the requesting state will refuse to try a delivered extraditee for offenses not enumerated in the extradition request will often depend on what the court perceives to be the rationale supporting the principle of specialty. If the court adopts the classical, or

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1. [T]he party shall not be delivered up by this government to be tried for any other offence than that charged in the extradition proceedings; and . . . when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offence than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. United States v. Rauscher, 119 U.S. 407, 424 (1886). Most of the extradition treaties to which the United States is a party contain an express clause setting forth the principle of specialty. For examples of such clauses, see notes 14-15 & 17-18 infra. Even when the treaty does not expressly state it, U.S. courts and the executive branch will infer the existence of the specialty doctrine. 119 U.S. at 422; Note from Secretary of State Root to German Ambassador Von Sternburg (Dec. 28, 1907), reprinted in 4 G. Hackworth, Digest of International Law 235 (1942).


4. M.C. Bassiouni, supra note 1, at 50.
positivist,\textsuperscript{5} approach, it will view specialty as a right of the surrendering nation only.\textsuperscript{6} International law, according to this theory, only concerns itself with the relationships between nations, not between nations and individuals.\textsuperscript{7} Thus, since international law governs the rules of extradition, any violation of the principle of specialty is an issue for the contracting nations to the extradition treaty to resolve. Therefore, if the surrendering state fails to file a timely protest, a court of the requesting state may try the accused for offenses not contained in the extradition request.\textsuperscript{8}

The alternative rationale views specialty as a right of the individual which he may assert as a defense even in the absence of any formal protest by the state that surrendered him. This right may be fundamental ("an independent human right, legally unassailable as such by both the requested and the requesting State\textsuperscript{9}") or derivative (originating in treaties\textsuperscript{10} or municipal law\textsuperscript{11}). It would limit the court's in personam jurisdiction to the offense charged in the extradition request.\textsuperscript{12}

\begin{itemize}
\item \textsuperscript{5} M. García-Mora, supra note 2, at 129.
\item \textsuperscript{6} "As a matter of international law, the principle of specialty has been viewed as a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused." Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973). See United States v. Paroutian, 299 F.2d 486, 490 (2d Cir. 1962); United States ex rel Donnelly v. Mulligan, 76 F.2d 511, 513 (2d Cir. 1935).
\item \textsuperscript{7} L. Oppenheim, supra note 1, at 19. See M.C. Bassiouni, supra note 1, at 562. Bassiouni states: "Extradition is still regarded . . . as an institutional practice. States are the subjects of its regulation, while individuals are the objects of its outcome."
\item \textsuperscript{8} Fiocconi v. Attorney Gen., 462 F.2d 475, 481 (2d Cir.), cert. denied, 409 U.S. 1059 (1972).
\item \textsuperscript{9} S. J. Verzul, supra note 2, at 298.
\item \textsuperscript{10} "[D]elinquents who take refuge in a foreign country relying on a legislation [an extradition treaty] which promises them protection have acquired a true right, disregard of which would tend to weaken the law of nations and to introduce lack of confidence into international relations." Fiscal v. Samper, 9 Ann. Dig. 402, 405 (Sup. Ct., Spain, 1934). The United States Supreme Court has stated:

\begin{quote}
[A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.
\end{quote}

Head Money Cases, 112 U.S. 580, 598 (1884). For a discussion of U.S. extradition treaty provisions, see notes 13-19 infra and accompanying text.
\item \textsuperscript{11} For a discussion of the U.S. municipal law governing extradition, see notes 20-25 infra and accompanying text.
\item \textsuperscript{12} [The] principle, known as the "specialty principle" in the extradition laws of most countries . . ., limits the jurisdiction of the court to such offence or offences as are the subject of the extradition in the specific case, and thereby vests personal immunity in the accused not to be tried . . . for any other offence committed prior to his extradition.
\end{itemize}

This Note examines these two conflicting approaches to specialty in light of the current bilateral extradition treaties and municipal extradition statutes of the United States. It then reviews the existing case law in terms of the United States as both requesting and surrendering state. Finally, the Note formulates an approach to the principle of specialty that offers maximum protection to the extradited individual as well as to the surrendering state without unduly hampering the requesting state’s efforts to administer justice and protect its domestic security.

I

THE PRINCIPLE OF SPECIALTY IN THE LAWS OF THE UNITED STATES

A. TREATIES

There is no international obligation to extradite in the absence of a treaty. The United States, therefore, has entered into extradition agreements with more than eighty nations. Most of the current treaties contain clauses expressly setting forth the specialty principle in one form or another. These clauses, however, vary greatly in scope and are either vague or silent on the respective rights of the surrendering state and the accused. For instance, certain U.S. treaties flatly prohibit the trial of an extraditee for any offense not included in the extradition request. These treaties are of little or no assistance to a court attempting to determine whether specialty is a right of the accused or of the surrendering state.

Treaties that allow either the extraditee, the surrendering state, or both to consent to trial for offenses not listed in the extradition request may be of more help in determining for whose benefit the principle of specialty exists. Some U.S. treaties allow the extraditee to waive application of the principle

13. The principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).

of specialty.\textsuperscript{15} Since it would be anomalous for an individual to be able to deprive a nation of a sovereign right,\textsuperscript{16} it is reasonable to assume that these treaties provide the accused some kind of personal right under the principle of specialty which he may waive or retain.

Conversely, those treaties that allow the surrendering state to consent to additional prosecution of an extraditee\textsuperscript{17} seem to support the theory that specialty is a right of nations, not of individuals. Finally, the treaties that allow the surrendering state or the individual to waive application of the specialty doctrine\textsuperscript{18} appear to create a joint right existing in both surrendering nation and extraditee, with either party capable of exercising waiver.

\textsuperscript{15} No person surrendered by either of the high contracting parties to the other shall, without his consent, freely granted and publicly declared by him, be triable or tried or be punished for any crime or offense committed prior to his extradition, other than that for which he was delivered up, until he shall have had an opportunity of returning to the country from which he was surrendered.


\textsuperscript{16} M. GARCÍA-MORA, \textit{supra} note 2, at 131. See \textit{Ex parte Coy}, 32 F. 911 (W.D. Tex. 1887). In \textit{Coy}, the U.S. Government contended that the accused had waived the right of specialty. In reply, the court rhetorically asked: "Was Mr. Coy a part of the treaty stipulations with Mexico? Is Mr. Coy able to bind and unbind the Government from its duties and obligations towards other nations by any act that he can perform? The statement of the proposition discloses its absurdity." \textit{Id.} at 917. \textit{See also} Vallerini v. Grandi, 28 Rivista di Diritto Internazionale 75 (Corte Cass., Italy, 1935), \textit{translated in} 8 Ann. Dig. 378. The Italian court reasoned: Inasmuch as the institution of criminal proceedings, which is an attribute of the sovereignty of the State, cannot be made dependent upon the discretionary will of the accused, the consent of the extradited person cannot affect in any way the application of the general rule that he cannot be prosecuted for acts committed before his extradition [which are not included in the extradition request].

\textsuperscript{8} Ann. Dig. at 379-80.

\textsuperscript{17} A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

\begin{itemize}
  \item 3. The requested Party has consented to his detention, trial and punishment for an offense other than that for which extradition was granted, or to his extradition to a third State.
\end{itemize}


\textsuperscript{18} A person surrendered under this convention shall not be tried or punished in the country to which his or her extradition has been granted, nor given up to a third power, for a crime or offense not provided for by this convention and committed previous to his or her extradition, unless the consent of the surrendering government be given for such trial or such surrender to a third power.

But such consent shall not be necessary:
No clear legal theory interpreting the principle of specialty emerges from an examination of U.S. extradition treaties. The inconsistency between the treaties is hardly surprising. Negotiations with different countries will naturally produce different treaty provisions, especially as time passes and legal and political thought, as well as the negotiating diplomats, change.19

**B. Statutes**

The extradition statutes of the United States make few references to the nature, scope, or function of the principle of specialty. The Secretary of State has discretionary power under 18 U.S.C. § 3186 to deliver fugitives to foreign governments so that they may “be tried for the offense of which charged.”20 The executive department under 18 U.S.C. § 3192 must protect a fugitive returned to the United States “until the final conclusion of his trial for the offenses specified in the warrant of extradition.”21

Unfortunately, judicial interpretation of these statutes varies. The Supreme Court has held that the similarly worded predecessor statutes22 were “conclusive upon the judiciary of the right conferred upon persons”23 during extradition proceedings.24 This language appears to state that the U.S. extradition statutes are a source of a derivative personal right to specialty. The Second Circuit, however, recently interpreted the Supreme Court's words to mean that municipal extradition law was “merely congressional recognition” of the fact that the principle of specialty applies when-

(a) When the accused shall have voluntarily requested to be so tried or surrendered to a third power.


19. For example, treaties negotiated by the United States around the turn of the twentieth century emphasize the individual's right to waive specialty, see notes 15 & 18 supra and accompanying text, whereas more recent treaties give the right to waive specialty to the surrendering state, see note 17 supra and accompanying text.


21. Id. § 3192.

22. R.S. §§ 5272, 5275.


24. See also United States ex rel. Donnelly v. Mulligan, 74 F.2d 220 (2d Cir. 1934). There the court remarked: “The Congress of the United States . . . has clothed the criminal with protection while he is here so that he may be tried only for the crime for which he has been extradited.” Id. at 222.
ever "the foreign country would consider [a prosecution] to be outside the limits of its act of extradition."25

When considered together, these two cases indicate that the municipal extradition statutes are vague enough to allow a court to interpret them as either a grant to the individual of a right to specialty, or a codification of the rights of nations in extradition proceedings. U.S. courts are apparently free to interpret the statutes in the manner most supportive of their own views on the nature of specialty.

II
THE PRINCIPLE OF SPECIALTY AS APPLIED

A. THE UNITED STATES AS REQUESTING NATION

The Supreme Court first considered the principle of specialty in 1886 in the landmark case of United States v. Rauscher.26 Before this case, the lower courts were in conflict as to the correct approach to specialty.27 Rauscher involved a second mate aboard an American ship extradited from Britain for the murder of a crew member. After the extradition, a grand jury indicted Rauscher for assault and unlawful infliction of cruel and unusual punishment.28 The applicable treaty enumerated certain extraditable crimes, including murder, but failed to mention either of the charges contained in the grand jury indictment.29 After a careful analysis of relevant

27. The early cases concerning specialty in which the United States was the requesting nation illustrate the conflicts in theory and the anomalous results that the principle tends to produce. In United States v. Caldwell, 25 F. Cas. 237 (C.C.S.D.N.Y. 1871) (No. 14,707), the court allowed an indictment for the crime of bribing an officer of the United States to stand although Canada had surrendered the accused on a charge of forgery. The court felt that a violation of the principle of specialty was not "a proper subject of investigation in the courts," although it would "doubtless constitute a good cause of complaint between the two governments." Id. at 237. Fifteen years later, another suspect extradited from Canada on a forgery charge fared better. In Ex parte Hibbs, 26 F. 421 (D. Ore. 1886), the court held that the Government could not prosecute the forgery extraditee for the offense of uttering forged money orders, even though the two charges arose from the same transaction. The treaty, the court ruled, had "secured" a "right of person or property," id. at 431, in favor of the accused which prevented his trial on any charge other than that for which Canada had granted extradition.
28. The unusual indictment came under § 5347 of the Revised Statutes of the United States, which Congress has since repealed. Rauscher's ship was at sea at the time of the incident, but within the admiralty and maritime jurisdiction of the United States.
29. 119 U.S. at 410-11. The treaty did not contain any explicit mention of the principle of specialty. The Court, however, found that the specificity with which the contracting nations had enumerated the extraditable offenses, as well as the "manifest scope and object" of the treaty, made "impossible" any interpretation that would exclude the operation of the doctrine. Id. at 420, 422. See note 1 supra.
SPECIALTY

state and federal case law and the pertinent federal statutes, the Court held that an extraditee could “only be tried for one of the offences described in [the] treaty, and for the offence with which he is charged in the proceed-ings for his extradition.”

Unfortunately (at least for legal theorists), the Rauscher Court did not rely on a single rationale in its analysis of the principle of specialty. Instead, the Court stated that to ignore the doctrine would amount to “an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition.”

The analysis is further complicated by the Court’s final conclusion that the trial court “did not have jurisdiction of the person at [the] time, so as to subject [Rauscher] to trial.”

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30. Id. at 424-29.
31. See note 23 supra and accompanying text.
32. 119 U.S. at 430.
33. Id. at 422 (emphasis added).
34. Id. at 433. See note 12 supra and accompanying text. There is another confusing element of the decision. Rauscher involved an indictment for murder, which the treaty listed as a cause for extradition, followed by a subsequent trial on a nonextraditable offense. Therefore, it would be possible to read the case narrowly as holding only that specialty prohibits the trial of an extraditee for an offense not listed as extraditable in the treaty provisions. As the Court noted:

If the party could be convicted on an indictment for inflicting cruel and unusual punish-ishment where the grand jury would not have found an indictment for murder, the treaty could always be evaded by making a demand on account of the higher offence defined in the treaty, and then only seeking a trial and conviction for the minor offence not found in the treaty.

119 U.S. at 432.

In Johnson v. Browne, 205 U.S. 309 (1907), however, the Court gave the principle a wider scope. The case involved a duty examiner for the Port of New York who fled to Canada upon his conviction for conspiracy to defraud the United States. The United States first sought extradition based upon the previous conviction, but a Canadian court ruled that conspiracy to defraud the United States did not come within the treaty's definition of fraud. The United States then proceeded to request extradition based on an outstanding indictment charging attempt “to enter certain Japanese silks upon payment of less than the amount of legal duty thereon.” Id. at 311. This approach was successful, but instead of prosecuting the accused on the indictment used to obtain extradition, the United States merely imprisoned him on his previous conviction. On appeal, the Supreme Court ruled that this procedure violated the extradition treaties with Canada. The treaties, according to the Court, made “manifest an intention to prevent a State from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then having obtained possession of his person to use it for another and different purpose.” Id. at 320.

This decision implies that the principle of specialty is concerned primarily with preventing extradition for one offense and subsequent trial or punishment on any other charge rather than limiting extradition and trial to certain enumerated crimes. Indeed, the Second Circuit, citing Johnson v. Browne, recently stated:

In United States v. Rauscher . . . the Supreme Court established the rule of domestic law that the courts of this country will not try a defendant extradited from another country on the basis of a treaty obligation for a crime not listed in the treaty. While this determination might appear to be limited to circumstances indicating a possible
Nevertheless, the *Rauscher* Court emphasized the rights of the individ-
ual under the principle of specialty.\(^{35}\) Subsequent lower court decisions,
however, have diminished the importance of the rights of the extraditee in
the application of the doctrine. For example, one court stated that the ac-
cused was “not a very important factor.”\(^{36}\) Rather, it was an “absurdity” to
think that the extraditee could nullify the right of the surrendering country
to have the United States observe the principle of specialty.\(^{37}\)

This erosion of the individual’s interest in the specialty principle has
moved swiftly in recent years. The decision in *United States v. Paroutian*\(^{38}\)
completely ignored the concept of the rights of the individual under the
principle of specialty. In *Paroutian*, Lebanon extradited the accused for
narcotics trafficking on the basis of an indictment issued by the United
States District Court for the Southern District of New York charging con-
spiracy to violate federal narcotics laws. His subsequent conviction oc-
curred on the basis of an indictment from the United States District Court
for the Eastern District of New York. That indictment included two
charges—receipt and concealment of heroin—that Lebanese officials never
ruled upon. Nevertheless, the Second Circuit presumed that Lebanon
would still have considered the United States to have tried the accused only
on the offense for which Lebanon had extradited him, that is, narcotics traf-
ficking. Since the court felt that specialty only protects the surrendering
state,\(^{39}\) it did not allow an appeal based upon the doctrine.

By its own admission, the Second Circuit in *Fiocconi v. Attorney Gen-
eral*\(^{40}\) went “a step further”\(^{41}\) than the *Paroutian* court. In *Fiocconi*, Italy
surrendered two fugitives on the basis of indictments issued in the United
States District Court for the District of Massachusetts that charged conspir-
cy to import heroin. After the Massachusetts court released the pair on
bail, the United States District Court for the Southern District of New York
subpoenaed, indicted, tried, and convicted them for receipt, concealment,
sale, and facilitation of the transportation, concealment, and sale of heroin.
Although Italy never granted an expansion of its original extradition order,

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\(^{35}\) For example, in *United States v. Rauscher*, 119 U.S. 407 (1886), the Court stated: “the
courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the
rights of persons growing out of [the] treaty . . . .” *Id.* at 419. *See id.* at 430.

\(^{36}\) *Ex parte Coy*, 32 F. 911, 917 (W.D. Tex. 1887).

\(^{37}\) *Id.* *See note 16 supra and accompanying text.

\(^{38}\) 299 F.2d 486 (2d Cir. 1962).

\(^{39}\) *Id.* at 490-91.

\(^{40}\) 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

\(^{41}\) *Id.* at 481.
the Second Circuit upheld the convictions. The court acknowledged that extraditees should not be "subject to indiscriminate prosecution," but felt that the "essential" question was "whether the surrendering state would regard the prosecution [on a different indictment] as a breach [of the requesting state's international obligations]." The lack of an affirmative protest indicated to the court that Italy felt such a breach had not occurred.

Paroutian and Fiocconi stand for the proposition that when the United States prosecutes an extraditee for a crime "of the same character" as that appearing in the original extradition request, the trial court should decline jurisdiction only if the surrendering state protests. Thus any protection that the individual receives will be due to affirmative action on the part of the surrendering state. Reliance on this test, however, will not necessarily protect even the surrendering state's rights since several factors may prevent the surrendering state from protesting an abuse of its extradition process. First, many treaties exclude the extradition of nationals. A surrendering state, if a party to this type of treaty, may decide that the protection of the rights of an extraditee who is not a citizen of that state is simply not worth the effort. Second, the surrendering state may decide not to protest an abuse of its extradition process for fear of straining its diplomatic relations with the requesting nation. Finally, the surrendering state may never learn of events occurring after extradition and thus never become aware of any abuse of its extradition process.

B. THE UNITED STATES AS SURRENDERING NATION

Traditionally, the role of the judiciary in extradition proceedings is extremely limited when the United States surrenders a fugitive. The extra-

42. Id.
43. Id. at 480.
44. Id. at 481.
45. Id.
48. See id. at 305.
49. "It would be inconvenient, if not impossible, for the ambassador of the surrendering power to keep his eye on every case of an extradited fugitive with a view of interposing in case he should be put to trial for any other crime than that for which he was surrendered." United States v. Watts, 14 F. 130, 140 (D. Cal. 1882).
50. In the United States, the State Department and the judiciary share the process of extraditing a fugitive to a requesting state. The relevant statute, 18 U.S.C. § 3184 (1976), enables any U.S. magistrate or federal or state judge, upon complaint, to issue an arrest warrant for a fugitive from a foreign nation with which the United States has a treaty, provided the fugitive is physically within his jurisdiction. After the fugitive's arrest, the magistrate presides over a hearing to determine the sufficiency of the evidence. If he finds a prima facie case against the accused, the magistrate notifies the State Department. Bassiouni, supra note 12, at 737. The
dition magistrate simply decides if at least one of the offenses charged by
the requesting state is extraditable. Furthermore, U.S. courts of appeals
do not have the power to make a full review of the magistrate's decision;
rather, they only "inquire whether the magistrate had jurisdiction, whether
the offence charged is within the treaty and . . . whether there was any
evidence warranting the finding that there was reasonable ground to believe
the accused guilty." Most importantly, an appellate court considering re-
quested extradition lacks its normal power to protect the individual from
abuse by overzealous prosecutors since the court, of course, has no power
over the executive branch of the requesting government. This protective
power resides in the State Department, which has the discretionary right to
refuse to surrender the accused or to condition the extradition by imposing
whatever terms it deems advisable. Therefore, courts must rely on the
good faith of the requesting nation and the wisdom of the State Depart-
ment to prevent any abuse of the principle of specialty.

State Department, upon receipt of a requisition for extradition, issues a warrant for the com-
mittment of the fugitive to jail until surrender.

The State Department has discretionary power to surrender the accused to the requesting
state. 18 U.S.C. § 3186 (1976); M.C. BASSIOUNI, supra note 1, at 531-34; Note, Executive Dis-
cretion in Extradition, 62 COLUM. L. REV. 1313, 1313 (1962). Even if the extradition magis-
trate has found sufficient evidence to extradite, the State Department may refuse to surrender.
Moreover, it may condition the extradition by imposing whatever terms it deems necessary.
See 6 M. WHITEMAN, supra note 46, at 507-09 (1896); Shapiro v. Ferrandina, 478 F.2d

507-09 (1973).
Two relatively recent cases, however, indicate that the federal judiciary may be ready to assume a more active role in protecting the extraditee. In affirming the district court's decision to extradite the accused, the Second Circuit in *Gallina v. Fraser* acknowledged that existing authority gave the State Department the power to decide "the conditions under which a fugitive is to be surrendered to a foreign country." The court, however, commented:

Nevertheless, we confess to some disquiet at this result. We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle of executive discretion as the sole means of conditioning extradition.

In *Shapiro v. Ferrandina*, Judge Friendly also recognized the principle of executive discretion in conditioning extradition, and the potential embarrassment any judicial intervention might cause the Secretary of State in his handling of extradition proceedings. But Judge Friendly noted a number of factors that might justify an advisory "judicial determination of extraditability as to separate offenses, even if the extraditability of the person is conceded or is independently determined." The first consideration that would urge judicial intrusion into the State Department's management of foreign affairs was the expertise of the judiciary in extradition matters. Second, the court felt that the Secretary of State might welcome a prior judicial determination of the extraditability of certain offenses. Third, since the treaty with Israel required double criminality, the court's competence

murder charges and thus did not reach a conclusion on their political nature, but he did allow extradition for the financial crimes. In affirming the magistrate's decision, the court stated that "where several offenses are charged and one or more may be political, extradition may nevertheless follow for those which are not political." *Id.* at 559. Such a position readily presents the possibility that the requesting country will either try the extraditee for the political offenses or increase the sentence imposed upon conviction of the extraditable crimes in order to punish the extraditee for the political offenses. See I. Shearer, *supra*, at 189. In a note to the ambassador from Venezuela, Secretary of State Rusk conditioned the accused's extradition on limitation of the trial to the financial offenses. Note from Secretary of State Rusk to Ambassador Tejera-Paris (Aug. 12, 1963), reprinted in 6 M. Whiteman, *supra* note 46, at 1051. Commenting on the *Jimenez* case, one writer stated that it was "naive to believe that the doctrine of specialty shall operate as a protective shield to the relator." M.C. Bassouni, *supra* note 1, at 400.

56. *See note* 54 *supra*.
58. *Id.* at 79.
59. *Id.*
61. *Id.* at 906 (emphasis in original).
in ascertaining and interpreting local law made a judicial examination of the charges reasonable.\textsuperscript{63}

The \textit{Shapiro} court also addressed the difficult issue of the role of specialty when the requesting state gives or may give a different legal characterization to the acts found extraditable by the surrendering state. Whether the United States is the surrendering or requesting state, American courts generally base extradition decisions on the character of the acts presented in the request, and not on the legal offenses stated therein.\textsuperscript{64} The court noted, however, that the issue before it was neither "a mere lack of parallelism in nomenclature"\textsuperscript{65} nor "crimes so factually intertwined as to constitute a logical whole."\textsuperscript{66} Instead, the extradition request contained "multiple characterizations"\textsuperscript{67} of certain acts and thus created the possibility that the accused would receive excessive punishment through the imposition of successive sentences. Furthermore, although the facts did not hint at any political ramifications, the court pointed out that multiple characterizations of the same act could, in some situations, lead to political punishment for lesser, nonpolitical crimes.\textsuperscript{68}

It is important that \textit{Shapiro} emphasizes the potential mistreatment of the individual, rather than the possibility of abuse of U.S. sovereignty or its extradition process. Along with \textit{Gallina}, the decision indicates that the judiciary is aware of possible violations of the principle of specialty and has a strong desire to insure that the individual whom this country extradites will receive the full protection of the doctrine in foreign tribunals. Thus the rationale of \textit{Shapiro} and \textit{Gallina} seems to be in conflict with that of recent

\textsuperscript{63} 478 F.2d at 906.
\textsuperscript{64} The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.

Collins v. Loisel, 259 U.S. 309, 312 (1922).
\textsuperscript{65} 478 F.2d at 908. \textit{Cf.} Collins v. Loisel, 259 U.S. 309 (1922) (United States can extradite a person accused of "cheating" under the law of India since domestic law makes obtaining property by false pretenses a crime); Greene v. United States, 154 F. 401 (5th Cir.), \textit{cert. denied}, 207 U.S. 596 (1907) (if same facts involved, a nation can extradite for fraud and indict for conspiracy to defraud). \textit{But cf.} In re Wise, 168 F. Supp. 366 (S.D. Tex. 1957) (no extradition for fraud allowed when treaty provision only mentions "obtaining . . . by false devices, money, valuables or other personal property").
\textsuperscript{66} 478 F.2d at 908. Judge Friendly cited \textit{Paroutian} in support of this distinction. He did not, however, mention his own decision in \textit{Fiocconi}, although the facts of both cases were quite similar. \textit{See} notes 38-45 \textit{supra} and accompanying text. For a discussion of \textit{Shapiro} as an attempt by Judge Friendly to limit his \textit{Fiocconi} decision, see 40 \textit{Brooklyn L. Rev.} 1016 (1974).
\textsuperscript{67} 478 F.2d at 909.
\textsuperscript{68} \textit{See} note 55 \textit{supra}. 
specialty cases in which the United States was the requesting nation.\textsuperscript{69} In the latter cases, the courts have only emphasized the protection of the sovereign rights of the surrendering state, despite the courts' greater power to safeguard the accused when the United States is the requesting country. Given the current judicial trend toward protection of personal rights, it seems probable that the courts of this country will continue to attempt to preserve fully the principle of specialty when the United States surrenders a fugitive.\textsuperscript{70} Whether they will do so when the United States requests and obtains extradition is less clear.

III

PROPOSALS

A. RECOMMENDED APPROACH

Several commentators have suggested that the solution to the myriad problems that arise from the principle of specialty is to make its application an individual right.\textsuperscript{71} This approach would alleviate considerably some of the inherent difficulties of the doctrine. The individual's interest in not being prosecuted for a different offense is more immediate, if not greater, than the interest of the surrendering state in preventing an abuse of its extradition process. Therefore, it is more probable that the accused will safeguard, albeit unintentionally, the surrendering state's rights than that the surrendering state will safeguard the individual's rights. A surrendering state must consider its relationship with the requesting state;\textsuperscript{72} an individual probably will go to all legal limits to protest the prosecuting nation's actions.

Making specialty an individual right, however, would create difficulties as to the validity of the extraditee's consent to trial for other crimes. Individual waiver of the right would mean that the requesting state could proceed under any quantum of evidence for any crime under local law without an official of the surrendering nation being able to review the charges or their evidentiary foundation. It would also be difficult for the surrendering country to ascertain whether the extraditee actually did con-

\textsuperscript{69} See notes 36-49 supra and accompanying text.

\textsuperscript{70} Although the decision in \textit{Shapiro} was "advisory" concerning the specialty issue, 478 F.2d at 906, it did widen the traditional scope of review for an appellate court considering a habeas corpus petition which claims potential abuse of the principle of specialty. Since full review of a magistrate's extradition order is unavailable, see note 52 supra and accompanying text, the court held it proper to consider more than the "mere legality of detention." 478 F.2d at 907.

\textsuperscript{71} See M. \textsc{García-Mora}, supra note 2, at 130; Bassiouni, supra note 12, at 761; 6 \textsc{Vand. J. Transnat'l L.}, supra note 47, at 307-08.

\textsuperscript{72} See note 48 supra and accompanying text.
sent to stand trial for additional offenses. Even if he did consent, a question may arise whether the consent was voluntary or the product of coercion or duress. The knowledge that the surrendering state would be less likely to protest when the accused waives his own, rather than the state's, right to specialty would increase the temptation for the requesting state to obtain a nonvoluntary consent.

Recognizing specialty as a right of both the individual and the surrendering state would be a more feasible approach. This concept is hardly revolutionary; nearly a century ago, the Rauscher Court probably had in mind this type of joint right when it spoke of a breach of specialty as "an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition." Such an approach would protect the rights of both the extraditee and the surrendering state. Furthermore, if properly defined and implemented, it would not unduly hinder the requesting state's administration of criminal justice and protection of its domestic security.

B. IMPLEMENTATION IN THE UNITED STATES

I. Treaties

Extradition treaties are the most natural source for a clear definition of the rights and duties of the three interested parties in any extradition—the individual, the requesting state, and the surrendering state. Therefore,


74. Yet most countries, including the United States, do allow an extraditee to consent to trial on charges not enumerated in the extradition request. M. Garcia-Mora, supra note 2, at 130; see In re Tirpitz, 9 Ann. Dig. 401 (Ct. Cass., Belg., 1937) ("[t]he appellant had by waiving the formalities of extradition expressly consented to be tried for offences other than those for which his extradition was granted"); Public Prosecutor v. Malteson, 5 Ann. Dig. 276 (Ct. app., Brussels, 1929) (when an extraditee did not raise the question of specialty before the examining magistrate or the judge of the first instance, he had "tacitly consented to be tried for the offence for which he was prosecuted"); In re Arietto, 26 Rivista di Diritto Internazionale 267 (Corte Cass., Italy, 1933), summarized in 7 Ann. Dig. 334 ("[i]t is clear that this guarantee of the specific character of extradition which the [specialty] principle exists to protect has no longer any justification when the person extradited clearly wishes to submit unconditionally to the justice of his country"); Lazzeri v. Schweizerische Bundesanwaltschaft, 87 BGE 1195 (Switz., 1961), translated in 34 I.L.R. 134 ("sentence could be imposed only for the offences for which extradition was granted"... but it remained open to the accused to waive this immunity"); 4 G. Hackworth, supra note 1, at 239; 4 J. Moore, Digest of International Law 319-27 (1906). But see Ex parte Coy, 32 F. 911 (W.D. Tex. 1887); notes 36-37 supra and accompanying text.

75. 119 U.S. at 422.

76. [I]t would not be difficult to provide ... new treaty stipulations ... [T]he statesmen of the two countries, whose interests and objects in this matter are identical, could surely devise means which, while the right of asylum would be sufficiently protected, would at the same time prevent that right from being so used as to afford immunity for crime.
the United States should strive to eliminate the vagueness of the specialty clauses in its current treaties. First, the redrafted clauses should allow the trial or punishment of an extraditee for a nonextraditable crime only with the express consent of both the accused and the surrendering government. Because of the difficulty in determining whether the accused has given actual voluntary consent once a country extradites him, the treaty should limit individual consent to that given during the extradition proceedings in the surrendering state.

This type of specialty provision would protect the individual from indiscriminate prosecution for nonextraditable offenses in the requesting nation's courts. If the individual should consent to additional prosecution, the surrendering state could withhold its own consent if it perceived any potential mistreatment of the accused, such as multiple characterizations of the same act or acts. If the surrendering government did consent, it would at least have notice of the departure from the principle of specialty and could keep a close watch on the accused's trial to prevent any undue prosecution. The procedure would not threaten the requesting state's domestic security to any great extent since nonextraditable crimes tend to be minor when compared to those enumerated in the treaty.

Second, for extraditable crimes, the treaty should require the consent of the surrendering state, but not that of the individual. This limitation on the accused's rights is necessary because those offenses enumerated as extraditable within the treaty reflect a major concern on the part of the contracting nations that such crimes, if unpunished, would have a major adverse effect on the requesting state's social order. Thus the rights of the requesting state are of great importance when it seeks to charge the extraditee with a crime that, although enumerated in the treaty, was not presented to the surrendering state during the extradition proceedings. Although the requesting state should not have to forfeit its right to prosecute the offender in such a case, it also should not simply infer the consent of the

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78. See note 73 supra and accompanying text.

79. Such consent would be rare, but could occur when the accused foresees an opportunity to plea bargain and admit guilt to a lesser, nonextraditable crime. In such a case, the surrendering state should fully inform the accused of the effect of his waiver of the right of specialty.

80. See note 67 supra and accompanying text.

81. See note 49 supra and accompanying text.
surrendering state to additional prosecution. Rather, the treaty should require that the requesting state supply documentary evidence meeting the probable cause for extradition standard before the surrendering state consents to any additional prosecution. Under this requirement, each charge that the extraditee faces would be subject to a de novo analysis and the surrendering government could deny its consent if it found the evidence to be insufficient or if it feared that the requesting state would inflict excessive punishment by imposing consecutive sentences.

Due to the seriousness of the offenses typically enumerated in extradition treaties, requesting states would not need the permission of the accused to prosecute him for other crimes listed in the treaty. The treaty, however, should contain a guarantee that the requesting nation would inform, within a specified time period, the extraditee and the surrendering state of any and all charges. If not informed within that time, the extraditee should not be prosecuted for any additional crimes. Such a provision would prevent the requesting state from detaining an extraditee indefinitely while it sought additional charges that the surrendering state would accept.

Finally, there must be an escape clause because, even with these safeguards, cases involving political offenses present particular difficulties. The requesting state's desire to prosecute political offenders may be so great that it will extradite the fugitive on nonpolitical charges, and subsequently try or punish him for the political crimes. Therefore, treaties should grant the surrendering state the discretionary power to refuse extradition when-

82. But see note 44 supra and accompanying text.
83. See note 50 supra.
84. Of the current extradition agreements to which the United States is a party, the treaty with Mexico most closely approximates this standard. The treaty provides:

A person surrendered under this convention may be tried and punished in the country to which his extradition has been granted . . . for any crime or offense provided for by article 2 of this convention, and committed previous to his extradition, besides that which gave rise to the extradition. Notice of the purpose to so try . . . him, with specification of the crime or offense charged, shall be given to the government which surrendered him, which may, if it thinks proper, require the production of documentary evidence of the charge . . . .


85. An example of such a guarantee requires: "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(2), 213 U.N.T.S. 221, 226. In Cole v. Arkansas, 333 U.S. 196 (1948), the Supreme Court said: "No principle of procedural due process is more clearly established than that notice of the specific charge . . . [is] among the constitutional rights of every accused . . ." Id. at 201.

86. See note 55 supra.
ever that state has a reasonable belief that the requesting state may politically persecute the accused upon extradition.  

2. Statutes

The use by the surrendering state of its power to deny or condition extradition is the most effective method of enforcing the principle of specialty. In the United States, this discretionary power rests in the State Department. The State Department, however, rarely exercises its right to deny extradition. The executive branch's desire to insure that foreign countries will grant its own requests probably explains the infrequent use of executive discretion to deny the surrender of fugitives. Since the concepts of reciprocity and mutuality are inherent in extradition treaties, it is in the best interest of the State Department not to impede or prevent the extradition process.

Although the State Department's policy furthers the interest of the United States as surrendering state, it does little or nothing to protect the interests of the accused. Transferring the power to condition or deny extradition to the judiciary would be a much more effective method for the United States, as surrendering state, to protect the interests of all involved parties. Unlike the executive branch, the judiciary has no self-interest to advance in extradition cases. Furthermore, courts have great experience

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87. An example of such a clause states:
1. Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.
2. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.


88. See note 50 supra.

89. In the course of 21 years, the State Department denied only two extradition requests. Both cases involved U.S. nationals and the applicable treaty expressly gave the United States the power to refuse to extradite nationals. Note, supra note 50, at 1328.

90. A comment made by a State Department legal advisor concerning the Jimenez case, see note 55 supra, illustrates the executive branch's self-interest in assuring that extradition is kept free of any restrictions:

This Department would be seriously concerned should the courts in the United States restrictively interpret and apply the extradition treaties to which this country is a party. Not only would such interpretation and application of the treaties seriously inhibit the ability of the United States to fulfill what this Department, and undoubtedly the other parties to the treaties, construe as the obligation under the treaties, but it can fairly be assumed that such restrictive interpretation and application of the treaty will redound to our detriment when we attempted [sic] to invoke our rights under such treaties.

Letter from Acting Legal Advisor Meeker to Assistant Attorney General Miller (June 6, 1961), reprinted in 6 M. WHITEMAN, supra note 46, at 766.
and expertise in interpreting treaties and in balancing conflicting interests. Finally, the transfer would allow the State Department to maintain better diplomatic relations with foreign nations since it could point to the court’s decision when questioned about any denial or conditioning of extradition.

Unfortunately, courts have been loath to accept this authority, feeling that further inquiry into possible specialty violations is not “a proper subject of investigation in the courts.” Therefore, Congress should effectuate this shift of authority by amending the present municipal extradition statutes. This amendment could give sole authority to the extradition magistrate, or allow either the judiciary or the executive branch to condition or deny surrender.

Diplomatic relations with other countries, however, cannot be entirely ignored. Despite the proposed amendment, the State Department will probably continue to pressure the courts to decide as the executive thinks best. The courts in turn will probably defer to the executive, who has traditionally had the last word in international affairs. Thus an added safeguard is necessary. Congress should enact new legislation conditioning all extradition upon receipt of a legally binding document from the requesting state that pledges to observe the principle of specialty. Upon receipt of the document, the court would make its decision on extradition.

The approach set forth above will undoubtedly place a greater burden on officials and courts. The United States will have to draft extradition treaties with more care. Preextradition investigations will have to be more thorough. Courts will have to examine extradition treaties, requests, and proceedings in greater detail. The benefits that will inure to the individual and to the contracting nations, however, will be well worth the effort.

CONCLUSION

The current U.S. approach to the principle of specialty is ill-defined, and even contradictory in some instances. The problem stems from confusion as to whether specialty is a right of the extraditee, the state that surrenders him, or both. A proper approach to the principle of specialty would protect the extraditee’s right to specialty to the greatest possible extent that would not threaten the requesting nation’s domestic security and adminis-

93. As of 1935, Canada, France, Germany, Great Britain, Italy, and Switzerland all had municipal extradition statutes that conditioned extradition on the requesting state’s observance of the principle of specialty. See Harvard Research, supra note 73, at 373, 381, 386, 393, 408, 422.
tration of justice. Therefore, the United States should revise its extradition treaties and domestic legislation to provide a joint right of specialty to the individual and the surrendering state whenever the requesting state wishes to charge the extraditee with a crime not mentioned in the extradition request. Only when the treaty enumerates the additional charge as an extraditable offense should the requesting state be able to deny the extraditee his right to specialty. The surrendering state, however, should have the right to approve or deny the prosecution of any additional charges against the extraditee.

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