Born to Run: The Supreme Court of Washington's Misapplication of the Doctrine of Specialty in *State v. Pang*

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Abstract: The Supreme Court of Washington's decision in State v. Pang that Martin Pang could not be tried for murder involved an erroneous application of the doctrine of specialty. This Note contends that this decision was based upon the court's overly broad reading of the U.S. Supreme Court's decision in United States v. Rauscher. The Supreme Court of Washington implied terms into the extradition treaty because of the court's incorrect interpretation of Rauscher, which prevented Washington from prosecuting Pang for murder. In addition, the court failed to take into account the policy rationales behind the doctrine of specialty, which favors allowing the State to prosecute Pang for murder. This Note concludes that the Supreme Court of Washington misread the terms of the U.S.--Brazil extradition treaty, and Washington had the right to prosecute Pang for murder.

A fire broke out at the Mary Pang Food Products warehouse in south Seattle on January 5, 1995. The blaze, which was declared an arson, took the lives of four firefighters. The fire at the Pang warehouse was the biggest tragedy in the Seattle Fire Department's history. In an arson investigation, Mr. Martin Pang, son of the warehouse owners, became the main suspect. Pang fled to Brazil, and the United States immediately sought to have him extradited back to the State of Washington for trial on the charges of arson and four counts of murder. The Supreme Court of Brazil granted an order of extradition for Pang, but only for the single count of arson. The tragic and unnecessary loss of four lives in the fire, the cowardly but dramatic escape from U.S. borders to Brazil, and Brazil's absolute refusal to extradite Pang for the four counts of murder brought state and national attention to the situation.

2. Id. at 865, 940 P.2d at 1300.
3. Id.
6. Pang, 132 Wash. 2d at 859, 940 P.2d at 1297.
7. Id. at 873, 940 P.2d at 1304.
Upon receiving Pang from Brazil, Washington ignored the Brazilian order and proceeded to prosecute Pang for arson and the four counts of murder. Pang challenged the State's decision to prosecute him on the latter counts but failed at the trial court level. Pang appealed this decision directly to the Supreme Court of Washington. The court held that the doctrine of specialty prevented the State from trying Pang for any offense not listed in the extradition order issued by Brazil. Under the doctrine of specialty, a state that receives a defendant by way of extradition can normally only prosecute the person for the offenses for which the sending state surrendered him. The terms of each specific extradition treaty can expand or limit the protection afforded a defendant. Applying the specialty doctrine, the Supreme Court of Washington interpreted the U.S.-Brazil treaty as preventing the receiving state from prosecuting Pang for any offenses beyond those listed in the extradition order.

This Note urges that the Supreme Court of Washington misread the U.S.-Brazil extradition treaty and misapplied the doctrine of specialty in this case. The court should have allowed the State to prosecute Pang for both arson and the four counts of murder. The scope of the protection provided under the doctrine of specialty is determined by the terms of the extradition treaty between the two countries. In this case, the terms of the U.S.-Brazil treaty provided Pang with less protection than is accorded a defendant under some versions of specialty. The treaty specifically allows the receiving state to control the scope of prosecution by way of the offenses that are listed in the request for extradition. The Supreme Court of Washington implied increased protection into the treaty and incorrectly

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10. Id. at 890–91, 940 P.2d at 1312–13.
11. Id. at 893, 940 P.2d at 1314.
12. Id. at 915, 940 P.2d at 1325.
15. Pang, 132 Wash. 2d at 915, 940 P.2d at 1325.
16. United States v. Andonian, 29 F.3d 1432, 1435 (9th Cir. 1994).
17. Pang, 132 Wash. 2d at 918, 940 P.2d at 1327 (Durham, C.J., dissenting).
18. The Treaty 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.” Treaty of Extradition, Jan. 13, 1961, U.S.–Braz., art. XXI, 15 U.S.T. 2093.
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prevented Washington from prosecuting Pang for an offense that was within the parameters of the treaty.

Part I of this Note discusses the extradition process and how the doctrine of specialty fits into it. Part II provides a summary of the facts making up the case against Martin Pang and discusses the majority and dissenting opinions in State v. Pang. Finally, Part III argues that the Supreme Court of Washington misapplied the doctrine of specialty in the Pang case. The plain meaning of the treaty's terms gave the State of Washington the power to prosecute Pang for both arson and murder; therefore, the court should have allowed the State to prosecute Pang for both crimes.

I. EXTRADITION AND THE SPECIALTY DOCTRINE

A. Extradition Treaties

The United States uses the process of extradition to obtain jurisdiction over the vast majority of defendants located outside its territorial reach. Extradition is defined as the "surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender."

Generally, countries gain access to defendants located outside their borders through extradition treaties with one another. An extradition treaty is an agreement between two governments to cooperate in the

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19. A duty to extradite individuals is not recognized as a part of international law. See Bassiouni, supra note 13, at 383. However, countries do have an international legal duty to surrender fugitives from justice in cases involving international crimes. See generally id. at 8–11.


22. Bassiouni, supra note 13, at 6. States also can surrender fugitives on the basis of reciprocity or international comity, both of which are based on principles of friendly cooperation among nations, but neither of which is legally binding on any country. See generally id. at 17–18.

23. The term "extradition treaty" includes bilateral treaties, multilateral treaties, multilateral treaties containing an extradition clause, military rendition agreements, and treaties for the transfer of offenders containing a return clause. See id. at 49. Today, the United States relies almost exclusively on bilateral extradition treaties as the legal basis for requests for extradition. It also can rely on multilateral treaties, reciprocity, comity, and national legislation. See id. at 34.
Countries enter into extradition treaties because of a mutual desire to suppress crime and ensure that criminals are not using territorial boundaries as shields from prosecution. An extradition treaty between countries imposes a legal duty upon the parties to the treaty to extradite individuals in a manner consistent with the treaty's terms. The United States relies heavily on extradition treaties to acquire jurisdiction over defendants located outside its territorial reach.

B. The Mechanics of Extradition

A country must follow several steps to extradite an individual pursuant to a treaty. The country seeking to extradite (requesting country) must make a formal request to the country where the individual is located (surrendering country). This formal request must include the complaint upon which the arrest was made. The complaint lists the facts underlying the crimes for which the defendant is charged and specifically includes the offenses for which the requesting country seeks to prosecute the individual.

After receiving the formal request for extradition, the surrendering country holds an extradition hearing. The extradition treaty generally contains a list of offenses for which both countries agree extradition may be granted. At the hearing, the surrendering country looks at the offenses with which the suspect is charged and determines: (1) whether the offenses are extraditable under the terms of the treaty, (2) whether "probable cause"

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24. Id. at 384.
25. Id. at 4 ("Thus extradition, which at one time had manifested itself as a practice designed for the preservation of the political and religious interests of states . . . , evolved into an international means of cooperation in the suppression of criminality.").
26. See United States v. Verdugo-Urquidez, 939 F.2d 1341, 1349 (9th Cir. 1991); see also Restatement (Third) of Foreign Relations Law § 475 cmt. b (1986) ("[A] person will ordinarily be extradited only in accordance with the conditions set forth in the treaty . . . ").
27. See supra note 23.
28. See supra notes 19–20 and accompanying text.
29. Restatement, supra note 26, § 475 cmt. e.
30. Id.
31. "The complaint must satisfy the requirements of the applicable treaty and relevant legislation, and these require that it set forth the basic facts upon which it is founded." Bassiouni, supra note 13, at 662–63.
32. Id.
33. These treaties include either a list of offenses for which extradition will be granted or a formula that determines if an offense is extraditable. Id. at 393.
exists to show that the individual committed the charged offenses, (3) whether the request for extradition meets all the statutory requirements and the specific requirements of the applicable treaty, and (4) whether to grant extradition for all, some, or none of the charged offenses.

If the country decides to grant extradition, it issues an extradition order that defines the scope of the extradition and details the offenses for which the country is granting extradition. This order must be consistent with the terms and scope of the extradition treaty. At this point, the surrendering country gives the receiving country possession of the suspect for prosecution.

C. The Application of Specialty in Extradition

Any extradition must meet a number of general requirements, including specialty. Specialty, defined in its broadest sense, stands for the proposition that a receiving state cannot prosecute an extradited individual beyond the offenses for which he or she was surrendered. Specialty is aimed at preventing the receiving country from violating the trust of the surrendering country by prosecuting an individual for offenses not made out by the facts in the extradition request; but, arguably the doctrine also protects the

34. Id. at 703; see also United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995).
35. See Bassiouni, supra note 13, at 656–57.
36. These five requirements are usually written directly into extradition treaties. The United States considers these requirements “substantive conditions of extradition.” Id. at 384. The requirements are as follows:

(1) Reciprocity—requirement that judicial systems of the requesting and the surrendering states must have similar procedures and processes. Id. at 384–85.

(2) Double criminality—requirement that an accused person may be extradited only for actions that are considered criminal under the laws of both the surrendering and requesting states. Id. at 388.

(3) Specialty. Id. at 429–36.

(4) Extraditable offenses—requirement that a person can be extradited only if the charged offenses are enumerated in the treaty as an extraditable offense. Id at 393.

(5) Non-Inquiry—requirement that the surrendering state will not inquire into the means by which the requesting country acquires evidence of probable cause to make a request for extradition, the method by which a conviction will be achieved once extradition is granted nor the possible treatment the extradited individual will receive. Id. at 486.

The Pang case is concerned only with the issue of specialty and specifically the interpretation of the specialty clause in the U.S.–Brazil extradition treaty. Pang claimed that his prosecution for murder would violate his specialty rights under the treaty. He did not claim that any of the other substantive requirements had been violated. This Note, therefore, does not explore the other four requirements.

37. See id. at 429.
extradited individual’s rights. The vast majority of U.S. extradition treaties contain express specialty clauses that U.S. courts must respect. Additionally, the doctrine of specialty, if not expressly included, is impliedly embodied in all extradition treaties.

1. Justifications for the Application of Specialty in Extradition

The doctrine of specialty is aimed primarily at protecting the sovereignty of the surrendering state by ensuring that once it has turned over an individual for an offense, the requesting country cannot turn around and prosecute the extradited individual for a completely unrelated offense. Under the doctrine, the surrendering state retains an interest in any defendant it surrenders for extradition. The surrendering state therefore has power to examine each request for extradition and decide whether the charged offenses meet the requirements of the applicable extradition treaty. In addition, the surrendering state controls the scope of the prosecution, subject to the terms of the applicable treaty, by means of the extradition order it issues. A violation of the doctrine of specialty violates the surrendering nation’s sovereignty.

2. Implying Specialty into an Extradition Treaty

The U.S. Supreme Court held in United States v. Rauscher that courts may imply the doctrine of specialty into an extradition treaty when the

38. See Fiocconi v. Attorney Gen., 462 F.2d 475, 481 (2d Cir. 1972); see also Restatement, supra note 26, § 477 cmt. b (“The doctrine of specialty is designed to prevent prosecution for an offense for which the person would not have been extradited or to prevent punishment in excess of what the requested state had reason to believe was contemplated.”).
40. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1351 (9th Cir. 1991).
41. Levitt, supra note 14, at 1025.
42. Bassiouni, supra note 13, at 433.
44. See supra Part I.B.
45. If the extradition contains an explicit specialty clause, then the scope of surrendering state’s control over the prosecution is determined by a good faith reading of the clause. See infra Part III.A.2.
46. The surrendering state is always the intended beneficiary of a specialty clause, so it is always granted standing to challenge a violation of the clause in the extradition treaty. Bassiouni, supra note 13, at 463. The surrendering nation also has the power to waive the doctrine and allow prosecution for offenses other than those for which the defendant was originally surrendered. Id. at 434.
countries have left it out. In *Rauscher*, the United States sought to extradite William Rauscher, an American officer, from England so he could stand trial for a charge of murder on the high seas. The United States made a formal request for his extradition under the U.S.–Great Britain extradition treaty. The treaty neither mentioned the doctrine of specialty nor specified that the receiving country could only charge an extradited defendant with crimes in the extradition request or order. But, because it listed murder as an offense for which extradition could be granted, Great Britain granted the request and extradited Rauscher. However, once in the United States, Rauscher was tried and convicted for cruel and unusual punishment, an offense neither listed in the extradition treaty nor specified in the request for extradition. Rauscher appealed, arguing that his conviction violated the extradition treaty that impliedly contained the specialty doctrine.

The U.S. Supreme Court held that Rauscher could only be tried for the offense “with which he [was] charged in the extradition proceedings and for which he was delivered up,” even though the treaty language contained no such limitation. The Court based its holding on the treaty’s history and terms, the writings of legal experts concerning extradition at the time, and the principle of comity that governs nations’ actions in the absence of treaties. Under the principle of comity, a country receiving a fugitive from another country in the absence of a treaty would not prosecute a fugitive for any offense other than that for which the individual was surrendered. Applying this principle, the U.S. Supreme Court held that because the treaty listed the offenses for which an individual could be extradited, it implicitly limited a receiving state’s ability to prosecute an individual for offenses not listed in the treaty. Because the parties to the treaty gave no indication that they would not follow the rules of comity, the Court implied those rules into the treaty. The Court concluded that the treaty contained an implied

47. 119 U.S. 407, 419 (1886); see also State v. Pang, 132 Wash. 2d 852, 905, 940 P.2d 1293, 1320, cert. denied, 118 S. Ct. 628 (1997).
49. Id.
50. Id.
51. Id. at 410–11.
52. Id. at 409.
53. Id. at 424.
54. Id. at 430.
55. Id. at 419–20.
56. Id.
57. Id.
specialty clause and the United States could only prosecute Rauscher for the offense for which Great Britain surrendered him—murder.\textsuperscript{58}

The \textit{Rauscher} decision stands for the proposition that when an extradition treaty is silent on the issue of specialty, the doctrine will be implied into the treaty’s terms as long as the record indicates that the two countries that made the treaty would follow the rules of comity in the absence of a treaty.\textsuperscript{59} When a court implies the doctrine of specialty into a treaty, it will impose the strictest version of the doctrine, which allows the State to prosecute defendants only for the offenses listed in the extradition order from the surrendering country.\textsuperscript{60}

3. \textit{Express Specialty Provisions}

All extradition treaties negotiated by the United States over the last 100 years since \textit{United States v. Rauscher}\textsuperscript{61} expressly include some form of the specialty doctrine in their terms.\textsuperscript{62} The scope of prosecution provided to the receiving country varies with each treaty.\textsuperscript{63} Some nations apply the version of specialty utilized in \textit{Rauscher}\textsuperscript{64} while others utilize a more liberal version of the doctrine that allows for increased ability of the receiving state to prosecute individuals for crimes not listed in the extradition order.\textsuperscript{65}

\begin{itemize}
  \item \textsuperscript{58} Id. at 420.
  \item \textsuperscript{59} See \textit{State v. Pang}, 132 Wash. 2d 852, 905, 940 P.2d 1293, 1320, \textit{cert. denied}, 118 S. Ct. 628 (1997); see also \textit{U.S. v. Verdugo-Urquidez}, 939 F.2d 1341, 1351 (9th Cir. 1991) (“Indeed, one of the rules embodied in all extradition treaties—either explicitly or implicitly—is the rule of specialty . . . .”).
  \item \textsuperscript{60} \textit{See Pang}, 132 Wash. 2d at 918, 940 P.2d at 1326 (Durham, C.J., dissenting).
  \item \textsuperscript{61} 119 U.S. 407 (1886) (holding that doctrine of specialty applies in all criminal proceedings in United States and that if extradition treaty does not contain doctrine explicitly within its terms courts may imply it into treaty’s terms).
  \item \textsuperscript{62} \textit{See Levitt}, supra note 14, at 1027–28.
  \item \textsuperscript{63} \textit{See Pang}, 132 Wash. 2d at 917, 940 P.2d at 1327 (Durham, C.J., dissenting).
  \item \textsuperscript{64} Many treaties contain very restrictive specialty clauses that limit the prosecution of extradited individuals to those crimes specifically listed in the extradition order. These clauses allow the same scope of prosecution as the specialty clause implied into the treaty in \textit{Rauscher}. See \textit{infra} Part I.C.2.; \textit{United States v. Baramdyka}, 95 F.3d 840 (9th Cir. 1996) (holding that language of U.S.–Chile extradition treaty only allows extradited defendants to be prosecuted for offenses specified in extradition order); \textit{United States v. Khan}, 993 F.2d 1368, 1374–75 (9th Cir. 1993) (refusing to allow United States to prosecute defendant for offense not listed in extradition order from Pakistan based on restrictive language of specialty clause as expressly written into U.S.–Pakistan treaty).
  \item \textsuperscript{65} The more liberal version of specialty provides the requesting nation with much more control over the scope of its prosecution of an extradited defendant. This version of specialty allows prosecution for all crimes and offenses that were made out by the facts in the request for extradition or were specifically requested in the extradition request. \textit{See Pang}, 132 Wash. 2d at 916–17, 940 P.2d at 1326–27 (Durham, C.J., dissenting); \textit{see also} \textit{U.S. v. Sensi}, 879 F.2d 888 (D.C. Cir. 1989) (upholding prosecution of
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When an extradition treaty contains an explicit specialty provision, its language determines the scope of prosecution of the extradited individual by the receiving state. The practice of extradition relations through treaties is limited by a strict interpretation of the applicable treaty in each case. Courts must read extradition treaties in good faith when interpreting them. A good faith reading of an extradition treaty requires interpreting the treaty's language according to the plain, ordinary meaning of the words and their import at the time of the treaty's creation. Courts are confined in their analysis of a treaty's specialty clause to the exact wording of the clause and must refrain from implying terms into extradition treaties that go beyond the literal terms of the treaty.

II. THE PANG DECISION

A. Facts and Procedural History

On January 5, 1995, an intentionally set fire burned down the Mary Pang Products warehouse in Seattle and killed four firefighters. Mr. Martin Shaw Pang, son of the warehouse owners, became the Seattle police’s main suspect in an arson investigation. Pang fled to Brazil during the course of the police investigation, but was nevertheless charged with the crimes of murder and arson. Brazilian authorities later arrested Pang in Brazil.
The United States made a formal request for Pang's extradition to Washington State to face charges for four counts of first degree murder and one count of first degree arson. The Federal Supreme Court of Brazil granted extradition for Pang to the United States, but only for the offense of arson. Despite its best efforts, the United States failed to persuade the Brazilian government to give it permission to prosecute Pang for the four counts of murder.

Nonetheless, the Prosecuting Attorney continued to prosecute Pang for both arson and murder. The King County Superior Court denied Pang's motion for dismissal or severance of the murder charge. The court held that Brazil implicitly waived its right to object to Pang's prosecution, and therefore Pang had no standing to challenge any alleged violations of the treaty. The Supreme Court of Washington granted review to determine if Pang's prosecution violated the extradition treaty.

**B. The Supreme Court of Washington Found that the Doctrine of Specialty Barred Prosecution**

The Supreme Court of Washington overturned the King County Superior Court's decision, and held that the doctrine of specialty prevented prosecutors from trying Pang for murder. The court opened its analysis by finding that Pang had standing to challenge his prosecution for murder as a violation of his rights under the terms of the extradition treaty. The court then reviewed the limitations Brazil could place on Pang's prosecution pursuant to the treaty terms.

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74. *Id.* at 868, 940 P.2d at 1302.
75. *Id.* at 856–59, 940 P.2d at 1295.
76. *Id.* at 873, 940 P.2d at 1304. The court held that under the Brazilian Penal Code the offenses of arson and first degree murder corresponded only to the single crime of aggravated arson. *Id.* The impact of the order was that Washington would not be able to try Pang for murder because in Washington the only way to punish the arsonist for deaths resulting from the fire is to charge him with the crime of first degree murder. *Id.* at 876, 940 P.2d at 1305–06.
77. *Id.* at 875, 940 P.2d at 1305.
78. *Id.* at 890, 940 P.2d at 1312–13.
79. *Id.*; see also supra note 46.
80. Pang, 132 Wash. 2d at 893, 940 P.2d at 1314.
81. *Id.* at 915, 940 P.2d at 1325.
82. *Id.* at 896–902, 940 P.2d at 1316–18.
83. *Id.* at 905–06, 940 P.2d at 1321.
The court defined the specialty doctrine as a limit placed on the ability of a receiving country to prosecute an extradited individual for any crimes other than the ones for which surrender was made.\(^8\) Basing its definition of specialty on the U.S. Supreme Court's holding in *United States v. Rauscher*,\(^8\) the Supreme Court of Washington noted that the *Rauscher* Court implied the doctrine of specialty into the treaty because the treaty in question was silent on that issue.\(^8\) The court interpreted *Rauscher* to require that the doctrine of specialty be implied into the U.S.–Brazil extradition treaty at issue in the *Pang* case.\(^7\)

The court noted that Article XXI of the U.S.–Brazil treaty directly incorporates the doctrine of specialty into the treaty.\(^8\) That clause states 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 extradition, other than that which gave rise to the request."\(^8\) Despite this express specialty clause, the court concluded that *Rauscher* still applied; therefore, the State's ability to prosecute Pang was limited to arson, the crime for which Brazil extradited him.\(^9\) The majority based its decision on two Ninth Circuit cases that, according to the court, held that *Rauscher* requires that the doctrine of specialty be implied into all extradition treaties, even those with express specialty clauses.\(^9\)

Turning to the U.S.–Brazil extradition treaty at issue, the court cited *United States v. Khan*\(^9\) for the proposition that Pang could not be prosecuted for a crime not listed in the request for extradition.\(^9\) The court in *Khan* disallowed the prosecution of an extradited defendant for crimes not specifically listed in the Pakistani extradition order.\(^9\) The decision in *Khan* is based on the specific language of the extradition treaty involved,

\(^8\) Id. at 902, 940 P.2d at 1318.
\(^8\) Id. at 906, 940 P.2d at 1320.
\(^8\) Id. at 902, 940 P.2d at 1320.
\(^8\) Id. at 907, 940 P.2d at 1321.
\(^8\) Id. at 907–08, 940 P.2d at 1320–21; see United States v. Baramdyka, 95 F.3d 840, 845 (9th Cir. 1996); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1351 (9th Cir. 1991).
\(^9\) Id. at 907, 940 P.2d at 1321.
\(^9\) 993 F.2d 1368 (9th Cir. 1993).
\(^9\) Pang, 132 Wash. 2d at 913, 940 P.2d at 1324.
\(^9\) Id.
which limited prosecution to crimes for which Pakistan had specifically agreed to extradite a party.\textsuperscript{95} Based on the language of the specialty clause in the U.S.–Brazil extradition treaty and the fact that all extradition treaties contain an implicit level of specialty protection equal to that granted in \textit{Rauscher}, the majority concluded that Washington could not prosecute Pang for any crime other than arson.\textsuperscript{96}

C. \textbf{The Dissent Argued that the Doctrine of Specialty Must Be Applied According to the Treaty}

In a dissenting opinion, Chief Justice Durham argued that the prosecution of Pang for both murder and arson was well within the terms of the U.S.–Brazil extradition treaty. Finding that there are varying levels of specialty protection that differ from treaty to treaty, the dissent opined that a court must look to each individual treaty’s specific language to understand the exact scope of permissible prosecution.\textsuperscript{97}

The dissent argued that the majority’s misreading of \textit{Rauscher} led it to misapply the doctrine of specialty in the \textit{Pang} case.\textsuperscript{98} The majority conceded that the strict version of specialty implied into the treaty in \textit{Rauscher} was due to the fact that the treaty contained no specialty clause in its body.\textsuperscript{99} The dissent noted that the court in \textit{Rauscher} was careful to state that its holding was limited to treaties that fail to provide an express specialty clause.\textsuperscript{100} Based on \textit{Rauscher} and subsequent cases applying its holding, the dissent concluded that if a specialty clause is written into the treaty’s terms, then a court is bound by those terms alone and \textit{Rauscher} is inapplicable.\textsuperscript{101}

Turning its attention to the exact language of the U.S.–Brazil extradition treaty, the dissent noted that the U.S.–Brazil treaty contained an express specialty clause and that \textit{Rauscher} was therefore inapplicable to the \textit{Pang} case.\textsuperscript{102} Because the treaty contained an express specialty clause, the dissent

\textsuperscript{95} Id.
\textsuperscript{96} Id. at 913–14, 940 P.2d at 1324.
\textsuperscript{97} Id. at 916–17, 940 P.2d at 1326 (Durham, C.J., dissenting).
\textsuperscript{98} Id. at 921–22, 940 P.2d at 1328–29 (Durham, C.J., dissenting).
\textsuperscript{99} Id. (Durham, C.J., dissenting).
\textsuperscript{100} Id. (Durham, C.J., dissenting).
\textsuperscript{101} Id. (Durham, C.J., dissenting).
\textsuperscript{102} Id. at 923, 940 P.2d at 1329 (Durham, C.J., dissenting).
\textsuperscript{103} Id. at 924–25, 940 P.2d at 1330 (Durham, C.J., dissenting).

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held that the scope of Pang’s prosecution should be defined solely by the treaty’s terms.  

Lastly, the dissent stated that the plain meaning of the U.S.–Brazil treaty’s specialty clause allowed prosecution of extradited defendants for any offenses “which gave rise to the request.” The State requested extradition of Pang for both arson and first degree murder and presented facts sufficient in the extradition request to make out both charges. Thus, prosecuting Pang for murder would not violate the extradition treaty.

III. THE SUPREME COURT OF WASHINGTON MISAPPLIED THE DOCTRINE OF SPECIALTY IN THE PANG CASE

State v. Pang presented the Supreme Court of Washington with its first opportunity to interpret the terms of an extradition treaty. Unfortunately, the court wrongly decided the case by misunderstanding and misapplying the specialty doctrine. The court incorrectly used a non-literal interpretation of the U.S.–Brazil treaty based on its faulty application of the law surrounding the specialty doctrine. The court also failed to consider the policy reasons underlying the specialty doctrine, all of which suggest that Pang’s situation did not warrant the protection of specialty. Rather than imply additional terms, the supreme court should have confined its analysis of the case to the plain language of the treaty and allowed the State to prosecute Pang for four counts of murder.

A. The Supreme Court of Washington Should Have Interpreted the U.S.–Brazil Extradition Treaty Literally

I. The State Supreme Court Failed to Read the Treaty Literally

The language of the extradition treaty in this case is straightforward: “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...” Read literally, any offense the requesting country included in the request for extradition could be prosecuted. However, instead of restricting itself to this literal interpretation of the clause, the Supreme Court

103. Id. (Durham, C.J., dissenting).

104. Id. at 925, 940 P.2d at 1330 (Durham, C.J., dissenting).

105. Id. at 930, 940 P.2d at 1332 (Durham, C.J., dissenting).

106. Treaty of Extradition, supra note 18, art. XXI (emphasis added).
of Washington implied additional terms into the treaty. 107 The majority read the clause as implicitly requiring that an extradited defendant cannot be prosecuted for crimes not specifically included in the extradition order from the surrendering country. 108 Yet, nowhere does the treaty state, either explicitly or implicitly, that the parties intended to limit the receiving country's ability to prosecute individuals solely to the crimes listed in the extradition order. The only limitation imposed by the treaty itself is that the offenses prosecuted must be made out in the request for extradition by the requesting country.

2. The State Supreme Court's Non-Literal Reading of the Extradition Treaty Violated Established Rules of Treaty Interpretation

The non-literal reading of the treaty by the majority goes against the rules of treaty interpretation. The general rule in the realm of extradition relations is that all treaties must be read strictly according to their terms. 109 Extradition treaties must be read in "good faith," and courts must not apply questionable interpretations to extradition treaties that will allow the prosecution of an extradited defendant for crimes other than those for which the defendant was surrendered. 110 The court failed to acknowledge that Washington was applying a "good faith" reading of the treaty by seeking to prosecute Pang for murder. The treaty's language would have allowed the prosecution of Pang for murder. Instead of abiding by the treaty's clear terms, the court proceeded to imply additional terms into the treaty. The basis for this majority decision was its overly broad reading of Rauscher.

The majority itself admitted that the doctrine of specialty was expressly incorporated into the terms of the U.S.--Brazil extradition treaty. 111 Because the treaty contains a specialty clause, the court's analysis of the scope of prosecution allowed under the treaty should have focused exclusively on an analysis of the treaty's terms. 112 The U.S.--Brazil extradition treaty clearly states that the only limitation on the prosecution of an extradited defendant

108. Id.
109. See Bassiouni, supra note 13, at 404–05.
111. Pang, 132 Wash. 2d at 906, 940 P.2d at 1321 ("In this case, the doctrine of specialty is incorporated into the terms of the Treaty . . . ").
112. See Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) ("To determine the nature and extent of the right we must look to the treaty which created it"); see also United States v. Andonian, 29 F.3d 1432, 1435 (9th Cir. 1994).
is that all the prosecuted offenses must arise out of the same facts “which
gave rise to the request” for extradition. In the Pang case, all of the
offenses surround the fire that Pang allegedly started at the warehouse. The
State made a request to extradite Pang for both crimes. This fits within the
parameters of the specialty clause in the treaty.

3. The Supreme Court of Washington Grossly Misread Rauscher

The court based its holding in Pang on a flawed reading of the Rauscher
decision. The majority correctly looked to Rauscher as the starting point for
an analysis of specialty in U.S. extradition law, but it read the case too
broadly. As the Pang majority noted, the Rauscher Court implied a version
of specialty into an extradition treaty that was silent on the issue. The
version of specialty applied in Rauscher limited all prosecution of
extradited defendants by the receiving country to the offenses for which the
defendant was specifically surrendered. The U.S. Supreme Court
explicitly limited its holding in Rauscher to the extradition treaty in that
case, and based its decision to imply a strict version of the doctrine on the
facts of the case—namely, that the parties to the treaty abided by the rules
of comity. The U.S. Supreme Court implied the specialty clause only
because the treaty contained no express terms to determine the intended
scope of prosecution of extradited defendants.

The court’s interpretation of Rauscher virtually demands that all
extradition treaties conform to the version of specialty that was implied into

113. Treaty of Extradition, supra note 18, art. XXI.
114. Pang, 132 Wash. 2d at 859, 940 P.2d at 1297.
115. Since the Rauscher decision, the United States has routinely incorporated specialty clauses into
all of the extradition treaties it has entered. See Christopher J. Morivillo, Individual Rights and the
Doctrine of Specialty: The Deterioration of United States v. Rauscher, 14 Fordham Int’l L.J. 987, 1000
116. Pang, 132 Wash. 2d at 905, 940 P.2d at 1320.
117. Id. at 903, 940 P.2d at 1319.
118. United States v. Rauscher, 119 U.S. 407, 429 (1886) (“The right of one government to demand
and receive from another the custody of an offender... depends upon the existence of treaty stipulations
between them and in all cases is derived from and is measured and restricted by, the provisions, express
or implied, of the treaty.”).
119. Comity is the set of rules by which countries abide when receiving fugitives from other countries
without extradition treaties. One of the rules of comity is that the receiving country cannot prosecute an
individual for any offense other than one for which he was surrendered. See supra Part I.C.2.
120. Rauscher, 119 U.S. at 429.
the Rauscher extradition treaty. 121 This reading forces all treaties, irrespective of the explicit treaty language, to limit implicitly the offenses for which an extradited defendant can be prosecuted to those specified in the extradition order. 122 Rauscher does not support this broad reading. 123

4. The Pang Decision Contradicts the Weight of Authority

Other courts applying Rauscher have adopted a much narrower reading of the case's holding. The Pang court's decision to ignore the express language of the treaty and imply additional limitations in the treaty contradicts the great weight of authority from other courts across the country. 124

The vast majority of courts that have examined express specialty clauses in treaties have confined their analysis to the language of the treaty instead of implying additional levels of protection into the treaty. 125 Rauscher and its strict version of specialty do not govern the scope of the prosecution; instead, it is the "language of the applicable treaty" 126 that determines the protection accorded to an extradited person. The Pang majority itself cites two U.S. Court of Appeals cases that directly contradict its own holding. 127 These two cases demonstrate the result the majority should have reached. In Fiocconi v. Attorney General 128 and United States v. Sensi, 129 the courts

121. Pang, 132 Wash. 2d at 905, 940 P.2d at 1320.
122. Id.
123. In fact, the two Ninth Circuit cases cited by the majority fail to support such a broad reading. Neither United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) nor United States v. Baramdyka, 95 F.3d 840 (9th Cir. 1996) supports the majority's proposition that all extradition treaties contain an implicit specialty clause limiting prosecution to only the offenses for which individuals were surrendered. In fact, the holding in Baramdyka contradicts the majority's position; the court stopped the prosecution of an extradited individual for crimes not listed in the extradition agreement based on the plain language of the extradition treaty at issue in the case, not on an implied version of specialty. Baramdyka, 95 F.3d at 845.
124. See, e.g., United States v. Andonian, 29 F.3d 1432 (9th Cir. 1994); United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991); United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989); United States v. Cuevas, 847 F.2d 1417, 1427 (9th Cir. 1989); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986).
125. See, e.g., Baramdyka, 95 F.3d at 845; United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir. 1995); Andonian, 29 F.3d at 1435; United States v. Khan, 993 F.2d 1368, 1373 n.4 (9th Cir. 1993); United States v. Levy, 905 F.2d 326, 328 (10th Cir. 1990); Sensi, 879 F.2d at 895.
126. See Andonian, 29 F.3d at 1435.
127. Pang, 132 Wash. 2d at 912-13, 940 P.2d at 1324.
128. 462 F.2d 475.
129. 879 F.2d 888.
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allowed the government to prosecute extradited defendants for offenses for which the defendants were not specifically surrendered in the extradition orders.130

Both cases involved extradition treaties with explicit specialty clauses incorporated into their terms.131 In each case the court allowed prosecution of defendants based on the expansive language of the applicable treaty.132 The court in Fiocconi, by allowing the defendants to be prosecuted for crimes not listed in the extradition order, expressly rejected the contention that Rauscher requires courts to imply greater levels of protection to extradited defendants beyond the express treaty language.133 Instead, the court noted that if a country wants to ensure that defendants are not prosecuted for offenses other than those listed in the extradition order, it must expressly place that restriction into the treaty; otherwise, such prosecutions can occur.134

The defendant in Sensi was also convicted for charges other than those for which he was extradited.135 The court upheld these convictions based upon the treaty language, which allowed prosecution of all offenses "established by the facts in respect of which his extradition has been granted."136 The crimes of which the defendant was convicted in Sensi were not listed in the extradition order, but were based on the same facts as those crimes for which extradition was granted.137 The court therefore held that the conviction complied with the version of specialty that existed in that treaty.138

Following this logic, Pang's prosecution for murder did not violate the specialty doctrine in the U.S.–Brazil extradition treaty. The treaty clearly

130. Pang, 132 Wash. 2d at 912, 940 P.2d at 1323.
131. The specialty clause in the Fiocconi stated that "the person ... delivered up for the crimes enumerated ... shall in no case be tried for any ... crime, committed previously to that for which his ... surrender is asked." Fiocconi v. Attorney Gen., 462 F.2d 475 (2d Cir. 1972) (quoting Extradition Convention, Sept. 15, 1868, U.S.–It., art. Ill, 15 Stat. 631). The specialty clause in Sensi stated that "[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 ...." United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989) (quoting Treaty of Extradition, June 8, 1972, U.S.–U.K., art. XII, 28 U.S.T. 227, 233).
132. Pang, 132 Wash. 2d at 926, 940 P.2d at 1331.
133. Fiocconi, 462 F.2d at 480–81.
134. Id. at 481.
136. Id.
137. Id. at 895–96.
138. Id.
states that the only limitation on the prosecution of an extradited individual is that the prosecuted offenses be those that gave rise to the request for extradition. Based upon the reasoning of Sensi and Fiocconi, a court is bound to follow the express treaty language in determining the scope of prosecution permitted by the treaty. The State of Washington made a request of extradition for murder and arson. That is all that is required to meet the treaty's terms. Therefore, a court enforcing the treaty should have allowed Washington to prosecute Pang for both crimes.

The treaty's language is the first place a court must look to determine the parties' intent. The parties to an extradition treaty may choose whichever version of specialty best suits their needs: (1) the strictest version of specialty—the version first introduced in Rauscher that allows prosecution only for offenses for which surrender was specifically granted; or (2) a less restrictive version, as in the treaties interpreted in Fiocconi and Sensi, that allows the requesting nation to control the scope of prosecution in its request for extradition. The United States and Brazil placed the latter version into their extradition treaty.

It is improper for the Supreme Court of Washington to step in twenty-five years after the treaty was signed and decide to read into the treaty more restrictive terms. The role of the court is simply to interpret the "plain meaning of the words" of the treaty. By refusing to read the treaty according to its plain meaning, the Pang court thwarted the stated intention of the parties to the treaty and prevented Washington from prosecuting an individual for the deaths allegedly caused by his intentional actions. The treaty granted Washington the power to prosecute Pang for all crimes that made up its request for extradition. Thus, the court should have allowed Washington to continue to prosecute Pang for the murder charges.

B. Policy Justifications Mandate that Washington Prosecute Pang for Murder

Two policy justifications underlie the specialty doctrine: preserving the surrendering state's sovereignty, and protecting an individual's right not to

139. See supra note 18.
140. The requesting nation maintains control because it can prosecute the defendant for whatever crimes it is legitimately able to make out in the request for extradition. Once extradition is granted, the prosecution of the defendant is in the requesting nation's hands subject to the limitation that all crimes charged must have been made out in the request for extradition.
141. See supra Part II.B.
142. Bassiouni, supra note 13, at 411.
be charged with unrelated offenses after surrender.\textsuperscript{143} Neither of these policies would have been threatened if Pang had been prosecuted for murder. First, the sovereign rights of Brazil, preserved through the terms of the treaty, would not have been violated because the prosecution was valid under the literal terms of the treaty. The U.S.--Brazil extradition treaty explicitly contains a specialty clause that grants the requesting nation broad powers over the scope of prosecution.\textsuperscript{144} Second, the policy of protecting an individual from being tried by the receiving country for completely unrelated and possibly false charges after that individual has been extradited for a valid offense was not in jeopardy.\textsuperscript{145} Washington was merely trying to prosecute Pang to the full extent of his crime. Both the fire and the resulting deaths sprang from Pang's single act of arson. Pang should not have received additional protection from prosecution based solely on the fact that he chose Brazil as his destination when fleeing from U.S. authorities.

1. \textit{Prosecuting Pang for Murder Would Not Have Violated Brazil's Sovereignty}

The prosecution of Pang for murder would not have violated Brazil's sovereignty because it was authorized under the express terms of the treaty. Brazil, along with the United States, chose the language of the specialty clause incorporated into the extradition treaty. Pang's prosecution would not have violated the treaty's terms. In addition, Washington was not seeking to abuse Brazil's sovereignty by prosecuting Pang for a crime that was completely unrelated to the one for which Washington requested he be surrendered. Therefore, Brazil had no ground on which to object to Pang's valid prosecution under the treaty's terms, and no violation of its sovereignty would have occurred.

Both parties knew, or reasonably should have known, that the specialty clause language included in the treaty allowed an extradited individual to be prosecuted for all offenses made out in the request for extradition.\textsuperscript{146} The treaty language put Brazil on notice that Pang could be prosecuted for the crime of murder in the first degree because it was one of the two offenses

\textsuperscript{143} \textit{See supra} Part I.C.1; \textit{see also Restatement, supra} note 26, § 477 cmt. b.

\textsuperscript{144} \textit{State v. Pang, 132 Wash. 2d 852, 918, 925, 940 P.2d 1293, 1326–27 (Durham, C.J., dissenting), cert. denied, 118 S. Ct. 628 (1997).}

\textsuperscript{145} \textit{See Restatement, supra} note 26, § 477 cmt. b.

\textsuperscript{146} \textit{See supra} note 18.
for which Washington sought extradition in its request.\textsuperscript{147} The State listed all of the facts surrounding the crime and the reasons why it sought to prosecute Pang for both murder and arson.\textsuperscript{148} Brazil knew that Washington was requesting extradition for both murder and arson. In fact, the government of Brazil clearly stated that it had no objection to having Pang punished for the full extent of his actions, as long as the terms of the treaty were honored.\textsuperscript{149} Pang’s prosecution for murder fell within the scope of the treaty’s specialty clause that allowed prosecution for all offenses “which gave rise to the request”\textsuperscript{150} for extradition. No violation of Brazil’s sovereignty under the treaty would have occurred had the prosecution been allowed to move forward.

Because both charges against Pang arose out of the same set of facts, prosecuting Pang for murder would not have violated the central purpose of specialty: to protect the sovereignty of the surrendering country by stopping the indiscriminate prosecution of an individual for crimes separate and unrelated to the extradition request.\textsuperscript{151} Washington sought to prosecute Pang for offenses that arose out of the fact that he intentionally set a warehouse on fire.\textsuperscript{152} The mere fact that two countries do not give a crime the same name is not relevant to the issue of specialty.\textsuperscript{153} The only question is whether the defendant’s underlying actions are considered criminal in both jurisdictions.\textsuperscript{154} In both the United States and Brazil, an intentionally set fire that results in death is a criminal act and is punished more severely than arson that results only in property damage.\textsuperscript{155} Brazil was not tricked

\textsuperscript{147}. Pang, 132 Wash. 2d at 868, 940 P.2d at 1301; see also United States v. Sensi, 879 F.2d 888, 895 (D.C. Cir. 1989) (holding that U.S.–U.K. extradition treaty language, which expressly allowed prosecution for additional crimes made out by facts that served as basis for extradition, put United Kingdom on notice that such prosecutions could occur and that it had no grounds to object).

\textsuperscript{148}. See supra Part II.A.

\textsuperscript{149}. The Brazilian Minister of Justice wrote to Attorney General Reno stating:

[P]rovided 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 the deaths and the consequences thereof, under U.S. law.


\textsuperscript{150}. See supra note 18.

\textsuperscript{151}. See supra Part I.B.1.

\textsuperscript{152}. Pang, 132 Wash. 2d at 930, 940 P.2d at 1333 (Durham, C.J., dissenting).

\textsuperscript{153}. Collins v. Loisel, 259 U.S. 309, 312 (1922).

\textsuperscript{154}. Id.

\textsuperscript{155}. Pang, 132 Wash. 2d at 930, 940 P.2d at 1333.
into surrendering Pang for the arson charge only to find out later that Washington was trying him for a completely unrelated crime. Washington was merely seeking to punish Pang for the full extent of his criminal actions.

2. Prosecuting Pang Would Not Have Violated His Interests Under the Treaty

The secondary concern of the doctrine of specialty is to protect the interests of the extradited individual. The doctrine prevents a country from prosecuting an individual for crimes unrelated to those stated in the extradition request and prevents punishment of a defendant beyond what the surrendering nation could have expected when it allowed the extradition.

Washington’s prosecution of Pang for murder would not have violated Pang’s interests. Pang did not need specialty’s protection. He was lucky enough to have landed in a country that labels arson resulting in the loss of human life as one crime instead of two. This difference in Brazil’s justice system as compared to Washington’s is not the type of situation that specialty is intended to protect. Pang did not have a right to hide behind the shield of specialty in this case.

156. The view that the individual is also a direct beneficiary of the doctrine of specialty and can invoke its protection is not a universal one in the U.S. judicial system. The Third, Eighth, Ninth, Tenth, and Eleventh Circuits all follow the view that an extradited individual has standing, separate from the surrendering country, to challenge his or her prosecution as a violation of his or her treaty rights. See Bernacchi, supra note 43, at 1388–40; see also Bassiouni, supra note 13, at 464–74.

The Second, Fifth, Sixth, and Seventh Circuits all have denied individuals standing to challenge a violation of the doctrine of specialty. These courts have held that extradition treaties and specialty serve only to protect the interests of the surrendering state’s sovereignty. See Bassiouni, supra note 13, at 474–76; see also Restatement, supra note 26, § 477 cmt. b (“Both the person extradited and extraditing country are beneficiaries of the doctrine.”); Bernacchi, supra note 43, at 1398–1400.

157. See Restatement, supra note 26, § 477 cmt. b.

158. There is no indication in the record of the case, nor in any of the outside coverage of the case, that Pang fled to Brazil because of its legal system. This is not a case of a defendant choosing to flee to a specific country based on its favorable system of laws. Instead, all indications are that Pang fled to Brazil for no specific reason and was “lucky” enough to have chosen a destination that happened to have arson and aggravated arson in its criminal code.

159. “The ‘principle of specialty’ reflects a fundamental concern of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government, especially political crimes.” Fiocconi v. Attorney Gen., 462 F.2d 475, 481 (2d Cir. 1972).
3. Prosecuting Pang for Murder Would Have Furthered the Policies Underlying Extradition

The Supreme Court of Washington’s decision to prevent the State from prosecuting Pang for murder served only to protect a suspected arsonist from standing trial for the full extent of his actions. The purpose of extradition treaties is to help facilitate the capture of fugitives who flee a country’s jurisdiction.  The terms of the treaty set up the ground rules that the parties to the treaty agree to follow when extraditing an individual. The goal of the U.S.—Brazil extradition treaty, as with all such treaties, is to help ensure that no crimes go unpunished and that countries aid each other in this goal. The court’s decision in *Pang* overrode the explicit terms of the treaty and prevented Washington from prosecuting Pang for the full extent of his alleged crimes.

IV. CONCLUSION

The Supreme Court of Washington grossly misapplied the doctrine of specialty in the *Pang* case. The court’s overly broad reading of *Rauscher* led it to imply improperly additional terms into the treaty, preventing the State from prosecuting Pang for murder. The majority looked past the plain language of the treaty, which would have allowed the prosecution of Pang for both murder and arson, to reach its conclusion. The court should have constrained itself to the language of the treaty and not implied additional terms. Neither Brazil’s sovereign rights nor Pang’s rights under the treaty needed the protection given by the *Pang* decision. Prosecuting Pang for both murder and arson would not have violated the extradition treaty and the court should have allowed it.  

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160. *See supra* Part I.A.


162. The saga of Martin Pang recently concluded. Pang agreed to plead guilty to a lesser charge of four counts of first degree manslaughter. The judge in the case, Superior Court Judge Larry Jordan, imposed a sentence of 35 years. Pang has agreed not to appeal this sentence. Even in light of this sentence, many members of the families of the killed firefighters feel Pang should have been tried and punished for the crime of murder. Steve Miletich, *Tears and Bitterness at Pang’s Sentencing*, Seattle Post-Intelligencer, Mar. 24, 1998, at A1.